

DOES IT EXIST? *LIBERTYWORKS* AND AUSTRALIA'S SHRINKING IMPLIED FREEDOM OF POLITICAL COMMUNICATION

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In this article we examine the recent High Court decision in LibertyWorks Inc v Commonwealth of Australia ('LibertyWorks'). We argue that this decision fails to properly apply the implied freedom of political communication (the 'implied freedom') in four principle ways. First, the majority judgments do not properly grapple with the complexities of legislative purpose. The Foreign Influence Transparency Scheme Act 2018 (Cth) ('FITS Act') targets foreign influence rather than just covert and corrupt foreign interference, yet the judgements blur this important distinction throughout. If the true legislative purpose of the FITS Act is to increase transparency to prevent foreign influence, this purpose is illegitimate and incompatible with Australia's representative government, so the FITS Act should fail on this basis. Alternatively, if the true purpose is to increase transparency to prevent foreign interference, that legislative purpose is not served by the scheme, because it is ineffective in achieving its aim. Second, the majority in LibertyWorks do not properly assess the legislative breadth of the FITS Act, including the wide range of actors to which the obligations to register relate. This, we suggest, imposes a broad and, arguably, unbalanced burden on free debate. Third, the majority do not pay sufficient regard to the different tiers of registration, which create not only public, but also private (and therefore unjustified) catalogues of information. Finally, Steward J's constitutionally conservative (yet paradoxically activist) claim that the implied freedom may not exist appears to invite a future constitutional challenge to the implied freedom. We argue his Honour may be right, but not for the reasons he elucidates. In our view, the implied freedom was essentially non-existent in this case because it was not robustly applied by the High Court.

I INTRODUCTION

LibertyWorks Inc v Commonwealth of Australia ('LibertyWorks') is the latest High Court judgment to examine the implied freedom of political communication.¹ The question on appeal was whether the registration scheme in the *Foreign Influence*

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¹ (2021) 391 ALR 188 ('LibertyWorks').

Transparency Scheme Act 2018 (Cth) ('*FITS Act*') impermissibly burdens the implied freedom of political communication (the 'implied freedom'). Like the analogous legislative scheme in the United States — the *Foreign Agents Registration Act* ('*FARA*') — the *FITS Act*'s aim was to address growing concerns about foreign interference in Australian political affairs, without curtailing productive foreign influence.² It requires those who undertake various activities on behalf of foreign governments or principals to register details about themselves with the aim of improving transparency. In a 5:2 judgment,³ the Court upheld the *FITS Act* provisions as valid, finding that the burden imposed on the implied freedom is justified by, and proportionate to, the policy objectives of the legislation.

We argue that this judgment failed to properly apply the implied freedom in primarily four ways. First, the majority judgments do not properly identify the legislative purpose of the Act, which targets foreign *influence* rather than just covert and corrupt foreign *interference*. The judgments note the important difference between the two terms. Foreign interference is understood as the use of 'covert, deceptive, corrupting or threatening means to damage or destabilise the government or political processes of a country'.⁴ In contrast, foreign influence involves benign and open international engagement and persuasion. Only influence that is covert, deceptive or corrupting should constitute interference.⁵ However, the Court's assessment of legislative purpose fails to fully identify with the fact that the Act's title and legislative content casts a much wider net, regulating and potentially deterring much 'softer' foreign influence. One possibility is that the actual legislative purpose is to prevent foreign influence, which, in our view, is not legitimate and arguably incompatible with representative government. On these grounds, the scheme should fail. Alternatively, if the legislative purpose is construed as addressing only foreign interference, then it is ineffective in achieving this aim. The legislation is disproportionate and should be invalidated on this basis.

Second, and relatedly, the breadth of the Act is under-analysed by the majority. The wide range of actors to which the obligations to register relate imposes a broad and, arguably, unbalanced burden on free debate. Similar concerns have been raised in relation to the analogous *FARA* in the United States.⁶ While the Australian government claimed at the time of enactment that its

² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13146 (Malcolm Turnbull, Prime Minister) ('Turnbull, *Second Reading Speech*').

³ *LibertyWorks* (n 1). Kiefel CJ, Keane, Gleeson, Stewart and Edelman JJ in the majority; Gageler and Gordon JJ dissenting.

⁴ Australian Security Intelligence Organisation, *ASIO Annual Report 2017–18* (Report, 25 September 2018) 25 ('*ASIO Annual Report 2017–18*'); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (Report, June 2018) 2–5 ('*PJCIS, FITS Advisory Report*').

⁵ *LibertyWorks* (n 1) 192 [9].

⁶ Nick Robinson, "'Foreign Agents' in an Interconnected World: *FARA* and the Weaponization of Transparency' (2020) 69(5) *Duke Law Journal* 1075, 1081.

version was an improvement on *FARA*,⁷ an assessment of the Australian public register suggests that the problem of unwarranted breadth remains.

Third, the majority do not pay sufficient regard to the different tiers of registration articulated under the scheme, which create not only public, but also private (and therefore unjustified), catalogues of information, presumably for use by government. This runs counter to the narrowly stated objective of the *FITS Act*, which is to promote transparency or ‘sunlight’ with respect to foreign interference.⁸ The private registration requirements, in our view, impose an unjustified burden on free political communication.

Finally, Steward J’s constitutionally conservative (yet paradoxically activist) claim that the implied freedom may not exist and is not supported by the text and structure of the *Constitution*, appears to invite a future constitutional challenge to the implied freedom, calling into question over three decades of established precedent and more recent analysis confirming the existence of the implied freedom in cases like *Brown v Tasmania* (*‘Brown’*),⁹ and *Comcare v Banerji* (*‘Banerji’*).¹⁰ Steward J’s provocative judgment exemplifies the shaky footing of the implied freedom, the existence of which may indeed rely on changeable judicial attitudes to, and interpretations of, the *Constitution*. However, in our view, for these plaintiffs at least, his Honour is right: the implied freedom was largely illusory in this case, because it was not robustly applied by the High Court.

In Part II, we explain the facts of *LibertyWorks* and the relevant features of the *FITS Act*. In Part III, we examine the majority and dissenting judgments, drawing attention to the Court’s analysis of the difference between foreign influence and interference, the private and public registers, the broadness of the burden on the implied freedom, and Steward J’s provocation in relation to the existence of the implied freedom.

In Part IV, we offer a critique of the judgment. First, we critique the Court’s failure to fully grapple with the complexities arising in their analysis of the purpose of the *FITS Act*. There was no analysis of the ostensible mismatch between the Act’s politically-stated objective, which is to target foreign interference, and its execution, which regulates and, arguably, criminalises foreign influence. We apply ordinary principles of statutory interpretation and draw on parliamentary debates and other framing materials to elucidate two possible interpretations: (1) to prevent foreign influence; or (2) to prevent foreign interference. If the true purpose of *FITS* is to prevent foreign influence, then this purpose is arguably not legitimate or compatible with Australian representative government, so the scheme should fail. Alternatively, if the true purpose is to prevent foreign

⁷ See Foreign Influence Transparency Scheme Amendment Bill 2019 (Cth).

⁸ *Foreign Influence Transparency Scheme Act 2018* (Cth) (*‘FITS Act’*) s 3. See also Turnbull, *Second Reading Speech* (n 2), where Turnbull defended the Counter Foreign Interference Strategy on the basis of ‘four pillars: sunlight, enforcement, deterrence and capability. Of these, sunlight is at the very centre.’

⁹ (2017) 261 CLR 328 (*‘Brown’*).

¹⁰ (2019) 267 CLR 373 (*‘Banerji’*).

interference, then we argue that the scheme is ineffective in achieving this aim and disproportionate in the means deployed, and so it should fail.

Second, we bolster our assessment of the Act's proportionality through an examination of the public register and consider specific examples of notable submissions by former Prime Ministers Kevin Rudd and Tony Abbott in dealing with the scheme. Based on this evidence, we agree with the dissenting judgments that the Act is not fit for purpose.

Third, we consider Steward J's assessment that the implied freedom may not exist. We conclude that the last resort judicial protection of free speech in Australia failed in this case, because the High Court did not robustly apply the implied freedom.

II BACKGROUND

A Facts

The plaintiff, LibertyWorks Inc, is a private Australian think-tank that promotes 'individual rights and freedoms in public policy, including the promotion of freedom of speech and political communication'.¹¹ Since its incorporation in 2015, LibertyWorks has organised political conferences in Australia and made submissions to parliamentary inquiries on freedom of political speech.¹² In 2018, the President of LibertyWorks entered into an agreement with the American Conservative Union ('ACU') to collaborate on an ACU event to be held in Australia in 2019. The ACU is a US corporation that aims to promote political freedom and to influence US politics and politicians with dissemination of 'conservative/classical liberal' ideas.¹³ The ACU agreed to provide LibertyWorks with the names of speakers and to ensure the event was a success, and the two organisations were referred to as 'co-hosts' in promotional material.

The President of LibertyWorks was subsequently contacted by a Deputy Secretary of the Attorney-General's Department. The Deputy Secretary drew attention to the *FITS Act* and notified LibertyWorks that the ACU appeared to fall within the definition of a 'foreign political organisation'. The Deputy Secretary also noted that the event would constitute a 'communications activity' under the Act. Notice was therefore given under s 45 of the *FITS Act* to LibertyWorks requiring LibertyWorks to provide documents to enable the Deputy Secretary to assess whether it was liable to register. LibertyWorks did not comply,¹⁴ and did not register. On 20 February 2020, LibertyWorks filed an action in the High Court,

¹¹ *LibertyWorks* (n 1) 190 [1].

¹² *Ibid.*

¹³ *Ibid* 191 [2].

¹⁴ *Ibid* [5].

arguing that the registration provisions unjustifiably burdened the implied freedom, and were therefore invalid.¹⁵

B *Legislative Scheme*

The political context for enactment of the *FITS Act* was the growing threat of foreign interference to liberal democracies, including Australia. While Russian interference in the 2016 US election focussed global attention on the threat of foreign interference in the democratic sovereignty of nation-states, the Sam Dastyari saga in Australia (which prompted the Senator to resign after his financial dealings with businesses connected to the Chinese Communist Party came to light) energised domestic attention on foreign interference through political donations.¹⁶ It has been similarly well established that foreign actors, including foreign intelligence services, have attempted to interfere with Australian decisionmakers at all levels of government and across a range of sectors, including democratic institutions, education and research, media and communications, culturally and linguistically diverse communities, and critical infrastructure.¹⁷

Part of the response to this threat was the introduction in 2018 of a suite of interlocking and overlapping legislation, as part of the Counter Foreign Interference strategy. The package of reforms included the *FITS Act*, the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), and the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).¹⁸ In 2020, the government passed a further piece of legislation, *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth), to protect and manage Australia's foreign relations more broadly, including arrangements entered into by Australian universities. This legislation is scaffolded by various governance and risk frameworks, guidelines to counter foreign interference in the Australian university sector, including strengthening

¹⁵ Ibid [6].

¹⁶ Fergus Hunter, 'Sam Dastyari Contradicted Labor Policy, Backed China's Position in Sea Dispute at Event with Donor', *Sydney Morning Herald* (online, 1 September 2016); 'Sam Dastyari Resignation: How We Got Here' *ABC News* (Online, 12 December 2017); Nick McKenzie, James Massola and Richard Baker, 'Labor Senator Sam Dastyari Warned Wealthy Chinese Donor Huang Xiangmo His Phone Was Bugged' *Sydney Morning Herald* (online, 29 November 2017).

¹⁷ 'National Security: Countering Foreign Interference' *Australian Government: Department of Home Affairs* (Web Page, 16 February 2023) <<https://www.homeaffairs.gov.au/about-us/our-portfolio/national-security/countering-foreign-interference>>.

¹⁸ Other parts of this package include the *Security Legislation Amendment (Critical Infrastructure) Bill 2021* (Cth), *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) and the *Defence Trade Controls Act 2012* (Cth). While these are all relevant to countering Foreign Interference, we will only examine the legislation that potentially impacts on speech.

cybersecurity, and the establishment of a University Foreign Interference Taskforce in 2019 ('UFIT').¹⁹

The *FITS Act* therefore intersects with other laws through 'interlocking components',²⁰ each designed to address the risk of foreign interference.²¹ The *FITS Act's* breadth is evident in its framing language. While part of a 'Counter Foreign Interference Strategy', the Act in fact seems to regulate 'foreign influence' rather than just 'foreign interference'. This is reflected in the Act's title and content. Foreign influence suggests a much wider net and a lower bar than foreign interference. Foreign interference is understood in the framing material as the use of 'covert, deceptive, corrupting or threatening means to damage or destabilise the government or political processes of a country'.²² This is different from foreign influence, which is defined as involving benign activities of a foreign principal that seek to influence government and political systems. Only influence which is covert, deceptive or corrupting should constitute interference.²³

The objective of the Act is stated narrowly in s 3 as being to 'provide for a scheme for the registration of persons who undertake certain activities on behalf of foreign governments and other foreign principals, in order to improve the transparency of their activities on behalf of those foreign principals'.²⁴ The Act defines 'foreign principal' as either a foreign government, a foreign government related entity, a foreign political organisation or foreign government related individuals.²⁵ It requires individuals or organisations²⁶ to register details about themselves and their foreign principal with the Secretary if the person will communicate or distribute information or material to the Australian public or sections of it under an arrangement with, or in the service of, a foreign principal.²⁷ The type of communication captured is political communication, the sole or substantial purpose of which is to influence government or the public at large.²⁸ The type of communications caught under the Act is broad. Section 13(1) defines

¹⁹ 'University Foreign Interference Taskforce' *Australian Government: Department of Education* (Web Page, 14 March 2023) <<https://www.education.gov.au/guidelines-counter-foreign-interference-australian-university-sector/resources/guidelines-counter-foreign-interference-australian-university-sector>>.

²⁰ Turnbull, *Second Reading Speech* (n 2) 13149.

²¹ The *FITS Act* (n 3) was part of the Counter Foreign Interference Strategy which included the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), the Foreign Influence Transparency Scheme Bill 2017 (Cth), the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), and the Foreign Influence Transparency Scheme Bill 2018 (Cth). See also Michael Head, 'Australia's Anti-Democratic "Foreign Interference" Bills' (2018) 43(3) *Alternative Law Journal* 160.

²² *ASIO Annual Report 2017–18* (n 4); PJCIS, *FITS Advisory Report* (n 4).

²³ *LibertyWorks* (n 1) 192 [9].

²⁴ *FITS Act* (n 3) s 3.

²⁵ *Ibid* s 10.

²⁶ 'Person' is defined broadly to include an individual, a body corporate, a body politic, any association or organisation (both incorporated and unincorporated), or any combinations of individuals: *ibid*.

²⁷ *Ibid* s 18.

²⁸ *Ibid* s 12.

‘communications activity’ as circumstances where a person ‘communicates or distributes information or material to the public or a section of the public’ or ‘produces information or material for the purpose of the information or material being communicated or distributed to the public or a section of the public.’ Information can take any form, and as noted, influence is broadly conceived as to ‘affect in any way’.²⁹

Persons exempt from registration include those engaged in humanitarian aid or assistance, the provision of legal advice or representation, religious activities, registered charities, artistic purposes, diplomatic and consular officials, and the members of certain professions, such as tax agents, customs brokers and liquidators and receivers, and members of Parliament and government officials.³⁰ The latter exemptions seem odd; a politician acting as an agent of foreign interference is presumably precisely the kind of foreign manipulation of democracy such a law should capture. Notably absent from the list of exemptions are academics, universities and schools, media organisations, and think tanks. Those who are registered under the Act have onerous reporting responsibilities, including the reporting of information or other communications distributed to the public in Australia on behalf of a foreign principal,³¹ reporting material changes in circumstances,³² annually renewing registration³³ and keeping records.³⁴ There are also notification requirements to cease to be registered.³⁵ Penalties for failing to register or acquit responsibilities under the Act include imprisonment on conviction for terms ranging for six months to five years.³⁶

III *LIBERTYWORKS INC V COMMONWEALTH OF AUSTRALIA*

The question before the High Court was whether the *FITS Act* is constitutionally invalid with respect to the registration requirements regarding communications activities — that is, whether the registration scheme unjustifiably burdens the implied freedom. To resolve this, the High Court had to apply the well-established test for determining invalidity with respect to the implied freedom. Initially

²⁹ Ibid s 10.

³⁰ Ibid pt 2 div 4.

³¹ Ibid ss 16, 38.

³² Ibid s 34.

³³ Ibid s 39.

³⁴ Ibid s 40.

³⁵ Ibid ss 19, 31.

³⁶ Ibid s 56.

articulated as a two-part test in *Lange v Australian Broadcasting Corporation*,³⁷ the approach was revised in subsequent cases³⁸ and now includes three limbs:³⁹

1. Does the law effectively burden freedom of communication about government or political matters?
2. If 'yes', is the purpose of the law legitimate and compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If 'yes', is the law reasonably appropriate and adapted to advance that aim in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

If the first question is answered 'yes' and the second or third 'no', the law is invalid.

Courts' approaches have evolved to protect communication necessary to facilitate free and informed federal voting choices and to enable effective functioning of responsible government.⁴⁰ Decisions since *Lange* have arguably sought to constrain the implied freedom, probably due to faltering judicial support,⁴¹ which is in turn perhaps explicable as a reaction to the freedom's judicially 'implied' nature. As Edelman J explained in *Banerji*:

unlike the United States, in Australia the boundaries of freedom of speech are generally the province of parliament; the judiciary can constrain the choices of a parliament only at the outer margins for reasons of systemic protection. The freedom of political communication that is implied in the Commonwealth *Constitution* is highly constrained.⁴²

However, Stone has shown how the Court's categorisation of the implied freedom as a structural limitation based on institutional justifications, rather than a

³⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 ('*Lange*').

³⁸ *Coleman v Power* (2004) 220 CLR 1, 77–8 [196] (Gummow and Hayne JJ), 50 [92]–[93] (McHugh J), 82 [210]–[213] (Kirby J) ('*Coleman*'); *McCloy v New South Wales* (2015) 257 CLR 178, 193 [2] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Brown* 363–4 [104] (Kiefel CJ, Bell and Keane JJ), 418–25 [281]–[295] (Nettle J).

³⁹ See generally Shireen Morris and Adrienne Stone, 'Abortion Protests and the Limits of Freedom of Political Communication' (2018) 40(3) *Sydney Law Review* 395, 397.

⁴⁰ *Lange* (n 37) 566–7. The sections of the Constitution usually cited as giving rise to the freedom are ss 7, 24, 64 and 128. See Adrienne Stone and Simon Evans 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4(4) *International Journal of Constitutional Law* 677; Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 438, 467.

⁴¹ Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (2001) 25(2) *Melbourne University Law Review* 374, 417 ('Rights, Personal Rights and Freedoms').

⁴² *Banerji* (n 10) 441–2 [164]. See also 394–6 [19]–[21], 407–8 [50], 422–3 [99] (Gageler J); *Wotton v Queensland* (2012) 246 CLR 1, 31 [80]; *Unions NSW v New South Wales* (2013) 252 CLR 530, 553–4 [35]–[36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 574 [119] (Keane J) ('*Unions NSW*'); *Brown* (n 9) 360 [90], 373–4 [150] (Kiefel CJ, Bell and Keane JJ).

personal right, may be conceptually overstated, because the basic reasoning underlying the freedom of political communication is consistent with some level of concern for individual autonomy. Personal autonomy is relevant to the idea of a ‘free choice’ in voting, arising from the text and structure of the *Constitution* and ‘democratic government presupposes or logically implies the autonomy of citizens’.⁴³ Further, the conceptual distinction is minimal in practice. Whether the freedom is construed as a personal right akin to the US First Amendment or a narrower structural limitation, judges are inevitably drawn into an evaluation and balancing of competing values,⁴⁴ as evidenced by the proportionality analysis that is usually associated with rights guarantees.

In *LibertyWorks*, the Court undertook this proportionality analysis to find that the burden imposed on political communication by the registration scheme was justified by the policy objective of controlling and minimising foreign interference through increased transparency. This is a conclusion we find unpersuasive, for reasons we explain in Part III.

A *Majority Judgments*

Kiefel CJ, Keane J and Gleeson J in their joint judgment noted that the basis of the implied freedom rests on the understanding that ‘a free flow of communication is necessary to the maintenance of the system of representative government for which the *Constitution* provides.’⁴⁵ They also emphasised that the freedom operates as a restriction on legislative power, not as a personal right, in line with precedent.⁴⁶ The defendant conceded that the registration scheme imposes a burden on political communication, a concession the judges said was ‘properly made’.⁴⁷ Likewise, there was ‘no dispute that [the] purpose of the *FITS Act* ... to promote transparency in political discourse by requiring or facilitating disclosure of the relationship between a person and their foreign principal ... was legitimate’.⁴⁸ The judgments nonetheless discuss the question of legislative purpose, and find the purpose of increasing transparency in foreign engagement to be a ‘powerful public, protective purpose’,⁴⁹ which is legitimate and important for safeguarding democracy.⁵⁰ (As we articulate below, this issue should, in our view, have been more strongly interrogated.) The major issue in contention for

⁴³ Stone, *Rights, Personal Rights and Freedoms* (n 41) 393.

⁴⁴ Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23(3) *Melbourne University Law Review* 668; Adrienne Stone, ‘The Limits of Constitutional Text and Structure Revisited’ (2005) 28(3) *UNSW Law Journal* 842.

⁴⁵ *LibertyWorks* (n 1) 199 [44].

⁴⁶ *Ibid* [44].

⁴⁷ *Ibid* 202 [54], 205 [68].

⁴⁸ *Ibid* 201 [53].

⁴⁹ *Ibid* 209 [85].

⁵⁰ *Ibid* 204 [61]–[62]; Gageler J accepted this as a legitimate purpose at 213 [101] and Gordon J agreed at 221 [127].

the High Court, therefore, arose at the latter stages of the test as articulated in *Lange*,⁵¹ *McCloy*⁵² and *Clubb v Edwards*.⁵³ Proportionality analysis required the Court to assess whether the law is suitable, necessary, and adequately balanced in achieving its aims, and, therefore, whether the law is justified.

The Justices found the law to be proportionate. Though it was accepted that the registration requirements might deter a small number of people from engaging in political communication,⁵⁴ they disagreed that the scheme created a 'chilling effect'⁵⁵ and characterised the burden as modest. Their Honours held that the scheme was rationally connected and therefore suitable to the stated purpose of the Act.⁵⁶ They further found that the scheme was reasonably necessary to achieve the stated purpose of promoting transparency in political discourse because '[r]egistration enables both the relationship between the person and their foreign principal and a description of the political communication undertaken by the person ... to be matters of public record.'⁵⁷ More specifically, they explained that registration requirements enable:

the commentariat to be alerted to the presence of foreign influencers in public affairs, thereby allowing public debate to be informed in a way that would not be achieved by source disclosure to the recipients of a particular communication at the time of the communication.⁵⁸

Citing *Banerji*,⁵⁹ the joint-judgment confirmed that 'a law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom.'⁶⁰ On this standard, it was held that the Act's 'important purpose' was not outweighed by the modest burden it imposed on the freedom.

Edelman J came to the same conclusion as Kiefel CJ, Keane J and Gleeson J but adopted different reasoning. His Honour found that, while the burden imposed by the registration provisions is not excessive, it is nevertheless burdensome. While it seems to only cover a narrow class of persons (those who have a connection to a foreign principal),⁶¹ it will, in fact, cover a broader class, and within that class, the 'burden is deep'⁶² and ongoing,⁶³ though 'should not be over-stated'.⁶⁴ Edelman J noted that the Act targets speakers as well as their

⁵¹ *Lange* (n 37) 569, 575.

⁵² *McCloy* (n 38) 214–15 [71].

⁵³ (2019) 267 CLR 171, 200 [67].

⁵⁴ *LibertyWorks* (n 1) 206 [74].

⁵⁵ *Ibid* 205 [68].

⁵⁶ *Ibid* 207 [77].

⁵⁷ *Ibid* 208 [82].

⁵⁸ *Ibid* [83].

⁵⁹ *Banerji* (n 10) 402–3 [38].

⁶⁰ *LibertyWorks* (n 1) 209 [86].

⁶¹ *Ibid* 245 [211].

⁶² *Ibid* 240 [195].

⁶³ *Ibid* 249 [223].

⁶⁴ *Ibid* 247 [219], 248 [221].

speech, and imposes constraints prior to communication, at the time of communication and after communication through the requirement of record keeping for up to ten years. Despite this, Edelman J found that the burden is justified. Using his structured proportionality approach, his Honour found the impugned provisions to satisfy the three limbs of structured proportionality: suitability; reasonable necessity; and adequacy in balance.

Edelman J found the provisions to be suitable because the purpose of the communicative activity provisions is to make transparent — to government, decision-makers, and members of the public — the nature and interests of the political communication. According to Edelman J, this is not only consistent with the implied freedom but reinforces it.⁶⁵ His Honour noted that the breadth of the provisions is extensive, and potentially covers both academic researchers and the communications activities of multinational companies operating in Australia.⁶⁶ Academic researchers were excluded from the exemptions contained in pt 2 div 4 of the Act. However, because the scope of these provisions was not at issue in this case, his Honour said it was not the Court's role to decide whether the effect of such breadth was a reason for invalidity.⁶⁷ While his Honour found the depth of the burden on the implied freedom to be significant, he noted that the registration requirements do not *prohibit*, but merely constrain and deter, communications.⁶⁸

Edelman J also cautioned against overstating the gap between the public and private registers, arguing that if the provisions are to serve the function of improving transparency, the public register cannot simply be an 'information dump'.⁶⁹ An administrative process is therefore necessary to filter the relevant information to enable clear and accessible information, consistent with the purpose of transparency. This filtering process will necessarily exclude various categories of information, including information that is commercially sensitive or involves matters of national security.⁷⁰ It would therefore not result in a 'large private dossier' of personal information being held on a government register.⁷¹

Edelman J distinguished the scheme from the US legislation, noting that the *FITS Act* does not engage in content-based discrimination.⁷² Rather, the scheme is 'generally facially neutral in its application to political communication' and the registration provisions 'are expressed as duties that apply to all affected persons, independent of the content of the political communication.'⁷³ With respect to suitability, Edelman J found there was no alternative policy that would impose

⁶⁵ Ibid 244 [208], 254–5 [244].

⁶⁶ Ibid 246–7 [215]–[216].

⁶⁷ Ibid 247 [217].

⁶⁸ Ibid [219], 254–5 [244].

⁶⁹ Ibid 251 [230].

⁷⁰ Ibid.

⁷¹ Ibid 250 [227].

⁷² Justice Gageler held in *Brown* that such discriminatory laws warrant closer scrutiny because of the risk 'political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded': *Brown* (n 9) 443 [202], 446 [220], 395 [223].

⁷³ *LibertyWorks* (n 1) 253 [236].

less of a burden on the implied freedom while achieving the stated aim. Since the provisions do not prohibit political communication, his Honour found them adequate in their balance.⁷⁴

Steward J agreed with the answers and reasons given by Kiefel CJ, Keane J and Gleeson J, but expressed slightly different views in relation to adequacy of balance.⁷⁵ His Honour held that a law found to be suitable and necessary may nevertheless impermissibly burden the implied freedom if there is an extreme 'overreach of means over ends'.⁷⁶ Steward J felt the law does overreach because of the breadth of the definition of 'arrangement', which, contrary to the Commonwealth's submissions, does not just describe the unique position of the plaintiff, but can capture many other individuals. For instance, it captured the former Prime Minister, Tony Abbot, and NSW politician Mark Latham, both of whom were to be speakers at the LibertyWorks event.⁷⁷ It could also capture any other person who might organise a conference with a foreign principal, a collaboration between a local and overseas academic in relation to any political communication, or international law and accounting firms who might lobby government. In these examples, the individual 'may not in any way be acting as an intermediary for a foreign principal' but may nevertheless be required to register.⁷⁸ In the light of the legislation's breadth, which requires those engaged in innocent foreign influence to register, Steward J made the following noteworthy observations:

It follows that it is arguable that the extension of the *FITS Act* to those with nothing relevantly to disclose, to those who have nothing relevantly to hide, and to those who act only for themselves, but who, in each case, are nonetheless associated with a foreign principal by participation in an arrangement, is a manifestly disproportionate legislative solution to the aim of minimising undisclosed foreign political influence. The disproportion may be said to be manifest because it treats the innocent as if they are guilty of being undisclosed intermediaries for a foreign principal. That conclusion may well be strengthened when one considers the obligations imposed, on pain of potential imprisonment, on registrants, potential registrants and those who undertake registrable communications activities. The disproportion here is arguably so stark that it overcomes any necessary judicial deference concerning matters of national security.⁷⁹

After making these pointed remarks about the Act's overreach, however, Steward J backtracked and narrowed his conclusion. His Honour said he could express 'no final view' on the matter because the plaintiff did not contend for invalidity on

⁷⁴ Ibid 254–5 [244].

⁷⁵ Ibid 255 [247].

⁷⁶ Ibid 265–6 [292].

⁷⁷ Paul Karp, 'Tony Abbott Was Asked to Register as Agent of Foreign Influence after Migration Speech in Hungary', *The Guardian*, 20 February 2020.

⁷⁸ *LibertyWorks* (n 1) 266–7 [295].

⁷⁹ Ibid 267 [296].

this basis⁸⁰ — an apparent criticism of the way the case was argued before the Court. Because LibertyWorks had limited its attack to item 3 of the table in s 21(1) of the *FITS Act*, it was not open to the Court to make a finding in relation to whether other sections, such as s 11(1)(a)(i), burden the implied freedom.

B *Dissenting Judgments*

Gageler J and Gordon J dissented, finding that the registration requirements impermissibly burden the implied freedom and that the two tiers of registration meant that the legislation failed to achieve its stated purpose of achieving transparency.

Gageler J observed that the registration requirements operate as a precondition to engaging in political communication. This was seen as incompatible with the implied freedom because it burdens the registrant much more than is necessary to achieve the legislative intent.⁸¹ The registration system restricts communication at the outset by forcing the relevant entity or person to register, under pain of criminal sanction, before political communications can occur. Gageler J is correct that any system of prior constraint is more prohibitive than a system of subsequent punishment because it shuts off communication before it has occurred.⁸² This may not so much ‘chill’ speech as freeze some speech altogether.

For Gageler J, the registration requirements were therefore not ‘reasonably appropriate and adapted’ to advance the Act’s purpose in a way that is consistent with the maintenance of the constitutionally prescribed system of government. To be compatible with the implied freedom, his Honour explained, the prior restraint must withstand ‘close scrutiny’, consistent with a search for a ‘compelling justification.’⁸³ This means it must meet two conditions. First, it must be compatible with a system of representative government. Second, the constraint must be narrowly tailored to achieve that objective in a manner that minimally impairs the implied freedom. While the *FITS Act* meets the first of these conditions, it does not meet the second. It meets the first condition because its primary aim is to improve transparency by requiring registration on a publicly accessible register. However, its broadness, both in the way it imposes a burden prior to communication and the range of communication captured by it, means that it is not narrowly tailored to achieve its objective. It is not proportionate.

Gordon J similarly found that, because the impugned provisions regulate political communication, they require a compelling justification. In relation to the first limb of the test, Gordon J found the impugned provisions impose a

⁸⁰ Ibid 267 [297].

⁸¹ Ibid 210 [92].

⁸² Ibid 211 [95].

⁸³ Ibid.

substantial burden on the implied freedom. Her Honour drew attention to the breadth of 'communications activity', noting that a federal government decision includes a 'decision of any kind in relation to any matter, including administrative, legislative and policy matters', that information or material includes 'information or material in any form, including oral, visual, graphic, written, electronic, digital and pictorial forms', and would include (among other things) verbal or silent protests, media campaigns and academic work. These provisions regulate political communications of 'the broadest kind'.⁸⁴ Nor are these provisions limited to circumstances where a person is acting in the service of, or at the request of, a foreign government or a foreign government entity; they apply to any person who has an arrangement with a foreign organisation whose purpose is to pursue political objectives, irrespective of whether their views align with those of the foreign principal.⁸⁵

The burden on the implied freedom does not end there. Gordon J argues that the *FITS Act* imposes 'burden upon burden'.⁸⁶ The cumulative burdens include the registration requirements, obligations to provide information and documents to the Secretary, obligations to maintain documents, criminal consequences of failing to do so, the effect of the non-public register, and the possibility that obtained information could be shared with law enforcement agencies. We agree with Gordon J that these layers of regulation create a significant deterrent to individuals who 'would otherwise engage in legitimate and lawful political communication'. Echoing Gageler J's concerns, Gordon J notes this 'is not just a burden on political communication, but a burden imposed *before* a person communicates.'⁸⁷

Further, the fact that the *FITS Act* gives the Secretary wide discretion to collect information from the registrants and share it with other agencies creates a fundamental problem with the scheme: the problem is not simply that it confers wide discretionary powers, but that this kind of discretion exists at all.⁸⁸ For Gordon J, the secret register poses a particular problem:

Put bluntly, the scheme of registration established by the *FITS Act* is not fit for purpose. A scheme of registration narrowly tailored to improve transparency of political communication undertaken on behalf of foreign principles with the public or sections of the public in a manner that minimally impaired freedom of political communication would have no place for a secret register at all ... there would be no occasion for the discretionary collection and discretionary dissemination of information for other governmental purposes.⁸⁹

⁸⁴ Ibid 226–7 [146].

⁸⁵ Ibid 234 [176].

⁸⁶ Ibid 235 [178].

⁸⁷ Ibid 235–6 [178]–[179].

⁸⁸ Ibid 217–18 [116].

⁸⁹ Ibid 218 [117].

This renders the provisions of the *FITS Act* ‘unsuitable’ because there is no rational connection between the aim of improving transparency and the existence of a secret register that can be shared with the relevant Commonwealth enforcement bodies. Nor is the scheme ‘necessary’ because the alternative means of achieving the objective of improving transparency is not to have a two-tiered scheme of registration. Because the two-tier system of registration — one publicly accessible, the other private — does not improve transparency, it cannot be justified. This not only deters communication but ‘does nothing to minimise the risk of an *undisclosed influence*. It does the opposite. A non-public register is in darkness, not sunlight.’⁹⁰ Her Honour, therefore, found that the impugned provisions go beyond the purpose of the Act. The purpose of the Act is to increase transparency, and a non-public register does not serve this purpose. As such, the provisions overreach any legitimate purpose and are not necessary. We agree with this conclusion and elaborate below.

IV CRITIQUES AND OBSERVATIONS

A Foreign Influence v Foreign Interference: Grappling with Legislative Purpose

A key weakness pervading all the judgments is a failure to fully grapple with the mismatch between the politically stated purpose of the *FITS Act* as preventing foreign interference, and the execution, effect, and perhaps even the intent, of the legislation itself which, in our view, regulates and discourages foreign influence. That the High Court let this mismatch go largely unnoticed and unanalysed — and at times employs unclear and confusing language in construction of purpose — may be a result of the fact that the parties did not dispute the legitimacy of legislative purpose. As Gordon J noted, ‘[n]o other or wider purpose was said to be pursued’,⁹¹ which may be a weakness in how the case was argued. The majority Justices provide views on legislative purpose and agreed it was legitimate and compatible with Australian constitutional democracy.⁹² However, fundamental complexities with respect to legislative purpose were not explored.

A proper understanding of legislative purpose is crucial to the implied freedom test. As Gordon J made clear, ascertaining legislative purpose to apply the implied freedom should utilise ordinary methods of statutory interpretation,⁹³ having regard to ‘the text, the context and, if relevant, the

⁹⁰ Ibid 222 [130].

⁹¹ Ibid 221 [127].

⁹² Ibid 201 [53], 203–4 [60]–[62] (Kiefel CJ, Keane and Gleeson JJ), 213 [101] (Gageler J), 221 [127], 237 [183]–[184] (Gordon J), 240 [194], 241 [198], 243–4 [203]–[208], 267 [297] (Steward J).

⁹³ Ibid 237 [183], citing *Brown* (n 9) 362 [96] (Kiefel CJ, Bell and Keane JJ). See also *Unions NSW* (n 42) 557 [50].

history of the law'.⁹⁴ The identified purpose should speak to 'not what the law does in its terms but what the law is designed to achieve in fact'.⁹⁵ Further, '[i]t should be identified at a higher level of generality than the meaning of the words of the provisions, focussing instead on the "mischief" to which the provisions are directed'.⁹⁶ The text of the Act is, therefore, the starting point.

As noted, s 3 states that the object of the Act is to provide for a scheme of registration to improve the transparency of activities undertaken on behalf of foreign principals. Apart from the helpful reference to 'transparency', however, this provision does not get to the heart of the 'mischief' the legislation intends to address. As Edelman J notes, 'the objects of the Act cannot be conclusive of the purpose, nor are they necessarily at the appropriate level of generality'.⁹⁷ The provision's narrow articulation creates a sense of circularity: the legislatively stated purpose of the transparency-creating scheme of registration is to set up a transparency-creating scheme of registration. But what actual problem does the scheme seek to address? To use Gordon J's language, what is the law designed to achieve in fact? There are other clues in the text. The title refers to transparency in relation to 'foreign influence' and substantive provisions regulate foreign influence,⁹⁸ which is defined broadly in s 10 as to 'affect in any way'. Section 21 provides that registrable activities of foreign influence include political lobbying and other 'communications activities'. Notably, there is no reference in the Act to 'foreign interference', which is accordingly not defined.

Construction of the text, therefore, suggests that the legislative purpose of the Act is to establish a registration scheme to mandate greater transparency through regulation of foreign *influence* activities, presumably (we must extrapolate by reference to the extrinsic materials, discussed further below) to weed out or deter covert and corrupt foreign interference. The joint judgment seems to agree, but its reasoning is imprecise. Rather than starting with the text, the majority appears mainly guided by the extrinsic materials, including the Second Reading Speech and explanatory documents.⁹⁹ Indeed, the text of the Act is sometimes avoided. For example, the Justices muddy the issue when, referring not to the *FITS* Act, but to the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth), they observe that 'the name of the latter Act implies it is addressed to the risk of foreign interference'.¹⁰⁰ Yet, they do not point out the obvious corresponding observation, that the name of the *FITS* Act —

⁹⁴ *LibertyWorks* (n 1) 237 [183], citing *Brown* (n 9) 432 [321] (Gordon J).

⁹⁵ *Ibid*, citing *Brown* (n 9) 392 [209] (Gageler J). See also *Brown* (n 9) 432–3 [322] (Gordon J). See also *McCloy* (n 38) 232 [132] (Gageler J); *Unions NSW v New South Wales* (2019) 264 CLR 595, 657 [171] (Edelman J) ('*Unions No 2*').

⁹⁶ *LibertyWorks* (n 1) 237 [183], citing *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 394 [178] (Gummow J); *McCloy* (n 38) 232 [132] (Gageler J); *Brown* (n 9) 363 [101] (Kiefel CJ, Bell and Keane JJ), 391–2 [208] (Gageler J), 432 [321]; *Unions No 2* (n 95) 657 [171] (Edelman J).

⁹⁷ *LibertyWorks* (n 1) 243 [204].

⁹⁸ *FITS Act* (n 3) ss 12, 21.

⁹⁹ *LibertyWorks* (n 1) 203 [58] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁰ *Ibid* 193 [12] (Kiefel CJ, Keane and Gleeson JJ).

the Act under contention in this case — demonstrates it is addressed at preventing benign foreign influence.

To add to the ambiguity, the joint judgment understands the Act's purpose as being to improve transparency in foreign influence activities, because 'improper influence is most likely to succeed and amount to an interference in those (political) processes if its source remains undisclosed', indicating covert foreign interference is the true mischief being addressed. However, and confusingly, the joint reasons also state that the scheme will facilitate 'exposure of foreign influence, as a means of preventing or minimising the risk that ... foreign principals will exert *influence* on the integrity of Australia's political or electoral processes, as has occurred elsewhere.'¹⁰¹ On face value, this asserts that the purpose of the registration scheme in creating transparency in foreign influence activities could be to prevent foreign *influence*, not foreign interference. Yet influence can be positive. It might even increase the integrity of Australia's democracy. Consider a foreign thinktank engaging with Australians to relay advice on how Australia might guard against democratic decline. That would be a productive foreign influence on the integrity of Australian democracy. Why would we want to prevent or deter it?

Nevertheless, preventing foreign influence may be a plausible interpretation of the purpose of the Act, based on its text and operation (see part 3.2 discussion of the register). This is, arguably, not a legitimate purpose compatible with Australia's representative government. If the reasoning is intended to state this purpose, then it has failed to account for the fact that this contradicts the politically stated policy intent (which is relevant because it forms part of the legislative context which should inform purpose — discussed more below) as well as Australian democratic and constitutional values. How can a multicultural, globalised democracy like Australia — indeed, a nation with a continuing constitutional relationship and engagement with a foreign power in the UK — legitimately intend to prevent and discourage benign and productive foreign influence? Yet, this is arguably what the Act does.

Turning now to extrinsic context, in his Second Reading Speech with respect to a related Act in the same package of reforms, former Prime Minister Malcolm Turnbull drew out the distinction between foreign interference and benign foreign influence to argue that foreign 'interference is unacceptable from any country' and that Australia would therefore 'not tolerate foreign influence activities that are in any way covert, coercive or corrupt. That is the line that separates legitimate influence from unacceptable interference.'¹⁰² Turnbull therefore clarified that the package of reforms being proposed was 'not concerned with soft power', which is 'an attractive force' because '[i]f another nation has cultural or economic gravitational pull then it suggests they are doing something

¹⁰¹ Ibid (emphasis added). See also *ibid* 237 [184] (Gordon J).

¹⁰² Turnbull, *Second Reading Speech* (n 2) 13146.

right and we would all benefit from being involved'.¹⁰³ In other words, influence arising from persuasive argument, lobbying, and debate in the free marketplace of ideas should not be restricted, even if it flows across international borders, which, in an age of globalisation and digital connectivity, is inevitable. The government's factsheet makes this same delineation, explaining that 'foreign influence is not a bad thing' and that governments and a broad range of other actors engage in this influence all the time:

This type of 'foreign influence', when conducted in an open, lawful and transparent manner, contributes to our vibrant and robust democracy by ensuring that decision makers and the public are exposed to diverse opinions and voices from all sectors of society.¹⁰⁴

Foreign interference, however, was described as going 'beyond the routine diplomatic influence that is commonly practised by governments' to include 'covert, deceptive and coercive activities' by foreign nationals to 'advance their interests or objectives'.¹⁰⁵ After making this careful distinction, the government enacted the *FITS Act*, which indeed regulates the 'soft' and 'attractive force' of 'foreign influence'.¹⁰⁶ The practical result is that softer forms of foreign influence are registrable and failure to comply is a criminal offence. As Steward J correctly notes, the Act targets people who are not guilty of 'undisclosed foreign influence' (foreign interference).¹⁰⁷ It treats people engaged in positive and productive international engagement as if they are up to no good. So much for foreign influence being positive.

There is repeated imprecision in the judgments with respect to the distinction between foreign influence and interference. While the majority apparently agree that only foreign interference is a mischief,¹⁰⁸ they also reference problematic global trends in 'foreign influence',¹⁰⁹ which contradicts the former Prime Minister's directive and the Explanatory Memorandum's advice that such influence is productive. The majority further state that '[t]he mischief identified in the Second Reading Speech to which the *FITS Act* is directed is the risk that foreign states and individuals may seek to influence Australia's political processes and public debates.'¹¹⁰ However, this is a sloppy interpretation of the speech, which, as noted, identifies the mischief as illegitimate foreign interference not legitimate foreign influence. The Justices repeatedly refer to

¹⁰³ Ibid.

¹⁰⁴ Commonwealth Attorney-General's Department, *Foreign Influence Transparency Scheme* (Factsheet No 2, February 2019) 1 <<https://www.ag.gov.au/sites/default/files/2020-03/influence-versus-interference.pdf>>.

¹⁰⁵ Ibid.

¹⁰⁶ See, eg, *FITS Act* (n 3) s 12.

¹⁰⁷ *LibertyWorks* (n 1) 267 [296].

¹⁰⁸ Ibid 192 [9] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁹ Ibid [7] (Kiefel CJ, Keane and Gleeson JJ).

¹¹⁰ Ibid 203 [58] (Kiefel CJ, Keane and Gleeson JJ).

foreign influence as if it is automatically nefarious.¹¹¹ This conceptual fudging may help explain the Justices' failure to question why the *FITS Act* in fact regulates foreign influence in contradiction to the politically stated policy intent and Australian democratic and constitutional values. It suggests confusion susceptible to xenophobic interpretations or carelessness arising from automatic deference to Parliament on national security issues.¹¹² If this was a 'slip-up' and the High Court meant that regulating foreign influence would deter covert and corrupt foreign interference (which seems more likely), then, at the very least, this indicates conceptual confusion and lack of precise attention to this crucial issue.

We think there are two possible explanations for this conceptual confusion. The first is that, perhaps, the High Court has inadvertently identified the true purpose of the Act, which is to regulate foreign influence. If so, we contend that the purpose of increasing transparency to prevent mere foreign influence — which is no threat to national security — is not legitimate or compatible with Australian constitutional democracy. After all, the *Constitution* and convention require domestic representatives of the British King to engage with and advise domestic government ministers,¹¹³ providing a legitimate foreign influence and engagement on Australian democratic processes. This demonstrates that our system of representative government condones and, indeed, incorporates foreign influence, which is by no means automatically untoward. While that specific foreign engagement is obviously exempt from registration under the Act,¹¹⁴ the point about legitimacy and overall constitutional compatibility of such a legislative purpose remains. The legislative context, explanatory materials, the *Constitution*, and longstanding convention all demonstrate that benign foreign influence is part and parcel of Australian democracy. If the purpose of the Act is to prevent mere foreign influence, this is an illegitimate purpose incompatible with our representative government and the scheme should fail.

The second and more charitable interpretation is that, notwithstanding imprecise language, the Justices were intending to argue that the *FITS Act* promotes sunlight or transparency by regulating foreign influence, with the aim of rooting out and, thus, minimising the risk of foreign interference (foreign influence that is undisclosed or corrupt). As Edelman J describes, the scheme:

acts as a prophylactic to any sinister foreign influence on Australian political processes in circumstances of a growing global trend of foreign influence operations occurring

¹¹¹ Ibid 192–3 [10] (Kiefel CJ, Keane and Gleeson JJ).

¹¹² Rebecca Ananian-Welsh and Nicola McGarrity, 'National Security: A Hegemonic Constitutional Value?' in Ros Dixon (ed) *Australian Constitutional Values* (Hart Publishing, 2018) 267–86.

¹¹³ *Sue v Hill* (1999) 199 CLR 462 confirmed that the UK is now considered a 'foreign power' for the purposes of s 44 of the *Australian Constitution*.

¹¹⁴ *FITS Act* (n 3) s 25A(c).

at what the Australian Security Intelligence Organisation described as 'an unprecedented scale'.¹¹⁵

Though Edelman J is also imprecise in his use of 'influence' rather than 'interference' in this passage, his Honour's incorporation of 'sinister' conveys the intended meaning. Prevention of sinister foreign interference seems a legitimate legislative purpose, in line with the politically stated policy intent, particularly given judicial deference to policy discretion in matters of national security.¹¹⁶ However, this purpose is not served by the legislative execution. We believe the scheme is ineffective in achieving this purpose and disproportionate in the means employed. If the true purpose is prevention of covert and corrupt foreign interference, the scheme should fail the proportionality analysis for reasons explained below.

B *Two-Tier Registration: Investigating the Public Register*

The majority judgments do not properly address the legislative breadth of the legislation and the wide range of actors to which the obligations to register relate, which imposes a broad and, arguably, unbalanced burden on free debate. Steward J notes that '[n]o list of currently registered individuals or entities was before the Court'.¹¹⁷ To help fill this gap in analysis, we have undertaken a review of the publicly accessible register, which demonstrates the wide range of actors captured by the legislation and the kinds of communicative activity in which they are engaged. There are currently 76 entries under the category of 'communications activity'.¹¹⁸ The other categories are: parliamentary lobbying, general political lobbying, disbursement activity, and 'other activity.' We focus on the categories of communications activity and 'other activity' in this paper, as they both relate to our concerns in relation to the implied freedom.

The legislation captures a wide range of organisations and institutions, including companies such as South32 Limited, API Management Pty Ltd., Domestic Consulting and Woodside Petroleum, media organisations such as SEC Newsgate Pty Limited and Global CAMG Media Group, organisations such as Change.org Australia, the Australian Institute of International Affairs, Australian Strategic Policy Institute, Institute for Regional Security, Griffith Asia Institute, and the Perth USAsia Centre. It also captures various individuals, including prominent individuals like former Prime Minister Kevin Rudd.¹¹⁹ The kind of

¹¹⁵ *LibertyWorks* (n 1) 254–55 [244].

¹¹⁶ Ananian-Welsh and McGarrity (n 112) 267–86.

¹¹⁷ *LibertyWorks* (n 1) 266 [295].

¹¹⁸ Commonwealth Attorney-General's Department, 'Communications Activity' *Transparency Register* (Web Page, 23 September 2022) <<https://transparency.ag.gov.au/Activities>>.

¹¹⁹ *Ibid* 'Other Activity (Former Cabinet Minister or Recent Designated Position Holder)' *Transparency Register* (Web Page, 20 March 2023) <<https://transparency.ag.gov.au/Activities/Details/79a0bf1a-959e-ec11-a985-0050569fe6ca>>.

communications activity captured is equally broad. In the case of many of the companies, they have registered because of communications activity, broadly defined, which relates to joint ventures with foreign companies. For example, API Management describes its communications activities in these terms:

API Management Pty Ltd is the manager of the joint venture known as the Australian Premium Iron Ore Joint Venture under which the West Pilbara Iron Ore Project in Western Australia is held. As manager, API may engage in communications activities, on behalf of the joint venture, including in connection with applications for licenses, approvals and other authorisations under federal law relevant to the Project.¹²⁰

Change.org, which hosts petitions on its website that are initiated by members of the public, has registered its activity because it is an indirect subsidiary of the same organisation in the United States.¹²¹ The Australian Institute of Public Affairs has registered because it was contacted by the Chinese Embassy to host a discussion with three Chinese scholars about the Belt and Road initiative.¹²² The Australian Strategic Policy Institute registered because it had received funding for a research project from the Embassy of Japan and grant funding from NATO Strategic Communications Centre of Excellence for an independent research project in popular social media platforms.¹²³ The Australian Academy of Science has registered because:

The Academy engages with Chinese audiences by operating an official account on social media platform Weibo. English content is translated into Chinese by a certified-NAATI translator before being reviewed by a panel of respected Chinese-speaking Australian academics. The content is impartial and aims to promote the advances of Australian science.¹²⁴

Individuals have even registered for email communications with foreign political organisations, media and academic engagements, solitary protest activity and leaflet distribution. Kevin Rudd, for example, has registered for invited interviews about international relations hosted by public universities in the US, and webinars with the former Prime Minister of New Zealand, Helen Clarke, among many other speaking engagements, with a total of 53 registrations.¹²⁵

As is evident from this review of the public register, the reach of the Act is excessively broad, capturing many activities and individuals for engaging in

¹²⁰ Ibid 'Communications Activity' *Transparency Register* (Web Page, 15 May 2019) <<https://transparency.ag.gov.au/Activities>>.

¹²¹ Ibid (Web Page, 4 September 2020) <<https://transparency.ag.gov.au/Activities/Details/5222e30a-edce-e911-812b-0050569d2348>>.

¹²² Ibid (Web Page, 27 September 2019) <<https://transparency.ag.gov.au/Activities/Details/915bf43d-b5e0-e911-812e-0050569d617d>>.

¹²³ Ibid (Web Page, 10 March 2020) <<https://transparency.ag.gov.au/Activities/Details/e9326e96-ca4b-ea11-8132-0050569d2348>>.

¹²⁴ Ibid 'General Political Lobbying' (Web Page, 26 March 2019) <<https://transparency.ag.gov.au/Activities/Details/d5ea47a2-f745-e911-8121-0050569d2348>>.

¹²⁵ Ibid 'Other Activity (Former Cabinet Minister or Recent Designated Position Holder)' (Web Page, 20 March 2023) <<https://transparency.ag.gov.au/Activities>>.

routine communications activities that are part of living in a democratic and globalised society, and for conducting independent peer-reviewed research. This is an unjustified burden on the implied freedom because most of these entries do not appear to be engaging in untoward foreign interference, and if they were, this would not be evident from the information presented on the register, which undermines the policy purpose of preventing foreign interference. An assessment of the public register supports the conclusion that the requirements are not 'reasonably appropriate and adapted to advance that purpose' in a way that is consistent with the maintenance of the constitutionally prescribed system of government.

Indeed, it is not clear what is achieved by requiring these organisations and individuals to register. We are none the wiser about the nature of the international interactions or their relevance to the threat of foreign interference. Rather, the scheme imposes a heavy burden on international collaboration and free communication, including on organisations such as thinktanks and universities that typically have vast and international research networks which they are now required to register. As noted, this does not achieve the stated purpose of facilitating transparency, because the register does not inform the reader about untoward activities. If the registration requirements alone are deterring corrupt foreign interference (which seems unlikely), this is unprovable. The net result is that citizens are paying for this scheme with a heavy regulation of free speech and international engagement, with no visible payoff.

One counterargument is that the reporting requirements are not overly onerous, because all that is required is the submission of the relevant information. Admittedly, for larger organisations and wealthier individuals, the complex reporting requirements may not be an issue. However, for individuals without the resources to secure expensive legal advice to elucidate their obligations under the Act, it may cause them to err on the side of caution and not engage in the communications activity at all. The administrative burden is onerous. We are even aware of universities that have had to create new teams of experts dedicated to determining whether academics are required to register under the scheme for their international research activities.¹²⁶ When the authors sought advice from these teams as to our own liabilities under the Act, the answers were not easy to ascertain.

The confusing and combative nature of registration requirements is demonstrated by the various lawyer-drafted submissions to the register, and in the fact that even former Prime Ministers like Tony Abbott and Kevin Rudd have needed expert support to understand their obligations under the scheme. Rudd's multiple submissions to the register show how much work this creates for

¹²⁶ See Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (Inquiry, March 2022).

lawyers, which may be lucrative for the lawyers involved but unfair on ordinary citizens trying to participate in democratic engagement while negotiating this law. Rudd's multiple entries duplicate the same lawyerly words, demonstrating ongoing legal disagreement with the Department about the registration obligations:

I refer to Acting Secretary Anderson's letter of 12 January 2021. In it, Mr Anderson expressed a much narrower interpretation of my obligations under this scheme's special requirements for former cabinet ministers than was expressed by his predecessor, Mr Moraitis, less than two months earlier on 25 November 2020. My lawyer first contacted the Department in September 2019 to clarify my obligations. He did so at my initiative, despite his advice that I had nothing to register. I am not an agent of foreign influence and any such suggestion is forcefully rejected. I engage internationally as an individual, a scholar, a commentator, a former leader and in my roles with non-government and UN-affiliated institutions — never as an agent on behalf of any foreign government ...¹²⁷

Rudd's emphatic denial that he is an 'agent of foreign influence' perpetuates misunderstanding about what foreign influence is: according to Prime Minister Turnbull who oversaw the enactment of this legislation, foreign influence is positive, but in regulating and potentially criminalising benign foreign influence (if registration requirements are not fulfilled), this scheme has perpetuated the misconception that foreign influence is automatically nefarious.

In his international engagement, Rudd is presumably undertaking in legitimate foreign influence but not corrupt foreign interference. Nonetheless, the scheme creates scope for Rudd to argue about whether the Act requires him to register 'discussions of current issues ... with international public broadcasters, such as the BBC or Radio New Zealand', leading him to question whether '[t]his defies the Attorney-General's public statement that this law would be interpreted with "common sense"'. Rudd contends:

It is ridiculous to imagine that being interviewed by the BBC could make someone an agent of UK Government influence, especially if they use that platform to criticise the UK Government, as I often do. Given such interviews are already publicly transparent when they are broadcast or published, disclosing them here seems redundant.... the Department's sweeping interpretation will result in the waste of both officials' time and taxpayer funds. Australia must have dozens, if not hundreds, of living former cabinet ministers, all of whom must now be chased by the Department to register engagements that, by their nature, are already on the public record ...¹²⁸

These submissions demonstrate the incomprehensible, changing, disputed and indeed 'ridiculous' interpretations arising from the legislated registration requirements. Strangely, Rudd's submissions also note that he 'wholly supports'

¹²⁷ Australian Government, Attorney-General's Department, Transparency Register: <<https://transparency.ag.gov.au/SearchItemDetail/74ad18fe-0c7c-ed11-a994-0050569f66ca>>.

¹²⁸ *Ibid.*

the Act, which he thinks has 'potential to help safeguard Australia's core interests by highlighting potential agents of foreign influence.' We disagree. If the registration requirements cannot be easily apprehended even by former prime ministers without expert assistance and extensive disagreement with the department, the scheme is unfit for purpose.

The political furore over whether Tony Abbott needed to register further demonstrates the point.¹²⁹ The Act is easily and regularly misunderstood, including by members of the elected government that created the legislation. Under freedom of information laws relating to why Abbott was asked to register under the Act, it was revealed that a public servant had advised Abbott that it was 'reasonable' to hold off on registering until the question of his actual liability to register had been resolved. On later finding out that he did need to register, Abbott labelled the decision 'absurd', angering the then Attorney-General, Chris Porter.¹³⁰ If the bureaucrats administering the Act cannot give quick advice as to whether someone is liable to register, this is indeed absurd. It is a breach of a fundamental tenet of the rule of law: the requirement that the law be comprehensible and accessible, so rules can be followed. In our view, the registration requirements are extremely difficult to understand and follow without legal advice. An ordinary person would not bother dealing with the bureaucracy and red tape or the requirements will just be ignored.

The registration requirements can also be used for political ends. Rudd weaponises the legislation in his longstanding crusade against NewsCorp,¹³¹ demonstrating the propensity of the registration scheme to be wielded against ideological opponents, by burdening them with inconvenient and expensive paperwork. Legal advice obtained by Rudd from Brett Walker SC advises that NewsCorp may be liable to register under the scheme:

If News Corp therefore communicates or distributes information on behalf of a foreign principal to the public through its media outlets or platforms, the identity of the foreign principal must be apparent or disclosed in the communication to ensure that it is not 'communications activity' which is required to be registered under section 22 of the Act. Relevantly, if News Corp through its journalists were to make an arrangement with a foreign principal to communicate information to the public, for the purpose of political or governmental influence, the activity would be registrable unless the identity of the foreign principal is apparent in the information published.¹³²

Walker further notes that 'the registration and disclosure of communications activity undertaken on behalf of a foreign principal, required by the Act for the

¹²⁹ Karp (n 77).

¹³⁰ Ibid.

¹³¹ Amanda Meade, 'Kevin Rudd Petition Seeking Royal Commission into Murdoch Media Nears 500,000 Signatures', *The Guardian*, 2 November 2020.

¹³² Brett Walker SC, 'Memorandum of Advice' (23 December 2020) 2 [15]–[16] <<https://www.aph.gov.au/DocumentStore.ashx?id=5fede6b0-912d-4881-82c2-b5b8e135be43>>.

purpose of transparency or “sunlight”, would appear to override the protection provided to confidential sources.¹³³

Walker’s advice confirms the potential chilling effect of the registration scheme, including on journalism, that is essential for free and informed voting choices. The poorly drafted Act fails to protect journalists’ confidential sources. When viewed alongside other recent attempted incursions into free speech via legislation¹³⁴ and government action,¹³⁵ including press raids which saw Australia’s Freedom House score for press freedom decline,¹³⁶ this scheme adds to concerns that Australian journalistic freedom and free speech is diminishing.

C Eroding the Implied Freedom of Political Communication

Perhaps the most striking aspect of the *LibertyWorks* judgments is Steward J’s declaration that the implied freedom may not exist. His Honour’s comments appear to invite a future constitutional challenge and are worth recounting in full:

Thirdly, for my part, and with the greatest of respect, it is arguable that the implied freedom does not exist. It may not be sufficiently supported by the text, structure and context of the *Constitution* and, because of the continued division within this Court about the application of the doctrine of structured proportionality, it is still not yet settled law. The division within the Court over so important an issue may justify a reconsideration of the implication itself. In that respect, it is one thing to proclaim the necessity of a freedom of political discourse given the type of representative and responsible government created by the *Constitution*; it is another thing entirely to make an implication about when and how that freedom may be legitimately limited. The continued division in this Court about how that latter task is to be undertaken is telling. It may suggest that the implied freedom cannot be adequately defined. However, no party submitted that the implied freedom did not exist. In such circumstances, it is my current duty to continue to apply it faithfully. Any consideration of the existence of the implied freedom should, if necessary, be a matter for full argument on another occasion.¹³⁷

While the implied freedom has been interpreted in different ways over time, depending on the composition of the High Court and changing judicial

¹³³ Ibid 3 [18].

¹³⁴ See the other statutes in this package of reforms. See also Social Media (Anti-Trolling) Bill 2021 (Cth) (Exposure Draft).

¹³⁵ *Dutton v Bazzi* [2021] FCA 1474; Michael Douglas, ‘Defamation Actions and Australian Politics’ (2021) 5 *University of New South Wales Law Journal Forum* 1; Sophie Elsworth, ‘MP Andrew Laming Received Several Apologies Over Defamatory Tweets’, *The Australian* (31 October 2021); Samantha Maiden, ‘Peter Dutton Suggests Public-Funded Legal Fund for MPs to Sue for Defamation’, *News.com.au* (21 October 2021).

¹³⁶ Freedom House, ‘Freedom in the World 2020: Australia’ *Freedom House* (2023) <<https://freedomhouse.org/country/australia/freedom-world/2020>>.

¹³⁷ *LibertyWorks* (n 1) 255–6 [249] (Steward J).

approaches,¹³⁸ its existence has never been doubted, including in more recent judgments. For example, the implied freedom was recently affirmed in *Brown*, where the High Court found that aspects of the *Workplaces (Protection from Protestors) Act 2014* (Cth) unduly burdened the implied freedom because it prevented political protest, which is a form of political communication.¹³⁹ While the Court upheld the *Public Service Act 1999* (Cth) in *Banerji*, the existence of the implied freedom was confirmed. This changed with Steward J's suggestion that the Court's ongoing division on the issue means the implied freedom cannot be adequately defined. His Honour further argued that the implied freedom may never have been justified, citing Dawson J's rejection of the freedom in *Theophanous v The Herald and Weekly Times Limited*.¹⁴⁰ The contention is that, while it may be legitimate for the Court to protect the means by which representatives are 'directly chosen' by the people for the purposes of ss 7 and 24 of the *Constitution*, for example by declaring invalid legislation denying electors access to information necessary for them to exercise 'true choice' in an election,¹⁴¹ it is a stretch to say that this creates an implied freedom in relation to political communication. However, because the parties did not submit that the implied freedom did not exist, the freedom's non-existence was not a question to be determined in this case. Nevertheless, Steward J's judgment seems to invite a future challenge. While his Honour's provocation is constitutionally conservative in its aversion to judicial creativity and overreach, it is also paradoxically activist in its advocacy and encouragement of litigation to overturn decades of established precedent.

If, for Steward J, overturning a law that impedes a 'true choice' in elections is potentially legitimate under the *Constitution*, whereas creating an implied freedom of political communication is not, perhaps his Honour's argument is more about appropriate legal labels than the substance of the law. After all, the purpose of the implied freedom, as currently conceived, is to ensure that electors have the necessary information to make informed voting choices, as required by the *Constitution*. The 'implied freedom of political communication' is the trigger for judicial examination of where the boundaries of legislative power lie with respect to the free voting choices of citizens. This question hinges on the correct meaning of the word 'choice'. Like it or not, the *Constitution* does protect the idea of a 'choice' in federal electoral voting. The duty of High Court judges to discern what this means in practice with respect to Parliament's legislative power unavoidably entails uncertainty that must be ordered, as much as possible, by an appropriate legal test. If Steward J disagrees with the present test or tests, his

¹³⁸ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

¹³⁹ *Brown*.

¹⁴⁰ (1994) 182 CLR 104.

¹⁴¹ *LibertyWorks* (n 1) 268 [301] (Steward J).

Honour should articulate a better mechanism — including a more appropriate label for this mechanism — for determining the constitutional meaning of an electoral choice under ss 7, 24 and 128 of the *Constitution*. Without this, Steward J's judgment raises more questions than it answers.

V CONCLUSION

Steward J may be partially right to conclude that the implied freedom may not exist, but not for the reasons that his Honour elucidates. The implied freedom, in practice, did not exist for these plaintiffs because it was not robustly applied by the High Court. Free speech in Australia is at risk of being surreptitiously smothered by layer upon layer of dense and incomprehensible legislation. This creeping legislative incursion into free speech is going largely unscrutinised and unchallenged in the political realm. The High Court's adjudication of the implied freedom is the citizenry's last defence against state incursions into free speech. For the plaintiffs in *LibertyWorks*, this last defence turned out to be largely illusory.