

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

LIBERTYWORKS INC

PLAINTIFF

AND

COMMONWEALTH OF AUSTRALIA

DEFENDANT

LibertyWorks Inc v Commonwealth of Australia

[2021] HCA 18

Date of Hearing: 2 March 2021

Date of Judgment: 16 June 2021

S10/2020

ORDER

The questions of law stated in the Amended Special Case filed on 1 March 2021 be answered as follows:

1. *Is the Foreign Influence Transparency Scheme Act 2018 (Cth) invalid, to the extent it imposes registration obligations with respect to communications activities, on the ground that it infringes the implied freedom of political communication?*

Answer: No.

2. *In light of the answer to question 1, what relief, if any, should issue?*

Answer: None.

3. *Who should pay the costs of and incidental to this special case?*

Answer: The plaintiff should pay the defendant's costs.

Representation

P J Dunning QC with R Scheelings for the plaintiff (instructed by Speed and Stracey Lawyers)

S P Donaghue QC, Solicitor-General of the Commonwealth, with B K Lim and S Zeleznikow for the defendant (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales, with S Robertson for the Attorney-General for the State of New South Wales, intervening (instructed by Crown Solicitor's Office (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

LibertyWorks Inc v Commonwealth of Australia

Constitutional law (Cth) – Implied freedom of communication about governmental or political matters ("implied freedom") – Where *Foreign Influence Transparency Scheme Act 2018* (Cth) ("Act") included registration requirement for persons undertaking communications activity on behalf of foreign principal for purpose of political or governmental influence – Where foreign principal defined to include foreign political organisation – Where plaintiff undertook registrable activities on behalf of foreign political organisation in holding annual Conservative Political Action Conference events which constituted communications activity – Whether Act to extent it imposes registration obligations with respect to communications activity undertaken on behalf of foreign principal effectively burdens implied freedom – Whether provisions for legitimate purpose – Whether provisions suitable, necessary and adequate in balance.

Words and phrases – "adequate in its balance", "burden", "communications activity", "compelling justification", "disclosure", "foreign influence", "foreign interference", "foreign political organisation", "foreign principal", "legitimate purpose", "narrowly tailored", "necessary", "political or governmental influence", "prior restraint", "register", "registration", "scheme information", "structured proportionality", "suitable", "transparency", "undisclosed influence".

Foreign Influence Transparency Scheme Act 2018 (Cth), ss 11, 12, 13, 16, 18, 21, 38, 42, 43, 45, 46, 52, 53.

Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018 (Cth).

Foreign Influence Transparency Scheme Rules 2018 (Cth), s 6.

1 KIEFEL CJ, KEANE AND GLEESON JJ. The plaintiff, LibertyWorks Inc, was incorporated in 2015 under the *Associations Incorporation Act 1981* (Qld). It presently has 1,290 members in Australia. It is described in the Amended Special Case as "a private think-tank with an aim to move public policy in the direction of increased individual rights and freedoms, including the promotion of freedom of speech and political communication". Since its incorporation the plaintiff has organised political conferences in Australia and made submissions to parliamentary enquiries on freedom of political speech. It maintains a website from which it has published more than 200 posts which seek to raise awareness of individual freedom in public policy and it maintains a social media presence.

2 The American Conservative Union ("the ACU") was established as a corporation in the United States of America for the promotion of political freedom and for the purpose of influencing politics and politicians in that country from what is described in the Amended Special Case as a "conservative/classical liberal" perspective. Its Articles of Incorporation refer to its objects as being to foster and develop "a greater understanding and awareness of the tenets set forth in the Constitution of the United States and the Declaration of Independence to the end that the individual citizen shall understand, preserve and defend his or her inherent rights, liberties and responsibilities and cherish the principles upon which the Republic was founded".

3 A statement on the website of the ACU refers to its purpose as being to "harness the collective strength of the conservative movement and support the campaigns of conservative candidates". To this end the ACU organises and holds an annual multi-day political conference in the United States called the "Conservative Political Action Conference" ("CPAC"). Prominent people, including the immediate past President and Vice-President of the United States, government officials and sections of the media have attended CPAC.

4 At a meeting in 2018 between the President of the plaintiff and the Executive Director of the ACU it was agreed that the plaintiff and the ACU would collaborate in a CPAC event to be held in Australia in 2019, and that the ACU would provide the plaintiff with the names of speakers and otherwise assist to ensure its success. Since then the ACU has registered the word "CPAC" and a CPAC logo as trademarks in Australia. The CPAC event the subject of the discussions was held in Sydney in August 2019 and was widely marketed by the plaintiff. The CPAC event featured speakers from Australia, the United States, England and Japan. It included politicians (past and present), media personalities, members of "think tanks", economists and social commentators. The promotional material for the event described the ACU as the "Think Tank Host Partners" and a "co-host" of it with the plaintiff. The Chairman, Executive Director and another board member of the ACU, together with ACU staff, attended the CPAC event.

2.

According to the Amended Special Case, another CPAC event was proposed to be held in Australia in November 2020.

5 A Deputy Secretary of the Attorney-General's Department wrote to the President of the plaintiff in August 2019 concerning the upcoming CPAC event to be presented by the plaintiff and the ACU. The Deputy Secretary outlined the scheme of the *Foreign Influence Transparency Scheme Act 2018* (Cth) ("the FITS Act"), and observed that the ACU would appear to fall within the definition of a "foreign political organisation" and therefore would be considered a "foreign principal" and that an event such as the CPAC event would appear to be a "communications activity". The plaintiff was asked to consider whether it was required to register its arrangements with the ACU under the scheme. Further correspondence followed, including a notice purporting to be given under s 45 of the FITS Act, which required information and documents which might enable the Deputy Secretary to determine whether the plaintiff was liable to register. The notice was not complied with and ultimately was not further pursued. The plaintiff has not to date registered under the FITS Act.

6 The plaintiff claims that the provisions of the FITS Act respecting communications activity by a person who acts on behalf of a foreign principal burden the freedom of political communication which is implied by the *Constitution*, cannot be justified and are therefore invalid.

Foreign influence – agreed facts

7 It is agreed between the parties to this Amended Special Case that in recent years there has been a global trend of attempts at the foreign influence of democratic processes. Official reports¹ have concluded that a foreign country sought to undermine the Brexit referendum in the United Kingdom, the 2016 Presidential election in the United States and the 2017 French Presidential election. Foreign actors in many countries have also sought to exert covert influence through the use of both traditional and social media, including by spreading disinformation

1 Mueller, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (2019), vol 1 at 1-5, 14-15; United Kingdom, House of Commons, Digital, Culture, Media and Sport Committee, *Disinformation and 'Fake News': Final Report* (2019) at 68-71, 72; United Kingdom, Intelligence and Security Committee of Parliament, *Russia* (2020) at 5, 9.

3.

and propaganda. Two social media platforms have taken action against cyber troops engaged in foreign influence operations in at least seven countries².

8 At the time that the FITS Act was enacted the Australian Security Intelligence Organisation ("ASIO") had warned that espionage and foreign interference activity against Australia's interests was "occurring at an unprecedented scale"³. Australia was experiencing undisclosed foreign influence both in respect of government and political systems and processes and more broadly in the Australian community. ASIO identified foreign powers clandestinely seeking to shape the opinions of members of the Australian public, media organisations and government officials to advance their own countries' political objectives, including through the recruitment and co-opting of influential and powerful Australian voices to lobby decision-makers. It identified ethnic and religious communities in Australia as the subjects of covert influence operations designed to diminish their criticism of foreign governments⁴.

9 The parties agree that there is a distinction to be drawn between foreign interference and foreign influence. The parties agree that foreign influence may be taken to refer to activities undertaken on behalf of a foreign principal that influence government and political systems and processes. Foreign influence will amount to foreign interference if it is undertaken using covert, deceptive, corrupting or threatening means to damage or destabilise the government or political processes of a country⁵.

10 In Australia, ASIO reports, foreign principals often pursue their own interests by engaging Australians to seek to influence governments and others on

2 Bradshaw and Howard, *The Global Disinformation Order: 2019 Global Inventory of Organised Social Media Manipulation* (2019) at 2.

3 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 2.

4 Australian Security Intelligence Organisation, *ASIO Annual Report 2017-18* (2018) at 3, 25; Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 2-5.

5 Australian Security Intelligence Organisation, *ASIO Annual Report 2017-18* (2018) at 25; Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 6-7, 9-11, 17, 166-167; Australian Security Intelligence Organisation, *Director-General's Annual Threat Assessment* (2020) at 9.

their behalf. Almost every sector of the Australian community is a potential target for foreign influence but this is said to be particularly true in relation to parliamentarians and their staff, government officials, business leaders, the university community, and the media and opinion-makers⁶.

- 11 Even when the purpose of the foreign influence is not to damage or destabilise Australia, if left undisclosed it can impede the ability of decision-makers in Australia, and the Australian public, to make informed decisions because it can conceal the nature of the competing interests at play. The parties agree that transparency of foreign influence can contribute to the effective functioning and accountability of Australian government institutions and help protect their integrity by reducing the risk that foreign influence will result in foreign interests prevailing over domestic interests by ensuring that the Australian public can assess the nature, level and extent of foreign influence in respect of particular decisions or processes accurately⁷.

The FITS Act

- 12 The FITS Act was enacted as part of a package of legislative reforms alongside the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) and the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth). As the name of the latter Act implies, it is addressed to the risk of foreign interference.

- 13 The object of the FITS Act is stated in s 3 to be:

"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."

6 Australian Security Intelligence Organisation, *Director-General's Annual Threat Assessment* (2020) at 9.

7 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 10-12; Attorney-General's Department, *Parliamentary Joint Committee on Intelligence and Security, Attorney-General's Department Submission, Inquiry into the Foreign Influence Transparency Scheme Bill 2017* (2018) at 3, 9-10.

5.

14 A "foreign principal" is defined by s 10 to mean:

- "(a) a foreign government;
- (b) a foreign government related entity;
- (c) a foreign political organisation;
- (d) a foreign government related individual."

15 Each foreign principal is then further defined. Attention in this matter is focussed on the entity in para (c), which is defined by s 10 to include a foreign organisation that exists primarily to pursue political objectives. It is accepted that it applies to the ACU.

16 Broadly speaking and as relevant to the primary question before the Court the scheme of the FITS Act may be understood to require a person to register details about themselves and their foreign principal with the Secretary⁸ where the person communicates or distributes information or material to the Australian public or a section of it under an arrangement with, in the service of or under the order or direction of a foreign principal; where the person and the foreign principal expect that that activity will be undertaken; and where it is undertaken for the sole or substantial purpose of political or governmental influence, which includes influencing the public.

Liability to register

17 Part 2 of the FITS Act deals with registration under the scheme. Section 16(1) ("Requirement to register") provides that:

- "(1) A person who:
 - (a) becomes liable to register under the scheme in relation to a foreign principal; and
 - (b) is not already registered under the scheme in relation to the foreign principal;

8 The Secretary of the Attorney-General's Department: see *Acts Interpretation Act 1901* (Cth), s 19A and the example therein; *Administrative Arrangements Order* (Cth), 5 December 2019.

6.

must apply to the Secretary for registration in relation to the foreign principal, no later than 14 days after becoming liable."

"Person" is defined widely⁹.

18 Section 16(2) lists the requirements for an application, including that it be accompanied by any information or documents required by the Secretary¹⁰.

19 Section 18(1) identifies the persons who are liable to register:

"(1) If a person:

(a) undertakes an activity on behalf of a foreign principal that is registrable in relation to the foreign principal; or

(b) enters a registrable arrangement with a foreign principal;

the person *becomes* liable to register under the scheme in relation to the foreign principal."

20 For the purposes of s 18(1)(a), s 11(1) provides that a person "undertakes an activity *on behalf of* a foreign principal" if:

"(a) the person undertakes the activity in any of the following circumstances:

(i) under an arrangement¹¹ with the foreign principal;

(ii) in the service of the foreign principal;

(iii) on the order or at the request of the foreign principal;

(iv) under the direction of the foreign principal; and

9 See s 10.

10 s 16(2)(d).

11 "Arrangement" is defined to include a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten: s 10.

7.

- (b) at the time the arrangement or service is entered into, or the order, request or direction made, both the person and the foreign principal knew or expected that:
 - (i) the person would or might undertake the activity; and
 - (ii) the person would or might do so in circumstances set out in section 20, 21, 22 or 23 (whether or not the parties expressly considered the existence of the scheme)."

It does not matter whether consideration is payable for the purposes of s 11(1)¹².

21 Section 18(1)(a) directs attention to what is a "registrable activity". A "registrable arrangement", referred to in s 18(1)(b), is defined by s 13A to be an arrangement between a person and a foreign principal to undertake, on behalf of the foreign principal, one or more activities that, if undertaken by the person, would be registrable in relation to the foreign principal in circumstances where the person is not exempt. The definition therefore also directs attention to registrable activities.

Registrable activities

22 The definition of "registrable activity" in s 10 directs the reader to ss 20 to 23 inclusive, which provisions also appear in Pt 2. Section 20 concerns parliamentary lobbying on behalf of a foreign government; ss 22 and 23 deal respectively with activities involving "former Cabinet Ministers" and "recent designated position holders". Section 21 concerns "activities in Australia for the purpose of political or governmental influence".

23 In a table in s 21(1), four activities undertaken in Australia are listed together with the kind of foreign principal on whose behalf the person acts in connection with those activities. To be registrable an activity must be one covered by an item of the table; the foreign principal must be the kind of foreign principal specified for the activity in the table; and the person who undertakes the activity on behalf of the foreign principal must not be exempt under Div 4 in relation to the activity¹³. Item 1 of the table refers to the activity of parliamentary lobbying on behalf of a foreign government related entity, a foreign political organisation or a foreign government related individual. Items 2 and 4 respectively refer to general

12 s 11(2).

13 s 21(1)(a), (b) and (c).

political lobbying and disbursement activity with any kind of foreign principal. Each of the activities listed in Items 1, 2 and 4 is further defined¹⁴. The focus of the plaintiff's case is on Item 3 of the table. It refers to "communications activity" carried out on behalf of any kind of foreign principal.

- 24 A person is said by s 13(1) to undertake "communications activity" if:
- "(a) the person communicates or distributes information or material to the public or a section of the public; or
 - (b) the person 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 or material may take any form¹⁵.

- 25 To be registrable, each of the activities listed in the table in s 21(1), including communications activity, must be carried out "for the purpose of political or governmental influence". "Influence" includes "affect in any way"¹⁶.

The purpose of political or governmental influence

- 26 Section 12(1) provides that:
- "A person undertakes an activity for the purpose of ***political or governmental influence*** if the sole or primary purpose, or a substantial purpose, of the activity is to influence one or more of the following:
- ..."

- 27 There are seven processes or proceedings then listed in the sub-section. They include those relating to a federal election, a federal government decision, proceedings of a House of the Parliament, a registered political party, a candidate who is not endorsed by a registered political party and a registered political campaigner¹⁷.

14 See s 10.

15 s 13(2).

16 See s 10.

17 See s 12(1).

9.

28 Section 12(2) provides that:

"A person also undertakes an activity for the purposes of ***political or governmental influence*** if the sole or primary purpose, or a substantial purpose, of the activity is to influence the public, or a section of the public, in relation to a process or proceedings mentioned in subsection (1)."

29 By s 14, the purpose of an activity must be determined having regard to:

- "(a) the intention of the person undertaking the activity or that person's belief (if any) about the intention of any foreign principal on whose behalf the activity is undertaken; and
- (b) either or both of the following:
 - (i) the intention of any foreign principal on whose behalf the activity is undertaken;
 - (ii) all of the circumstances in which the activity is undertaken."

Exemptions

30 The provisions of Pt 2, Div 4 render a person exempt from registration in relation to certain activities that the person undertakes on behalf of a foreign principal. They include humanitarian aid or assistance¹⁸; the provision of legal advice or representation¹⁹; religious activities²⁰; registered charities²¹; artistic purposes²²; and the activities of members of certain professions²³. A person is exempt in relation to diplomatic or consular activities²⁴ and activities undertaken

18 s 24.

19 s 25.

20 s 27.

21 s 29C.

22 s 29D.

23 s 29F.

24 s 26.

in the person's capacity as an officer or employee of a foreign government in the name of that foreign government²⁵.

Responsibilities following registration

31 A person is registered under the scheme from the day the application is given to the Secretary until the registration ends²⁶. Provision is made for ending registration where a person is satisfied, in effect, that they are no longer required to register²⁷.

32 A person who is registered under the FITS Act has certain responsibilities, which are set out in Pt 3, Divs 2 and 3. The person is required to report material changes in circumstances²⁸; report disbursement activity for the purpose of political or governmental influence²⁹; review the information given at registration and give notice that it is up to date or update it when a voting period³⁰ for federal elections and referendums begins³¹; and during the voting period give the Secretary notice of any registrable activity undertaken other than disbursement activity³². A person who remains liable to register must renew the registration annually³³.

33 Section 40(1) requires a person who is registered under the scheme in relation to a foreign principal to keep records whilst registered under the scheme and for three years after the registration ends. The matters in respect of which records must be kept are registrable activities undertaken by the person on behalf of the foreign principal; benefits provided to the person by the foreign principal;

25 s 29(1).

26 s 17.

27 ss 31, 32.

28 s 34.

29 s 35.

30 "Voting period" is defined: see s 10.

31 s 36.

32 s 37.

33 s 39.

information or material forming part of any communications activity that is registrable; registrable arrangements between the person and the foreign principal; and other information or material communicated or distributed to the public or a section of the public in Australia on behalf of the foreign principal³⁴.

Disclosure in communications activity

34 Although s 38 ("Disclosure in communications activity") appears in Pt 3, Div 3 ("Other responsibilities"), it places an obligation on any person, not just a registered person, to make a disclosure about the foreign principal when undertaking communications activity on their behalf. It provides that:

"(1) If:

- (b) a person undertakes communications activity on behalf of a foreign principal; and
- (c) the communications activity is registrable in relation to the foreign principal within the meaning of section 21 (activity in Australia for the purpose of political or governmental influence);

the person must make a disclosure about the foreign principal in accordance with rules made for the purposes of subsection (2).

(2) The rules^[35] may prescribe any or all of the following:

- (a) instances of communications activity;
- (b) when and how disclosures are to be made in relation to instances of communications activity;
- (c) the content, form and manner of disclosures;
- (d) circumstances in which a person is exempt from making a disclosure."

35 The *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) ("the Disclosure Rules") provide in a detailed way for the form and manner of disclosure of different types of

34 s 40(2).

35 "Rules" means rules made under s 71: see s 10.

communications activity. By way of example, s 5(1) requires that printed material which is communicated or distributed contain a disclosure at the end or bottom of each page of the printed material in a type size that can be easily read. Section 5(2) prescribes the content of the disclosure. It requires the person undertaking the communications activity and the foreign principal to be identified, that a statement that the communications activity is undertaken on behalf of the foreign principal be included and that there be a statement that the disclosure is made under the FITS Act.

The register, the Secretary and scheme information

36 Part 4, Div 2 of the FITS Act deals with the register of scheme information which is required to be kept by the Secretary³⁶. The information that is required to be kept on the register includes the name of the person and the foreign principal, the application for registration and any accompanying information, any notices in the nature of reports given to the Secretary, any information prescribed by the rules and any other information the Secretary considers appropriate³⁷.

37 The Secretary is required to make available to the public, on a website, information relating to a person who is registered in relation to a foreign principal. That information includes³⁸ the name of the person and the foreign principal, a description of the kind of registrable activities the person has undertaken or is undertaking on behalf of the foreign principal and any other information required to be made available by rules. However, the website is not to contain any information which the Secretary is satisfied is commercially sensitive, affects national security or is of a kind prescribed by the rules³⁹. The Secretary may correct or update the information made available⁴⁰. Part 4, Div 4 deals with how scheme information may otherwise be dealt with. It assumes no relevance to the plaintiff's case.

38 If the Secretary reasonably suspects that a person might be liable to register under the scheme but is not registered, the Secretary may give a notice under s 45

36 s 42(1).

37 s 42(2).

38 s 43(1).

39 s 43(2).

40 s 44.

13.

requiring the provision of information relevant to the person's liability to register in relation to a foreign principal. Where the Secretary reasonably believes that a person whether registered or not has information or a document that is relevant to the operation of the scheme, the Secretary may give a notice under s 46 requiring such information or documents, or production of copies of such documents. There are requirements respecting the contents of the notice⁴¹.

Offences and penalties

39 Part 5 deals with enforcement and includes provisions creating offences arising from a person's failure to register or to renew their registration when liable to do so⁴²; giving notice that a person's liability to register has ended while still liable to do so⁴³; and failing to fulfil a person's responsibilities under the scheme⁴⁴. Offences of the last kind may result in a penalty; those earlier mentioned may result in imprisonment on conviction for terms ranging between six months and five years.

The questions on the Amended Special Case

40 The parties have agreed to state the following questions for the opinion of the Full Court:

1. Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, to the extent it imposes registration obligations with respect to communications activities, on the ground that it infringes the implied freedom of political communication?
2. In light of the answer to question 1, what relief, if any, should issue?
3. Who should pay the costs of and incidental to this special case?

41 Question 1 reflects a substantial narrowing of the plaintiff's case concerning the implied freedom of political communication. Prior to its amendment the

41 s 46(3), (7).

42 s 57.

43 s 57A.

44 s 58.

question was stated as whether the FITS Act is "invalid, either in whole or in part (and if in part, to what extent)" on the ground that it infringes the freedom.

42 The relief sought by way of declaration, as relevant to question 2, has correspondingly narrowed. The original declarations sought were that the FITS Act is wholly invalid or invalid so far as it purports to apply to foreign political organisations or to the plaintiff; and in the alternative that s 45 and the offence provisions relating to it are invalid. The reference to s 45 may be explained by an earlier controversy about the notice given to the plaintiff by the Attorney-General's Department requesting information⁴⁵. The declaration now sought is "that the [FITS Act] is invalid, to the extent it imposes registration obligations with respect to communications activities".

43 In oral argument the plaintiff identified the objectionable feature of the FITS Act as Item 3 of the table in s 21(1), which treats communications activity as a registrable activity and in doing so engages ss 16 and 18 and the requirement of registration. The primary question raised by the parties in the Amended Special Case might be understood in this way.

The implied freedom, burdens and justification

44 The constitutional basis for the implication in the *Constitution* of a freedom of communication on matters of politics and government is well settled⁴⁶. The freedom is recognised as necessarily implied because the great underlying principle of the *Constitution* is that citizens are to share equally in political power⁴⁷ and because it is only by a freedom to communicate on these matters that citizens may exercise a free and informed choice as electors⁴⁸. It follows that a free flow of communication is necessary to the maintenance of the system of representative government for which the *Constitution* provides⁴⁹. The freedom operates as a

45 See [5] above.

46 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; see also *McCloy v New South Wales* (2015) 257 CLR 178 at 200 [23].

47 Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) at 329.

48 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560.

49 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [27].

constitutional restriction on legislative power and should not be understood to be a personal right⁵⁰.

45 The freedom is of such importance to representative government that any effective statutory burden upon it must be justified⁵¹. That process commences with the identification of the purpose which the statute seeks to achieve. That purpose must be legitimate, which is to say compatible with the constitutionally prescribed system of representative government⁵². If the statute does not have a legitimate purpose no further consideration will be necessary, for invalidity will be made out.

46 In addition to having the requisite purpose, the law must be shown to be proportionate to the achievement of that purpose. In order to justify a burdensome effect on the freedom a law must be a proportionate, which is to say a rational, response to a perceived mischief⁵³. A law will satisfy the requirements of proportionality if it is suitable, necessary and adequate in its balance⁵⁴. The parties' arguments on the Amended Special Case address these matters.

47 The plaintiff's submissions also address another question: whether the provisions of the FITS Act are "reasonably appropriate and adapted". The submissions do so by reference to the test of reasonable necessity, but not the other tests of proportionality, and a criterion of whether the provisions are "closely

50 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560; *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80]; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [30], 554 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30]; *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90].

51 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68]; *Brown v Tasmania* (2017) 261 CLR 328 at 369 [127]; *Comcare v Banerji* (2019) 267 CLR 373 at 399 [29].

52 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31].

53 *Clubb v Edwards* (2019) 267 CLR 171 at 199-201 [66]-[70]; see also *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68].

54 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-196 [2]-[4]; *Brown v Tasmania* (2017) 261 CLR 328 at 368 [123], 416 [278]; *Clubb v Edwards* (2019) 267 CLR 171 at 200-202 [70]-[74], 264 [266], 311 [408], 330 [463]; *Comcare v Banerji* (2019) 267 CLR 373 at 400 [32].

tailored" to the achievement of the statutory purpose, which criterion is not further explained.

48 In *Lange v Australian Broadcasting Corporation*⁵⁵, the final question as to the validity of a law effecting a burden on the freedom was stated to be whether the burden is "undue" having regard to its purpose⁵⁶. Whether that question should be determined by reference to a test of whether the law is "reasonably appropriate and adapted" or of whether it is "proportionate" was left open by the Court, as were the means by which those conclusions might be reached. But in *McCloy v New South Wales*⁵⁷ a majority of this Court provided the answer, holding that the final question to be addressed is whether a law is a proportionate response to its purpose and that that is to be ascertained by a structured method of proportionality analysis. That approach has consistently been maintained by a majority of this Court in each of the cases concerning the implied freedom since *McCloy*⁵⁸ and, more recently, it has been applied by a majority to the freedom guaranteed by s 92 of the *Constitution*⁵⁹.

49 The plaintiff's submissions make mention of notions of strict scrutiny. It is said that the present case is "a rare example of *in terms* regulation of political communication, which is presumptively 'direct' or non-incidental in its burden and so automatically attracts stricter scrutiny". The error in that statement, that the FITS Act regulates political communication, may be put to one side. As New South Wales, intervening, submits, there has been no majority support in this Court for

55 (1997) 189 CLR 520.

56 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 569, 575; see also *McCloy v New South Wales* (2015) 257 CLR 178 at 214-215 [71]; *Clubb v Edwards* (2019) 267 CLR 171 at 200 [67].

57 (2015) 257 CLR 178 at 193-195 [2], 217 [79].

58 *Brown v Tasmania* (2017) 261 CLR 328 at 368-369 [123]-[127], 416-417 [278]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 615 [42], 638 [110], 653-656 [161]-[167]; *Clubb v Edwards* (2019) 267 CLR 171 at 208-209 [96]-[102], 266-269 [270]-[275], 341-345 [491]-[501]; *Comcare v Banerji* (2019) 267 CLR 373 at 402-405 [38]-[42], 455-458 [202]-[206]. See also *Spence v Queensland* (2019) 93 ALJR 643 at 670-671 [93], 671 [97], 719 [324]-[326]; 367 ALR 587 at 613, 614, 677.

59 *Palmer v Western Australia* (2021) 95 ALJR 229 at 242-243 [52], 284 [264]; 388 ALR 180 at 193, 247.

the proposition that there may be a class of laws that under Australian constitutional law automatically attract stricter scrutiny. Although there has been some mention of the "strict scrutiny" doctrine in United States constitutional jurisprudence, it has never been accepted by a majority of this Court as relevant to the implied freedom⁶⁰.

50 Before turning to address the arguments advanced by the plaintiff in support of its case, we note that the plaintiff did not seek to advance an argument that the Act was invalid as imposing on the plaintiff a form of "prior restraint" upon the exercise by the plaintiff of a right of free speech. In particular in that regard, the plaintiff did not suggest that the Act operated as a regime for the licensing of political communication. That the plaintiff eschewed any such argument is hardly surprising. The Act is not concerned to permit only communications allowed by the government; rather it is concerned to ensure that the identity of the source of such political information as is disseminated on behalf of foreign principals is known to the public and to government decision-makers.

The plaintiff's case

51 The plaintiff accepts that the ACU is a foreign principal for the purposes of the FITS Act because it is a foreign corporation that is a foreign political organisation. It acknowledges that the ACU exists primarily to pursue political objectives⁶¹. It is agreed that, subject to the question of validity, the plaintiff has registration obligations under the FITS Act because it undertakes registrable activities on behalf of the ACU in the form of holding annual CPAC events which constitute communications activity. It follows that such events involve the communication or distribution of information or material to the public or a section of the public in Australia for the purpose of political or governmental influence.

52 The plaintiff does not contend that the other activities itemised in the table in s 21(1), aside from communications activity, are activities which might not lawfully attract a requirement of registration. It does not contend that s 16 or s 18 ought not apply to lobbying and disbursements. It says that the fact that a measure may be appropriate for those activities does not mean it is appropriate for all. Communications activities should warrant separate treatment because they most clearly involve communications on matters of politics and government, which are the subject of the freedom.

60 *Tajjour v New South Wales* (2014) 254 CLR 508 at 551 [37], 575 [132].

61 See the definition of "foreign political organisation" in s 10.

53 There is no dispute that a purpose of the FITS Act is to promote transparency in political discourse by requiring or facilitating disclosure of the relationship between a person and their foreign principal. There is no dispute that such a purpose is a legitimate one in the sense referred to above. Essentially the plaintiff's case is that the requirement of registration cannot be justified because it is not necessary. It is not necessary because s 38 read with the Disclosure Rules requires the disclosure of the relationship between the person and the foreign principal at the time a communication is made. Registration therefore adds nothing to the achievement of the purpose of transparency. The relevant provisions of the FITS Act may be framed so that registration is not required where communications activity is undertaken.

A burden on the freedom

54 The defendant concedes that the FITS Act, in its requirement of registration where communications activity is undertaken on behalf of a foreign principal, is effective to burden the freedom. The concession is properly made. Conditioning political communication to a requirement of registration is effective to burden the freedom. That is sufficient to require that the relevant provisions of the FITS Act be justified.

Purpose and legitimacy

55 The plaintiff identifies the purpose of the FITS Act as that referred to in s 3, namely to render transparent the fact that activities in the nature of political communication which are carried out by a person in Australia are undertaken on behalf of a foreign principal. The plaintiff submits that it is thereby to be inferred that the concern of the FITS Act is to overcome covert, deceptive or clandestine conduct.

56 Both parties refer in this regard to what was said by the then Prime Minister, in the Second Reading Speech for the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth), concerning the three Bills then before the Parliament. In that Speech⁶² the Prime Minister said that the Bills being introduced were shaped by a set of principles one of which was that "foreign influence activities that are in any way covert, coercive or corrupt" would not be

62 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13146.

tolerated. That, he said, is "the line that separates legitimate influence from unacceptable interference".

57 The Prime Minister went on to say⁶³ that the Counter Foreign Interference Strategy undertaken through the three pieces of legislation has four pillars: sunlight, enforcement, deterrence and capability. Of these, he said, "sunlight is at the very centre". To "ensure activities are exposed to sunlight" a Foreign Influence Transparency Scheme was being introduced. In essence it requires that if "a person or entity engages with the Australian political landscape on behalf of a foreign state or principal then they must register accordingly". This, the Prime Minister said, "will give the Australian public and decision-makers proper visibility when foreign states or individuals may be seeking to influence Australia's political processes and public debates". The requirement of registration is not to be seen as a taint but rather the application of "basic principles of disclosure to allow the public and policymakers to assess any underlying agenda"⁶⁴. To similar effect, in the Revised Explanatory Memorandum⁶⁵ it is said that it is essential that there is transparency where communications activity is undertaken on behalf of a foreign principal. This allows the public or a section of the public or a government decision-maker to assess the interests which are being represented by the person undertaking the communications activity.

58 The 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. This implies that the influence sought to be achieved may have adverse effects on processes in our democracy. The Revised Explanatory Memorandum refers, in the context of penalties for enforcement, to the "serious implications that unchecked and unknown forms and sources of foreign influence can have on Australia's democratic system of government"⁶⁶. An improper influence is most likely to succeed and amount to an interference in those processes if its source remains undisclosed. The purpose of

63 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13148.

64 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13148.

65 Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at 72 [401].

66 Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at 150 [853].

the FITS Act, as the defendant correctly submits, may be understood as being to seek to achieve transparency, in the sense of the exposure of foreign influence, as a means of preventing or minimising the risk that foreign governments or other foreign principals will exert influence on the integrity of Australia's political or electoral processes, as has occurred elsewhere.

59 Long ago this Court recognised the risk that greater influence over electoral processes might be gained by concealment of the source of expressions of view. In *Smith v Oldham*⁶⁷, a section of the *Commonwealth Electoral Act 1902* (Cth), by which the Commonwealth Parliament sought to regulate the conduct of persons with regard to elections, was unsuccessfully challenged. It required that after the writs for an election or referendum had issued, any articles or reports commenting upon candidates or political parties were to be signed by the author, whose name and address were also to appear in the article or report. Griffith CJ observed that "[i]t is a notorious fact that many persons rely upon others ... in forming their opinions". The weight that they attribute may be greater or less if they know the real authors. He went on to say that "Parliament may, therefore, think that no one should be allowed by concealing his name to exercise a greater influence"⁶⁸.

60 A requirement of registration in order to protect the processes of a representative government in a democracy is not new⁶⁹. The importance of that purpose has been recognised by the *Foreign Agents Registration Act of 1938* ("the US Act"), which provides that a person must not act as an agent of a foreign principal without filing a registration statement with the Attorney General⁷⁰. The statement must include details about the registrant, the foreign principal, and agreements between them, and a comprehensive statement of the activities the registrant performs on the foreign principal's behalf, money received from the foreign principal and money spent in connection with those activities. Agents are required to provide supplementary information and to keep records, and are subject to disclosure requirements. The US Act provides for exemptions from registration and for penalties by way of enforcement. The constitutionality of the US Act, in

⁶⁷ (1912) 15 CLR 355.

⁶⁸ *Smith v Oldham* (1912) 15 CLR 355 at 358-359.

⁶⁹ See also *Lobbying Act*, RSC 1985, c 44 (4th Supp).

⁷⁰ 22 USC §612.

the context there of the right of freedom of expression, has been regarded as well settled⁷¹.

61 Even on the plaintiff's somewhat narrower description of purpose, the FITS Act must be understood as one supportive of the processes necessary to our democracy. The Act seeks to ensure that those making decisions in government, those making political judgments, those involved in the election of candidates to the Commonwealth Parliament and other interested persons are aware of the true actors and interests concerned when statements are made or information is provided on political matters. So understood, not only is that purpose legitimate, as consistent with the constitutionally prescribed system of representative government, it serves to protect it⁷². Such a purpose may be a very important factor in the justification of a law⁷³.

62 It should be noted here that, although the focus of argument in this Court was upon political communication on behalf of a foreign principal directed to the general public, the defendant, rightly, identified a purpose of the Act as being to minimise the risk of undisclosed foreign influence upon the integrity of governmental decision-making. That the Act does indeed pursue such a purpose is clear from the terms of ss 12 and 21 of the Act as well as from the extraneous materials referred to in these reasons. There can be no doubt as to the legitimacy of this purpose, or as to the suitability of the Act as a rational response to the risk so identified. As was said by Brennan J in *Australian Capital Television Pty Ltd v The Commonwealth*⁷⁴:

"[T]he salutary effect of freedom of political discussion on performance in public office can be neutralized by covert influences".

The extent of the burden

63 The defendant correctly submits that whilst the extent of the burden effected by the requirement of registration in connection with communications activity is not relevant to the threshold question as to whether justification is required, it may assume some importance when considering what has to be justified and the

71 *Attorney General of United States v Irish People Inc* (1982) 684 F 2d 928 at 935.

72 *McCloy v New South Wales* (2015) 257 CLR 178 at 207-208 [46]-[47].

73 *McCloy v New South Wales* (2015) 257 CLR 178 at 218 [84].

74 (1992) 177 CLR 106 at 159.

questions to be addressed in that process. It most clearly assumes relevance to the question whether a law is necessary in order to achieve its purpose and to the question whether it is adequate in its balance, where the burden effected is considered in light of the importance of the purpose sought to be achieved⁷⁵.

64 It is instructive to observe what political communication is not affected by the relevant provisions of the FITS Act. As the defendant points out, the Act does not place any burden on a person in Australia engaging in political communication on their own behalf, unaffected by any relationship with a foreign principal. To illustrate this point it may be observed that if the plaintiff had not entered into an arrangement with the ACU it could have conducted the CPAC event without incurring an obligation to register.

65 Foreign governments and other foreign principals may also communicate ideas and information to those in the Australian political or governmental sphere or to the Australian public without registering so long as the ideas and information are communicated directly by them. It is only if they are communicated through an intermediary, which has the effect that the source of the ideas or information conveyed is disguised, that registration becomes necessary under the FITS Act.

66 Contrary to the plaintiff's submissions, the FITS Act, in its provisions respecting communications activity, does not operate directly on political communication and is not discriminatory. It does not prohibit political communication and does not seek to regulate its content. The FITS Act is directed to exposing the relationship between the person making the communication and the foreign source.

67 In its written submissions the plaintiff said that the definitions of "on behalf of" and "arrangement" are over-inclusive. This terminology may suggest that the FITS Act has a wide application. The principal factors which would reduce its breadth are the requirements of purpose and intention in ss 12(1) and (2), 21(1) and 14. These matters need not be further explored. The plaintiff does not contend for invalidity on this basis. The point it seeks to make by these observations is that the terms of the FITS Act will be productive of wide coverage, in support of its argument that registration is not necessary.

68 The defendant concedes that conditioning political communication to a requirement of registration effects some burden, but contends that it is modest. The plaintiff likewise submits that the requirement to register alone operates as some disincentive to political communication. It makes the not unimportant point that

75 *McCloy v New South Wales* (2015) 257 CLR 178 at 218 [84].

registration is required with the government itself. But it goes too far in suggesting that it will have a "chilling effect".

69 The plaintiff describes the process attending registration and its consequences as "onerous" and therefore operating as a deterrent to political communication. It points to the information which must be supplied with an application to register, the fact that the Secretary may require further information, the obligations which accrue from registration, such as updating the information initially provided and the requirement to keep records of communications activity, and the additional obligation to disclose communications activity undertaken.

70 The plaintiff accepts that there are limits to what information the Secretary could lawfully require under s 46. If the Secretary's demands went beyond what is reasonably required for the purpose of the FITS Act it might be expected that challenges in the nature of judicial review might be sought in the courts. For present purposes the point to be made is that the requirement to provide information cannot be regarded as at large.

71 It is difficult to accept that the requirements to take particular steps following registration are likely to be unduly onerous. Several of them are similar to what is required by other legislation. Part XX of the *Commonwealth Electoral Act 1918* (Cth)⁷⁶ requires a Transparency Register to be maintained by the Electoral Commissioner. The Act requires persons such as political campaigners and associated entities to register with the Commissioner and provide certain information and keep that information up to date, in order to support the object of transparency of schemes in the Act relating to donations, electoral expenditure and the authorisation of electoral matter. Prior to 2018, when the provisions for the Transparency Register were introduced, the *Commonwealth Electoral Act* contained requirements for the registration of political parties and the parties' agents and had done so since at least 1990⁷⁷. It required the provision of some information which is now contained in the Transparency Register. The *Lobbying*

76 As amended by the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth).

77 Registration of political parties was introduced by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth). Registration of party agents was introduced by the *Electoral and Referendum Amendment Act 1989* (Cth); a Register of Candidates was established by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) but was abolished in 1987 by the *Commonwealth Electoral Amendment Act 1987* (Cth).

of Government Officials Act 2011 (NSW) requires third-party lobbyists to register with the New South Wales Electoral Commission, which publishes the Register on a website maintained by it. Third-party lobbyists are required to keep information updated and their registration can be suspended or cancelled if it is not⁷⁸.

72 In submitting that the provisions of the FITS Act requiring registration have a deterrent effect on persons who might wish to engage in political communication, the plaintiff's submissions place some weight upon the criminal sanctions which are imposed for breach. True it is that criminal sanctions are imposed for failure to register or renew registration or failure to fulfil the responsibilities of a registrant in order to deter non-compliance. But the offences are not directed to the making of political communication; rather they are directed to ensuring that the exposure of the relationship between the maker and the foreign principal is achieved.

73 The plaintiff takes no issue with the obligation imposed by s 38 to disclose the fact of the relationship between the person communicating information and their foreign principal at the time the disclosure is made. The plaintiff's answer to the question why this obligation is an acceptable burden but that of registration is not is that the disclosure obligation can be discharged easily and involves no ongoing obligations. That is to say the plaintiff's argument respecting the burden effected by registration and the obligations which follow is essentially one of deterrence.

74 It may be accepted that the FITS Act's requirement of registration with respect to communications activity may operate so as to deter some persons from making political communication. But in determining the extent of that burden it must be borne in mind that there will be a very small proportion of persons in Australia who will be in that position. The only communication affected is that made under an arrangement with or at the direction of a foreign principal with the intention that it be used for the purpose of political or governmental influence. The requirement will apply to only a small subset of political communication. Even before one considers the extent of the exemptions provided for in the FITS Act, this leaves most political communication unaffected. Of the limited category of persons who are required to register under the Act, only a small proportion could be expected to be deterred by the requirement of registration. The burden effected is likely to be modest.

78 See also *Integrity Act 2009* (Qld); *Lobbyists Act 2015* (SA); *Integrity (Lobbyists) Act 2016* (WA).

75 It may be observed here that the implied freedom is engaged at all only as an incident, albeit an indispensable incident, of the system of representative government established by the *Constitution*. It would be distinctly jejune to insist that participation in the public affairs of the nation must not involve a cost to one's privacy or other individual interests⁷⁹.

Proportionality analysis

Suitability

76 The test of suitability requires that there be a rational connection between the purpose of the statute in question and the measures adopted by it to achieve that purpose⁸⁰. This is an enquiry which logic demands⁸¹. In this case the purpose of minimising the risk of influence being exerted by foreign principals on Australia's political or election processes is sought to be achieved by measures which seek to make transparent the identity of the foreign principal on whose behalf the person making the communication or providing information intended to influence acts. Clearly, both disclosure by direct means and making publicly available the name of the person and their foreign principal through the process of registration have the requisite connection to the purpose of the FITS Act.

77 In its written submissions the plaintiff correctly stated the test for suitability. But it then contended that there is no rational connection between the purpose of the FITS Act and its situation because the arrangement between it and the ACU was not covert or clandestine; it has always been transparent. This is not a correct approach to the question of suitability. Whilst the facts of a particular case may illuminate aspects of the effect of a statute on the freedom it is necessary to consider the effect on the freedom as a whole in order to determine the question of constitutional invalidity⁸². The question is not whether the FITS Act can be seen to have application to the plaintiff's circumstances. It is whether there is a rational

79 *Comcare v Banerji* (2019) 267 CLR 373 at 398 [28], 401-402 [35]-[36].

80 *McCloy v New South Wales* (2015) 257 CLR 178 at 209-210 [54]; *Brown v Tasmania* (2017) 261 CLR 328 at 370 [132]-[133]; *Clubb v Edwards* (2019) 267 CLR 171 at 205 [84].

81 *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [80]; *Brown v Tasmania* (2017) 261 CLR 328 at 370 [133].

82 *Comcare v Banerji* (2019) 267 CLR 373 at 395-396 [20].

connection between the statutory purpose and the requirement of registration. Clearly there is.

Necessity

78 This aspect of proportionality analysis involves the enquiry whether there is an alternative measure available which is equally practicable and at the same time is less restrictive of the freedom⁸³ and which is obvious and compelling⁸⁴. The test of reasonable necessity has consistently been applied in cases involving the implied freedom and in cases concerning the s 92 freedom, where it has been held to be a doctrine of the Court⁸⁵.

79 The alternatives the plaintiff points to in its submissions include adding to the list of exemptions in Pt 2, Div 4 communications that identify their connection to a foreign principal at the time they are made; or amending the definition of the types of relationships with foreign principals that the FITS Act is legitimately seeking to reveal. In reality these are merely methods of re-drafting the relevant provisions of the FITS Act so as to effect an exclusion of the requirement of registration for communications activity from s 21 in order that ss 16 and 18 do not apply. The crux of the plaintiff's case is that disclosure under s 38 and the Disclosure Rules is sufficient for the purpose of identifying the relationship between a person and their foreign principal and the requirement of registration adds nothing.

80 More commonly an alternative is identified by reference to a provision in another statute or to a measure which could readily be applied to the statutory scheme in question. A difference in the plaintiff's approach to the test of reasonable

83 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44]; *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57], 217 [81]; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139].

84 *Monis v The Queen* (2013) 249 CLR 92 at 214 [347]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 210-211 [57]-[58]; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139]; *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6], 262 [263], 264-265 [266(3)], 265-266 [267]-[268], 269-270 [277], 337 [478]-[480]; *Comcare v Banerji* (2019) 267 CLR 373 at 401 [35].

85 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418 at 477 [103]; *Palmer v Western Australia* (2021) 95 ALJR 229 at 240 [37], 242 [50]; 388 ALR 180 at 190, 193.

necessity from other cases is that the plaintiff points to an existing provision of the statute in question. It submits that nothing more than s 38 is necessary to the scheme of the FITS Act to achieve its purpose. If it is true that registration makes no real contribution to achieving the FITS Act's purpose, there seems no reason in logic why the plaintiff cannot contend that it is not reasonably necessary.

81 Section 38 and the Disclosure Rules cover many methods of communication. They include television and radio broadcasting, social media and printed mediums. In some circumstances the disclosure will be to the public at large and in others it will be only to a small group of persons. The plaintiff's example is of the latter kind. At a conference such as the CPAC event a disclosure will be made by a speaker only to those present unless the speaker's paper is subsequently published more widely. Likewise, where a communication is made on a social media page which is restricted to a small group or in a newspaper in a foreign language, the disclosure will be limited.

82 In circumstances such as these, if what is conveyed by way of political communication is further disseminated by those receiving or reading the communication the disclosure of the relationship between the person making it and their foreign principal may not be more widely published. Information or opinions which might be influential may gain currency within political discourse or public debate without the source of the communication being revealed. This is the very risk which the FITS Act seeks to prevent. Registration enables both the relationship between the person and their foreign principal and a description of the political communication undertaken by the person in that capacity to be matters of public record.

83 It may also be said that, in the nature of things, those persons most interested in, and capable of, subjecting to scrutiny the interests of a foreign participant in the political affairs of this country will be members of the commentariat, such as journalists. The skill and experience of the commentariat, if brought to bear, can ensure effective disclosure of the nature and extent of foreign interests at play in the affairs of this country that might otherwise remain undisclosed or dimly understood. The requirement of registration established by the FITS Act allows the commentariat to be alerted to the presence of foreign influencers in public affairs, and thus enables 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.

84 Both disclosure and registration are necessary for the achievement of the FITS Act's purposes. To the contrary of registration being unnecessary, disclosure under s 38 is not enough. The plaintiff is speaking of a more limited obligation than the FITS Act scheme requires for its purposes.

Adequacy in the balance

85 Recently it has been 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 freedom⁸⁶. In this regard a powerful public, protective purpose assumes a special importance⁸⁷. The FITS Act clearly has such a purpose. The limited submissions made by the plaintiff on this topic do not deny that the purpose of the FITS Act is protective of Australia's political and electoral processes. That important purpose cannot be said to be outweighed by a burden on the freedom which is modest.

Questions not addressed

86 These reasons do not address questions as to whether the Secretary's power to require information from a person, prior to or following registration, extends to information intended to be used for governmental purposes beyond those necessary for the purposes of the FITS Act. They do not address questions of this kind because such questions do not arise from the Amended Special Case for the opinion of this Court.

87 The outer limits of the plaintiff's case, as detailed in these reasons, were confirmed by the plaintiff on more than one occasion during the hearing. The plaintiff at no point sought to expand its case or to amend the Amended Special Case by arguing that the provisions of the FITS Act which permit information to be required constitute overreach, are disproportionate on that account and are therefore invalid. The only point made by the plaintiff concerning the Secretary's power under s 46 was that information-gathering might be onerous. The arguments put by both parties proceeded upon the footing that the Secretary's power is necessarily limited to the purposes of the Act.

88 A case for invalidity premised on questions of the kind referred to above has not been put to the parties for their considered response. During the course of the hearing the Solicitor-General of the Commonwealth was asked whether information might be collected for executive purposes under the Secretary's discretionary powers and not be made public. The Solicitor-General answered to the effect that provisions which enable governmental use of information do not change the purpose for which the information can be gathered. He did not concede

86 *Comcare v Banerji* (2019) 267 CLR 373 at 402 [38].

87 *McCloy v New South Wales* (2015) 257 CLR 178 at 218-219 [86]-[87]; *Clubb v Edwards* (2019) 267 CLR 171 at 209 [101]-[102]; *Comcare v Banerji* (2019) 267 CLR 373 at 402-403 [38], 404 [42].

that information might be required other than for the purpose of ensuring the transparency of any relationship between a person and their foreign principal. If such information was provided, the Solicitor-General explained, it would be incidental and it would be of narrow compass. The Solicitor-General was responding to an enquiry. He was not concerned to, and did not, argue a case for the defendant in response to a case that the defendant was required to meet. No such case was advanced against the validity of the Act. For its part, the plaintiff did not pursue the subject of the enquiry.

89 Questions as to the Secretary's powers and the purposes served by these powers are large questions. No basis for these questions is to be found in the Amended Special Case agreed by the parties. It is not contended that information of this kind was sought from the plaintiff for the purposes mentioned. If pressing for answers to such questions could result in invalidity it would be necessary to consider other questions, such as whether the information was relevant to the integrity of governmental decision-making, and, if that question were answered in the negative, further questions would arise, such as whether the application of familiar techniques such as severance, reading down or disapplying the provisions affected might save them from invalidity. None of these matters were adverted to, much less addressed, by the parties. It is certainly not to be supposed that the defendant could not have advanced compelling arguments in relation to these matters.

90 In *Lambert v Weichelt*⁸⁸, Dixon CJ explained that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties". This approach has been taken to mean that it is ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid⁸⁹. The same applies where a provision may be read down⁹⁰. For a constitutional question to be decided by the Court it needs to be shown by the special case "that

88 (1954) 28 ALJ 282 at 283.

89 *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33].

90 *Tajjour v New South Wales* (2014) 254 CLR 508 at 587-588 [173], referring to *The Commonwealth v Queensland* (1987) 62 ALJR 1 at 1-2; *Coleman v Power* (2004) 220 CLR 1 at 56 [110].

Kiefel CJ
Keane J
Gleeson J

30.

there exists a state of facts which makes it necessary for that question to be decided"⁹¹. That condition is not met here.

Answers

91 The answers to the questions referred are then as follows:

1. Is the *Foreign Influence Transparency Scheme Act 2018* (Cth) invalid, to the extent it imposes registration obligations with respect to communications activities, on the ground that it infringes the implied freedom of political communication?

Answer: No.

2. In light of the answer to question 1, what relief, if any, should issue?

Answer: None.

3. Who should pay the costs of and incidental to this special case?

Answer: The plaintiff should pay the defendant's costs.

91 *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52].

92 GAGELER J. The compulsion to be registered under the *Foreign Influence Transparency Scheme Act 2018* (Cth) ("the FITS Act") as a precondition to engaging in political communication with the public or a section of the public on behalf of a foreign principal is in my opinion incompatible with the constitutional freedom of political communication. The incompatibility arises because the scheme of registration established by the FITS Act has incidents which burden political communication by a registrant to a substantially greater extent than is necessary to achieve the sole identified legislative object of improving transparency.

93 Repeated elucidation of the constitutional freedom of political communication in recent cases and thorough exposition of the scheme of registration established by the FITS Act in other reasons for judgment in this case permit me to express my reasoning with minimal elaboration. My reasoning applies the precedent-mandated *Lange-Coleman-McCloy-Brown* analysis of the compatibility of a law with the constitutional freedom using an analytical approach I have adequately explained in the past⁹² to the application of the third stage of that analysis, which requires consideration of whether a law burdening freedom of communication in pursuit of a legitimate purpose is reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government.

94 Analytically important from the start is to be categorical about the nature of the burden that the compulsion to register imposes on political communication. To be forced under pain of criminal sanction to register under a statutory scheme as a precondition to being permitted to engage in a category of political communication at all is to be subjected to a prior restraint on political communication.

95 "A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place"⁹³. "If

92 *Tajjour v New South Wales* (2014) 254 CLR 508 at 579-581 [148]-[152]; *McCloy v New South Wales* (2015) 257 CLR 178 at 231-234 [129]-[138], 238-239 [150]-[152]; *Brown v Tasmania* (2017) 261 CLR 328 at 389-391 [200]-[206]; *Clubb v Edwards* (2019) 267 CLR 171 at 225 [161]-[162]; *Comcare v Banerji* (2019) 267 CLR 373 at 408-409 [53]-[54].

93 Emerson, *The System of Freedom of Expression* (1970) at 506.

it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."⁹⁴

96 Prior restraint of political communication was understood in Australia even before representative and responsible government to derogate from an inherited common law freedom which had been recognised in England after the expiration of the licensing laws in 1695⁹⁵ and taken to be established by the time Sir William Blackstone published the fourth volume of his *Commentaries on the Laws of England* in 1769⁹⁶. The common law freedom was described variously as a "common right", a "constitutional right" and a "constitutional privilege" by Forbes CJ in reasons he gave in 1827 for refusing to certify⁹⁷ that a legislative proposal by Governor Darling to license newspapers was consistent with the laws of England so far as the circumstances of the colony of New South Wales would then admit⁹⁸. The lucidity and present-day resonance of those reasons justify them being set out in full.

97 Forbes CJ wrote⁹⁹:

"By the laws of England¹⁰⁰, the right of printing and publishing belongs of common right to all His Majesty's subjects, and may be freely exercised

94 *Nebraska Press Assn v Stuart* (1976) 427 US 539 at 559, citing Bickel, *The Morality of Consent* (1975) at 61.

95 Emerson, "The Doctrine of Prior Restraint" (1955) 20 *Law and Contemporary Problems* 648 at 650-651.

96 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 11 at 151.

97 Under 4 Geo IV, c 96, s 29.

98 See Spigelman, "Foundations of the Freedom of the Press in Australia", in Castle (ed), *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008) 373; Campbell, "Colonial Legislation and the Laws of England" (1965) 2 *University of Tasmania Law Review* 148 at 157-159.

99 *Historical Records of Australia*, Series I, Volume 13 at 292-294. See also *Newspaper Acts Opinion* [1827] NSWKR 3. The paragraphing has been added. The emphasis is in the original. The footnoting is also in the original but has been modernised.

100 Bacon, *A New Abridgment of the Law*, 6th ed (1807), vol 4 at 764-768; *Mitchel v Reynolds* (1711) 1 P Wms 181 at 183 [24 ER 347 at 348]; *The Clothworkers of Ipswich Case* (1614) Godbolt 252 at 253 [78 ER 147 at 147-148].

like any other lawful trade or occupation. So far as it becomes an instrument of communicating intelligence and expressing opinion, it is considered a constitutional right, and is now too well established to admit of question that it is one of the privileges of a British subject. The text is comprehensively laid down by Mr Justice Blackstone as follows: – 'The liberty of the press consists in laying no previous *restraint* upon publications, and not in freedom from censure for criminal matter when published. *Every free man has an undoubted right to lay what sentiments he pleases before the public – to forbid this is to destroy the freedom of the press.*'

To subject the press to the restrictive power of a *licenser*, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and to make him the arbitrary and infallible judge of all controverted points in learning, religion and government¹⁰¹. In affirmance of this doctrine, the late Lord Ellenborough is reported, in a celebrated case of libel, to have delivered himself in these words – 'The law of England is a law of liberty, and, consistently with this liberty, we have not what is called an *imprimatur*, *there is no such preliminary license necessary.*'¹⁰²

In a recent work, of which the great lawyer, whom I have just cited, was pleased to express his approbation, the principle of the law is stated in the following terms: – 'There is nothing upon which Englishmen are justly more sensible than upon whatever has the appearance of affecting the liberty of the press. But popular writers have certainly extended the notion of this liberty beyond what in reason it will bear. They have converted it into a native, an original, a primitive right, instead of considering it only as a right derivative and deductive from the joint rights of opinion and of speaking. This, *including an exemption from the control of a licenser, and all previous restraint upon the mere suspicion of abuse*, is the proper notion of the liberty of the press.'¹⁰³

It were unnecessary to multiply authorities; it is clear that the freedom of the press is a constitutional right of the subject, and that this freedom essentially consists in an entire exemption from previous restraint; all the statutes in force are in accordance with this first principle of law; they facilitate the means of proof; in certain cases, they encrease the measure of punishment; but in no instance do they impose any previous restraint either

101 Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 11 at 151.

102 *Trial of William Cobbett* (1804) 29 St Tr 1 at 49.

103 Holt, *The Law of Libel*, 2nd ed (1816) at 59-60.

upon the matter of publication or the person of the publisher. Indeed to admit the power of selection among publishers would be more repugnant to the spirit of the law than to impose a direct *imprimatur*; it would be not merely to confine the right of publishing within partial bounds, but it would be to establish a monopoly in favor of particular principles and opinions, to destroy the press as the privilege of the subject, and to preserve it only as an instrument of government. 'The press', continues Blackstone, 'can never be used to any *good purpose*, when under the control of an inspector.'

By the laws of England, then, every free man has the right of using the common trade of printing and publishing newspapers; by the proposed bill, this right is confined to such persons only as the Governor may deem proper. By the laws of England, the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint; by the proposed bill, a preliminary license is required, which is to destroy the freedom of the press, and to place it at the discretion of the government."

98 Forbes CJ had earlier explained in official correspondence that the freedom of political communication that existed at common law even in a penal colony was such that a prior restraint on publication "requires to be carefully examined". "[I]f you take away the freedom of public opinion upon matters of government", he wrote, "you take away a legal right; necessity you will say justifies it; then the limit of that justification is the necessity which compels it; it should go no further"¹⁰⁴.

99 The constitutionally entrenched freedom of political communication which came to be recognised 165 years later in *Australian Capital Television Pty Ltd v The Commonwealth*¹⁰⁵ and *Nationwide News Pty Ltd v Wills*¹⁰⁶ to derive from the national system of representative and responsible government established by the *Constitution* is a systemic structural imperative as distinct from an individual right or privilege. That difference from the common law freedom of political communication expounded by Forbes CJ acknowledged, application of the *Lange-Coleman-McCloy-Brown* analysis to a prior restraint on political communication requires no lesser intensity of scrutiny and demands no lesser standard of justification than that identified by Forbes CJ.

100 To be compatible with the constitutional freedom of political communication, a prior restraint on political communication must withstand what

¹⁰⁴ *Historical Records of Australia*, Series IV, Section A, Volume 1 at 682.

¹⁰⁵ (1992) 177 CLR 106.

¹⁰⁶ (1992) 177 CLR 1.

Gleeson CJ referred to in *Mulholland v Australian Electoral Commission*¹⁰⁷ as "close scrutiny, congruent with a search for 'compelling justification'". To meet that standard of compelling justification, the restraint must satisfy two conditions. The restraint must be imposed in pursuit of an object that is not only consistent with the constitutionally prescribed system of representative and responsible government but also compelling. And the restraint must be narrowly tailored to achieve that object in a manner that minimally impairs freedom of political communication. That is to say, the burden on political communication imposed by the restraint must not be substantially greater than is reasonably necessary to achieve the purpose.

101 The scheme of registration established by the FITS Act satisfies the first of those conditions. It does not satisfy the second.

102 The object of the scheme of registration established by the FITS Act is limited to that identified in the FITS Act. The sole object of the scheme of registration there identified is to "improve the transparency" of activities undertaken on behalf of foreign principals¹⁰⁸. As explained to the House of Representatives by the Attorney-General, the object is to enable "the public and decision-makers in government [to] have access to information to enable them to accurately assess how foreign sources may be seeking to influence Australia's government and political processes"¹⁰⁹.

103 Neither the FITS Act nor anything appearing in the record of the extensive process of parliamentary deliberation which preceded its enactment indicates that any part of the object of the scheme of registration is to assist in monitoring or enforcing compliance with measures introduced by the contemporaneously enacted *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) or *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) or any other Commonwealth, State or Territory legislation. The Solicitor-General of the Commonwealth was careful to eschew any argument that the object of the scheme of registration established by the FITS Act has any additional element of that nature.

104 Of "the four pillars of sunlight, enforcement, deterrence and capability" identified by the Prime Minister as underpinning the "counter-foreign-interference

107 (2004) 220 CLR 181 at 200 [40].

108 Section 3 of the FITS Act.

109 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 June 2018 at 6399. See also Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at [1]-[5].

strategy" implemented by the package of legislation of which the FITS Act formed part¹¹⁰, the FITS Act is therefore concerned exclusively with "sunlight". Use of that metaphor derives from an essay written by Louis D Brandeis in 1913 entitled "What Publicity Can Do". Brandeis commenced the essay¹¹¹:

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

Brandeis' additional metaphor of "electric light" was adapted by the Committee on the Judiciary of the House of Representatives of the United States in explaining the design of the forerunner to the FITS Act, the *Foreign Agents Registration Act 1938* (US), as being to let "the spotlight of pitiless publicity ... serve as a deterrent to the spread of pernicious propaganda"¹¹².

105 Pursuit of the sole identified object of improving transparency of activities undertaken on behalf of foreign principals by narrowly tailored means undoubtedly justifies creation of a system of registration under which a person wishing to engage in political communication with the public or a section of the public on behalf of a foreign principal must first disclose on a public register information relevant to enabling the public to appraise the political communication in light of the relationship between the person and the foreign principal. Undoubtedly, it justifies requiring a registrant to provide information of that character to the Secretary of the Attorney-General's Department in order for that information to be made available to the public on a website to be established and maintained by the Secretary.

106 The system of registration established by the *Foreign Agents Registration Act*, under which registrants are required to furnish to the Attorney General of the United States registration statements which become public records open to public examination and available to the public over the Internet, is a longstanding legislative precedent.

107 What pursuit of that sole identified object of improving the transparency of activities undertaken on behalf of foreign principals by narrowly tailored means

110 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13146.

111 Brandeis, "What Publicity Can Do", *Harper's Weekly*, 20 December 1913 at 10. See also Brandeis, *Other People's Money and How the Bankers Use It*, new ed (1932) at 92.

112 HR Rep No 1381, 75th Cong, 1st Sess (1937) at 2.

does not justify is creation of a system of registration under which a person who wishes to engage in political communication with the public or a section of the public on behalf of a foreign principal must first provide to the Secretary of the Attorney-General's Department any information that the Secretary in his or her discretion requires¹¹³, all of which is to be kept on a register established and maintained by the Secretary¹¹⁴, only some of which is to be made available to the public on a website to be established and maintained by the Secretary¹¹⁵, but all of which is to be available to be shared at the discretion of the Secretary with any "enforcement body"¹¹⁶ for the purpose of any "enforcement related activity"¹¹⁷ within the meaning of the *Privacy Act 1988* (Cth)¹¹⁸; with any Department, agency or authority of the Commonwealth, a State or a Territory or any Australian police force for the purpose of protecting public revenue¹¹⁹ or for the purpose of

113 Section 16(2)(d), s 34(1) and (3)(d), and s 39(2)(d) of the FITS Act.

114 Section 42 of the FITS Act.

115 Section 43 of the FITS Act.

116 Including the Australian Federal Police or the police force of a State or Territory, the Integrity Commissioner, the Office of the Director of Public Prosecutions or similar body established under a State or Territory law, the Australian Crime Commission, the Immigration Department, the Australian Prudential Regulation Authority, the Australian Securities and Investments Commission, the New South Wales Crime Commission, the Independent Commission Against Corruption of New South Wales, the Law Enforcement Conduct Commission of New South Wales, the Independent Broad-based Anti-corruption Commission of Victoria, the Crime and Corruption Commission of Queensland, the Corruption and Crime Commission of Western Australia, the Independent Commissioner Against Corruption of South Australia, and any other Commonwealth agency or State or Territory authority "to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction". See the definition of "enforcement body" in s 6(1) of the *Privacy Act 1988* (Cth).

117 Including "the prevention, detection, investigation, prosecution or punishment of ... criminal offences ... or ... breaches of a law imposing a penalty or sanction", or "the conduct of surveillance activities, intelligence gathering activities or monitoring activities", or "the prevention, detection, investigation or remedying of misconduct of a serious nature". See the definition of "enforcement related activity" in s 6(1) of the *Privacy Act 1988* (Cth).

118 Item 1 of the table in s 53(1) of the FITS Act.

119 Item 2 of the table in s 53(1) of the FITS Act.

protecting "security"¹²⁰ within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth)¹²¹; or with any other person who might be prescribed in a legislative instrument made by the Attorney-General under the FITS Act for any other purpose that might be prescribed by that instrument¹²².

108 Subjection of a registrant to the requirement to provide that broader category of information as an incident of registration is itself a burden on the political communication in respect of which registration is required. The burden lies in the registrant being unable to engage in the political communication at all without the registrant needing first to submit to a requirement to divulge privately held information that is then available to be used for governmental purposes adverse to the interests of the registrant and those with whom the registrant is politically affiliated. Important to recognise in that respect is that information about a registrant not publicly accessible would otherwise be obtainable by the Commonwealth, State and Territory agencies and authorities with whom the Secretary is empowered to share it under the scheme only through the exercise of covert or coercive powers conferred by other Commonwealth, State or Territory laws.

109 Asked in the course of argument to explain that added burden on political communication arising as an incident of registration, the Solicitor-General sought to minimise its significance by arguing that the discretions conferred on the Secretary are confined by reference to the stated object of the FITS Act. The discretion to require information from a registrant to be included on the register, he argued, is to be exercised for the sole purpose of promoting transparency through publication of information from the register on the website. The discretion to share information from the register with the numerous Commonwealth, State and Territory agencies and authorities with whom the Secretary is empowered to share it, he argued, is to be exercised only for the purpose of sharing information of interest to those agencies and authorities that might be captured incidentally in

120 Including the protection of the Commonwealth, the States and Territories and their people from "clandestine or deceptive" activities carried on for the purpose of affecting political or governmental processes relating to Australia undertaken in active collaboration with a foreign government, an entity directed or controlled by a foreign government or a foreign political organisation. See the definitions of "security", "acts of foreign interference" and "foreign power" in s 4 of the *Australian Security Intelligence Organisation Act 1979* (Cth).

121 Item 3 of the table in s 53(1) of the FITS Act.

122 Item 4 of the table in s 53(1) of the FITS Act.

the process of gathering information for the sole purpose of promoting transparency by means of the publication of information on the website.

110 The submission overstated the extent to which applicable principles of statutory interpretation confine the discretions by reference to the stated object of the FITS Act.

111 The discretions are conferred on the Secretary against the background of the principle that "[a] statute which confers a power to obtain information for a purpose defines, expressly or impliedly, the purpose for which the information when obtained can be used or disclosed" with the result that "[t]he statute imposes on the person who obtains information in exercise of the power a duty not to disclose the information obtained except for that purpose"¹²³. The statutory purposes for which information included on the register can be disclosed in the discretion of the Secretary serve to indicate the statutory purposes for which information can be obtained in the discretion of the Secretary for inclusion on the register.

112 Moreover, the discretions are in terms unconfined. That being so, "the factors that may be taken into account in [their] exercise ... are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard"¹²⁴. The factors to which the Secretary can have regard in exercising the discretions cannot be confined by reference to the statutory object of the scheme of registration identified in the FITS Act to the exclusion of reference to the structure of the scheme of registration of which the discretions form part.

113 Notwithstanding the limitation of its object to improvement of transparency, no part of the design of the scheme of registration established by the FITS Act is to confine collection of information from registrants to that to be made publicly available on the website. The discretion to require information from registrants for inclusion on the register is rather designed to facilitate each of the

123 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424; *Katsuno v The Queen* (1999) 199 CLR 40 at 57 [24].

124 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40, citing *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49-50, adopting earlier formulations in *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-758 and *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

forms of use and disclosure of information included on the register for which the FITS Act provides. Publication of information on the website is just one of them.

114 The architecture of the scheme in that respect is mapped out in the simplified outline of the FITS Act in the statement that "[c]ertain information about registrants and their activities is made publicly available"¹²⁵. The architecture of the scheme is then detailed in the simplified outline of the Part which governs "[o]btaining and handling scheme information" in statements that "[s]ome scheme information will be made publicly available" and that "[o]ther scheme information must be handled in accordance with [identified provisions specifically including those which authorise the Secretary to share information from the register with the numerous Commonwealth, State and Territory agencies and authorities with whom the Secretary has discretion to share it]"¹²⁶.

115 Moving beyond the simplified outlines to the detail of the operative provisions, there is a marked contrast between the unconfined discretion of the Secretary to require information from registrants and the precisely defined obligation of the Secretary to publish a subset of that information on the website. Apart from the name of the registrant and the foreign principal and a description of the kind of registrable activities the registrant undertakes on behalf of the foreign principal, the information to be published on the website is limited to that prescribed by legislative instrument made by the Attorney-General¹²⁷. Publication of the whole of the prescribed information is mandatory subject only to exceptions for information that the Secretary is satisfied is commercially sensitive, affects national security or is excepted by legislative instrument made by the Attorney-General¹²⁸.

116 The contrast between the precisely defined obligation of the Secretary to publish a subset of the information from the register on the website and the discretions of the Secretary both to collect information from registrants to be included on the register and to share information from the register with Commonwealth, State and Territory agencies and authorities highlights that the fundamental problem with the scheme is not that the discretions to collect and share information are overbroad but that they exist at all. The problem that arises from the existence of the discretions is not one that might or might not occur in the administration of the scheme, consideration of which can be deferred until if and

125 Section 4 of the FITS Act (emphasis added).

126 Section 41 of the FITS Act (emphasis added).

127 Section 43(1) of the FITS Act.

128 Section 43(2) of the FITS Act.

when it does arise¹²⁹. The problem is inherent in the structure of the scheme to which every registrant is immediately subjected: to attempt to remove the problem by reading down the scope of the discretions so as to minimise the disconnect between the information on the secret register and the information on the publicly accessible website would be to engage in the legislative process of designing a new scheme¹³⁰.

117 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 principals 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. The information to be required from registrants and the information to be made available to the public would be one and the same and would be defined by legislative prescription. There would be no occasion for the discretionary collection and discretionary dissemination of information for other governmental purposes.

118 By subjecting a registrant to the requirement to provide information to be included on a secret register to be available to be shared with Commonwealth, State and Territory agencies and authorities, the scheme of registration established by the FITS Act burdens political communication by a registrant with the public or a section of the public to a substantially greater extent than is necessary to achieve the sole identified legislative object of improving the transparency of that communication. For that reason, the compulsion to be registered under the scheme in order to engage in political communication with the public or a section of the public on behalf of a foreign principal is not compatible with the constitutional freedom of political communication.

119 Doing my best to express that incompatibility in the language of structured proportionality, I would not shrink from saying that the scheme of registration established by the FITS Act is not "suitable"¹³¹ for the reason that there is no rational connection between the object of improving transparency and the subjection of a registrant to the requirement to provide information to be included on the register that is not to be published but that is to be available to be shared with Commonwealth, State and Territory agencies and authorities. If that is too

129 *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33], applying *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

130 cf *Spence v Queensland* (2019) 93 ALJR 643 at 669-670 [85]-[91]; 367 ALR 587 at 611-613.

131 cf *Comcare v Banerji* (2019) 267 CLR 373 at 400 [33].

strong, I would still say that the scheme is not "necessary"¹³² for the reason that an obvious and compelling reasonably practicable alternative means of achieving the object of improving transparency is not to subject a registrant to that requirement at all. At the very least, I would say that the scheme is not "adequate in its balance"¹³³ for the reason that the burden it places on political communication by subjecting a registrant to that requirement contributes nothing to the achievement of the benefit of improved transparency sought to be achieved.

120 The conclusion that the compulsion to be registered under the scheme of registration established by the FITS Act is incompatible with the constitutional freedom of political communication in its application to a person who seeks to engage in political communication with the public or a section of the public on behalf of a foreign principal does not necessarily entail the conclusion that the compulsion to be registered is incompatible with the constitutional freedom in its application to a person who seeks to engage on behalf of a foreign principal in other registrable activities within the scope of the scheme. There is a difference between a requirement to register as a precondition to engaging in political communication with the public or a section of the public and a requirement to register as a precondition to representing the interests of another in dealings with legislative and executive arms of government¹³⁴. Conformably with the implied freedom's centrally informing concern to protect the integrity of the processes of representative and responsible government, the permissible incidents of a scheme of registration directed to persons representing others in dealing with government¹³⁵ can be expected to be more burdensome in practice than the permissible incidents of a scheme of registration directed to persons engaging in political communication with the public.

121 My formal answers to the questions reserved by the special case are as follows. (1) In their application to a person who undertakes, or arranges to undertake, on behalf of a foreign principal an activity made registrable by Item 3 of the table in s 21(1), ss 16 and 18 of the FITS Act infringe the implied freedom of political communication and are for that reason invalid. (2) The plaintiff should have a declaration to that effect. (3) The defendant should pay the costs of and incidental to the special case.

132 cf *Comcare v Banerji* (2019) 267 CLR 373 at 401 [35].

133 cf *Comcare v Banerji* (2019) 267 CLR 373 at 402 [38].

134 cf *Thomas v Collins* (1945) 323 US 516 at 544-545; *United States v Harriss* (1954) 347 US 612 at 625-626, 636.

135 eg Pt 2A of the *Migration Act 1958* (Cth), considered in *Cunliffe v The Commonwealth* (1994) 182 CLR 272.

122 GORDON J. The *Foreign Influence Transparency Scheme Act 2018* (Cth) ("the *FITS Act*") was one of three measures¹³⁶ enacted by the Federal Parliament as part of a "Counter Foreign Interference Strategy" which was "built upon the four pillars of sunlight, enforcement, deterrence and capability"¹³⁷. "Sunlight" was said to be at the "very centre" of that strategy¹³⁸. The *FITS Act* was introduced 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"¹³⁹ to ensure such activities are "exposed to sunlight"¹⁴⁰.

123 The plaintiff, LibertyWorks Inc, is "a private think-tank with an aim to move public policy in the direction of increased individual rights and freedoms, including the promotion of freedom of speech and political communication". Subject to validity, the parties agree that LibertyWorks is required to register under the *FITS Act* because it is a person who engages in a "registrable activity": namely, it undertakes, on behalf of a foreign principal (the American Conservative Union ("the ACU")), which is a foreign political organisation because it is a foreign organisation that exists primarily to pursue political objectives), communications activity in Australia for the purpose of political or governmental influence¹⁴¹. The registrable activity is holding annual Conservative Political Action Conference ("CPAC") events in Australia. LibertyWorks relevantly organised and co-hosted the 2019 CPAC event under an arrangement with the ACU or otherwise entered into a registrable arrangement with the ACU.

136 The other measures were the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) and the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).

137 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13146.

138 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13148.

139 *FITS Act*, s 3.

140 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13148.

141 *FITS Act*, s 21(1), table item 3.

124 LibertyWorks challenges the validity of specific provisions¹⁴² of the *FITS Act* as infringing the implied freedom of political communication in their application to "communications activity", which is just *one* of the "registrable activities" under the *FITS Act*¹⁴³ ("the impugned provisions"). LibertyWorks does not challenge the application of the impugned provisions to any of the other "registrable activities"¹⁴⁴. The relief sought by LibertyWorks in its Further Amended Statement of Claim and the question of law stated for the opinion of the Full Court each reveal that LibertyWorks' challenge is to the validity of the *FITS Act* to the extent it imposes registration obligations with respect to "communications activity". LibertyWorks identified the aspects of the *FITS Act* – the impugned provisions – which it contends are invalid. It identified the "targets" of its challenge as ss 16 and 18 (the requirement to register), in their operation in respect of s 21(1), table item 3. In that way, LibertyWorks confined its challenge to the operation of the *FITS Act* with respect to *registrable "communications activity"* (except for s 38), and not the *other kinds of "registrable activities"*. LibertyWorks, however, was not simply concerned with the requirement to "register", but with the things that "registration brings with it", including ongoing record-keeping obligations, obligations to provide information and documents to the government and the criminal consequences for non-compliance. The deterrent effects of an obligation to register with respect to "communications activity" cannot be understood without reference to the aspects of the scheme to which registrants and persons liable to register are made subject by the *FITS Act*.

125 As with any question of constitutional validity, the first step must always be to construe the Act and determine its legal effect and practical operation¹⁴⁵.

142 *FITS Act*, ss 16, 18, 21(1), table item 3, 37, 39, 57-59. As these reasons will explain, LibertyWorks' challenge to certain definitions in ss 10, 11, 12, 13, 13A and 14 fails as the definitions have no operative effect absent other provisions.

143 See *FITS Act*, Pt 2, Div 3.

144 The other registrable activities include "parliamentary lobbying on behalf of [a] foreign government" and "[p]arliamentary lobbying", "[g]eneral political lobbying" and "[d]isbursement activity" for the purpose of political or governmental influence: *FITS Act*, ss 20, 21(1), table items 1, 2 and 4.

145 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 498-499 [53]; *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 68 [158]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581 [11]; *Brown v Tasmania* (2017) 261 CLR 328 at 428 [307], 433-434 [326], 479-480 [485]-[486], 481 [488].

It is necessary to begin with the proper construction and application of the impugned provisions within the scheme and framework of the *FITS Act*¹⁴⁶. "[T]he impugned provisions cannot be read in isolation"¹⁴⁷ and the Court is not confined to choosing between competing constructions advanced by the parties¹⁴⁸. Determining the legal effect and practical operation of the *FITS Act* in its application to LibertyWorks is not to "roam at large"¹⁴⁹. LibertyWorks does not seek to challenge the operation of provisions of the *FITS Act* "in circumstances which have not arisen and may never arise"¹⁵⁰.

126 The impugned provisions in their application to "communications activity" are intended to, and do, regulate political communications of the broadest kind between members of the public and with political representatives. The impugned provisions place a significant burden on political communications, which requires a compelling justification.

127 The purpose of the *FITS Act* identified by the Commonwealth – to minimise the risk of foreign principals exerting *undisclosed influence* upon the integrity of Australia's political or election processes – is legitimate. No other or wider purpose was said to be pursued.

128 Where, however, a person, like LibertyWorks, "undertakes" a "communications activity" on behalf of a "foreign principal", such as a foreign political organisation, for the purpose of "political or governmental influence",

146 *Comcare v Banerji* (2019) 267 CLR 373 at 434 [136], [138].

147 *Banerji* (2019) 267 CLR 373 at 434 [138]. See also *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 376; *Gerhardy v Brown* (1985) 159 CLR 70 at 103; *Wainohu v New South Wales* (2011) 243 CLR 181 at 220 [70]; *Murphy v Electoral Commissioner* (2016) 261 CLR 28 at 128 [321], 129 [328].

148 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 366 [13]; *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 77 ALJR 1806 at 1808 [7], 1815 [51]; 201 ALR 271 at 274, 283; *Coleman* (2004) 220 CLR 1 at 93-94 [243]. See also *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 308.

149 *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [33], quoting *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227. See also *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 69 [156]-[158].

150 *Knight* (2017) 261 CLR 306 at 324-325 [32]-[33], applying *Lambert v Weichelt* (1954) 28 ALJ 282 at 283. See also *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [32]-[36], 216-217 [135]-[138], 248-249 [230], 287 [329].

the impugned provisions are not tailored to the identified purpose of the *FITS Act* and are not justified.

129 As will be seen, the *FITS Act* contemplates that the Secretary of the Attorney-General's Department ("the Secretary") will gather, in a range of ways¹⁵¹, an extensive amount of "scheme information"¹⁵² that relates to persons who may be liable to register and registrants or that is more broadly relevant to the operation of the scheme. The overreach of the impugned provisions is best illustrated by the fact that the *FITS Act* creates two repositories of that "scheme information": one is a "register" kept by the Secretary, which is not made public¹⁵³; the other is a publicly accessible website¹⁵⁴. What is not made public cannot "improve the transparency"¹⁵⁵ of activities on behalf of a foreign principal. The gap between the two repositories is not justified and cannot be bridged.

130 It was not suggested that the disconformity between the register and the public website could be solved by severing the information gathering provisions which yield the register. The gap is not bridged by significantly reading down the information gathering provisions. They are not provisions that can be given some limited distributive operation¹⁵⁶. Any reading down which would be necessary is to the point that the information gathered would only be of a kind that would appear on the public website. That is not what the *FITS Act* says or does¹⁵⁷. The *FITS Act* enables the Secretary to obtain information which is stored on a register and not made public, but which may relevantly be provided by the Secretary to law enforcement bodies¹⁵⁸. That is, as LibertyWorks submitted, a significant deterrent. And a non-public register does nothing to minimise the risk of *undisclosed influence*. It does the opposite. A non-public register is in darkness, not sunlight.

151 See, eg, *FITS Act*, ss 16(2)(d), 34-37, 39(2)(d), 45-46.

152 *FITS Act*, s 50.

153 *FITS Act*, s 42.

154 *FITS Act*, s 43.

155 *FITS Act*, s 3.

156 cf *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 61.

157 cf *Pidoto v Victoria* (1943) 68 CLR 87 at 111; *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 152, 164, 372; *Spence v Queensland* (2019) 93 ALJR 643 at 669-670 [87]-[90]; 367 ALR 587 at 612-613.

158 See, eg, *FITS Act*, s 53.

As LibertyWorks submitted, the acquisition of information that is not made public does "nothing for ... the sunshine purpose of the [*FITS Act*]". The public website, with its prescribed contents, on the other hand is directed at the identified legitimate purpose of minimising the risk of foreign principals exerting *undisclosed influence* upon the integrity of Australia's political or election processes and is justified. It discloses the fact of the influence, how the influence is effected and by whom and through whom. The gathering of other scheme information and storing of it on a non-public register does not.

Implied freedom of political communication

131 Sections 7, 24 and 128 of the *Constitution* (with Ch II, including ss 62 and 64) create a system of representative and responsible government. The implied freedom of political communication is "an indispensable incident of the system of representative and responsible government ... because that system requires that electors be able to exercise a free *and informed choice* when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation"¹⁵⁹ (emphasis added).

132 There is no doubt that the implied freedom protects political communication "undertaken legitimately *to influence* others to a political viewpoint"¹⁶⁰ (emphasis added). This includes communications between elected representatives and electors, and "between all persons, groups and other bodies in the community"¹⁶¹. As Mason CJ has explained¹⁶²:

"That is because individual judgment, whether that of the elector, the representative or the candidate, on so many issues turns upon free public discussion ... of the views of all interested persons, groups and bodies and on public participation in, and access to, that discussion. In truth,

159 *Brown* (2017) 261 CLR 328 at 430 [312]. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138-139 ("ACTV"); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557-562; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [27]-[28], 571 [104]-[109] ("*Unions No 1*").

160 *Unions No 1* (2013) 252 CLR 530 at 551 [30].

161 ACTV (1992) 177 CLR 106 at 139. See also *Unions No 1* (2013) 252 CLR 530 at 551-552 [28]-[30]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 577 [140]; *Brown* (2017) 261 CLR 328 at 430 [312].

162 ACTV (1992) 177 CLR 106 at 139 (footnote omitted).

in a representative democracy, public participation in political discussion is a central element of the political process."

133 Moreover, the range of "communications" protected by the implied freedom is broad¹⁶³. The freedom protects discussion of matters that "*might bear* on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal Ministers and their departments"¹⁶⁴ (emphasis added). This includes communications "made to the public on a government or political matter"¹⁶⁵ and communications "in relation to public affairs and political discussion"¹⁶⁶. It encompasses communications "on the wide range of matters that may call for, or are relevant to, political action or decision", criticism of "government decisions and actions", and communications which "seek to bring about change" or "call for action where none has been taken and in this way influence the elected representatives"¹⁶⁷.

134 Whether the impugned provisions are invalid for impermissibly burdening the implied freedom falls to be assessed by reference to the following questions¹⁶⁸: (1) Do the impugned provisions effectively burden the freedom of political communication? (2) Is the purpose of the *FITS Act* legitimate, in the sense that it is consistent with the maintenance of the constitutionally prescribed system of government? (3) Are the impugned provisions reasonably appropriate and adapted to advance that legitimate purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government?

163 *Hogan v Hinch* (2011) 243 CLR 506 at 544 [49].

164 *Lange* (1997) 189 CLR 520 at 571; see also 561. See also *Tajjour* (2014) 254 CLR 508 at 577 [141].

165 *Lange* (1997) 189 CLR 520 at 571.

166 *ACTV* (1992) 177 CLR 106 at 138.

167 *ACTV* (1992) 177 CLR 106 at 138.

168 See test identified in *Lange* (1997) 189 CLR 520 at 561-562, 567-568, as modified and refined in *Coleman* (2004) 220 CLR 1 at 51 [95]-[96], 77-78 [196], 82 [211], *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] and *Brown* (2017) 261 CLR 328 at 363-364 [104], 375-376 [155]-[156], 398 [236], 413 [271], 416 [277], 432-433 [319]-[325], 478 [481].

The *FITS Act*

135 The question whether a statute burdens the implied freedom is answered by reference to the terms, legal effect and practical operation of the statute¹⁶⁹. It is not answered by deciding whether a statute "limits the freedom on the facts of a particular case"¹⁷⁰; the focus is on the effect on the implied freedom "generally"¹⁷¹.

136 A statute will "effectively burden" the implied freedom if "the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications"¹⁷². The level of justification required depends on the nature and extent of the burden imposed¹⁷³. In the present case, the nature and extent of the burden, not whether the impugned provisions burdened the implied freedom, was in issue. In order to explain the nature and extent of the burden it is necessary to give detailed consideration to the relevant provisions of the *FITS Act*.

Registrable activities and registration

137 As has been noted, the *FITS Act* provides for "a *scheme* for the registration of *persons* who undertake certain [*registrable*] *activities on behalf of* foreign

169 *Lange* (1997) 189 CLR 520 at 567; *Unions No 1* (2013) 252 CLR 530 at 553 [35]; *Brown* (2017) 261 CLR 328 at 353 [61], 382 [180].

170 *Clubb* (2019) 267 CLR 171 at 192-193 [35]. See also *Wotton v Queensland* (2012) 246 CLR 1 at 31 [80]; *Unions No 1* (2013) 252 CLR 530 at 554 [36], 586 [166]; *Brown* (2017) 261 CLR 328 at 360 [90].

171 *Wotton* (2012) 246 CLR 1 at 30 [78], 31 [80]; *Unions No 1* (2013) 252 CLR 530 at 553-554 [35]-[36]; *Brown* (2017) 261 CLR 328 at 360 [90], 398 [237]; *Clubb* (2019) 267 CLR 171 at 301 [377].

172 *Monis v The Queen* (2013) 249 CLR 92 at 142 [108]. See also *Unions No 1* (2013) 252 CLR 530 at 574 [119]; *McCloy* (2015) 257 CLR 178 at 230-231 [126]; *Brown* (2017) 261 CLR 328 at 382-383 [180], 455 [395]; *Clubb* (2019) 267 CLR 171 at 257 [250].

173 *Monis* (2013) 249 CLR 92 at 146 [124]; *Tajjour* (2014) 254 CLR 508 at 580 [151]; *McCloy* (2015) 257 CLR 178 at 238-239 [150]-[152], 259 [222], 269-270 [255]; *Brown* (2017) 261 CLR 328 at 367 [118], 369 [128], 378-379 [164]-[165], 389-390 [200]-[201], 423 [291], 460 [411], 477-478 [478]; *Clubb* (2019) 267 CLR 171 at 299-300 [369].

governments and other *foreign principals*, in order to improve the transparency of their activities on behalf of those foreign principals"¹⁷⁴ (emphasis added).

138 Broadly, the "scheme"¹⁷⁵ comprises distinct but interconnected mechanisms: a requirement for persons to register when engaged in one of the "registrable activities"¹⁷⁶; a "register" of information obtained in relation to the scheme maintained by the Secretary that is not publicly available¹⁷⁷ and a separate publicly accessible website containing specified information about registrants¹⁷⁸; disclosure obligations in respect of registrable communications activities, irrespective of registration¹⁷⁹; the imposition of responsibilities on registrants¹⁸⁰; and penalties for non-compliance¹⁸¹.

139 A person "undertak[ing] an activity on behalf of a foreign principal"¹⁸² lies at the core of the operation of the *FITS Act*. "[P]erson" is defined broadly to include individuals, bodies corporate, bodies politic, partnerships, associations, organisations, and any combination of individuals who together constitute a body¹⁸³. This would include "think-tanks" (like LibertyWorks), public interest groups, academic institutions, media organisations and individual citizens alike.

140 The breadth of the legal effect and practical operation of the *FITS Act* arises in two ways: first, the phrases "undertakes an activity on behalf of"

174 *FITS Act*, s 3. Each italicised term is defined in the *FITS Act*.

175 "[S]cheme" means the *FITS Act* and rules made under s 71: *FITS Act*, s 10 definitions of "scheme" and "rules". Two sets of rules have been made under s 71: *Foreign Influence Transparency Scheme Rules 2018* (Cth) ("*FITS Rules*") and *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) ("*Disclosure Rules*").

176 *FITS Act*, ss 16 and 18; see also Pt 2, Div 3.

177 *FITS Act*, s 42.

178 *FITS Act*, s 43; *FITS Rules*, s 6.

179 *FITS Act*, s 38; *Disclosure Rules*, Pt 2.

180 *FITS Act*, Pt 3.

181 *FITS Act*, Pt 5.

182 *FITS Act*, s 18(1); see also ss 11 and 13A.

183 *FITS Act*, s 10 definition of "person".

and "foreign principal" are broadly defined and, second, the scheme's mechanisms are broad in nature and effect. Those statements require explanation. "[F]oreign principal"¹⁸⁴ is broadly defined to mean a "foreign government", a "foreign government related entity", a "foreign political organisation" and a "foreign government related individual"¹⁸⁵. In this way, the term "foreign principal" not only captures foreign governments and foreign political parties and individuals or corporations related to them, it also extends to "a foreign organisation that exists primarily to pursue political objectives"¹⁸⁶. By definition, a foreign organisation that exists primarily to pursue political objectives does not have to have any connection to a foreign government or a foreign political party. The political objectives pursued by such an organisation need not be linked in any way to a foreign government. Indeed, what is "political" is undefined¹⁸⁷.

141 Next, irrespective of whether consideration is payable¹⁸⁸, "[a] person undertakes an activity *on behalf of* a foreign principal if"¹⁸⁹:

- "(a) the person undertakes the activity in any of the following circumstances:
 - (i) *under an arrangement with* the foreign principal;
 - (ii) *in the service of* the foreign principal;
 - (iii) *on the order or at the request of* the foreign principal;
 - (iv) *under the direction of* the foreign principal; and
- (b) at the time the arrangement or service is entered into, or the order, request or direction made, both the person and the foreign principal knew or expected that:

184 *FITS Act*, s 10 definition of "foreign principal".

185 Each term is defined in s 10 of the *FITS Act*.

186 *FITS Act*, s 10 para (b) of the definition of "foreign political organisation".

187 cf *ACTV* (1992) 177 CLR 106 at 125-126.

188 *FITS Act*, s 11(2).

189 *FITS Act*, s 11(1).

- (i) the person would or might undertake the activity; and
- (ii) the person would or might do so in circumstances set out in section 20, 21, 22 or 23 (whether or not the parties expressly considered the existence of the scheme)." (emphasis added)

142 The phrases "in the service of", "on the order or at the request of" and "under the direction of" are self-explanatory. They seek to address where a person is acting as what might loosely be described as an "agent" of a foreign principal. But what of the first identified connection – acting "under an arrangement"? "[A]rrangement" is defined¹⁹⁰ to include "a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten". The activities undertaken "on behalf of" a foreign principal as defined in the *FITS Act* therefore extend well beyond any ordinary understanding of an agency or employment relationship. The consequence is that activities of a collaborative kind that are instigated or principally pursued by the person liable to register (not just those undertaken at the behest or direction of a foreign principal) are captured by the scheme.

143 It is then necessary to address registration under the scheme. Section 18 of the *FITS Act* identifies the persons who are liable to register¹⁹¹. It provides that a person is liable to register in relation to a foreign principal if the person undertakes a registrable activity on behalf of a foreign principal or enters a "registrable arrangement"¹⁹² with a foreign principal. Under s 16(1), once a person has become liable to register they "*must apply* to the Secretary for registration" within 14 days¹⁹³ (emphasis added). A knowing or reckless failure to do so is an offence¹⁹⁴.

190 *FITS Act*, s 10 definition of "arrangement".

191 A person is not required to register if they are exempt under Pt 2, Div 4 of the Act: *FITS Act*, ss 20(b), 21(1)(c), 22(d), 23(d). See also *FITS Rules*, s 5. No exemption was said to apply to LibertyWorks.

192 A registrable arrangement is relevantly an arrangement between a person and a foreign principal for the person to undertake, on behalf of the foreign principal, one or more activities which, if undertaken, would be registrable: *FITS Act*, s 13A.

193 Once a person becomes liable to register, they remain liable until they cease to be liable under s 19: *FITS Act*, s 18(2).

194 *FITS Act*, s 57.

144 A registration application must be "in writing", "in an approved form (if any)", "given in an approved manner (if any)" and "accompanied by any information or documents required by the Secretary"¹⁹⁵. No "approved form" or "approved manner" of making an application for the purpose of s 16(2) is presently prescribed. The Attorney-General's Department has published a "factsheet" setting out the "information and documents that must be provided" by persons registering under the scheme¹⁹⁶. The documentation is extensive in nature and subject matter. Once an application is made that complies with the requirements in s 16(2), the person is "registered" under the scheme¹⁹⁷ and is a "registrant"¹⁹⁸.

145 What is a "registrable activity" is addressed in ss 20 to 23. For present purposes, it is sufficient to focus on just one of the registrable activities identified in s 21(1), namely "[c]ommunications activity" undertaken in Australia "for the purpose of political or governmental influence"¹⁹⁹. In respect of this registrable activity, a person's liability to register arises from the fact that the person has engaged, *or proposes to engage*, in political communication. A person relevantly undertakes a "communications activity" if they communicate or distribute "*information or material* to the public or a section of the public" or produce "*information or material for the purpose of the information or material being communicated or distributed to the public or a section of the public*"²⁰⁰ (emphasis added) and the sole or primary *purpose*, or a substantial *purpose*, of the communications activity is to "affect in any way"²⁰¹, among other things²⁰², "a process in relation to a federal election"²⁰³, "a process in relation to a federal

195 *FITS Act*, s 16(2).

196 Attorney-General's Department, *Foreign Influence Transparency Scheme: Factsheet 15*, April 2019.

197 *FITS Act*, s 17.

198 *FITS Act*, s 10 definition of "registrant".

199 *FITS Act*, s 21(1), table item 3.

200 *FITS Act*, s 13(1).

201 *FITS Act*, s 10 definition of "influence".

202 See *FITS Act*, s 12(1).

203 *FITS Act*, s 12(1)(a).

government decision"²⁰⁴ or "the public, or a section of the public, in relation to" such a process²⁰⁵.

146 Three aspects of the breadth of "communications activity" should be noted. First, a "federal government decision"²⁰⁶ includes a decision *of any kind* in relation to *any matter*, including administrative, legislative and policy matters, whether or not the decision is final or formal²⁰⁷. Second, "information or material" includes "information or material *in any form*, including oral, visual, graphic, written, electronic, digital and pictorial forms"²⁰⁸ (emphasis added) and would include, among other things, verbal or silent protests, media campaigns and academic work. Third, the "purpose of an activity"²⁰⁹ is determined by reference to²¹⁰: "the intention of the person undertaking the activity or that person's belief (if any) about the intention of any foreign principal on whose behalf the activity is undertaken", and²¹¹:

"either or both of the following:

- (i) the intention of any foreign principal on whose behalf the activity is undertaken;
- (ii) *all* of the circumstances in which the activity is undertaken." (emphasis added)

As is self-evident, these provisions regulate political communications of the broadest kind between members of the public.

204 *FITS Act*, s 12(1)(b).

205 *FITS Act*, s 12(2).

206 *FITS Act*, ss 12(1)(b), 12(3), 12(4).

207 *FITS Act*, s 12(4).

208 *FITS Act*, s 13(2).

209 *FITS Act*, s 14.

210 *FITS Act*, s 14(a).

211 *FITS Act*, s 14(b).

Disclosure and record keeping

147 Among other responsibilities²¹², persons liable to register and registrants must disclose certain information and documents to the Secretary. Initial registration²¹³ and annual renewal²¹⁴ applications must be "accompanied by any information or documents required by the Secretary". Registrants have an ongoing obligation to give "a notice" to the Secretary if they become aware that information provided to the Secretary "is, or will become, inaccurate or misleading in a material particular" or "omits, or will omit, any matter or thing without which the information is or will be misleading"²¹⁵. The notice must correct the inaccuracy or misleading impression²¹⁶ and it must be "accompanied by any information or documents required by the Secretary"²¹⁷. Additional disclosure obligations arise at the beginning of, and during, certain voting periods²¹⁸.

148 Registrants are also obliged to keep certain records for up to ten years²¹⁹ about: registrable activities the person undertakes; benefits provided to the person by the foreign principal; information or material forming part of any registrable communications activity; any registrable arrangement; and "other information or material communicated or distributed to the public or a section of the public" on behalf of the foreign principal²²⁰.

149 The Secretary may compel a person to produce any "information" or "documents" that may satisfy the Secretary as to whether the person is liable to register if the Secretary "reasonably suspects" the person might be liable to register²²¹. The Secretary also may compel a person (irrespective of whether they

212 *FITS Act*, Pt 3.

213 *FITS Act*, s 16(2)(d). See [144] above.

214 *FITS Act*, s 39(2)(d).

215 *FITS Act*, s 34(1).

216 *FITS Act*, s 34(1).

217 *FITS Act*, s 34(3)(d).

218 *FITS Act*, ss 36 and 37.

219 *FITS Act*, s 40(1) and (1A).

220 *FITS Act*, s 40(2).

221 *FITS Act*, s 45.

are a registrant) to produce any "information" or "documents" if the Secretary "reasonably believes" the person has information or documents "relevant to the operation of the scheme"²²².

150 Failure to give a notice required under Div 2 of Pt 3, failure to keep records as required under s 40, or failure to comply with a notice issued under s 45 or s 46 is an offence²²³.

Disclosure in communications activity

151 A person who undertakes a registrable communications activity on behalf of a foreign principal (whether or not the person is a registrant) "must make a disclosure *about the foreign principal* in accordance with rules made for the purposes of" s 38(2) of the *FITS Act*²²⁴ (emphasis added). In other words, a person must disclose the fact of a relevant relationship with a foreign principal within a registrable communications activity. Failure to do so is an offence²²⁵.

152 The *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) ("the *Disclosure Rules*") relevantly prescribe the disclosure required for the purposes of s 38(2) of the *FITS Act*. Section 5(1) of the *Disclosure Rules* prescribes certain "instances of communications activity" (for example, and among others, communication or distribution of printed material, streaming music, broadcasting by radio or television or oral communication made in person) and identifies the form and manner of disclosure required for each instance of communications activity (for example, at the end or bottom of each page of printed material in a type size that can be read by a person with 20/20 vision without visual aid, in an announcement at the end of the communication, or at the beginning of an oral communication in person). Section 5(2) prescribes that the content of the disclosure (except for radio advertisements and authorised political material) must: "identify the person undertaking the communications activity"; "identify the foreign principal on whose behalf the person undertakes the communications activity"; "include a statement that the communications activity is undertaken on behalf of the foreign principal"; and "include a statement that the disclosure is

²²² *FITS Act*, s 46.

²²³ *FITS Act*, ss 58(1), 58(3), 59.

²²⁴ *FITS Act*, s 38(1).

²²⁵ *FITS Act*, s 58(2).

made under the [*FITS Act*]. It provides that the disclosure could be worded along the following lines:

"This material is communicated by [name of person] on behalf of [name of foreign principal]. This disclosure is made under the [*FITS Act*]."

Scheme information

153 Division 4 of Pt 4 of the *FITS Act* addresses communicating and dealing with scheme information. "Scheme information"²²⁶, relevantly, is information obtained by a scheme official in the course of performing functions or exercising powers under the scheme. The Secretary, among others, is a "scheme official"²²⁷. A scheme official may communicate or otherwise deal with scheme information for the purposes of performing functions or exercising powers under the scheme or otherwise in the course of performing their functions in relation to the scheme²²⁸. However, the *FITS Act* provides that the Secretary may communicate scheme information for specified purposes, including to an "enforcement body" for the purpose of "an enforcement related activity" within the meaning of the *Privacy Act 1988* (Cth)²²⁹ or to any Department, agency or authority of the Commonwealth, a State or a Territory, or an Australian police force for the protection of "security" within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth)²³⁰.

154 Ordinarily "when a power to require disclosure of information is conferred for a particular purpose, the extent of dissemination or use of the information disclosed must itself be limited by the purpose for which the power was

226 *FITS Act*, s 50(a).

227 *FITS Act*, s 51(a).

228 *FITS Act*, s 52.

229 *FITS Act*, s 53(1), table item 1. "[E]nforcement body" is defined in s 6(1) of the *Privacy Act* to include a broad array of law enforcement bodies, and "enforcement related activity" is defined to include, among other things, "the prevention, detection, investigation, prosecution or punishment of" criminal offences or breaches of a law imposing a penalty or sanction.

230 *FITS Act*, s 53(1), table item 3. "[S]ecurity" is defined in s 4 of the *Australian Security Intelligence Organisation Act* to mean protection from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system or acts of foreign interference.

conferred"²³¹. As the Commonwealth accepted, however, the additional specified purposes in s 53 of the *FITS Act* expressly define "a wider set of purposes for which the information may [lawfully] be disseminated".

Non-public register

155 Section 42(1) requires the Secretary to keep a "register" of information "in relation to the scheme". Section 42(2) and (3) specify what the Secretary must include on the register. The register "must" include, in relation to each registrant²³²: the name of the person and the foreign principal; the registration application, any renewal application and any notices given by the person under Div 2 of Pt 3²³³, along with any "information or documents" that accompanied such an application or notice; a record of any other communications between the person and the Secretary; any information prescribed by rules made for the purposes of s 43(1)(c); and "*any other information or documents* the Secretary considers appropriate" (emphasis added). The register "must" also include²³⁴: any provisional and final transparency notices and any variations and revocations of transparency notices; any notices given under s 45 or s 46 to a person other than a registrant "and any responses received"; any information prescribed by rules made for the purposes of s 43(1)(c) other than in relation to registrants; and "*any other information or documents* the Secretary considers appropriate" (emphasis added). What is on the register is not publicly available. What is on the register is any document or information the Secretary (or any other scheme official) gathers pursuant to, or for the purposes of, the *FITS Act*.

Public website – certain scheme information must be made publicly available

156 The public website is a subset of the non-public register. Section 43(1) prescribes that the following information "must" be made *publicly available*²³⁵, on a website, in relation to each person who is, or has at any time been, registered

231 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 423; see also 424-425.

232 *FITS Act*, s 42(2).

233 Which contains ss 34-37 of the *FITS Act*.

234 *FITS Act*, s 42(3).

235 "Despite" s 43(1), the website "must not" include information that the Secretary is satisfied "(a) is commercially sensitive; or (b) affects national security; or (c) is of a kind prescribed by the rules" for the purposes of s 43(2)(c): *FITS Act*, s 43(2). See also s 6A of the *FITS Rules*.

in relation to a foreign principal²³⁶: "the name of the person and the foreign principal"; "a description of the kind of registrable activities the person undertakes or undertook on behalf of the foreign principal"; and "any other information prescribed by the rules for the purposes of" s 43(1)(c).

157 Section 6 of the *Foreign Influence Transparency Scheme Rules 2018* (Cth) ("the *FITS Rules*") prescribes that for the purposes of s 43(1)(c) in relation to each registrant the following information about the person and the foreign principal is to be made publicly available on the website: any trading name and ABN (or foreign equivalent) of the person and the foreign principal²³⁷; any other name by which the person is known²³⁸; if they are individuals, the person's occupation, any other names by which the foreign principal is known and the foreign principal's title²³⁹; if the person is a former Cabinet Minister or recent designated position holder, that fact²⁴⁰; and the name of the country that the foreign principal is part of or related to and the type of foreign principal²⁴¹.

158 Information about the registrable activities is also to be made publicly available, including a description of the registrable activities and the date or period over which they are to be, or were, undertaken²⁴²; whether the registrable activities are undertaken "under an arrangement with", "in the service of", "on the order or at the request of" or "under the direction of" the foreign principal²⁴³; and a description of the arrangement, order, request or direction or a description of the relationship of "service"²⁴⁴.

236 *FITS Act*, s 43(1)(a)-(c).

237 *FITS Rules*, s 6(a)-(b), (g)-(h).

238 *FITS Rules*, s 6(c)

239 *FITS Rules*, s 6(d) and (i).

240 *FITS Rules*, s 6(e)-(f).

241 *FITS Rules*, s 6(j)-(k).

242 *FITS Rules*, s 6(l)-(m).

243 *FITS Rules*, s 6(n).

244 *FITS Rules*, s 6(o)-(p).

The gap – two repositories of scheme information

159 It is necessary to say something further about the two repositories of scheme information and the gap that exists between them. As has been seen, the *FITS Act* contemplates: (a) a non-public "register" containing a wide range of information and documents obtained by the Secretary and scheme officials in the course of administering the scheme (namely, the gamut of "scheme information") and (b) a separate, publicly accessible "website" containing a far more limited class of scheme information.

160 It is evident from the text of the *FITS Act* and the *FITS Rules* that the "register" and "website" are separate and do not mirror each other. There are separate provisions dealing with information and documents to be included on the register²⁴⁵ and information to be made publicly available²⁴⁶. Unlike certain other Commonwealth Acts, the register maintained by the Secretary under the *FITS Act* is not *itself* made publicly available, either in its entirety²⁴⁷ or subject to removing information that is commercially sensitive²⁴⁸ or otherwise prejudicial by way of a carveout from the register itself.

161 The public website contains a more limited class of information and documents. The simplified outline of Pt 4 in s 41 states that "[s]ome scheme information will be made publicly available (*mainly*, the names of registrants, former registrants and foreign principals and descriptions of the registrable activities being undertaken)", and that "[o]ther scheme information" must be handled in accordance with the *Privacy Act*, Pt 5.6 of the *Criminal Code* (Cth) and the authorisations in Div 4 of Pt 4 of the *FITS Act* (emphasis added). Consistent with the simplified outline, s 43 is headed "*Certain information to be made publicly available*" (emphasis added).

162 Next, the types of information and documents that must be made publicly available are identified with precision in s 43(1)(a)-(b) and (2A) of the *FITS Act* and s 6 of the *FITS Rules*. That specificity may be contrasted with the generality of language used to identify the information and documents that must be placed on the register, the starkest illustration of which is that the Secretary must include on the register "*any ... information or documents the Secretary considers appropriate*"

245 *FITS Act*, s 42.

246 *FITS Act*, s 43.

247 cf *Commonwealth Electoral Act 1918* (Cth), ss 287N and 287Q.

248 cf *Competition and Consumer Act 2010* (Cth), s 152BCW.

that are not otherwise specifically identified in s 42(2) and (3)²⁴⁹ (emphasis added). There is no equivalent provision in relation to the public website.

163 Relatedly, s 42(2) and (3) specifically require that the following documents²⁵⁰, among others, must be included on the non-public register²⁵¹: applications for registration and renewal of registration with any accompanying information and documents, notices given to the Secretary with any accompanying information and documents, notices given by the Secretary requiring information and documents and any responses to such notices (presumably including the information and documents provided), and any correspondence between the Secretary and the person (for example, by email or letter). By contrast, there is no indication in the *FITS Act* or the *FITS Rules* that any of those documents will be uploaded onto the public website. What is to be contained on the public website is limited to specified types of "information" identified in s 43(1)(a) and (b) of the *FITS Act* and s 6 of the *FITS Rules*²⁵².

164 The publicly available information and documents constitute a subset of the categories of information and documents identified in s 42 that must be put on the register. The "name of the person and the foreign principal"²⁵³, provisional and final transparency notices and any variations and revocations of transparency notices²⁵⁴, and any information "prescribed by the rules for the purposes of" s 43(1)(c)²⁵⁵ are expressly identified as information and documents that must be contained on *both* the register and website. The only other category of information that must be put on the website is a description of the registrable activities²⁵⁶. The overlap between the register and what is made publicly available ends there.

249 *FITS Act*, s 42(2)(g) and (3)(c).

250 See *Acts Interpretation Act 1901* (Cth), s 2B definition of "document".

251 See especially *FITS Act*, s 42(2)(b)-(e) and (3)(a).

252 Provisional and final transparency notices and any variation or revocation of a transparency notice must also be made available to the public "on a website": *FITS Act*, s 43(2A).

253 *FITS Act*, ss 42(2)(a) and 43(1)(a).

254 *FITS Act*, ss 42(3)(aa)-(ac) and 43(2A).

255 *FITS Act*, ss 42(2)(f), 42(3)(b), 43(1)(c). See also *FITS Rules*, s 6.

256 *FITS Act*, s 43(1)(b).

165 There is no statutory basis for the Secretary to make information or documents publicly available other than those referred to in s 43(1)(a)-(b) and (2A) of the *FITS Act* and prescribed by the *FITS Rules* for the purposes of s 43(1)(c). There is no provision providing that the Secretary *may* place information or documents on the public website, for example, if the Secretary considers it *appropriate* to do so or considers the information *relevant* to the scheme²⁵⁷. The *FITS Act* only expressly confers obligations on the Secretary in respect of (a) information that the Secretary "must make" publicly available²⁵⁸ and (b) information that, despite falling within s 43(1), "must not" be made publicly available²⁵⁹.

Degree of disconnect between register and website

166 The disconnect between repositories of non-public and publicly available information under the *FITS Act* is not found in the *Foreign Agents Registration Act* 22 USC §§611-621 ("the *FARA*"), the Act on which the *FITS Act* was based²⁶⁰. Under the *FARA*, essentially all information and documents provided by registrants are made publicly available²⁶¹. The Attorney General must retain "in permanent form one copy of all registration statements furnished" under the *FARA*, "and the same shall be public records and open to public examination and inspection"²⁶². The Attorney General must "maintain, and make available to the public over the Internet, without a fee or other access charge ... an electronic database that": includes the information contained in registration statements and updates given under the *FARA*; and is searchable and sortable, at least by the

257 cf *Acts Interpretation Act*, s 33(2A).

258 *FITS Act*, s 43(1) and (2A). See *Fenton v Hampton* (1858) 11 Moo 347 at 360 [14 ER 727 at 732]; *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 301-302; *Egan v Willis* (1998) 195 CLR 424 at 468 [83]. See also Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 76 [4.210].

259 *FITS Act*, s 43(2).

260 Australia, Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 33 [2.108], 35 [2.115].

261 Section 616(a) of the *FARA* provides that the Attorney General "may withdraw from public examination the registration statement and other statements of any agent of a foreign principal whose activities have ceased to be of a character which requires registration".

262 *FARA*, §616(a).

categories of information that registrants are required to include in their registration statements under §612(a)²⁶³. The Attorney General must make each registration statement and update available over the Internet "as soon as technically practicable after" it is filed²⁶⁴. In addition, copies of any informational materials distributed on behalf of a foreign principal that are provided to the Attorney General pursuant to §614(a) "shall be available for public inspection"²⁶⁵ – that is, informational materials that must contain an "[i]dentification statement"²⁶⁶ within the materials akin to the disclosure required by s 38 of the *FITS Act*.

167 In response to the fact that the *FARA* is in different terms, the Commonwealth sought to characterise the disconnect between the *FITS Act* register and public website as "narrow", particularly on the basis that the gap would depend on the scope of the Secretary's powers to *lawfully* compel information and documents under ss 16(2)(d) and 39(2)(d). While this is a factor that will contribute to the degree of disconnect²⁶⁷, it is not the only relevant factor. Although it is not possible to identify the precise degree of disconnect, evidently the disconnect is not illusory.

168 The nature of the information and documents provided both by registrants and by other members of the public either voluntarily or in response to what would be an ordinary and lawful exercise of power by the Secretary may result in a significant divergence between the register and the public website. The following examples illustrate this point.

169 First, pursuant to s 16(2)(d), the Secretary may ask a person who wishes to lodge a registration application to provide "any information or documents" that would assist the Secretary to understand the nature of the relationship between the person and the foreign principal. The person may (but need not necessarily) respond by providing extensive information and documents about the relationship (such as contemporaneous records of meetings between the person and the foreign

263 *FARA*, §616(d)(1).

264 *FARA*, §616(d)(2).

265 *FARA*, §614(c).

266 *FARA*, §614(b).

267 See *Johns* (1993) 178 CLR 408 at 423, citing *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225 at 234; see also 424, 436, 453, 458, 468; *Katsuno v The Queen* (1999) 199 CLR 40 at 57 [24]; see also 50 [2], 65 [54], 87-88 [110]-[111]. See also *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 186-187.

principal, financial transactions, and correspondence between the person and the foreign principal) simply because they wish to make it apparent why the relationship is legitimate. Every supporting document provided must be placed on the register²⁶⁸, but only the particular information falling within s 43(1) of the *FITS Act* and s 6 of the *FITS Rules* would be placed on the website (namely, specific information about the person and the foreign principal and information about the registrable activities).

170 Second, the Revised Explanatory Memorandum to the *Foreign Influence Transparency Scheme Bill 2017* (Cth) explained that s 42(3)(c) (which requires that any other information or documents that the Secretary considers appropriate be included on the register) was intended to apply to information or documents that "are relevant to the scheme's management and administration"²⁶⁹. It gives the following example of the kind of information that may be relevant:

"Person A ... emails the Secretary to provide information about Person B, who Person A suspects is undertaking registrable activities on behalf of foreign principal X. If, upon investigation, scheme officials conclude that Person B may be required to register under the scheme, and Person B does so and information is made available on the register relating to Person B's application, the Secretary may consider it appropriate to also include the email from Person A on the register, subject to privacy considerations."

The original email from Person A was not in response to a notice issued by the Secretary compelling information or documents. It does not, therefore, raise any question about the Secretary's powers to lawfully compel information. It would be placed on the register if the Secretary considered it "appropriate" to do so²⁷⁰, but there would not appear to be any basis for placing it on the public website.

171 Third, the Secretary may issue a notice under s 46 of the *FITS Act* compelling a registrant to produce any "information" or "documents" that they are required to keep records of pursuant to s 40 on the basis that the Secretary "reasonably believes" the person has entered into a new registrable arrangement with the foreign principal. In response to the notice, the person may provide a range of information and documents to establish why proposed activities fall within an existing arrangement in respect of which the person is registered, including detailed information about "benefits provided to the person by the foreign

268 *FITS Act*, s 42(2)(b).

269 Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at 120 [674].

270 *FITS Act*, s 42(3)(c); see also s 42(2)(g).

principal", material forming part of a registrable communications activity, and the registrable arrangement²⁷¹. The registrant's response could be included on the register either as "a record of" communications between the person and the Secretary or as "other information or documents the Secretary considers appropriate"²⁷². There would not appear to be any basis for placing the response on the public website, although it may be necessary to "correct or update" information on the website having regard to information in the response²⁷³.

172 Fourth, as the Commonwealth acknowledged, certain of the information sought from LibertyWorks in a notice issued to it pursuant to s 45 of the *FITS Act* would not appear on the public website.

173 It is not necessary for present purposes to determine the extent to which it might be possible to narrow or eliminate the gap between the public website and non-public register by making rules for the purposes of s 43(1)(c) prescribing that all (or the vast majority) of the information and documents that must be on the register must be made publicly available. The *FITS Rules* as currently in force simply do not do that and a large degree of disconnect presently exists.

174 A real question remains, however, whether rules requiring that information of such breadth be made publicly available would be valid under s 71(1) of the *FITS Act* as either "required or permitted by" s 43(1)(c) or "necessary or convenient to be prescribed for carrying out or giving effect to" the *FITS Act*. Regulations or rules made pursuant to a statute may not "vary or depart from the positive provisions made by" the authorising statute or "go outside the field of operation which the Act marks out for itself"²⁷⁴. It would be surprising if it were possible to make rules that could effectively circumvent Parliament's evident intent, reflected in the text of the *FITS Act*, to create two separate repositories of scheme information, with the publicly available information being of a more limited kind.

271 See *FITS Act*, s 40(2)(b)-(d).

272 *FITS Act*, s 42(2)(e) and (g).

273 *FITS Act*, s 44.

274 *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410. See also *Toohey* (1981) 151 CLR 170 at 187; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 77 [174]. And see *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 205-206, 258, 263.

Burden

175 The legal and practical operation of the impugned provisions in respect of registrable communications activity undertaken on behalf of a foreign principal effects a substantial burden on the implied freedom of political communication²⁷⁵.

176 It is important to recall that the impugned provisions are not limited to circumstances where a person is acting as an agent for, in the service of, on the order or at the request of, or under the direction of a foreign government, a foreign government related entity or a foreign government related individual. The impugned provisions apply to a person who has an arrangement with a foreign organisation that exists primarily to pursue political objectives. And the legal effect and practical operation of the impugned provisions focusses on persons connected with a foreign principal who want to communicate about political matters whether or not the views to be expressed by the registrant are aligned with the views or interests of the foreign principal.

177 The requirement to disclose the fact of a relationship with a foreign principal within a registrable communications activity²⁷⁶ is a direct regulation of political speech²⁷⁷. Although the disclosure requirement is content neutral²⁷⁸, as it "applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech"²⁷⁹, because every registrable communications activity must contain prescribed information about the relationship between the person and the foreign principal.

178 But the *FITS Act* goes further – there is burden upon burden. The Commonwealth acknowledged that the effect of s 57 of the *FITS Act* is that "certain persons *cannot lawfully engage* in certain types of political communication if they knowingly or recklessly fail to register" (emphasis added).

275 *FITS Act*, s 21(1), table item 3.

276 *FITS Act*, s 38; *Disclosure Rules*, Pt 2.

277 *McIntyre v Ohio Elections Commission* (1995) 514 US 334 at 345-346; *Buckley v American Constitutional Law Foundation Inc* (1999) 525 US 182 at 209. See also *Coleman* (2004) 220 CLR 1 at 30 [27]; *Hogan* (2011) 243 CLR 506 at 555-556 [95]-[96]; *Wotton* (2012) 246 CLR 1 at 16 [30], 30 [78].

278 See *Brown* (2017) 261 CLR 328 at 414 [273]-[274], 415 [276], but cf 389 [199], 390 [202]; *Clubb* (2019) 267 CLR 171 at 197 [55], 213 [123], 227 [170], 230 [180], 232 [182], 301 [375]; *Banerji* (2019) 267 CLR 373 at 420 [90].

279 *McIntyre* (1995) 514 US 334 at 345 (footnote omitted).

But the burden is even more significant. The provisions of the *FITS Act* – the registration obligations²⁸⁰; the associated obligations to provide information and documents to the Secretary and to keep records²⁸¹; the criminal consequences for failing to register or comply with obligations²⁸²; the gap between the scheme information made publicly available²⁸³ and the scheme information kept on the non-public register maintained by the Secretary²⁸⁴; and the possibility that information obtained under the scheme may be communicated to law enforcement bodies²⁸⁵ – are likely, in practice, to have significant deterrent effects on a person who would otherwise engage in legitimate and lawful political communication²⁸⁶. The potential to deter general political discussion between ordinary members of the public is real. This is not a new concern. In *McIntyre v Ohio Elections Commission*²⁸⁷, the Supreme Court of the United States expressed concern about the deterrent effects of a law requiring the identification of information about a person who distributed campaign literature because the provisions applied "not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources".

179 It is not just a burden on political communication, but a burden imposed *before* a person communicates. In this sense, the *FITS Act* imposes what might be

280 *FITS Act*, ss 16 and 18.

281 *FITS Act*, ss 16(2)(d), 34(3)(d), 36(3)(d), 37(5)(d), 39(2)(d), 40. The Commonwealth accepted that "the level of the burden is connected to" what information and documents may be required by the Secretary, but said that the information that may be required "is not disproportionately burdensome".

282 *FITS Act*, ss 57 and 58. See *Brown* (2017) 261 CLR 328 at 357-358 [81], 359 [87], 460 [411], but cf 408-409 [259]. See also *Banerji* (2019) 267 CLR 373 at 403 [39].

283 *FITS Act*, s 43; *FITS Rules*, s 6.

284 *FITS Act*, s 42.

285 *FITS Act*, s 53.

286 See *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 301; see also 341. See also *Federal Election Commission v Massachusetts Citizens for Life Inc* (1986) 479 US 238 at 253-255, especially at 254; *Citizens United v Federal Election Commission* (2010) 558 US 310 at 337-338.

287 (1995) 514 US 334 at 351. See also *United States v Rumely* (1953) 345 US 41 at 46.

described as a prior restraint²⁸⁸ on "communications activity". The operation of the impugned provisions in respect of registrable "communications activity" is apt to result, in practice, in an immediate "freeze" on political communications²⁸⁹, "prevent[ing] speech from ever occurring"²⁹⁰. Although the *FITS Act* does not impose a "legal sanction" on engaging in political communication, the burden is significant or severe because "[t]he finger of government leveled against" registrants "is ominous"; "the spectre of a government agent will look over the shoulder" of those who register under the scheme²⁹¹.

180 The present case is illustrative of the breadth of the burden²⁹². The Secretary issued a notice under s 45 of the *FITS Act* requiring LibertyWorks to provide, among other things, documents that would plainly identify the names of participants, and speakers, at the CPAC Australia event. Such a disclosure could discourage persons from participating in political discussion out of fear that their political views (especially if controversial) may be made public, or conveyed to law enforcement bodies, and have consequences for them²⁹³. It may be inferred from the facts of the amended special case that the issuing of a s 45 notice to LibertyWorks resulted in a reluctance on the part of members of the Australian community to speak at and attend the CPAC Australia event (and therefore participate in legitimate political communication). The Commonwealth submitted that the possibility that disclosure of the identities of persons who are planning to speak at a CPAC Australia event would deter their participation is irrelevant

288 See Blackstone, *Commentaries on the Laws of England*, 2nd ed (rev) (1879), bk 4, ch 11 at 151-152: "freedom of the press" is defined as the right to be free from previous restraints. See also *Cunliffe* (1994) 182 CLR 272 at 299-300, 301, 341; *Levy v Victoria* (1997) 189 CLR 579 at 595; *Wotton* (2012) 246 CLR 1 at 15 [28]; *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1 at 62 [133]. cf *Communist Party of the United States v Subversive Activities Control Board* (1961) 367 US 1 at 172.

289 cf *Nebraska Press Assn v Stuart* (1976) 427 US 539 at 559.

290 Chemerinsky, *Constitutional Law: Principles and Policies*, 3rd ed (2006) at 954.

291 *Rumely* (1953) 345 US 41 at 57.

292 cf *Clubb* (2019) 267 CLR 171 at 228 [172].

293 See, eg, *Rumely* (1953) 345 US 41 at 57-58; *National Association for the Advancement of Colored People v Alabama* (1958) 357 US 449 at 462-463; *Bates v City of Little Rock* (1960) 361 US 516 at 523-524; *Shelton v Tucker* (1960) 364 US 479 at 485-489; *Gibson v Florida Legislative Investigation Committee* (1963) 372 US 539 at 555-557.

because "the whole point of the transparency regime is to reveal the[se] kinds of connections between people and foreign political actors". That submission does not address the fact that the persons who may be dissuaded from engaging in political communication include persons whom the *FITS Act* is *not* intended to regulate – namely, participants who are not registrants or liable to register.

181 It is true that the burden applies to a "subset" of political communication, insofar as the principal burden is on political communication undertaken "on behalf of" a foreign principal (not communications undertaken purely by a person on their own behalf or communications made directly by a foreign principal). However, as Deane and Toohey JJ observed in *Australian Capital Television Pty Ltd v The Commonwealth*²⁹⁴, "the fact that the number of groups or individuals who might wish to express their political views in a particular way is limited, does not suffice to justify a law suppressing the freedom of communication in that particular way". Nettle J similarly observed in *McCloy v New South Wales*²⁹⁵ that "[i]t would be wrong to conclude ... that, just because [impugned] provisions affect only a small section of the electorate, they can have only a small effect on the implied freedom".

182 The impugned provisions effect a substantial burden on general "public discussion ... of the views of all interested persons, groups and bodies and ... public participation in, and access to, that discussion" – matters which are fundamental to our system of government²⁹⁶. In their operation in relation to registrable communications activity, the impugned provisions regulate general political discussion of the broadest kind between members of the public (as well as to political representatives) and are likely, in practice, to have significant deterrent effects on persons who would otherwise engage in legitimate and lawful political communication. A burden of this kind requires a compelling justification²⁹⁷.

Legitimate purpose

183 To answer the second question – whether the purpose of the *FITS Act* is legitimate – it is necessary to identify the "true purpose" of the statute by

294 (1992) 177 CLR 106 at 175.

295 (2015) 257 CLR 178 at 265 [244].

296 *ACTV* (1992) 177 CLR 106 at 139.

297 *Brown* (2017) 261 CLR 328 at 477-478 [478]; *Clubb* (2019) 267 CLR 171 at 232 [183].

"ordinary processes of construction"²⁹⁸, having regard to "the text, the context and, if relevant, the history of the law"²⁹⁹. The purpose is "not what the law does in its terms but what the law is designed to achieve in fact"³⁰⁰. It 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 directed³⁰¹.

184 A "legitimate purpose" is one which is "compatible with the system of representative and responsible government established by the *Constitution*"³⁰², in the sense that it "does not impede the functioning of that system and all that it entails"³⁰³. As has been observed, the Commonwealth accepted that the purpose of the *FITS Act* is to minimise the risk of foreign principals exerting *undisclosed influence* upon the integrity of Australia's political or election processes. That purpose is not only compatible with the system of representative and responsible government, it also seeks to preserve and enhance that system³⁰⁴. The legitimacy of the purpose is supported by the materials in the amended special case, which make clear that *undisclosed* foreign influence can impede the ability of the Australian public and decision-makers to make informed decisions because it can deny those persons proper visibility over what interests are being advanced and by whom. But, as explained, the impugned provisions go well beyond the legitimate purpose of the *FITS Act*.

298 *Brown* (2017) 261 CLR 328 at 362 [96]. See also *Unions No 1* (2013) 252 CLR 530 at 557 [50].

299 *Brown* (2017) 261 CLR 328 at 432 [321].

300 *Brown* (2017) 261 CLR 328 at 392 [209]; see also 432-433 [322]. See also *McCloy* (2015) 257 CLR 178 at 232 [132]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171] ("*Unions No 2*").

301 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 394 [178]; *McCloy* (2015) 257 CLR 178 at 232 [132]; *Brown* (2017) 261 CLR 328 at 363 [101], 391-392 [208], 432 [321]; *Unions No 2* (2019) 264 CLR 595 at 657 [171].

302 *McCloy* (2015) 257 CLR 178 at 231 [130].

303 *McCloy* (2015) 257 CLR 178 at 203 [31]. See also *Coleman* (2004) 220 CLR 1 at 50-51 [92]-[96], 78 [196], 82 [211]. cf *Palmer v Western Australia* (2021) 95 ALJR 229 at 269 [197]; 388 ALR 180 at 227-228.

304 See *McCloy* (2015) 257 CLR 178 at 208 [47]; *Banerji* (2019) 267 CLR 373 at 423 [100], 438 [153].

Impugned provisions impermissibly burden the implied freedom

185 LibertyWorks' challenge to definitions within ss 10, 11, 12, 13, 13A and 14 of the *FITS Act* should be rejected. Generally speaking, and subject to contrary intent, definitions within an Act do not enact "substantive" law³⁰⁵. In other words, they are not provisions with any operative effect; they simply provide an aid to the construction of the substantive provisions in an Act. No contrary intent may be discerned from the *FITS Act*. Consequently, the impugned *definitional* provisions (albeit central to the operation of the *FITS Act*) may only be challenged to the extent that they contribute to invalidity of the operative provisions and, even then, they may only be challenged insofar as they are relevant to the application of those provisions to LibertyWorks³⁰⁶. It is necessary to address the validity of the operative impugned provisions.

186 Parliament can, consistently with the implied freedom of political communication, require the "registration" of certain persons who seek to influence political processes as an intermediary for a foreign principal and require that such persons disclose, in their political communications, that they are acting on behalf of a foreign principal. However, Parliament's ability to regulate such persons is subject to limits.

187 Where a person, like LibertyWorks, "undertakes" "communications activity" on behalf of a foreign principal for the purpose of political or governmental influence, the impugned provisions are not tailored to achieve the legitimate end of minimising the risk of foreign principals exerting *undisclosed influence* upon the integrity of Australia's political or election processes. The impugned provisions overreach and are not justified.

188 The gap between the information disclosed by a registrant who has engaged in, or proposes to engage in, a registrable "communications activity" which is made publicly available on the website, and the information and documents disclosed by a registrant but kept on the non-public register maintained by the Secretary (and which may be made available to law enforcement bodies), cannot be explained. As LibertyWorks submitted, the acquisition of information that is not made public does "nothing for ... the sunshine purpose of the [*FITS Act*]". The scheme information kept on the non-public register is not directed at,

305 *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 at 635; *Kelly v The Queen* (2004) 218 CLR 216 at 245 [84], 253 [103]; *Moreton Bay Regional Council v Mekpine Pty Ltd* (2016) 256 CLR 437 at 451 [61].

306 *Knight* (2017) 261 CLR 306 at 324-325 [32]-[33]; *Clubb* (2019) 267 CLR 171 at 192-193 [32]-[36], 216-217 [135]-[138], 248-249 [230], 287 [329].

and cannot be directed at, the identified legitimate purpose. Although the disconnect between the non-public register and the public website required explanation, no "'substantial relation' between the governmental interest and the information required to be disclosed"³⁰⁷ but not made public was identified³⁰⁸, let alone established, by the Commonwealth. No other, wider purpose than to minimise the risk of foreign principals exerting *undisclosed influence* upon the integrity of Australia's political or election processes was said by the Commonwealth to be pursued. To the extent the Commonwealth suggested that the "detail" regarding the difference between the non-public register and the public website is not relevant to the constitutional question in this case, that must be rejected. The question is whether the *FITS Act* can validly impose *this registration regime* in pursuit of the identified legitimate purpose. It cannot.

189 A non-public register does nothing to minimise the risk of *undisclosed influence*. It does the opposite. A non-public register is in darkness, not sunlight. Put in different terms, there is no rational connection between the non-public information stored on the register and the purpose of the *FITS Act* – minimising the risk of foreign principals exerting *undisclosed influence* upon the integrity of Australia's political or election processes.

190 And, to that extent at least, the impugned provisions are unnecessary. The *FITS Act* contains within it two sets of provisions which are directed at the stated purpose and achieve the stated objective. First, registration, accompanied by the creation of a public website with prescribed contents, is directed at the identified legitimate purpose of minimising the risk of foreign principals exerting *undisclosed influence* upon the integrity of Australia's political or election processes and is justified. It discloses the fact of the influence, how the influence is effected and by whom and through whom. The gathering of scheme information and storing it on a non-public register does not. Second, the requirement, irrespective of registration, to disclose a connection to a foreign principal in each prescribed communication is directed at the identified legitimate purpose and is justified.

191 The disconnect – the gap – between the two repositories of scheme information, and its consequences, cannot be justified in relation to registrable "communications activity". To that extent, at least, the impugned provisions overreach any legitimate purpose and are not necessary. The impugned provisions are invalid in their operation with respect to registrable "communications activity".

307 *Buckley v Valeo* (1976) 424 US 1 at 64 (footnote omitted).

308 *McCloy* (2015) 257 CLR 178 at 201 [24]; *Brown* (2017) 261 CLR 328 at 370 [131]; *Unions No 2* (2019) 264 CLR 595 at 616 [45], 632 [95]-[96].

The *FITS Act* is invalid to the extent that "communications activity" is a registrable activity within s 21(1), table item 3, on the basis that it infringes the implied freedom of political communication. The requirement, irrespective of registration, to disclose a connection to a foreign principal in a communications activity is directed at the identified legitimate purpose and is justified. As the Commonwealth submitted, s 38(1)(c) should be read and construed³⁰⁹ to mean "the communications activity is in Australia and is for the purpose of political or governmental influence".

Answers

192 For those reasons, the questions stated for the opinion of the Full Court in the amended special case should be answered as follows:

1. Is the [*FITS Act*] invalid, to the extent it imposes registration obligations with respect to communication[s] activities, on the ground that it infringes the implied freedom of political communication?

Answer: Yes, the *FITS Act* is invalid to the extent that "communications activity" is a registrable activity within s 21(1), table item 3, on the basis that it infringes the implied freedom of political communication.

Section 38(1)(c) should be read and construed to mean "the communications activity is in Australia and is for the purpose of political or governmental influence".

2. In light of the answer[] to question 1, what relief, if any, should issue?

Answer: Unnecessary to answer.

3. Who should pay the costs of and incidental to this special case?

Answer: The defendant.

309 *Acts Interpretation Act*, s 15A.

EDELMAN J.

Introduction

193 In this special case, the plaintiff, LibertyWorks Inc, challenged part of the *Foreign Influence Transparency Scheme Act 2018* (Cth) ("the FITS Act"). Its challenge, as it repeatedly confirmed in oral submissions, was limited to the operation of the FITS Act upon "communications activity", being a registrable activity as specified in item 3 of the table in s 21(1). That item, together with associated provisions in the FITS Act, regulates communications activity that is undertaken in Australia "on behalf of" a foreign principal for the purpose of political or governmental influence. The regulation involves a suite of obligations on those who undertake such communications activities, including registration obligations prior to the proposed communication, ongoing reporting obligations, disclosure obligations at the time of communication, record keeping obligations, and renewal of registration obligations.

194 The background and relevant legislative provisions are described in detail in other judgments. I agree with the conclusions of Kiefel CJ, Keane and Gleeson JJ, with their Honours' reasons concerning the legitimacy of the purpose of the FITS Act, and with their use of structured proportionality as the test for validity. However, I take a different approach to the burden imposed by the FITS Act upon political communication.

195 In my view, although the burden imposed by the communications activity provision, being item 3 of the table in s 21(1), and its associated provisions is not excessive it is still a substantial burden upon political communication. It can be accepted that the class of persons who are exposed to the burden is limited to those having a particular connection with a foreign principal. But that class is not as narrow as persons who are genuine agents of a foreign principal. And within that class of persons, the burden is deep. The communications activity upon which the FITS Act focuses is defined in broad terms. It targets the speakers as well as their speech. The effect of the FITS Act upon political communication is not merely incidental: it focuses specifically upon communication for the purpose of political or governmental influence. It operates as a constraint prior to communication, at the time of communication, and after communication by requiring disclosure of a variety of information which can be provided to numerous revenue and law enforcement authorities. It requires records to be kept for up to ten years.

196 During oral argument, the Court raised with the parties two particular respects in which provisions of the FITS Act might arguably impose a burden upon political communication beyond that which is justified. The first of those respects is those provisions concerned with communications made "on behalf of" a foreign

principal³¹⁰ extending beyond communications as an agent or representative of the foreign principal. The second is those provisions that require information to be provided to the Secretary of the Attorney-General's Department ("the Secretary") for the purposes of registration and which empower the Secretary to put the information on a public website and disclose any of it to a range of authorities³¹¹. LibertyWorks had not sought, and did not seek, to challenge any of these provisions directly. Many of them were not even challenged indirectly. As senior counsel for LibertyWorks said on at least four occasions in oral submissions, the provisions that were challenged indirectly were only challenged in their operation in respect of registrable communications activity³¹². Hence, no submissions were made concerning whether the scheme, in these two particular respects, was suitable, reasonably necessary, or adequate in the balance.

197 If LibertyWorks had brought a direct challenge to any provisions other than the communications activity provision then it would likely have been met by a response from the Commonwealth that s 15A of the *Acts Interpretation Act 1901* (Cth) would permit reading down of³¹³, or severance of part of³¹⁴, the meaning of those provisions, or that those open-textured provisions³¹⁵ could be disapplied in their operation to the extent of the invalidity that would otherwise arise. In the absence of such challenge, all provisions other than the communications activity provision fall to be considered only as part of the consideration of the interpretation and operation of the communications activity provision, to assess whether the associated burden on political communication can be justified.

198 For the reasons below, the communications activity provision is at the core of the Act. It is a provision with a legitimate purpose that is a matter of the highest government policy. Although the communications activity provision, and associated provisions, impose a substantial burden on political communication,

310 Particularly s 11, when read with the definitions in s 10 of "arrangement", "foreign political organisation", "foreign principal", and "influence".

311 Particularly ss 16, 34, 42, 43, 53.

312 The provisions challenged as part of its challenge to item 3 of the table in s 21(1), and identified in LibertyWorks' written submissions, were certain definitions in s 10, and ss 11-14, 16, 18, 37, 39, 57, 58-59.

313 Particularly FITS Act, s 10, definition of "arrangement".

314 Particularly FITS Act, s 42(2).

315 Particularly FITS Act, ss 16(2)(d), 34(3)(d), 39(2)(d).

that burden is justified. The provisions regulating registrable communications activity are suitable, reasonably necessary, and adequate in the balance.

Structured proportionality analysis

199 The parties and the interveners proceeded upon the now accepted approach for analysing whether legislative provisions are incompatible with the freedom of political communication that is implied from the text and structure of the *Constitution*. In a compelling recent dissection of arguments against structured proportionality, it was observed by reference to its (arguably³¹⁶) German origins that "one is left with a lingering sense that proportionality is disliked because it is *foreign*"³¹⁷. The modern acceptance of multi-jurisdictional, interconnected learning means that we no longer see the world through eyes with which "[w]e are so self-satisfied with our own customs" that "we cannot bring ourselves to believe it possible that a foreigner should in any respect be wiser than ourselves"³¹⁸.

200 In contrast with a vague, ad hoc application which purports directly to apply the triple uncertainty in the phrase "reasonably appropriate and adapted", a structured proportionality analysis provides a transparent manner in which to determine whether a law which burdens political communication for some legitimate purpose has contravened the implied freedom of political communication. Structured proportionality sets out three tests which such a law must meet in order for its burden upon political communication to be justified: (i) suitability; (ii) reasonable necessity; and (iii) adequacy in the balance. Each of the three tests reflects the roots of the freedom of political communication as an implication derived as a matter of necessity from the text and structure of the *Constitution*: "[t]he nature and extent of the freedom is governed by the necessity which requires it"³¹⁹. If the three tests were thought to be incomplete, no coherent fourth test has ever been enunciated, nor a need for it explained, by any critic of proportionality. Nor has it been explained why flexibility is needed: (i) to permit any law which fails one of the three tests nevertheless to be valid; or (ii) to invalidate any law despite its burden on political communication being suitable, reasonably necessary, and adequate in the balance. There remains flexibility within

316 Compare *Clubb v Edwards* (2019) 267 CLR 171 at 331-332 [465]-[466].

317 Carter, "Moving Beyond the Common Law Objection to Structured Proportionality" (2021) 49 *Federal Law Review* 73 at 94 (emphasis in original).

318 Trollope, *Orley Farm* (1862), vol 1 at 141.

319 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 350 [27]. See also at 361 [66].

each test and scope for development of the factors that will influence the application of it.

201 The nature and extent of the freedom cannot be determined independently of the representative democracy considerations that underpin the very reason for the implication. Each stage of structured proportionality is therefore shaped so as to be consistent with those considerations. As to the first stage, "suitability", a provision will rarely fail for lacking rational connection with the legitimate purpose of Parliament for the obvious reason that Parliament's purpose is itself ascertained and derived in part from the expected operation of the provision. Unless the provision is truly arbitrary, serving no purpose at all, a conclusion that a provision has no rational connection with its legitimate purpose – ie that the means employed are incapable of realising its ostensible purpose³²⁰ – will usually mean that Parliament has misstated its purpose. And the third stage, "adequacy in the balance", is only reached once it has been concluded that the provision is a reasonably necessary means of achieving the legitimate purpose³²¹. Hence, a conclusion that a provision is inadequate in the balance will often mean that Parliament is entirely precluded from achieving its legitimate policy objective. For an implication founded upon representative democracy, this would be a remarkable outcome. As I have explained previously, invalidation of a law at this third stage should only occur in extreme cases where the purpose is trivial when compared with the great burden that the law places upon political communication³²².

202 In most cases, the heartland of the dispute in the application of structured proportionality will be at the second stage of that analysis, "reasonable necessity". As will be seen below, this case is no exception. The test of reasonable necessity remains capable of further development and refinement, including the manner in which it applies to different categories of case. But it must be a test which caters for the constitutional feature of representative democracy. It is not merely sufficient to identify a law which could achieve the Parliament's purpose to the same degree but with a lesser burden upon political communication. The presence of adjectives such as "obvious" or "compelling" in the descriptions of such

320 *Comcare v Banerji* (2019) 267 CLR 373 at 400 [33] and the cases footnoted.

321 *Clubb v Edwards* (2019) 267 CLR 171 at 268 [274], 330-331 [463], 334 [470]. See also *Palmer v Western Australia* (2021) 95 ALJR 229 at 285 [267], 287 [275]; 388 ALR 180 at 248, 250.

322 *Clubb v Edwards* (2019) 267 CLR 171 at 341-343 [491]-[495]. See also *Palmer v Western Australia* (2021) 95 ALJR 229 at 285 [267]; 388 ALR 180 at 248.

alternatives allows latitude for parliamentary choice in the implementation of public policy³²³.

The legitimate purpose of the FITS Act's regulation of registrable communications activity

203 To ask whether the purpose of a legislative provision is constitutionally illegitimate is to ask only whether the purpose contravenes an express or implied constitutional prohibition. When the enquiry is made in the context of the implied freedom of political communication, the question is whether the purpose of the provision, as opposed to its effect, is to impede freedom of political communication³²⁴. Where one of the very objects of Parliament is to burden political communication, the purpose is not "compatible with the maintenance of the constitutionally prescribed system of representative and responsible government" and it is therefore illegitimate³²⁵.

204 It is essential to identify at the appropriate level of generality the purpose of the communications activity provision making registrable those communications activities undertaken on behalf of a foreign principal. One relevant source for identification of that purpose is the objects of the FITS Act itself. That said, the objects of the Act cannot be conclusive of the purpose³²⁶, nor are they necessarily at the appropriate level of generality since the purposes of the

323 See *Monis v The Queen* (2013) 249 CLR 92 at 214 [347]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 211 [58], 217 [81], 270 [258], 285-286 [328]; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139], 418 [282]; *Clubb v Edwards* (2019) 267 CLR 171 at 270 [277], 337 [478], 339 [484]; *Comcare v Banerji* (2019) 267 CLR 373 at 401 [35], 452-453 [194]; *Palmer v Western Australia* (2021) 95 ALJR 229 at 285 [265], 286 [271]; 388 ALR 180 at 248, 249.

324 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657-660 [173]-[178]; *Clubb v Edwards* (2019) 267 CLR 171 at 327 [454]; *Comcare v Banerji* (2019) 267 CLR 373 at 452 [191]. See also *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31]; *Clubb v Edwards* (2019) 267 CLR 171 at 194 [44].

325 *Brown v Tasmania* (2017) 261 CLR 328 at 364 [104], 376 [156], 416 [277], 432 [319]-[320]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 655 [165].

326 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.

whole legislation can often be cast at a higher level of generality than the particular purposes of its disparate parts³²⁷.

205 The *Foreign Influence Transparency Scheme Bill 2017* (Cth) ("the FITS Bill") was introduced in December 2017 as part of a package of three Bills, two introduced in the House of Representatives and one in the Senate. They were introduced following statements by the Director-General of the Australian Security Intelligence Organisation that "the threat from espionage and foreign interference is 'unprecedented'"³²⁸. When introducing one of the Bills into the House of Representatives, the then Prime Minister said that any one of the three pieces of legislation "would mark an enormous improvement in our ability to counter foreign interference" and that they were "interlocking components. All are important and none will fully succeed without the others."³²⁹

206 The two Bills that were considered "cognately"³³⁰ by the House of Representatives were the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth) and the FITS Bill. The third Bill, introduced in the Senate, was the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (Cth). Together, the three Bills were part of a "Counter Foreign Interference Strategy", with four pillars: sunlight, enforcement, deterrence, and capability. Of these four core purposes in the cognate legislation, "sunlight is at the very centre"³³¹. That object of "sunlight", or transparency, was set out in s 3 of the FITS Act as the basis 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".

207 Descending to the particularity of the communications activity provision, item 3 of the table in s 21(1), the Revised Explanatory Memorandum to the FITS Bill said that it was "essential that there is transparency" for communications

327 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [172].

328 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13148.

329 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13149.

330 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 June 2018 at 6351-6352.

331 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 December 2017 at 13148.

activity on behalf of a foreign principal to allow "the person, the public or a section of the public to assess the interests which are being represented by the person undertaking the communications activity"³³². That transparency is needed because³³³:

"Decision-makers in the Australian Government and the public should know what interests are being advanced in respect of a particular decision or process. However, it is difficult to assess the interests of foreign actors when they use intermediaries to advance their interests through activities such as lobbying or communication of information or material. When the relationship between the foreign actor and the intermediary is concealed, the ability to assess the interests being brought to bear on a particular decision or process is limited and ultimately undermines the ability of the decision-maker and the public to evaluate and reach informed decisions on the basis of those representations."

208 In short, the purpose of regulating registrable communications activity is to make transparent, to government decision-makers and to members of the public, the nature and extent of foreign interests that are involved in political communication. It does so by imposing a "spotlight of pitiless publicity"³³⁴. LibertyWorks properly accepted that this purpose was legitimate. As I explain later in these reasons, the purpose is not merely consistent with freedom of political communication, it is a purpose that reinforces the freedom despite doing so by burdening some political communication.

The extent of the burden upon political communication

209 There are a number of difficulties involved in the evaluation of the extent of a burden that is placed on political communication. One difficulty is that the evaluation sometimes depends upon reaching conclusions of fact, and the drawing of inferences, beyond the stated case but without the benefit of the usual rules of evidence³³⁵. Another difficulty with an overall assessment of the burden is that the evaluative process requires consideration of two different dimensions to a

332 Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at 72 [401].

333 Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at 2 [3].

334 *Meese v Keene* (1987) 481 US 465 at 487, quoting HR Rep No 1381, 75th Cong, 1st Sess (1937) at 2.

335 *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280 at 292.

burden³³⁶. There is a dimension of breadth, which is concerned with the scope of the burden: how much political communication, between how many people, is affected by the law? There is also a dimension of depth, which is concerned with how deeply the burden is felt.

210 An evaluation of the burden that a law places on political communication must be undertaken across the dimensions of both depth and breadth. For instance, a law which prohibited for ten years, by sanction of imprisonment, any political communication by Cabinet Ministers in favour of a particular political position on a single, narrow subject would affect only a tiny proportion of the Australian population and only a small subset of political communication. The breadth of the burden, based upon the number of people and extent of communication affected, might be found to be very narrow. But the depth of the burden might be found to be enormous.

Breadth of the burden

211 At first blush, the burden imposed by the communications activity provision and its associated provisions appears reasonably narrow. The burden extends only to those who communicate "on behalf of" a foreign principal and "for the purpose of political or governmental influence". If the words "on behalf of" in s 11 of the FITS Act were used in their well-established legal sense then the class of persons affected by the communications activity provision would be limited to those speakers who engaged in communications only as agents for foreign principals. But the concepts of "foreign principal" and "on behalf of" are defined in much broader terms.

212 A "foreign principal", as defined in the FITS Act, is not merely a foreign government or a foreign government related entity in the ordinary sense of those terms. For instance, "foreign principal" extends also to any "foreign organisation that exists primarily to pursue political objectives"³³⁷ and any company in which such a foreign organisation holds more than 15% of the issued share capital³³⁸. It also extends to individuals within those organisations or companies, who are not

336 *Clubb v Edwards* (2019) 267 CLR 171 at 337-338 [480].

337 FITS Act, s 10, definitions of "foreign principal" and "foreign political organisation".

338 FITS Act, s 10, definitions of "foreign principal", "foreign government related entity", and "foreign political organisation".

Australian citizens or permanent Australian residents, who are obliged to act in accordance with the organisation's or company's directions³³⁹.

213 As to the definition of "on behalf of" a foreign principal, as Steward J explains³⁴⁰, this definition is not confined to those who speak "on behalf of" foreign principals as agents in any true sense. The extended definition of "on behalf of"³⁴¹ in the FITS Act includes undertaking an activity under an "arrangement of any kind, whether written or unwritten", and thus the literal terms of the definition extend beyond arrangements in the true sense of agency. That true sense describes authorised acts which change legal relations by being done on behalf of another person and for the benefit of, and thus attributable to, that other person³⁴². By contrast, an act done "under" an "arrangement of any kind" is capable of extending to acts done under contract or even under "some consensus as to what is to be done"³⁴³. The FITS Act thus appears to redefine, and expand, the long-established concept of agency³⁴⁴.

214 With the extended meanings of "foreign principal" and "on behalf of", and without any reading down or severance of those meanings, or disapplication of their operation, the regulation of registrable communications activity is not as

339 FITS Act, s 10, definitions of "foreign principal", "foreign government related entity", "foreign political organisation", and "foreign government related individual".

340 At [266].

341 Especially s 11(1)(a)(i), read with s 10, definition of "arrangement".

342 *Northern Land Council v Quall* (2020) 94 ALJR 904 at 920 [77]; 383 ALR 378 at 397. See also *Petersen v Moloney* (1951) 84 CLR 91 at 94; *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652; *Scott v Davis* (2000) 204 CLR 333 at 408 [227]; *Australian Competition and Consumer Commission v Flight Centre Travel Group Ltd* (2016) 261 CLR 203 at 215 [15]; Watts and Reynolds, *Bowstead and Reynolds on Agency*, 22nd ed (2021) at 4-5 [1-005], 22-23 [1-027].

343 *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* (2020) 275 FCR 342 at 354 [60].

344 Compare the *Foreign Agents Registration Act of 1938* (22 USC §§611-621), §611(c), and the criticisms of the expanded meaning given in *Attorney General of the United States v Irish Northern Aid Committee* (1982) 668 F 2d 159: Law, "The Foreign Agents Registration Act: A New Standard for Determining Agency" (1983) 6 *Fordham International Law Journal* 365.

confined as the ordinary notion of "on behalf of a foreign principal" might suggest. Two examples can be given.

215 One example concerns academic researchers. A conscious choice was made not to include them within the exemptions contained in Div 4 of Pt 2; no exemption was made for universities, academics, or research institutes³⁴⁵. The regulation of registrable communications activity might, therefore, extend to communications by academic researchers in Australia whose public research output is conducted with funding from any company in which more than 15% of the issued share capital is held by a foreign organisation that exists primarily to pursue political objectives³⁴⁶. If the funding of those communications meant that they were undertaken "under an arrangement" then they would be registrable communications activities if the academic had a substantial purpose to "affect in any way"³⁴⁷ a section of the public, such as an academic audience, in relation to processes in relation to a federal government decision³⁴⁸.

216 Another example is that the regulation of registrable communications activity might extend to the same communications by a multinational company in Australia, again with a shareholder that exists primarily to pursue political objectives if the shareholder has more than 15% of the issued share capital. Or, it might extend to the same communications by a wholly Australian company that is acting under an "arrangement" within the meaning in s 10 with a foreign company that exists primarily to pursue political objectives. Here, the regulation extends to LibertyWorks, a private think-tank and an incorporated association³⁴⁹ advocating for libertarian political positions, which has an arrangement with the American Conservative Union, in the form of holding annual Conservative Political Action Conferences in Australia.

217 Since LibertyWorks did not directly challenge the scope of the extended definition of "on behalf of", procedural fairness to the Commonwealth precludes this Court from considering whether the effect of that definition is an independent

345 Australia, Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 103 [4.144].

346 FITS Act, s 10, definitions of "foreign principal", "foreign government related entity", and "foreign political organisation".

347 FITS Act, s 10, definition of "influence".

348 FITS Act, ss 12(1)(b), 12(2).

349 See *Associations Incorporation Act 1981* (Qld), s 21.

reason for invalidity and, if so, the effect that this would have on the remainder of the FITS Act. As Steward J observes, a consideration of whether the definition is an independent reason for invalidity would also require consideration of whether it could be read down to apply only to its usual common law sense, a possibility that I consider to be at least open by a restrictive reading of "under" in s 11(1)(a)(i)³⁵⁰. Procedural fairness thus requires that the breadth of operation of "on behalf of" falls to be considered only as part of the breadth of the burden imposed by the communications activity provision and its associated provisions.

218 Apart from these expanded definitions, it is also relevant to the breadth of the burden imposed by the communications activity provision and its associated provisions that communications activity includes almost every sense of political communication by almost every means. As the Revised Explanatory Memorandum to the FITS Bill recognised, "communications activities can be very powerful in affecting the views and opinions of persons involved in Australia's political and governmental processes"³⁵¹. And the regulation of communications activity targets both speakers and speech³⁵².

Depth of the burden: the nature and extent of disclosure required

219 The depth of the burden prior to the communication, whilst significant, should not be overstated. The regulation of registrable communications activity under the FITS Act is not analogous with the United States notion of "prior restraint", a loose concept which has been said to provide an "impetus to distort doctrine in order to expand protection"³⁵³. The regulation of registrable communications activity does not "forbid" such activity³⁵⁴, nor does it restrain the activity by prohibiting its exercise without permission. It merely *constrains* political communication: there is nothing in the scheme under the FITS Act as it applies to registrable communications activity which directly or indirectly empowers any form of speech to be prohibited by anyone under any conditions.

350 See also FITS Act, ss 14(a), 14(b)(i).

351 Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at 72 [401].

352 See *Citizens United v Federal Election Commission* (2010) 558 US 310 at 341; *National Institute of Family and Life Advocates v Becerra* (2018) 138 S Ct 2361 at 2378.

353 Jeffries, "Rethinking Prior Restraint" (1983) 92 *Yale Law Journal* 409 at 420.

354 See Blackstone, *Commentaries on the Laws of England* (1769), bk 4, ch 11 at 151-152.

Nevertheless, the burden has real depth. The regulation of registrable communications activity by the FITS Act places substantial constraints and deterrents upon that communication by requirements prior to, contemporaneous with, and subsequent to the communication, which all have a substantial deterrent effect.

220 The application for registration, and any renewal, must be "accompanied by any information or documents required by the Secretary"³⁵⁵. There is also an obligation upon a person registered under the scheme to provide any information or documents required by the Secretary in order to correct any inaccuracy or misleading aspect of that information about which the person becomes aware³⁵⁶. Although some of those provisions were relied upon indirectly as part of the challenge by LibertyWorks to the scheme of registrable communications activity, no direct challenge was brought to those provisions on the basis that they imposed a burden that is not reasonably necessary. An answer to any such challenge, explained below, is that well-established principles of interpretation require the Secretary's power to be heavily confined. Even if the provisions did not require that confinement, as open-textured provisions with distributive application, the scope of any application which would not be reasonably necessary for the purposes of the FITS Act would be disappplied to that extent³⁵⁷ and, as Dixon J put it, the provisions would be "restricted" to their valid operation³⁵⁸.

221 In any event, the burden upon political communication that is imposed by the powers of the Secretary should not be overstated. The only information or documents that the Secretary can require are those that are reasonably necessary for the Secretary to assess whether registration is required and to keep information on the register accurate. If "the general character of the statute" reveals that "powers were intended to be exercised only for a particular purpose, then the exercise of the powers not for such purpose but for some ulterior object will be

355 FITS Act, ss 16(2)(d), 39(2)(d).

356 FITS Act, s 34(3)(d).

357 *Clubb v Edwards* (2019) 267 CLR 171 at 317-318 [424], discussing *Newcastle and Hunter River Steamship Co Ltd v Attorney-General for the Commonwealth* (1921) 29 CLR 357. See also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 252.

358 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31 at 76. See also *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 369.

invalid"³⁵⁹. Where the power is one to obtain information, the general character of a statute will define the purpose for which that information can be used³⁶⁰. Registration, which is at the core of the FITS Act, is plainly the "general character" of the statute. A request for information or documents by the Secretary under s 16(2)(d), s 34(3)(d) or s 39(2)(d) will be ultra vires if it is not necessary for assessing whether registration is required or whether registration information needs to be corrected.

222 Whilst the extent of the required information is limited to the matters necessary for registration, the requirement to disclose that information to the Secretary is capable of operating as a real constraint on political communication. The information required to be produced might include, for example, details of any arrangements with a foreign principal, shareholdings of a company, the persons to whom a communication is going to be made, the content of the communication, and the purposes for which the communication is to be made. The information sought by the Secretary must be produced even if it might tend to incriminate the person or expose them to a penalty, although individuals have a derivative use immunity³⁶¹. The information can be provided by the Secretary to any agency concerned with the protection of public revenue as well as a long list of "enforcement bodies", which include the Australian Federal Police, the Integrity Commissioner, the Australian Crime Commission, the Immigration Department, the Australian Securities and Investments Commission, and State and Territory police forces³⁶². Although there are no facts before the Court concerning the extent to which persons might be deterred from political communication by the prospects of use of such information, and therefore any such assessment can only be evaluated in an abstract way, I would assess the deterrent effect as significant.

223 The burden on political communication is deepened by obligations during the communication and after the communication. During registrable communications activity, a disclosure about the foreign principal must be made in

359 *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108 at 120. See also *R v Toohey*; *Ex parte Northern Land Council* (1981) 151 CLR 170 at 186-187; *Walton v Gardiner* (1993) 177 CLR 378 at 409.

360 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 424. See also at 436, 453, 458, 468. See, further, *Katsuno v The Queen* (1999) 199 CLR 40 at 57 [24]; *Smethurst v Commissioner of Australian Federal Police* (2020) 94 ALJR 502 at 521 [55]-[56], 539 [151]-[152]; 376 ALR 575 at 589-590, 613-614.

361 FITS Act, s 47.

362 FITS Act, s 53, read with *Privacy Act 1988* (Cth), s 6(1), definition of "enforcement body".

the form and manner prescribed by the rules made for the purposes of s 38(2)³⁶³. And, after the registrable communications activity, the person making the communication is required to report any material changes in circumstances³⁶⁴ and to keep records while registered under the scheme, and for three years after registration ends, of the following: any registrable activities undertaken "on behalf of" the foreign principal; any benefits provided to the person by the foreign principal; any information or material forming part of any registrable communications activity in relation to the foreign principal; any registrable arrangement between the person and the foreign principal; and other information communicated or distributed to the public or a section of the public in Australia on behalf of the foreign principal³⁶⁵.

224 These constraints upon communication are further deepened by substantial sanctions for not complying with various provisions in their operation upon registrable communications activity. The relevant provisions relied upon by LibertyWorks – ss 16, 18, 34, 37, and 39 – concern the requirements to register, report registrable communications activity, and renew registration. Failure to apply for or to renew registration under the scheme carries maximum penalties of between 12 months' and five years' imprisonment³⁶⁶. Failure to fulfil responsibilities under the scheme carries maximum penalties of a fine of \$13,320³⁶⁷. Failure to comply with a notice requiring information carries a maximum penalty of six months' imprisonment³⁶⁸.

The non-public nature of some information on the register

225 During oral argument, one aspect of the FITS Act raised by the Court as potentially imposing a burden upon political communication was the maintenance of information provided to the Secretary on a non-public register. The Court queried whether there was a gap between, on the one hand, the information maintained by the Secretary on a register in relation to communications activity and, on the other hand, the information that is to be made publicly available on a website. If so, one issue that arises is the extent of that gap and another, albeit

363 *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth).

364 FITS Act, s 34.

365 FITS Act, ss 40(1), 40(2).

366 FITS Act, s 57.

367 FITS Act, s 58.

368 FITS Act, s 59.

without any agreed facts before the Court, is the deterrent effect of such a gap on political communication.

226 It can be accepted that the more information that can be required to be disclosed by the Secretary and the larger the gap between the information contained on the register (which the Secretary can disclose to many enforcement agencies) and the information on the website, the greater the deterrent effect of registration and the more significant the burden will be upon political communication. Although questions of extent might be difficult to assess in other than such a relative manner, it is not difficult to draw an inference that people will be substantially less likely to communicate if the effect of doing so is that a large private dossier about them will be compiled and maintained by government. But the FITS Act does not have that effect.

227 One reason that the FITS Act cannot result in a large private dossier of information about persons being held on a government register is the existence of constraints upon the power of the Secretary to obtain information, as discussed above. Another is the answer by the Solicitor-General of the Commonwealth when this issue was raised by the Court: that it is questionable whether there is any significant gap between, on the one hand, the information kept on the register by the Secretary and, on the other hand, the information that is made available to the public on a website. Senior counsel for LibertyWorks also accepted that there might not be any gap between the register kept by the Secretary and the public website.

228 The information that is required to be made available to the public on a website, by s 43, is limited to the name of the person and the foreign principal, a description of the kind of registrable activities the person undertakes or undertook on behalf of the foreign principal, and any information prescribed by the rules for the purposes of s 43(1)(c)³⁶⁹. At first glance, this information appears to be considerably narrower than the information that the Secretary is required, by s 42, to maintain on a register. The register must also contain the application for registration, any renewals of the registration and information concerning material changes in circumstances, other communications between the person and the Secretary, and "any other information or documents the Secretary considers appropriate"³⁷⁰, the latter of which can only be information and documents considered appropriate for the purposes of the registration.

229 Although there appears to be a gap between the information on the register and the information on the public website, this gap is no more than the concomitant of the administrative process that is necessary for appropriate information to be

369 *Foreign Influence Transparency Scheme Rules 2018* (Cth), s 6. See also s 6A.

370 FITS Act, s 42(2)(g).

made available to the public. The information prescribed by s 42 to be contained on the register provides the substratum for the information required to be included on the public website for transparency, including the type of information which would be expected to be, and is, required by the rules. Such information includes: the type of foreign principal involved; in some circumstances, a description of the relationship between the person and the foreign principal; and the date or period over which, and any arrangement, order or direction by which, the person undertakes, has undertaken or proposes to undertake the registrable activities³⁷¹.

230 For the website to serve its intended function as a clear and transparent repository of information, it cannot simply be the site of an information dump. An administrative process is necessary to filter the relevant information from the application for registration, renewals, and information concerning changes in circumstances. The source documents and information on the register will need to be transformed into clear, readable information on the public website. The filtering process will also need to exclude various categories of information, prescribed in s 43(2) of the FITS Act, including: (i) information that is commercially sensitive; (ii) information that affects national security; and (iii) information that is prescribed by rules to be excluded for other reasons.

231 Once the information is filtered in this way, the website will be likely to reflect, at least in summary, all of the information on the register. But there remains an obvious need for that information, and the source documents, to remain on the register: to allow the register to be checked for any disputes about accuracy; and to allow the public information to be updated or corrected, including in the performance of the Secretary's powers to request information relating to material changes in circumstances or renewal of registration³⁷². This was the understanding of the Attorney-General's Department of the intended operation of these powers in the FITS Bill when it said, as recorded in the *Advisory Report on the Foreign Influence Transparency Scheme Bill* ("the Advisory Report"), that it was "intended that information collected ... is placed on the public website as soon as practicable"³⁷³.

232 This interpretation is consistent with the purpose of the communications activity provision and its associated provisions: to make transparent, to government decision-makers and members of the public, the nature and extent of

371 *Foreign Influence Transparency Scheme Rules 2018* (Cth), ss 6(k), 6(m), 6(n), 6(o).

372 FITS Act, ss 34(3)(d), 39(2)(d).

373 Australia, Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 138 [6.53].

foreign interests that are involved in political communication in Australia. But even if this interpretation were not the best interpretation of the provisions concerning the register and website, ss 42 and 43, there might be a simple answer to any challenge brought to those provisions on the basis of any alleged gap that might exist between, on the one hand, the category of information required by s 42(2)(g) to be maintained on the register and, on the other hand, the information to be included on the public website. That answer might be that the relevant paragraph of s 42(2) could be severed from the operation of s 42 by applying s 15A of the *Acts Interpretation Act*. It would be hard to see, for instance, how the removal from the register of information that is not required to ensure transparency could undermine the FITS Act. However, since no direct challenge was brought to s 42 or s 43, it is unnecessary to consider this issue further.

Analogies with the effect of United States legislation

233 It is almost always unhelpful to rely upon United States First Amendment decisions for the purposes of assessing the constitutional validity of Australian legislation. There is a significant difference between, on the one hand, the individual, or "private"³⁷⁴, freedom from abridgement of speech expressly guaranteed by the First Amendment to the United States Constitution³⁷⁵ and, on the other hand, the public freedom in Australia from Commonwealth or State legislation that imposes unjustified burdens upon political communication, impliedly guaranteed by the *Constitution*. In other words, the different freedoms are derived in different manners from different provisions enacted in different contexts in different constitutions. One recent, stark example of a difference in the legal approaches is the constitutional restrictions in relation to safe access zones recognised by this Court compared with those recognised by the Supreme Court of the United States³⁷⁶.

234 Nevertheless, where laws are expressed in broadly similar terms, comparative United States jurisprudence can assist by identifying the effect that the laws can have in burdening political communication. The United States experience of effect in relation to broadly similar laws can assist an Australian court to consider the breadth and depth of a burden upon political communication in Australia. This is particularly so in circumstances such as the present where the FITS Act was drafted following the recommendation of the Advisory Report,

374 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567.

375 Including any abridgement in State legislation, when the First Amendment is read with the Fourteenth Amendment.

376 *Clubb v Edwards* (2019) 267 CLR 171 at 338-339 [483], citing *McCullen v Coakley* (2014) 573 US 464.

which had considered "the merit of creating a legislative regime based on the United States' *Foreign Agents Registration Act 1938*" and developed the FITS Bill after close consultation with the Attorney-General's Department's "counterparts in the United States"³⁷⁷. Although care must still be taken when considering the effects of similar legislation in the different circumstances of another country, one basis for an expectation that the FITS Act would have at least the same effect is that, as Appendix C to the Advisory Report reveals, the FITS Act was intended in some respects to have wider operation and to confer greater powers of enforcement than the United States legislation³⁷⁸.

235 Like the FITS Act, the *Foreign Agents Registration Act of 1938*³⁷⁹ in the United States ("the FARA") does not prohibit any political communication. A report prepared by the Committee on the Judiciary of the United States House of Representatives explained the purpose of the FARA in the following way: "Our National Food and Drug Act requires the proper labeling of various articles, and safeguards the American public in the field of health. This bill seeks only to do the same thing in a different field, that of political propaganda."³⁸⁰ On the other hand, it has been observed by some that the FARA is far from benign in its actual effect. It has been argued that the FARA imposes a significant burden on political communication as it can be and has been "weaponized", as is said to have also occurred in relation to similar legislation in Russia and Hungary, by using the stigmatising label of "foreign agent" and using "the burdens of registration to punish dissenting or controversial views"³⁸¹. Commentators have thus written of

377 Australia, Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018) at 33 [2.108], 35 [2.115].

378 Australia, Parliament, Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (2018), Appendix C, Table 3.1.

379 22 USC §§611-621.

380 See Getmanenko, "Freedom from the Press: Why the Federal Propaganda Prohibition Act of 2005 is a Good Idea" (2009) 114 *Penn State Law Review* 251 at 279.

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

the dangers of the use of the FARA to "provide the basis for far-reaching inquiries"³⁸².

236 Such alleged effects could reflect a great depth of burden upon political communication³⁸³. Ultimately, however, for two reasons in combination there is insufficient basis to infer that these effects will exist in the application of the FITS Act. First, the FITS Act is generally facially neutral in its application to political communication: many of the provisions regulating registrable communications activity are expressed as duties that apply to all affected persons, independent of the content of the political communication. Secondly, although there are aspects of the operation of the FITS Act related to registrable communications activity that may have some capacity for application in a way which discriminates according to different types of communication – such as the powers of the Secretary to obtain information in order to fulfil the purposes of the FITS Act – the public nature of information displayed on the website about persons other than the person alleging discriminatory application might readily be expected to expose any discriminatory, and ultra vires, application of those powers.

Justification of the burden

237 At the risk of repetition, it is necessary to reiterate the case advanced by LibertyWorks. That case, clearly stated in oral submissions, centred upon the validity of the communications activity provision, item 3 of the table in s 21(1). Thus, apart from definitions provisions, the only provisions challenged by LibertyWorks³⁸⁴ were those concerned with the requirements to register, to report, and to renew registration in respect of registrable communications activity, and with the criminal sanctions for failure to do so. Other provisions were relied upon only to illustrate the operation of that aspect of the scheme and to demonstrate the extent of its burden on political communication. The Commonwealth was not called upon to answer any direct case based on invalidity of other aspects of the scheme.

Suitability

238 The scheme established by the FITS Act, backed by criminal penalties, requiring a person who undertakes registrable communications activity to register, report, and renew registration is plainly rationally connected with the purpose of

382 Roth, "The First Amendment in the Foreign Affairs Realm: 'Domesticating' the Restrictions on Citizen Participation" (1993) 2 *Temple Political & Civil Rights Law Review* 255 at 264.

383 Compare *Clubb v Edwards* (2019) 267 CLR 171 at 338 [481].

384 See fn 312 above.

making transparent, to government decision-makers and members of the public, the nature and extent of foreign interests that are involved in political communication in Australia.

239 LibertyWorks submitted that the regulation of registrable communications activity was not rationally connected with the purpose of the FITS Act because there was no covert or otherwise clandestine aspect of the arrangement between LibertyWorks and the American Conservative Union, nor was there any financial aspect to the arrangement between them concerning the conference. Thus, it was submitted, the registration scheme as it applies to registrable communications activity involves overreach. One difficulty with LibertyWorks' submission is that it sought to assess the suitability of the scheme by reference to its individual circumstances, rather than the operation of the scheme generally. But more fundamentally, considerations of overreach are irrelevant to this stage of the structured proportionality analysis³⁸⁵. Considerations that might suggest overreach are part of the assessment of whether the means adopted were reasonably necessary. They are not part of the assessment of suitability. Even provisions which apply their purpose in an overreaching manner are, almost by definition, rationally connected with their purpose.

Reasonable necessity

240 Since LibertyWorks' sole focus was upon invalidity of the communications activity provision, with other provisions relied upon only consequentially, LibertyWorks neither pleaded nor made any written or oral submissions that the particular definition of "on behalf of" in s 11, or the particular powers of the Secretary to obtain information or documents in ss 16 and 34, were not reasonably necessary to achieve the purposes of the regulation of registrable communications activity. LibertyWorks' argument, on an all-or-nothing basis, was that the entire regime regulating registrable communications activity was not reasonably necessary.

241 LibertyWorks' submissions about reasonable necessity were short and clear. They were effectively that the regulation of registrable communications activity was not reasonably necessary because there were obvious and compelling alternative means of achieving the purpose to the same extent but with considerably less burden upon political communication. The alternatives were said to be either: (i) the provision, already existing in s 38³⁸⁶, for disclosure of the foreign principal at the time of communication; or (ii) the creation of an exemption from the communications activity regime if disclosure is made under s 38. No

385 *Comcare v Banerji* (2019) 267 CLR 373 at 452 [192].

386 Read with the *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth).

other alternatives were explored by LibertyWorks or the Court for any replacement of the communications activity regime.

242 The problem with LibertyWorks' submissions is that its proposed alternatives would fall far short of achieving to the same extent the purpose of making transparent, to government decision-makers and members of the public, the nature and extent of foreign interests that are involved in political communication in Australia. The alternatives would simply provide disclosure to the recipients of the communication. They would not provide disclosure to the general public either before or after the communication. The examples given by the Solicitor-General of the Commonwealth are a good illustration: communications to the recipients in a foreign language newspaper or in a private Facebook group which disclose the relationship with the foreign principal would not have the prophylactic effects of avoiding sinister foreign influence and disclosing other foreign influence if registration were not required.

Adequacy in the balance

243 LibertyWorks also submitted, albeit faintly, that the regulation of registrable communications activity was not adequate in the balance in light of the burden that it imposed on political communication. The submission was not, and could not have been, pressed with any enthusiasm.

244 The purpose of the regulation of communications activity – to make transparent the nature and extent of foreign interests that are involved in political communication – allows the political process to operate openly and with better government and public information about influences. It also 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 at what the Australian Security Intelligence Organisation described as "an unprecedented scale". It is not merely that the purpose is one of great importance and of the highest public policy. The purpose also reflects and reinforces the very constitutional value that supports the implied freedom of political communication. The burden imposed here might deter some, but does not prohibit, political communication. Thus, there is no merit in any submission that this is the sort of trivial purpose that is so grossly outweighed by the burden on political communication that even reasonably necessary means to achieve that purpose are not justified.

Conclusion

245 The questions in the special case should be answered in the manner proposed by Kiefel CJ, Keane and Gleeson JJ.

246 STEWARD J. I agree with the answers given by Kiefel CJ, Keane and Gleeson JJ to the questions stated for the opinion of the Court in this special case, largely for the reasons their Honours give. However, on balance, that is subject to the following three observations.

247 First, I accept that the three stages of structured proportionality³⁸⁷ can, in a given case, be used as analytical tools to test whether a given law is reasonably appropriate and adapted in the advancement of its purpose. Its deployment to determine the outcome of this case is apt.

248 Secondly, had it been raised by the plaintiff, I may well have decided that s 11(1)(a)(i) of the *Foreign Influence Transparency Scheme Act 2018* (Cth) ("the *FITS Act*"), which addresses arrangements entered into with foreign principals, represents, when applied by item 3 of the table in s 21(1) of the *FITS Act*, an impermissible burden on the freedom of communication about matters of government and politics, which this Court has implied from the *Constitution* ("the implied freedom"). However, as the plaintiff ultimately made no such claim and, in the end, limited its case to an attack on item 3 of the table in s 21(1) of the *FITS Act*, it would be inappropriate to make any such decision. But the matter was raised in argument and it comprises an important issue about the reach of the *FITS Act* which should be highlighted.

249 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.

250 In amplification of the last two propositions only, and because of the importance of the issues which confronted this Court, I make the following further remarks.

387 *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] per French CJ, Kiefel, Bell and Keane JJ.

The *FITS Act* and "an arrangement"

251 My concern about the inclusion of "an arrangement" in the definition of when a person is acting "on behalf of" a foreign principal, in s 11 of the *FITS Act*, is important because that inclusion leads to individuals and organisations being liable to be registered under the *FITS Act* when they are only ever truly acting on their own behalf. That seems to be the position of the plaintiff here, for reasons given below. To explain this, it is necessary to set out some historical background.

The Foreign Agents Registration Act

252 In 1938, the United States Congress enacted the *Foreign Agents Registration Act*³⁸⁸ ("the *FARA*"). Subject to exemptions, the *FARA* requires agents of foreign principals (defined to include the government of a foreign country and a foreign political party) to file a registration statement with the United States Attorney General³⁸⁹. Unless so registered, a person cannot act as an agent of a foreign principal³⁹⁰. A wilful violation of the *FARA* is a criminal offence³⁹¹.

253 In the Supreme Court of the United States decision of *Viereck v United States*, Stone CJ explained the object of the *FARA* in the following terms³⁹²:

"The Act of 1938 requiring registration of agents for foreign principals was a new type of legislation adopted in the critical period before the outbreak of the war. The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment. But the means adopted to accomplish that end are defined by the statute itself, which, as will presently appear more in detail, followed the recommendations of a House Committee which had investigated foreign propaganda. These means included the requirement of registration of agents for foreign principals – with which it appears that petitioner complied – and the requirement that

388 22 USC §§611-621.

389 22 USC §§611, 612.

390 22 USC §612.

391 22 USC §618.

392 (1943) 318 US 236 at 241.

the registrant give certain information concerning his activities as such agent."

254 The definition of "agent of a foreign principal" in the *FARA* is instructive. It refers to a person who engages in various types of political activities in a particular capacity. That capacity is, for the most part, when any person "acts as an agent, representative, employee, or servant, or [when] any person ... acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal"³⁹³. Importantly, the *FARA* does not apply to arrangements entered into with a foreign principal more generally; it also does not apply to a person who is not acting for a foreign principal but is instead only acting for themselves.

255 In the United States District Court decision of *United States v Peace Information Center*³⁹⁴, the defendant had been charged under the *FARA* for failing to register as an agent of a foreign principal. Amongst other things, the defendant contended that the *FARA* breached the First Amendment to the *Constitution of the United States*. That argument was rejected. Judge Holtzoff observed that the *FARA* neither limited nor interfered with freedom of speech; it merely required persons carrying on certain activities to identify themselves by filing a registration statement³⁹⁵. In reaching this conclusion, Judge Holtzoff was influenced by an earlier observation of Vinson CJ in the Supreme Court decision of *American Communications Assn v Douds*³⁹⁶ that, in the context of the First Amendment, it had long been established that freedom of speech itself depends on the power of constitutional government to survive: "[i]f [constitutional government] is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts"³⁹⁷.

393 22 USC §611(c)(1).

394 (1951) 97 F Supp 255 (DCDC).

395 (1951) 97 F Supp 255 (DCDC) at 262.

396 (1950) 339 US 382.

397 (1950) 339 US 382 at 394.

256 Earlier, in *Viereck*, Black J in dissent also observed that the *FARA*
 "implements rather than detracts from the prized freedoms guaranteed by the First
 Amendment"³⁹⁸.

257 Of course, the freedom of speech that is guaranteed by the First Amendment
 to the *Constitution of the United States* is not the same as the implied freedom. The
 former is a personal right; the latter is a limitation on law making³⁹⁹. However,
 authorities concerning the First Amendment are not necessarily inutile.

258 In 2018, the Federal Parliament passed the *FITS Act*. It was inspired by the
FARA. Indeed, an Advisory Report on the *Foreign Influence Transparency Scheme*
Bill 2017 (Cth) ("the *FITS Bill*") prepared by the Parliamentary Joint Committee
 on Intelligence and Security in June 2018 reveals that in developing the *FITS Bill*,
 public servants within the Attorney-General's Department ("the Department") had
 closely consulted with their counterparts in the United States "to avoid ...
 challenges and limitations of [the] *FARA* in meeting its objective"⁴⁰⁰. A table
 comparing the *FARA* provisions and the provisions contained in the *FITS Bill*
 constitutes Appendix C to that Advisory Report.

259 Like the *FARA*, the *FITS Act* establishes a comprehensive regime for the
 registration of individuals and entities that engage in a variety of political activities
 "on behalf of" foreign principals. The phrase "on behalf of" is defined in s 11 of
 the *FITS Act* and is important for reasons that will become apparent. The two
 enactments serve, at least in part, a similar object and purpose.

260 The *FITS Bill* was presented to Parliament at the same time as the Bill which
 became the *National Security Legislation Amendment (Espionage and Foreign*
Interference) Act 2018 (Cth) ("the *EFI Act*"), which relevantly enacted, within
 Pt 5.2 of the *Criminal Code* (Cth), a new range of offences designed to attack the
 threat of spying and foreign interference. A further Bill, also introduced at the same
 time, became the *Electoral Legislation Amendment (Electoral Funding and*
Disclosure Reform) Act 2018 (Cth), which relevantly prohibits donations from
 foreign governments and state-owned enterprises being used to finance public
 debate and prohibits other regulated political actors from using donations from
 foreign sources to fund reportable political expenditure. Each of these Acts may

398 (1943) 318 US 236 at 251.

399 *Comcare v Banerji* (2019) 267 CLR 373 at 394-396 [19]-[20] per Kiefel CJ, Bell,
 Keane and Nettle JJ, 434 [135] per Gordon J.

400 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the*
Foreign Influence Transparency Scheme Bill 2017 (June 2018) at 35 [2.115].

be seen as complementary in purpose. As the Attorney-General said in the Second Reading Speech for the first two mentioned Bills⁴⁰¹:

"Deception has always been at the heart of espionage, and so transparency is the evergreen counterintelligence to propaganda. So it is that this legislative combination of new foreign interference offences and a register to make transparent the links of Australian advocacy to foreign principals brings Australian counterintelligence laws into the modern age."

The FITS Act and the intermediary

261 As Kiefel CJ, Keane and Gleeson JJ explain⁴⁰², the Commonwealth's submission that the true purpose of the *FITS Act* is to minimise the risk of foreign principals exerting undisclosed influence upon the integrity of Australia's political or election processes should be accepted as accurate.

262 The object and purpose of the *FITS Act* is not concerned with the content of any communication or lobbying or attempt to influence. Rather, as the Commonwealth submitted, it is concerned with the mode or method of certain types of communication. In that respect, the Commonwealth emphasised that the *FITS Act* places no fetter whatsoever on a foreign principal's ability to communicate. It is only, it was said, if a communication is made through an intermediary that the Act is engaged. The emphasis on a person being an "intermediary" as a trigger point for the application of the *FITS Act* is borne out by the *FITS Bill* Revised Explanatory Memorandum, which states⁴⁰³:

"Decision-makers in the Australian Government and the public should know what interests are being advanced in respect of a particular decision or process. However, it is difficult to assess the interests of foreign actors when they use intermediaries to advance their interests through activities such as lobbying or communication of information or material. When the relationship between the foreign actor and the intermediary is concealed, the ability to assess the interests being brought to bear on a particular decision or process is limited and ultimately undermines the ability of the decision-maker and the public to evaluate and reach informed decisions on the basis of those representations."

401 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 26 June 2018 at 6400.

402 At [53], [55], [58], [62].

403 Australia, Senate, *Foreign Influence Transparency Scheme Bill 2017*, Revised Explanatory Memorandum at 2 [3].

263 However, s 11 of the *FITS Act* defines the term "on behalf of" a foreign principal very much more broadly as follows:

"Undertaking activity on behalf of a foreign principal

- (1) A person undertakes an activity *on behalf of* a foreign principal if:
 - (a) the person undertakes the activity in any of the following circumstances:
 - (i) under an arrangement with the foreign principal;
 - (ii) in the service of the foreign principal;
 - (iii) on the order or at the request of the foreign principal;
 - (iv) under the direction of the foreign principal; and
 - (b) at the time the arrangement or service is entered into, or the order, request or direction made, both the person and the foreign principal knew or expected that:
 - (i) the person would or might undertake the activity; and
 - (ii) the person would or might do so in circumstances set out in section 20, 21, 22 or 23 (whether or not the parties expressly considered the existence of the scheme)."

264 Section 11(2) provides that it does not matter whether consideration is payable for the purposes of s 11(1).

265 Relevantly, s 10 defines the terms "arrangement", "foreign political organisation" and "foreign principal" as follows:

"arrangement includes a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten.

...

foreign political organisation includes:

...

- (b) a foreign organisation that exists primarily to pursue political objectives.

foreign principal means:

- (a) a foreign government;
- (b) a foreign government related entity;
- (c) a foreign political organisation;
- (d) a foreign government related individual."

266 Acting "in the service of" a foreign principal, or "on the order or at the request of" a foreign principal, or "under the direction of" a foreign principal, may each constitute conventional examples of acting on behalf of another. But acting "under an arrangement" may or may not involve a person acting on behalf of or for another or as an intermediary. Self-evidently, the inclusion within the definition here of an "arrangement" entered into between a person and a foreign principal was intended to attack attempts to avoid the more orthodox relationships of agency as identified in s 11(1)(a)(ii), (iii) and (iv). But sometimes legislative caution can perhaps go too far and lead to unintended consequences.

267 As already mentioned, there is no equivalent inclusion of "arrangements" in the *FARA* and, I should add, no equivalent language directed at arrangements with foreign principals may be found in the offences created by the *EFI Act*.

268 The definition of an "arrangement" is broad, and in my view arguably extends to occasions when a person does not in fact act for another, but instead wholly for themselves. In other statutory contexts, an arrangement has been said to exist where there exists "an element of reciprocal commitment even though it may not be legally enforceable"⁴⁰⁴. It ordinarily requires some "meeting of the minds" of the parties⁴⁰⁵. However, an arrangement involves more than a mere hope or expectation that each party will act in accordance with its terms⁴⁰⁶. Here, in my

404 *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at 322 [48] per French CJ and Kiefel J.

405 *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth)* (2020) 275 FCR 342 at 353-354 [60] per Allsop CJ, Wigney and Abraham JJ.

406 *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd* (2009) 239 CLR 305 at 322 [48] per French CJ and Kiefel J, citing *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 at 334-335 [35]-[37] per Gray J; *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452 at 464 [46] per Heerey, Hely and Gyles JJ; *Rural Press Ltd v Australian Competition and Consumer Commission* (2002) 118 FCR 236 at 257-258 [79] per Whitlam, Sackville and

view, the reference to an arrangement in s 11(1)(a)(i) appears not to be confined to synthetic or *de facto* examples of agency. As defined, the term does not necessarily connote any form of agency and perhaps cannot be so read down. There are no controlling words used in the definition of "arrangement" directed at the use in some way by a foreign principal of an Australian intermediary. The requirement of intention and expectation on the part of the foreign principal and the person, set out in s 11(1)(b), probably does not supply such words. Moreover, the very notions of being an intermediary or agent are arguably of themselves too imprecise in nature to justify a court reading down the broad language used in the definition of an "arrangement" so that it conforms with what is said to have been what Parliament really had in mind. Finally, there is no indication in the various Explanatory Memoranda that accompanied the *FITS Bill* of a legislative intention to curb the breadth of that definition.

269 The potential extensive reach of the *FITS Act*, arguably achieved by the inclusion of s 11(1)(a)(i), may be seen in the basal obligation to register in s 16 with respect to communications activities for the purposes of item 3 of the table in s 21(1)⁴⁰⁷. A person must apply for registration if the person "becomes liable to register under the scheme in relation to a foreign principal" and is not already so registered. Pursuant to s 18, a person relevantly becomes liable to register if that person "undertakes an activity on behalf of a foreign principal that is registrable in relation to the foreign principal".

270 Division 3 of Pt 2 of the *FITS Act* identifies what activities are registrable. It includes, pursuant to item 3 of the table in s 21(1), a "[c]ommunications activity ... for the purpose of political or governmental influence". Section 13 defines what is a "communications activity". It includes the communication or distribution of information or material to the public. Section 13(3) contains an important exemption for certain activities, including those undertaken "in the ordinary course of [a] disseminator's business" and which involve communicating or distributing information or material produced by another person, whose identity is apparent in the communication or distribution.

Gyles JJ; *Australian Competition and Consumer Commission v Amcor Printing Papers Group Ltd* (2000) 169 ALR 344 at 360 [75] per Sackville J; *Trade Practices Commission v Service Station Association Ltd* (1993) 44 FCR 206 at 230-231 per Lockhart J, Spender and Lee JJ agreeing; *Trade Practices Commission v Email Ltd* (1980) 43 FLR 383 at 385-386 per Lockhart J; *Trade Practices Commission v Nicholas Enterprises Pty Ltd [No 2]* (1979) 40 FLR 83 at 89-90 per Fisher J; *Top Performance Motors Pty Ltd v Ira Berk (Queensland) Pty Ltd* (1975) 24 FLR 286 at 290-292 per Smithers J.

407 The other obligations are described by Kiefel CJ, Keane and Gleeson JJ at [36]-[38].

271 Section 12 of the *FITS Act* defines when an activity is undertaken for the purpose of "political or governmental influence". It includes an activity if the "sole or primary purpose, or a substantial purpose" is to influence "a process in relation to a federal government decision". Section 12(4) elaborates on what sort of decision is intended to be caught. It includes a decision of "any kind in relation to any matter, including administrative, legislative and policy matters ... whether or not the decision is final". The word "influence" is defined broadly in s 10 of the *FITS Act* to include "affect in any way". Here the plaintiff accepted that the 2019 Conservative Political Action Conference ("CPAC"), discussed further below, involved the undertaking of communications activities for the purpose of political or governmental influence.

272 It follows that, if a person undertakes a communications activity for the purpose of "political or governmental influence" "on behalf of" a foreign principal, then that person is liable to be registered. A person will undertake such an activity "on behalf of" a foreign principal if, relevantly, the person does so "under an arrangement with the foreign principal" and at the time the arrangement is entered into both that person and the foreign principal "knew or expected" that the person would undertake that activity for the purpose of political or governmental influence⁴⁰⁸. The word "under" connotes a necessary causal relationship between the activity and the existence of an arrangement.

273 As noted in the reasons of Kiefel CJ, Keane and Gleeson JJ⁴⁰⁹, the *FITS Act* creates a number of offences that can apply to registrants, potential registrants and those who undertake registrable communications activities.

274 It would seem that no part of the foregoing statutory regime, as it applies to arrangements, necessarily requires the person undertaking the activity to be acting in fact at the behest of, or on behalf of, a foreign principal or as some kind of intermediary. A person, for example, might enter into an arrangement to collaborate with a foreign principal, on equal terms, to make a submission to government concerning a matter of public policy. A person might form an equal alliance with a foreign principal to pursue a commonly held political point of view. A person might jointly host a conference with a foreign principal concerning political or governmental issues. Each of these activities might well constitute registrable activities. In each case, the person in Australia may be independently advancing their own interests, thereby acting solely for themselves. In each case also, the requirement in s 11(1)(b) of the *FITS Act* for joint knowledge or expectation concerning the proposed activity would not necessarily prevent the activity from being liable to be registered.

408 *FITS Act*, s 11(1)(b).

409 At [39].

275 The Solicitor-General of the Commonwealth agreed with the foregoing. He did not suggest that the definition of "arrangement" should be in any way read down. He did not seek to rely on s 15A of the *Acts Interpretation Act 1901* (Cth). He agreed that a person, acting wholly in his or her interests, could be caught by the *FITS Act* if he or she had entered into an "arrangement" with a foreign principal (on the assumption that the other requirements of that Act are fulfilled). On that basis, an Australian academic who prepares a paper (that constitutes a communications activity for the purpose of political or governmental influence) under an arrangement or understanding (perhaps to deliver the paper at an international conference) with a foreign academic (who is a foreign principal) who proposes to prepare her or his own paper might be liable to be registered. The Solicitor-General submitted that this was a necessary by-product of important legislation which is broad-based and neutral. He submitted, however, that only a very small number of people might be caught this way.

276 Appearing as intervener, the Solicitor-General for New South Wales submitted that the term "arrangement" in s 11(1)(a)(i) should be read down by reference to the words "on behalf of" in s 11(1). With very great respect, I cannot agree with that particular submission; "[i]t would be quite circular to construe the words of a definition by reference to the term defined"⁴¹⁰.

Was the plaintiff an intermediary?

277 The agreed facts of this case appear to bear out the foregoing and may be illustrative of how the *FITS Act* might apply to a person acting in their own interests. The plaintiff is a private "think tank" which aims to move public policy in the direction of increased individual rights and freedoms, and a reduction in governmental control over all individuals' personal and economic lives. The American Conservative Union ("the ACU") is an American corporation established for the promotion of political freedom and for the purpose of influencing politics and politicians in the United States. It was not disputed that the ACU was and is a "foreign political organisation" for the purposes of the *FITS Act*.

278 The ACU holds an annual conference – the CPAC – in the United States at which talks are given by prominent people in politics, media, arts, sports and academia. The plaintiff wanted to hold a CPAC with the ACU in Australia in 2019, and so an oral agreement to collaborate for that purpose was reached. The plaintiff organised this event, and was responsible for all running and venue costs, scheduling and liaising with all Australian and many overseas speakers and

410 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, citing *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503.

attendees. The speakers included politicians, media personalities, members of think tanks, economists and social commentators.

279 In promotional material, the ACU was advertised as one of the "Think Tank Host Partners" of the CPAC and described as one of the "co-hosts" in a newspaper article. The ACU facilitated the attendance of some overseas speakers, and some members of the ACU also attended. The CPAC was held in August 2019.

280 Prior to the conference being held in 2019, the plaintiff received a letter from an officer of the Department. The letter recited that the Department was aware of the upcoming CPAC, was of the view that the ACU was a foreign political organisation and therefore a foreign principal, and was of the view that the CPAC appeared to constitute a communications activity for the purposes of political or governmental influence. The letter invited the plaintiff to consider whether it needed to register under the *FITS Act*.

281 On 21 October 2019, a notice was sent to the plaintiff by the Department obliging the plaintiff to produce, pursuant to s 45(2) of the *FITS Act*, any information or documents relevant to the question of whether the plaintiff is liable to register because of its relationship with the ACU. The notice stated that the information would include, but not be limited to, the following:

"Any agreement, contract or other document detailing any understanding or arrangement between [the plaintiff] and the ACU

Any invitations, letters or other correspondence from [the plaintiff] or the ACU sent to individuals invited to speak at or attend the Conference, including correspondence subsequent to the initial invitation

Copies, transcripts or video or audio recordings of speeches made by speakers at the conference, including of speeches by members of [the plaintiff] or the ACU to introduce or conclude the Conference or a specific day or event at the conference

Summaries of the topics covered by speakers at the Conference, and

Material produced or distributed by [the plaintiff] promoting the Conference or the ACU."

282 Section 45(2) of the *FITS Act* empowers the Secretary of the Department to obtain by notice "any information that may satisfy the Secretary as to whether [a] person is liable to register in relation to [a] foreign principal" if the Secretary "reasonably suspects that [the] person might be liable to register under the scheme

in relation to [the] foreign principal" and the person is not so registered⁴¹¹. Section 59 relevantly provides that it is an offence not to comply with a notice issued pursuant to s 45.

283 The plaintiff declined to comply with the notice on the ground that it was invalid. The Department decided not to take any further action because, whilst it was of the view that the plaintiff may have had registration obligations in relation to the ACU and the CPAC, it was also satisfied that the arrangement between the plaintiff and the ACU was "made transparent" through statements to the media and promotional materials.

284 At the time it agreed the facts of this case with the Commonwealth, the plaintiff was planning to hold another CPAC, in November 2020, with the ACU as a "Think Tank Partner", but the plaintiff expected that COVID-19 restrictions would prevent anyone from the ACU from physically attending the conference. Two speakers from the 2019 CPAC had expressed by telephone a reluctance to participate in the 2020 CPAC given the possibility of correspondence having to be made public pursuant to the *FITS Act*.

285 There is no suggestion from the agreed facts that the plaintiff has ever undertaken communications activities on behalf of, or at the behest of, the ACU, or that any of the speakers at the 2019 CPAC made speeches on behalf of anyone else or that anybody was an intermediary for the ACU. As the promotional material and other media communications made clear, the 2019 CPAC was jointly hosted by the plaintiff and the ACU.

286 Nonetheless, in my view, the collaboration that took place between the plaintiff and the ACU fell within the ordinary meaning of the words used in the definition of an "arrangement" in s 10 of the *FITS Act*. Given, as noted above, that it was not disputed that the ACU is a foreign principal and that it appears to have been accepted that the CPAC constituted a communications activity for the purposes of political or governmental influence, it follows that the plaintiff was liable to be registered under the *FITS Act*.

The implied freedom and an "arrangement" under the FITS Act

287 I generally agree with the reasons of Kiefel CJ, Keane and Gleeson JJ concerning the application of the test expressed in *McCloy v New South Wales*⁴¹² ("the *McCloy* test") to item 3 of the table in s 21(1) of the *FITS Act* and to the *FITS Act* more generally. The *FITS Act* falls within that category of laws identified by

411 *FITS Act*, s 45(1).

412 (2015) 257 CLR 178 at 193-195 [2] per French CJ, Kiefel, Bell and Keane JJ.

Vinson CJ in *Douds* as being necessary precisely because, if a democratic government is to endure, it must have the power to protect itself against unlawful conduct or corrupting influences⁴¹³. Such a law, as Black J observed in *Viereck*, ultimately promotes freedom of political expression⁴¹⁴. And as Brennan J (as his Honour then was) has recognised, "the salutary effect of freedom of political discussion on performance in public office can be neutralized by covert influences"⁴¹⁵.

288 Nonetheless, I am less confident that the *FITS Act* will deter only a very small proportion of persons from making political communications. For my part, however, what is critical here is that it was an agreed fact that at the time of the enactment of the *FITS Act*, Australia was experiencing undisclosed foreign influence in respect of government and political systems and processes and more broadly in the Australian community. It was agreed that the Australian Security Intelligence Organisation ("ASIO") had identified foreign powers clandestinely seeking to shape the opinions of members of the Australian public, media organisations and government officials to advance their own countries' political objectives, including through the recruitment and co-opting of influential and powerful Australian voices to lobby decision makers. It was further agreed that ASIO's view was that espionage and foreign interference activity against Australia's interests was "occurring at an unprecedented scale". Based upon such agreed facts, it should be accepted that the judicial branch of government is not well equipped to invalidate Parliament's solution to this threat as being, for example, *not* suitable, necessary and adequate in its balance. That is especially so given that national security and the maintenance of the Commonwealth is at issue; in such cases there must necessarily be a very large measure of judicial deference in determining the reach of the implied freedom⁴¹⁶.

289 For the purposes of applying the *McCloy* test, as helpfully distilled by the plurality in *Clubb v Edwards*⁴¹⁷, the Commonwealth admitted that the obligation to register under the *FITS Act* creates a burden on the implied freedom, albeit one that was said to be "modest". The plaintiff then accepted that the purpose of the *FITS Act* is compatible with the maintenance of the constitutionally prescribed

413 (1950) 339 US 382 at 394.

414 (1943) 318 US 236 at 251.

415 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 159.

416 cf *Harisiades v Shaughnessy* (1952) 342 US 580.

417 (2019) 267 CLR 171 at 186 [5] per Kiefel CJ, Bell and Keane JJ.

system of representative and responsible government. As to the test of structured proportionality, the plaintiff also conceded that the *FITS Act* is "suitable" because it exhibits a rational connection to its purpose⁴¹⁸. I otherwise generally agree with the reasons given by Kiefel CJ, Keane and Gleeson JJ⁴¹⁹ in relation to the two other limbs of structured proportionality as applied to item 3 of the table in s 21(1) of the *FITS Act*.

290 However, as I have explained, the *FITS Act* may oblige an individual to register, in the circumstances described above, when she or he may truly be acting only on behalf of her- or himself, ostensibly contrary to the very express object and purpose of that Act. That raises for consideration whether the inclusion of the word "arrangement", as an instance of when a person may be seen to be undertaking an activity "on behalf of" a foreign principal, itself offends the implied freedom in so far as it is applied for the purposes of item 3 of the table in s 21(1). For that purpose, I accept, applying the second limb of the *McCloy* test, that the inclusion – because, I infer, it is concerned with avoidance arrangements – is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.

291 That leaves the third limb of the *McCloy* test and its concern with a law's suitability, necessity and adequacy in its balance. For the moment, it can be properly assumed that s 11(1)(a)(i), in so far as it is engaged when applying item 3 of the table in s 21(1) of the *FITS Act*, is both a suitable and necessary law in the required senses⁴²⁰. That is because I accept that the concept of an "arrangement" provides a means of capturing those foreign principals who seek covert influence by ways which avoid s 11(1)(a)(ii), (iii) and (iv)⁴²¹; it is also because no party

418 *Comcare v Banerji* (2019) 267 CLR 373 at 400 [33] per Kiefel CJ, Bell, Keane and Nettle JJ, citing *Tajjour v New South Wales* (2014) 254 CLR 508 at 563 [81]-[82] per Hayne J; *McCloy v New South Wales* (2015) 257 CLR 178 at 217 [80] per French CJ, Kiefel, Bell and Keane JJ, 232-233 [132]-[133] per Gageler J, 262 [234] per Nettle J; *Brown v Tasmania* (2017) 261 CLR 328 at 370 [132]-[133] per Kiefel CJ, Bell and Keane JJ, 418 [281] per Nettle J; *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6] per Kiefel CJ, Bell and Keane JJ, 264 [266(2)] per Nettle J, 330-331 [463] per Edelman J.

419 At [78]-[85].

420 *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6] per Kiefel CJ, Bell and Keane JJ.

421 *Comcare v Banerji* (2019) 267 CLR 373 at 408 [53] per Gageler J.

suggested that there is an obvious and compelling alternative means of addressing foreign principals who so act⁴²². This leaves the issue of adequacy in the balance.

Adequacy in the balance

292

It has been said that a law which is found to be suitable and necessary may nonetheless impermissibly burden the implied freedom if "the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom"⁴²³. In other words, the question is "whether the law imposes a burden on the implied freedom which is 'manifestly excessive by comparison to the demands of legitimate purpose'"⁴²⁴. The inquiry is not a comparison of the benefits of the law with the benefits of an unburdened implied freedom, but a comparison of the effects of the law and the extent of the burden⁴²⁵. An overreach of means over ends may well demonstrate an excessive burden on the implied freedom which is disproportionate to the purpose or object of the impugned law⁴²⁶. In that respect, a "manifestly" excessive burden on the implied freedom is, in my view, a reference to a legislative means of achieving a legitimate purpose that is so extreme in its

422 *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6] per Kiefel CJ, Bell and Keane JJ.

423 *Comcare v Banerji* (2019) 267 CLR 373 at 402-403 [38] per Kiefel CJ, Bell, Keane and Nettle JJ, citing *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6], 199-200 [66]-[69], 209 [102] per Kiefel CJ, Bell and Keane JJ, 266-269 [270]-[275] per Nettle J, 344 [497]-[498] per Edelman J. See also *Davis v The Commonwealth* (1988) 166 CLR 79 at 99-100 per Mason CJ, Deane and Gaudron JJ (Wilson and Dawson JJ agreeing at 101); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 30-31, 34 per Mason CJ, 78 per Deane and Toohey JJ, 94-95 per Gaudron J, 101-102 per McHugh J; *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 324 per Brennan J; *McCloy v New South Wales* (2015) 257 CLR 178 at 219 [87], 220 [91] per French CJ, Kiefel, Bell and Keane JJ; *Brown v Tasmania* (2017) 261 CLR 328 at 422-423 [290] per Nettle J.

424 *Clubb v Edwards* (2019) 267 CLR 171 at 200 [69] per Kiefel CJ, Bell and Keane JJ, citing *Brown v Tasmania* (2017) 261 CLR 328 at 422-423 [290] per Nettle J and *McCloy v New South Wales* (2015) 257 CLR 178 at 219-220 [89]-[92] per French CJ, Kiefel, Bell and Keane JJ.

425 *Clubb v Edwards* (2019) 267 CLR 171 at 201 [72] per Kiefel CJ, Bell and Keane JJ.

426 *Brown v Tasmania* (2017) 261 CLR 328 at 365 [109] per Kiefel CJ, Bell and Keane JJ.

effect on that freedom that it cannot, in any sensible way, be justified. The hurdle to be jumped is very high. As Nettle J observed in *Brown v Tasmania*⁴²⁷:

"[I]n the Australian constitutional context the description 'adequate in its balance' is better understood as an outer limit beyond which the extent of the burden on the implied freedom of political communication presents as manifestly excessive by comparison to the demands of legitimate purpose".

293 In *Clubb*, Edelman J emphasised that a conclusion that a law is inadequate in the balance after nevertheless making a finding that the law has a legitimate purpose "could have large consequences"⁴²⁸. As a result, as his Honour pointed out, in some other jurisdictions this test has been effectively abandoned⁴²⁹. This limb of structured proportionality should, accordingly, be approached with very considerable trepidation.

294 The agreed facts of this case illustrate, and only illustrate, the difficulty with the inclusion of s 11(1)(a)(i) in the *FITS Act*. They do not suggest that the plaintiff was in any way an agent of the ACU or in any way doing the ACU's bidding when holding the 2019 CPAC. As far as one can tell, the plaintiff has acted in its own right at all times in organising and hosting the CPAC. It did so with the collaboration and co-operation of the ACU. The ACU was, in that respect, apparently an equal partner. The plaintiff was in no way any kind of intermediary for the ACU. It follows that it is unlikely that any object or purpose of the *FITS Act* was fulfilled, or in any way enhanced, by making the plaintiff liable to be registered.

295 Given the breadth of the definition of "arrangement", contrary to the submission of the Commonwealth, the position of the plaintiff may not be unique. For example, there was material before us from the Department requiring one former prime minister, who was to attend merely as a speaker at the 2019 CPAC, to consider registration. More broadly, as already mentioned, the *FITS Act* arguably has the capacity to require registration by any person who might organise a conference with a foreign principal at which political communications are to take place; it might also apply to collaboration between local and overseas academics in relation to political communications. Other potential examples of its reach might include international law and accounting firms who might lobby in their own right

⁴²⁷ (2017) 261 CLR 328 at 422 [290], citing *McCloy v New South Wales* (2015) 257 CLR 178 at 219-220 [89]-[92] per French CJ, Kiefel, Bell and Keane JJ; Kiefel, "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives" (2010) 36(2) *Monash University Law Review* 1 at 12.

⁴²⁸ *Clubb v Edwards* (2019) 267 CLR 171 at 341-342 [492].

⁴²⁹ *Clubb v Edwards* (2019) 267 CLR 171 at 342 [493].

the government from time to time; and it might apply to companies in joint ventures with foreign principals. In each of these examples the local individual or entity may not in any way be acting as an intermediary for a foreign principal. Whether this aspect of the *FITS Act* will affect only a small number of Australians is not known to me. No list of currently registered individuals or entities was before the Court. However, the foregoing reasoning suggests that there is a potential for application on many occasions. It follows that if s 11(1)(a)(i) of the *FITS Act* is a valid law, in so far as it is engaged by item 3 of the table in s 21(1), such individuals or entities, as described above, may be obliged to register for no reason whatsoever connected with the object and purpose of the *FITS Act*. No one has suggested that Parliament, in any way, intended that Australians undertaking political activities in their own interests needed to register or make disclosures of any kind pursuant to the *FITS Act*.

296 The *FITS Act*, by s 3, proclaims that its object is to improve the transparency of activities undertaken on behalf of foreign principals. The Commonwealth states that the object of the Act is the minimisation of undisclosed foreign influence on political affairs. But if a person does not truly act for a foreign principal, there is no need for transparency; there is no covert source of foreign influence to disclose. 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.

297 In other words, it is arguable that by reason of s 11(1)(a)(i) of the *FITS Act* when applied by item 3 of the table in s 21(1) of that Act, the extent of the burden on the implied freedom presents, to use the language of Nettle J, "as manifestly excessive by comparison to the demands of legitimate purpose"⁴³⁰; the legitimate purpose here being to address unacceptable arrangements with foreign principals

430 *Brown v Tasmania* (2017) 261 CLR 328 at 422 [290], citing *McCloy v New South Wales* (2015) 257 CLR 178 at 219-220 [89]-[92] per French CJ, Kiefel, Bell and Keane JJ; Kiefel, "Section 92: Markets, Protectionism and Proportionality – Australian and European Perspectives" (2010) 36(2) *Monash University Law Review* 1 at 12.

that fall outside the reach of s 11(1)(a)(ii), (iii) and (iv). For the reasons already given, it may not be possible to read down the term "arrangement" to save it from invalidity⁴³¹. However, I express no final view. The plaintiff did not contend for invalidity on this specific basis. If necessary, the reach of s 11(1)(a)(i) may be considered on another occasion.

The existence of the implied freedom

298 The divergence of views in this Court concerning the test for the application of the implied freedom perhaps may illustrate the tenuous nature of that implication. If the content of the implied freedom cannot even now be agreed upon, then, for my part, that may demonstrate that it was never justified. In *Theophanous v Herald & Weekly Times Ltd*, Dawson J rejected the existence of the implied freedom and said⁴³²:

"Whilst it may disappoint some to find that the Australian Constitution provides no guarantee, express or implied, of freedom of speech, that is because those who framed the Constitution considered it to be one of the virtues of representative government that no such guarantee was needed. I have elsewhere dealt with the manner in which the founding fathers placed their faith in the democratic process rather than constitutional guarantees to secure those freedoms regarded as fundamental in any democratic society⁴³³. They took the view that constitutional guarantees operate as a fetter upon the democratic process and did not consider it necessary to restrict the power of Parliament to regulate those liberties which the common law recognizes and nurtures.

If a constitutional guarantee of freedom of speech or of communication is to be implied, the implication must be drawn from outside the Constitution by reference to some such concept as 'the nature of

431 cf *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [32]-[33] per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ; *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [32]-[36] per Kiefel CJ, Bell and Keane JJ, 216-217 [135]-[138] per Gageler J, 248-249 [230] per Nettle J, 287 [329] per Gordon J.

432 (1994) 182 CLR 104 at 193-194.

433 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 186; and see also at 133-134 per Mason CJ.

our society'⁴³⁴. That is not an implication which can be drawn consistently with established principles of interpretation.

The *Engineers' Case*⁴³⁵ may have given rise to the misconception that no implications may be drawn from the Constitution and to have led to some imbalance in the interpretation of the federal division of powers⁴³⁶. But it is now clear that implications can and must be drawn in the interpretation of the Constitution to give effect to its intention⁴³⁷. However, it has never been thought that the implications which might properly be drawn are other than those which are necessary or obvious having regard to the express provisions of the Constitution itself. To draw an implication from extrinsic sources, which the first defendant's argument necessarily entails, would be to take a gigantic leap away from the *Engineers' Case*, guided only by personal preconceptions of what the Constitution should, rather than does, contain. It would be wrong to make that leap."

299 I am afraid that I still respectfully agree with much of the foregoing.

300 The grave importance of the freedom to speak about political and governmental issues to a democratic society is undeniable. But whilst implying a legal guarantee of such freedom from the text and structure of the *Constitution* may be understandable, that text and structure may not supply a clear answer for when and how that freedom may permissibly be limited. The daunting search for a unifying principle of limitation is yet to uncover a principle that has been agreed upon by the Justices of this Court. It may not clearly be found in the text and structure of the *Constitution*; nor, as Dawson J observed, can it be found outside the *Constitution*. If that is so, then it may be that it cannot be found at all.

301 So concluding does not deny, for example, the ability of this 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*. As Dawson J recognised in *Australian Capital Television Pty Ltd v The Commonwealth*, legislation which, for example,

434 See, eg, *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633 at 670 per Murphy J.

435 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

436 See, eg, Craven, "The Crisis of Constitutional Literalism in Australia", in Lee and Winterton (eds), *Australian Constitutional Perspectives* (1992) 1 at 4-9.

437 See *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657 at 681-682 per Dixon J.

purported to have the effect of denying electors access to information necessary for the exercise of a true choice in an election would be incompatible with the *Constitution*⁴³⁸.

302 On one view, the implication has, since its birth, been a source of
uncertainty. Perhaps, and subject to the *Constitution*, if a law exhibits a sufficient
connection with a head of constitutional power, that is enough⁴³⁹; it may be better
for its reasonableness and legitimacy to be otherwise matters reserved to the
legislative branch of government⁴⁴⁰.

303 I am not the only Justice of this Court who has been concerned about the
implied freedom. Callinan J was critical of its existence in *Australian Broadcasting
Corporation v Lenah Game Meats Pty Ltd*⁴⁴¹, as was Heydon J in *Monis v The
Queen*⁴⁴². There is no need at this stage to set out what each of these Justices said.

304 The current division of opinion in this Court may, in my view, justify a
reconsideration, with leave if necessary, of the existence of the implied freedom.
Nonetheless, as already mentioned, neither party challenged the existence of the
implied freedom in this special case. For the disposition of this proceeding, it is
therefore not appropriate to deny its application here. It should, if required, be a
matter for full argument to be considered on another occasion.

Conclusion

305 I agree with the answers to the stated questions proposed by Kiefel CJ,
Keane and Gleeson JJ.

438 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 187. See also Goldsworthy, "Constitutional Implications Revisited" (2011) 30 *University of Queensland Law Journal* 9 at 28-29.

439 cf *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 at 80 [77] per Bell J, citing *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28 at 43 [26]. See also *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *New South Wales v The Commonwealth* (2006) 229 CLR 1 at 143 [275] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

440 cf *Gerner v Victoria* (2020) 95 ALJR 107 at 112-113 [18] per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ; 385 ALR 394 at 399.

441 (2001) 208 CLR 199 at 330-339 [337]-[348].

442 (2013) 249 CLR 92 at 181-184 [243]-[251].

