

Case Note

LibertyWorks Inc v Commonwealth: The Implied Freedom of Political Communication and the Constitutionality of Australia's Foreign Influence Legislation

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Abstract

In *LibertyWorks Inc v Commonwealth*, the High Court of Australia considered a key aspect of Australia's counter foreign interference legislation — the foreign influence transparency scheme — and whether it was unconstitutional on the basis that it violated the implied freedom of political communication. The seven-member bench delivered five separate judgments. The Court upheld the impugned provisions of the *Foreign Influence Transparency Scheme Act 2018* (Cth), albeit tempered by two compelling dissents. In this case note, I argue that the legislation in its current form is likely to face a future challenge because its operative provisions go beyond the legitimate object of improving the transparency of foreign influence relationships. As the dissenting judgments reveal, the legislation establishes a scheme that confers broad discretions on administrative officials to collect and store information on a private register from which a limited subset of information is made available on a public website. I argue that the discrepancy between the two repositories of information reveals a legislative scheme that ostensibly promotes the benign object of transparency, but ultimately serves the more insidious function of government surveillance.

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I Introduction

The decision of the High Court of Australia in *LibertyWorks Inc v Australia* is the first to consider the constitutionality of Australia's foreign influence transparency scheme ('the Scheme'), which was introduced by the Turnbull Government in December 2017.¹ In 2019, LibertyWorks Inc ('LibertyWorks'), a Queensland non-profit think-tank, co-hosted the Conservative Political Action Conference ('CPAC') with the American Conservative Union ('ACU') in Sydney. Prior to the event the Attorney-General's Department asked LibertyWorks to consider whether it had registration obligations under the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*').² Afterwards, the Department issued a notice requiring LibertyWorks to produce information to enable it to determine whether registration obligations applied. LibertyWorks disputed the validity of the notice and refused to comply. In 2020, LibertyWorks mounted a constitutional challenge against select provisions of the legislation on the ground that they infringe the freedom of political communication implied under the *Australian Constitution* ('the implied freedom'). The High Court upheld the validity of the impugned provisions by a 5:2 majority comprising Kiefel CJ, Keane and Gleeson JJ, who issued a joint judgment, and Edelman J and Steward J who issued separate judgments. Gageler J and Gordon J dissented in separate judgments, holding that the provisions were invalid. While the legislation survived the challenge on this occasion, the *LibertyWorks* decision provides insight into its shortcomings and has broader implications for assessing the constitutionality of foreign influence laws in the future.

In this case note, I argue that the *FITS Act* is likely to face a future challenge because the provisions that establish a non-public register and confer broad discretions on officials to collect and share scheme information are disproportionate to the legitimate object of improving the transparency of foreign influence relationships.³ I evaluate two aspects of the Scheme that may provide fertile ground for a challenge.

The first aspect concerns the disconnect between two repositories of scheme information: a private register maintained by the Secretary and a public website that contains a far more limited subset of the information kept on the private register. The High Court was divided on the question of whether a gap exists between the two repositories and, if so, how much weight to accord to that disconformity when ascertaining the burden on the implied freedom. In this case note, I explain the significance of the split decision and argue that the view of the dissenting judges should be preferred.

The second aspect of the Scheme concerns the ambit of the Secretary's powers to deal with scheme information and, specifically, the Secretary's discretion

¹ *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490 ('*LibertyWorks*').

² *Ibid* 498 [5]; *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*').

³ On the increasing conferral of broad discretionary powers on the executive, see Gillian Triggs, 'Overreach of Executive and Ministerial Discretion: A Threat to Australian Democracy' (2017) 7(1) *Victoria University Law and Justice Journal* 8, 8–10; Margaret Allars, 'The Rights of Citizens and the Limits of Administrative Discretion: The Contribution of Sir Anthony Mason to Administrative Law' (2000) 28(2) *Federal Law Review* 187, 189–90; Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18(3) *Federal Law Review* 122, 128–30.

to disclose information for myriad purposes including for enforcement related activities. As these questions were left unanswered by the plurality,⁴ I extend the analysis of the dissenting judges, with a view to underscoring the incongruity between the Scheme's ostensible purpose of promoting transparency and its true underlying function of surveillance.

In Part II, I provide an overview of the implied freedom. In Part III, I canvass the salient features of the legislative scheme. In Part IV, I set out the background to the constitutional challenge. In Part V, I analyse the split decision, discuss insights to be gleaned from the joint judgment and explain why it is incomplete in light of the dissenting judgments. In Part VI, I offer a novel analysis of ss 52 and 53 of the *FITS Act* that reveals a worrying shift in purpose from transparency to surveillance.

It is worth mentioning that the decision raises three additional issues that may affect the development of the implied freedom jurisprudence but are beyond the scope of this case note: first, the doctrine of prior restraint;⁵ second, the expansion of the concept of agency through 'arrangements';⁶ and third, Steward J's doubts about the existence of the implied freedom.⁷

II The Implied Freedom of Political Communication

The freedom of political communication is implied by necessity from the system of representative and responsible government provided for by ss 7, 24, and 128 of the *Australian Constitution*.⁸ In *Lange v Australian Broadcasting Corporation*, the High Court unanimously held that the implied freedom is an 'indispensable incident'⁹ of that system because the free flow of political communication within the community enables electors to exercise a free and informed choice.¹⁰ As Mason CJ explained in

⁴ *LibertyWorks* (n 1) 511 [89] (Kiefel CJ, Keane and Gleeson JJ).

⁵ The American doctrine of 'prior restraint' is likely to feature more in future decisions concerning the implied freedom. Gageler J and Gordon J both referred to the concept when characterising the 'freezing' effect of the Scheme on political communication: see *LibertyWorks* (n 1) 512 [94]–[96], 513–14 [99]–[100] (Gageler J), 531 [179] (Gordon J); cf 540 [219] (Edelman J).

⁶ The definition of 'on behalf of' may amount to overreach because it includes acting under 'an arrangement of any kind': see *FITS Act* (n 2) ss 10 (definition of 'arrangement'), 11(1)(a)(i); cf United States' *Foreign Agents Registration Act of 1938* 22 USC § 611(c) (1938) ('*FARA*'). Steward J and Edelman J both expressed concerns about the legislature using this definition to extend the traditional scope of agency and suggested that it may not be adequate in its balance because it imposes scheme obligations on persons who are not agents for a foreign principal in any true sense of the word: see *LibertyWorks* (n 1) 534–5 [196], 538 [211], 538–9 [213], 539[215]–[216] (Edelman J), 549 [268], 550 [274]–[275], 554 [295] (Steward J). There is no exemption for scholastic and scientific pursuits; cf *FARA* (n 6) § 613(e). One implication is that Australian academics who collaborate with scholars who are affiliated with a foreign political organisation may be liable to register: see Professor Anne Twomey, Submission No 82.1 to Parliamentary Joint Committee on Intelligence and Security ('PJICIS'), Parliament of Australia, *Review of the Foreign Influence Transparency Scheme Bill 2017* (13 June 2018).

⁷ *LibertyWorks* (n 1) 546 [249] (Steward J). His Honour stated that 'with the greatest of respect, it is arguable that the implied freedom does not exist', and suggested that he would welcome, on another occasion, a full argument challenging its existence.

⁸ *Australian Constitution* ss 7, 24, 128. For commentary on the implied freedom, see generally James Stellios, *Zine's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 598–603.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 ('*Lange*').

¹⁰ *LibertyWorks* (n 1) 520 [131] (Gordon J); *Clubb v Edwards* (2019) 267 CLR 171, 295 [356] (Gordon J) ('*Clubb*'); *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, 661 [181]

Australian Capital Television Pty Ltd v Commonwealth, ‘individual judgment, whether that of the elector, the representative or the candidate ... turns upon free public discussion ... of the views of all interested persons ... and on public participation in that discussion’.¹¹ The implied freedom covers a range of communications including non-verbal conduct,¹² matters concerning the social and economic features of Australian society,¹³ and the exercise of public powers at any level of government in any part of the country.¹⁴ Unlike the First Amendment to the *United States Constitution*,¹⁵ it does not confer personal rights on individuals; rather, it operates as a restriction on legislative and executive power.¹⁶ The freedom is not absolute; it is limited to what is necessary for the effective operation of the constitutionally prescribed system of government.¹⁷

The current test endorsed by the majority of the High Court¹⁸ for determining whether a law impermissibly burdens the implied freedom, is set out in *Lange*,¹⁹ as refined in *Coleman*,²⁰ *McCloy v New South Wales*,²¹ and *Brown v Tasmania*.²² The test comprises two steps. The first step involves asking whether the law effectively burdens the implied freedom in its terms, operation, or effect. If the question is answered in the affirmative, the second step is engaged and asks: first, whether the law serves a legitimate purpose that is compatible with the maintenance of the system of representative and responsible government; and second, whether the law is reasonably appropriate and adapted to advancing that purpose. The latter inquiry involves asking whether the law is suitable, necessary, and adequate in its

(Edelman J) (*Unions NSW (No 2)*); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ), 430 [312] (Gordon J) (*Brown*); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 94 [203] (Keane J) (*Murphy*); *McCloy v New South Wales* (2015) 257 CLR 178, 279 [301] (Gordon J) (*McCloy*); *Tajjour v New South Wales* (2014) 254 CLR 508, 557 [55], 558 [59] (Hayne J) (*Tajjour*); *Monis v The Queen* (2013) 249 CLR 92, 136 [84] (Hayne J) (*Monis*); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 244 [178] (Gummow and Hayne JJ) (*Mulholland*); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) (*ACTV*); *Unions NSW v New South Wales* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 575 [122] (Keane J) (*Unions NSW (No 1)*); *Coleman v Power* (2004) 220 CLR 1, 48–9 [89] (McHugh J), 77 [195] (Gummow and Hayne JJ), 120–1 [320] (Heydon J) (*Coleman*).

¹¹ *ACTV* (n 10) 139 (Mason CJ).

¹² *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ), 641 (Kirby J) (*Levy*).

¹³ *Hogan v Hinch* (2011) 243 CLR 506, 544 [49] (French CJ).

¹⁴ *Lange* (n 9) 571; *Levy* (n 12) 643–4 (Kirby J).

¹⁵ *United States Constitution* amend I.

¹⁶ *LibertyWorks* (n 1) 513 [99] (Gageler J), 543 [233] (Edelman J), 547 [257] (Steward J); *Comcare v Banerji* (2019) 267 CLR 373, 394–6 [19]–[20] (Kiefel CJ, Bell, Keane and Nettle JJ), 434 [135] (Gordon J) (*Comcare*); *Lange* (n 9) 560; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 168 (Deane J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 (Brennan J); *ACTV* (n 10) 150 (Brennan J).

¹⁷ *Lange* (n 9) 561; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50 (Brennan J), 76 (Deane and Toohey JJ), 94 (Gaudron J); *ACTV* (n 10) 142 (Mason CJ), 150 (Brennan J), 169 (Deane and Toohey JJ), 185 (Dawson J), 217 (Gaudron J), 234 (McHugh J).

¹⁸ *LibertyWorks* (n 1) 504 [45]–[46], [48] (Kiefel CJ, Keane and Gleeson JJ), 521 [134] (Gordon J).

¹⁹ *Lange* (n 9) 561–2, 567–8.

²⁰ *Coleman* (n 10) 51 [95]–[96] (McHugh J), 77–8 [196] (Gummow and Hayne JJ), 82 [211]–[213] (Kirby J).

²¹ *McCloy* (n 10) 193–5 [2]–[4] (French CJ, Kiefel, Bell and Keane JJ).

²² *Brown* (n 10) 363–4 [104] (Kiefel CJ, Bell and Keane JJ), 375–6 [155]–[156] (Gageler J), 398–9 [237], 413 [271], 416 [277] (Nettle J), 431–3 [315]–[325], 478 [481] (Gordon J).

balance — this is known as the structured method of ‘proportionality analysis’.²³ The burden is assessed by reference to the effect of the law *generally*, rather than the particular case.²⁴ The level of justification required depends on the nature and extent of the burden imposed.²⁵

The implied freedom has been posited as a ground for challenging the constitutionality of legislation in myriad spheres including electoral law,²⁶ registration of political parties,²⁷ prohibitions on political donations from property developers,²⁸ caps on electoral communication expenditure by third-party campaigners,²⁹ protest activities,³⁰ preaching on public roads without council permission,³¹ distributing pamphlets containing insulting words,³² habitual consorting with convicted offenders,³³ offensive use of the postal service,³⁴ advertising certain legal services,³⁵ and entering hunting areas without a licence.³⁶ In *LibertyWorks*, the implied freedom was invoked to challenge the *FITS Act*, a federal law that purports to promote transparency of foreign influence activities in Australia.

III The Legislative Scheme

The *FITS Act* was introduced at a time when the Australian Security Intelligence Organisation (‘ASIO’) explicitly warned that Australia was experiencing undisclosed foreign influence activity on an unprecedented scale.³⁷ It is part of a trio

²³ *LibertyWorks* (n 1) 504 [46], 504 [48] (Kiefel CJ, Keane and Gleeson JJ), 535–6 [200]–[201] (Edelman J), 545 [247] (Steward J); *McCloy* (n 10) 193–5 [2], 217 [79] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 10) 368 [123] (Kiefel CJ, Bell and Keane JJ), 416–7 [278] (Nettle J); *Unions NSW (No 2)* (n 10) 615 [42] (Kiefel CJ, Bell and Keane J), 638 [110] (Nettle J), 653–4 [161] (Edelman J); *Clubb* (n 10) 200–2 [70]–[74] (Kiefel CJ, Bell and Keane JJ), 264–5 [266] (Nettle J), 311 [408], 330–1 [463] (Edelman J); *Comcare* (n 16) 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ), 442 [165], 451 [188] (Edelman J).

²⁴ *LibertyWorks* (n 1) 521 [135] (Gordon J); *Wotton v Queensland* (2012) 246 CLR 1, 31 [80] (Kiefel J); *Unions NSW (No 1)* (n 10) 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown* (n 10) 360 [90] (Kiefel CJ, Bell and Keane JJ); *Clubb* (n 10) 192–3 [35] (Kiefel CJ, Bell and Keane JJ).

²⁵ *LibertyWorks* (n 1) 521 [136] (Gordon J); *Monis* (n 10) 146–7 [124] (Hayne J); *Tajjour* (n 10) 580 [151] (Gageler J); *McCloy* (n 10) 238–9 [150]–[152] (Gageler J), 259 [222], 269–70 [255] (Nettle J); *Brown* (n 10) 367 [118], 369 [128] (Kiefel CJ, Bell and Keane JJ), 378–9 [164]–[165], 389–90 [200]–[201] (Gageler J), 460 [411], 477–8 [478] (Gordon J); *Clubb* (n 10) 299–300 [369] (Gordon J).

²⁶ *Day v Australian Electoral Officer* (SA) (2016) 261 CLR 1; *Murphy* (n 10); *Langer v Commonwealth* (1996) 186 CLR 302.

²⁷ *Mulholland* (n 10).

²⁸ *Spence v Queensland* (2019) 268 CLR 355; *McCloy* (n 10).

²⁹ *Unions NSW (No 1)* (n 10); *Unions NSW (No 2)* (n 10).

³⁰ *Brown* (n 10); *Clubb* (n 10).

³¹ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

³² *Coleman* (n 10).

³³ *Tajjour* (n 10).

³⁴ *Monis* (n 10).

³⁵ *APL Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322.

³⁶ *Levy* (n 12).

³⁷ Australian Security Intelligence Organisation (‘ASIO’), *ASIO Annual Report 2017–18* (2018), 3, 9, 25 (‘*ASIO Annual Report 2017–18*’); PJCIS, Parliament of Australia, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (Advisory Report, June 2018) 2–5 (‘*FITS Bill Advisory Report*’).

of reforms³⁸ underpinning Australia's counter foreign interference strategy, which, as the then Prime Minister explained, is built on four pillars: sunlight, enforcement, deterrence and capability.³⁹ The Scheme⁴⁰ aims to expose activities to 'sunlight',⁴¹ in order to give the public and policymakers 'proper visibility' of foreign influence and 'any underlying agenda'.⁴² This is echoed in the Revised Explanatory Memorandum, which states that 'it is difficult to assess the interests of foreign actors when they use intermediaries to advance their interests'.⁴³ As the then Attorney-General explained, transparency of foreign influence protects the integrity of Australian government institutions by reducing the risk of foreign interests prevailing over domestic interests:

[E]ven more dangerous and potentially even more damaging than traditional espionage is the practice that traditional spying now morphs into a massively broad and inventive range of covert hidden foreign influence, or hidden foreign influence, in our democratic systems. ... [W]hat can cause immense harm are [sic] foreign influence cloaked in the disguise of a purely or uniquely Australian veneer or foreign advocacy channelled by and through a recognised and seemingly independent Australian voice, which might be paid for or directed by foreign principals in a way that is hidden from sight.⁴⁴

Accordingly, the object of the *FITS Act* is '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'.⁴⁵ A person becomes liable to register if they undertake a registrable activity on behalf of a foreign principal.⁴⁶ A 'person' is defined broadly to include an individual, body corporate, body politic, partnership, association, and organisation, whether or not resident in, or carrying on business in, Australia.⁴⁷ A 'foreign principal' includes, for the purposes of the *LibertyWorks* decision, a

³⁸ See also *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) and *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth). For criticism, see Michael Head, 'Australia's Anti-Democratic "Foreign Interference" Bills' (2018) 43(3) *Alternative Law Journal* 160; Hannah Ryan, 'National Security: The Constitutional Cost of Combatting Espionage and Foreign Interference' (2018) 47(1) *Law Society of New South Wales Journal* 73.

³⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145–9 (Malcolm Turnbull).

⁴⁰ See *FITS Act* (n 2) ss 10 (definition of 'scheme'), 71; *Foreign Influence Transparency Scheme Rules 2018* (Cth) ('*FITS Rules*'); *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) ('*FITS Disclosure Rules*').

⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13146, 13148 (Malcolm Turnbull). The 'sunlight' metaphor derives from an essay by Louis D Brandeis, a former Justice of the United States Supreme Court, in which Brandeis states, 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants': see Louis D Brandeis, 'What Publicity Can Do', *Harper's Weekly* (20 December 1913) 10, quoted in *LibertyWorks* (n 1) 514 [104] (Gageler J).

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13148 (Malcolm Turnbull).

⁴³ Revised Explanatory Memorandum, *Foreign Influence Transparency Scheme Bill 2017* (Cth) 2 [3]. See also 72 [401].

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2018, 6398 (Christian Porter).

⁴⁵ *FITS Act* (n 2) s 3.

⁴⁶ *Ibid* s 18(1)(a).

⁴⁷ *Ibid* s 10 (definition of 'person').

foreign political organisation that exists primarily to pursue political objectives.⁴⁸ ‘Registrable activity’ comprises several categories,⁴⁹ including ‘communications activity’,⁵⁰ which is defined broadly as the production or distribution of information to the Australian public for the purpose of political or governmental influence.⁵¹ The words, ‘for the purpose of’, mean to undertake an activity whose sole, primary or substantial purpose is to influence any of several types of processes,⁵² including a ‘federal government decision’ on any matter, whether it is an administrative, legislative, or policy matter.⁵³ Persons who are liable to register must apply to the Secretary of the Attorney-General’s Department.⁵⁴

Registrants have a suite of responsibilities including ongoing reporting⁵⁵ and recordkeeping obligations.⁵⁶ Additionally, any person who undertakes a communications activity, whether or not a registrant, must make a disclosure at the time of the communication in accordance with the *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) (*FITS Disclosure Rules*).⁵⁷ Penalties for non-compliance range from 60 penalty units to five years’ imprisonment.⁵⁸ As at the time of writing, there are 110 registrants, 294 foreign principals, and 459 unique activities.⁵⁹

Under the Scheme, the Secretary has broad powers to obtain ‘scheme information’.⁶⁰ Applications for registration ‘must be accompanied by any information or documents required by the Secretary’.⁶¹ If the Secretary ‘reasonably

⁴⁸ Ibid s 10 (definitions of ‘foreign principal’ and ‘foreign political organisation’). Note: There are four categories of ‘foreign principal’: (a) foreign government; (b) foreign government related entity; (c) foreign political organisation; and (d) foreign government related individual.

⁴⁹ Ibid ss 20, 21(1), 22, 23.

⁵⁰ Ibid s 21(1) table, item 3. The *LibertyWorks* decision is concerned with ‘communications activity’ in Australia for the purpose of political or governmental influence. The other categories of ‘registrable activity’ include: parliamentary lobbying on behalf of a foreign government (s 20); parliamentary lobbying, general political lobbying, or disbursement activity, for the purpose of political or governmental influence (s 21(1) table, items 1, 2, 4); activities undertaken by former Cabinet Ministers on behalf of a foreign principal (s 22); and activities undertaken by recent designated position holders on behalf of a foreign principal (s 23). These other provisions were not the subject of the challenge in *LibertyWorks*.

⁵¹ *FITS Act* (n 2) s 13(1).

⁵² Ibid s 12(1). Note: The categories of processes which may be the subject of influence include: (a) a process in relation to a federal election; (b) a process in relation to a federal government decision; (c) proceedings of a House of Parliament; (d) a process in relation to a registered political party; (e) a process in relation to a member of the Parliament; (f) a process in relation to a candidate in a federal election; and (g) processes in relation to registered political campaigners.

⁵³ Ibid ss 12(1)(b), (4). Examples of federal government decisions include decisions made by the Executive Council, the Cabinet or a committee of the Cabinet, a Minister, a Commonwealth entity, a Commonwealth company, and an individual in the course of performing their functions in relation to an aforementioned body: *ibid* s 12(3).

⁵⁴ Ibid s 16.

⁵⁵ Ibid s 34(1).

⁵⁶ Ibid s 40.

⁵⁷ Ibid s 38(1); *FITS Disclosure Rules* (n 40) rr 5–7.

⁵⁸ *FITS Act* (n 2) pt 5.

⁵⁹ Attorney-General’s Department (Cth), *Transparency Register* (Web Page, December 2022) <<https://transparency.ag.gov.au/>>. Registrants include Tony Abbott, Alexander Downer, Brendan Nelson, Kevin Rudd, and Malcolm Turnbull.

⁶⁰ *FITS Act* (n 2) s 50. See also ss 16(2)(d), 34(3)(d), 35(3)(d), 36(3)(d), 37(3)(d), 39(2)(d), 45(2), 46(2).

⁶¹ Ibid s 16(2)(d).

suspects' that a person is liable to register, they may issue a notice requiring the person to provide any information and documents to 'satisfy the Secretary as to whether the person is liable to register'.⁶² Additionally, if the Secretary 'reasonably believes' that a person, whether or not a potential registrant, has information or documents relevant to the Scheme, they may issue a notice requiring the person to produce them.⁶³

Importantly, there are two repositories of scheme information. First, the Secretary is required to keep a (non-public) register,⁶⁴ which must include the names of the registrant and foreign principal, registration and renewal applications, any accompanying information, records of communications between the person and the Department, and any other information or documents the Secretary considers appropriate.⁶⁵ Second, there is a website on which certain information from the Secretary's register is made publicly available as required by the *FITS Act* and *Foreign Influence Transparency Scheme Rules 2018* (Cth) ('*FITS Rules*'); namely, the names of the registrant and foreign principal, and a description of the registrable activities.⁶⁶ The website does not include information that is 'commercially sensitive', affects 'national security', or is of a kind prescribed in the Rules (the *FITS Rules* and *FITS Disclosure Rules*).⁶⁷ Notably, the preceding terms are not defined in the legislation,⁶⁸ although the Department indicated that it may seek guidance from law enforcement agencies when determining their meaning.⁶⁹

Scheme officials are empowered, pursuant to s 52 of the *FITS Act*, to communicate scheme information for the purposes of performing their functions under the Scheme.⁷⁰ Additionally, the Secretary is empowered to disclose scheme information to certain persons for 'other purposes' under s 53, including the enforcement body for enforcement related activity,⁷¹ an Australian police force and any 'authority of the Commonwealth, a State or a Territory' for the protection of public revenue or security,⁷² and other persons for any other purposes prescribed by the Rules.⁷³

IV The Constitutional Challenge

The material facts of the case are as follows. LibertyWorks is a think-tank incorporated in Queensland. It aims to promote increased individual rights and freedoms in public policy. The ACU is an American corporation that aims to

⁶² Ibid ss 45(1)–(2).

⁶³ Ibid ss 46(1)–(2).

⁶⁴ Ibid s 42(1), *FITS Rules* (n 40) rr 6, 6A.

⁶⁵ *FITS Act* (n 2) s 42(2).

⁶⁶ Ibid s 43(1); *FITS Rules* (n 40) r 6.

⁶⁷ *FITS Act* (n 2) s 43(2).

⁶⁸ See *FITS Bill Advisory Report* (n 37) 139 [6.55]–[6.57].

⁶⁹ See Attorney-General's Department (Cth), Submission No 5.1 to PJCIS, Parliament of Australia, *Review of the Foreign Influence Transparency Scheme Bill 2017* (31 January 2018) 42 [40].

⁷⁰ *FITS Act* (n 2) s 52.

⁷¹ Ibid s 53(1) table, item 1.

⁷² Ibid s 53(1) table, items 2, 3; *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 (definition of 'security').

⁷³ *FITS Act* (n 2) s 53(1) table, item 4.

influence politics in the United States from a classical liberal perspective. In 2018, LibertyWorks approached the ACU and they agreed to collaborate as co-hosts on a CPAC event in Australia that was held in August 2019. That month, prior to the event, the Department asked LibertyWorks to consider whether it had registration obligations under the *FITS Act*. In October 2019, the Secretary issued a notice under s 45 of the *FITS Act* requesting information and documents in order to determine whether LibertyWorks is liable to register.⁷⁴ A freedom of information request revealed that Shadow Attorney-General, Mark Dreyfus, had prompted the enquiry.⁷⁵ The President of LibertyWorks was threatened with six months' imprisonment for refusing to comply.⁷⁶ The Department later decided not to pursue the matter.

The challenge brought by LibertyWorks was confined⁷⁷ to the provisions of the *FITS Act* that impose registration obligations⁷⁸ in respect of 'communications activities'.⁷⁹ The parties agreed that, subject to the validity of the legislation, LibertyWorks has registration obligations because it undertakes communications activity on behalf of the ACU.⁸⁰ They also agreed that the legislation burdens the implied freedom,⁸¹ and that its legitimate purpose is to promote transparency of intermediary relationships.⁸² LibertyWorks' main contention was that the impugned provisions go beyond the legislative object.⁸³ It argued that registration is unnecessary because there is a compelling alternative: namely, the disclosure obligation under s 38 coupled with the *FITS Disclosure Rules*, which prescribe the content and form of disclosure required for different communications activities.⁸⁴ Thus, registration contributes nothing more.⁸⁵

⁷⁴ *LibertyWorks* (n 1) 498 [5] (Kiefel CJ, Keane and Gleeson JJ), 551 [281] (Steward J).

⁷⁵ See Joe Kelly, 'How Labor's Top Lawyer Mark Dreyfus Steered Bureaucrats against ex-PM Tony Abbott', *The Australian* (online, 31 January 2020) <<https://www.theaustralian.com.au/nation/politics/how-labors-top-lawyer-mark-dreyfus-steered-bureaucrats-against-expm-tony-abbott/news-story/fdc9cea0e0db084adaeabd2a29119830>>.

⁷⁶ *FITS Act* (n 2) s 59(1). See also Joe Kelly, 'High Court to Rule on Foreign Influence Laws', *The Australian* (online, 5 February 2020) <<https://www.theaustralian.com.au/nation/politics/high-court-to-rule-on-foreign-influence-laws/news-story/4ae9371cac2830c4457e9a265970fe70>>.

⁷⁷ *LibertyWorks* (n 1) 503 [40]–[42], 505 [52] (Kiefel CJ, Keane and Gleeson JJ), 518–19 [124] (Gordon J); LibertyWorks Inc, 'Plaintiff's Submissions', Submission in *LibertyWorks Inc v Commonwealth*, Case No S10/2020, 22 September 2020, 7 [18] ('LibertyWorks Submissions').

⁷⁸ *FITS Act* (n 2) ss 16, 18.

⁷⁹ *Ibid* s 21(1) table, item 3.

⁸⁰ *LibertyWorks* (n 1) 505 [51] (Kiefel CJ, Keane and Gleeson JJ); LibertyWorks Submissions (n 77) 6 [17]; Commonwealth of Australia, 'Respondent's Submissions', Submission in *LibertyWorks Inc v Commonwealth*, Case No S10/2020, 21 October 2020, 3–4 [4] ('Commonwealth Submissions').

⁸¹ *LibertyWorks* (n 1) 505 [54] (Kiefel CJ, Keane and Gleeson JJ); LibertyWorks Submissions (n 77) 14–15 [32]; Commonwealth Submissions (n 80) 9 [17].

⁸² *LibertyWorks* (n 1) 505 [53], 505 [55] (Kiefel CJ, Keane and Gleeson JJ); LibertyWorks Submissions (n 77) 15–16 [34]–[36]; Commonwealth Submissions (n 80) 12 [22]–[23].

⁸³ LibertyWorks Submissions (n 77) 17 [42], 18–9 [46]–[49], 20 [55]–[56]; *LibertyWorks* (n 1) 505 [53], 508 [73] (Kiefel CJ, Keane and Gleeson JJ).

⁸⁴ *FITS Act* (n 2) s 38; *FITS Disclosure Rules* (n 40) rr 5–7.

⁸⁵ LibertyWorks Submissions (n 77) 18 [46]; LibertyWorks Inc, 'Plaintiff's Outline of Oral Submissions', Submission in *LibertyWorks Inc v Commonwealth*, Case No S10/2020, 2 March 2021, 4 [18]–[19].

V Understanding the High Court's Split Decision

In *LibertyWorks*, the High Court issued a joint judgment and four separate judgments. The judges agreed that the impugned provisions burden the implied freedom, and that a legitimate purpose of the legislation is to promote the transparency of activities undertaken by intermediaries on behalf of foreign principals.⁸⁶ The key issue was whether the burden is justified. The plurality considered the burden to be modest, and upheld the provisions.⁸⁷ Edelman J considered that the provisions have a significant deterrent effect and impose a deep burden but ultimately held that this was justified.⁸⁸ Steward J reached the same conclusion,⁸⁹ but intimated that he might have invalidated the provision concerning an 'arrangement',⁹⁰ had it been properly challenged.⁹¹ Gageler J and Gordon J dissented in separate judgments but reached the same conclusion, notwithstanding Gageler J's objection to structured proportionality.⁹² Their Honours each characterised the Scheme provisions as a 'prior restraint' on political communication,⁹³ and held that they impermissibly burden the implied freedom.

A The Majority: Inadequacy of Mere Disclosure

The majority judgments in *LibertyWorks* contain important insights, but they are limited insofar as they overlook the discrepancy between the two repositories of information. The key insight from the joint judgment is that disclosure obligations, without registration obligations, are inadequate. For the plurality, the most contentious aspect of proportionality analysis was the question of reasonable necessity;⁹⁴ namely, whether there is an equally practicable, obvious, and compelling alternative.⁹⁵ The plurality, along with Edelman J, rejected *LibertyWorks*' submission that the disclosure obligation under s 38 is sufficient.⁹⁶ Their Honours reasoned that disclosure might be restricted to a small group, for example, a private social media group, or a newspaper in a foreign language.⁹⁷ If some recipients were to further disseminate the communication to others, without alerting them to the relationship between the original intermediary and the foreign

⁸⁶ *LibertyWorks* (n 1) 507 [62], 510 [85] (Kiefel CJ, Keane and Gleeson JJ), 514 [102] (Gageler), 532 [184] (Gordon J), 537–8 [207]–[208] (Edelman J), 548 [261] (Steward J).

⁸⁷ *LibertyWorks* (n 1) 508–9 [74] (Kiefel CJ, Keane and Gleeson JJ).

⁸⁸ *Ibid* 534 [194]–[195], 535 [198], 540–1 [222]–[224] (Edelman J).

⁸⁹ *Ibid* 545 [246], 556 [305] (Steward J).

⁹⁰ *FITS Act* (n 2) s 11(1)(a)(i).

⁹¹ *LibertyWorks* (n 1) 545–6 [248] (Steward J).

⁹² *Ibid* 512 [93] (Gageler J); *Tajjour* (n 10) 579–81 [148]–[152] (Gageler J); *McCloy* (n 10) 231–4 [129]–[138], 238–9 [150]–[152] (Gageler J); *Brown* (n 10) 389–91 [200]–[206] (Gageler J); *Clubb* (n 10) 225 [161]–[162] (Gageler J); *Comcare* (n 16) 408–9 [53]–[54] (Gageler J). Cf *LibertyWorks* (n 1) 504 [46], 504 [48] (Kiefel CJ, Keane and Gleeson JJ).

⁹³ *LibertyWorks* (n 1) 512 [94] (Gageler J), 531 [179] (Gordon J).

⁹⁴ *Ibid* 509–10 [78]–[84] (Kiefel CJ, Keane and Gleeson JJ).

⁹⁵ *Lange* (n 9) 567–8; *Unions NSW (No 1)* (n 10) 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (n 10) 217 [81] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 10) 371–2 [139] (Kiefel CJ, Bell and Keane J); *Monis* (n 10) 214 [347] (Crennan, Kiefel and Bell JJ); *Tajjour* (n 10) 550 [36] (French CJ); *Clubb* (n 10) 186 [6] (Kiefel CJ, Bell and Keane JJ), 264–5 [266(3)], 265–6 [267]–[268], 269–70 [277] (Nettle J), 337 [478]–[480] (Edelman J); *Comcare* (n 16) 401 [35] (Kiefel CJ, Bell, Keane and Nettle J).

⁹⁶ *LibertyWorks* (n 1) 509–10 [78]–[84] (Kiefel CJ, Keane and Gleeson JJ), 545 [242] (Edelman J).

⁹⁷ *Ibid* 510 [81] (Kiefel CJ, Keane and Gleeson JJ).

principal, such information might become influential in political discourse without the original source being revealed.⁹⁸ The plurality emphasised the important role played by ‘members of the commentariat’, particularly journalists, who are most capable of scrutinising and exposing the interests of foreign participants in domestic political affairs.⁹⁹ Registration ensures that they are alerted to the presence of foreign influence and enables the public to be informed in a way that cannot be achieved by mere disclosure to recipients.

The plurality and Edelman J characterised the Scheme as serving a ‘powerful protective purpose’¹⁰⁰ of the ‘highest public policy’;¹⁰¹ namely, to promote transparency as a means of reducing the risk that undisclosed foreign principals will exert influence on the integrity of Australia’s political and governmental processes.¹⁰² Their Honours explained that the Scheme does not operate directly on communications, nor does it prohibit or regulate their content; it is content-neutral and non-discriminatory.¹⁰³ When assessing the extent of the burden, the plurality considered two counterfactuals that illustrate the kinds of political communication that are *not* burdened.¹⁰⁴ First, the Scheme does not affect persons who bear no relation to a foreign principal and who engage in political communication on their own behalf. For example, if LibertyWorks had organised the CPAC event without entering into an arrangement with the ACU, then it would not have registration obligations. Second, foreign principals need not register if they communicate directly with the Australian public; it is only when communication occurs through an intermediary that the source becomes obscured. Their Honours accepted that the registration requirement might have some deterrent effect, but held that this only applies to a ‘small subset of political communication’ and affects a ‘very small proportion of persons’.¹⁰⁵ The plurality concluded that *both* disclosure and registration are necessary for achieving the legislative object.¹⁰⁶ Edelman J and Steward J reached the same conclusion.¹⁰⁷

The key limitation of the joint judgment is that it overlooks a fundamental aspect of the *FITS Act*; namely, the existence of two repositories of scheme information. It is not that the plurality failed to advert to the issue;¹⁰⁸ rather, they consciously refrained from investigating the question. In one sense, the restrained nature of the joint judgment is appropriate. As the plurality noted, it is sound judicial practice to only decide on questions for which there exists a state of facts that make it necessary to determine the rights of the parties and where such a case has been put

⁹⁸ Ibid 510 [82] (Kiefel CJ, Keane and Gleeson JJ).

⁹⁹ Ibid 510 [83] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁰ Ibid 510 [85] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰¹ Ibid 545 [244] (Edelman J).

¹⁰² Ibid 507 [61]–[62] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰³ Ibid 507 [66] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁴ Ibid 507 [64]–[65] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁵ Ibid 509 [74] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁶ Ibid 510 [84] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁷ Ibid 534 [194]–[195], 535 [198] (Edelman J), 545 [246], 556 [305] (Steward J).

¹⁰⁸ See Transcript of Proceedings, *LibertyWorks Inc v Commonwealth* [2021] HCATrans 35, 603–6 (Kiefel CJ).

to all parties for a considered response.¹⁰⁹ Accordingly, the plurality confined their reasons to the ‘outer limits of the plaintiff’s case’,¹¹⁰ which did not advance any argument about the Secretary’s powers constituting overreach.¹¹¹ Indeed, the parties proceeded on the footing that the Secretary’s powers are limited by the legislative object.¹¹² This explains why the plurality expressly acknowledged that the joint judgment does not address questions about whether the Secretary’s information-gathering powers may be used for purposes beyond the objects of the *FITS Act*.¹¹³ Notwithstanding their fidelity to the conventional principles of judicial practice, the plurality missed an important opportunity to shed light on the role of statutory interpretation in mediating between the executive government and the people, by both enabling and constraining the exercise of discretionary powers by public officials.

B The Dissenters: A ‘Secret Register’

The dissenting judgments of Gageler J¹¹⁴ and Gordon J¹¹⁵ highlight the significance of the disconnect between two distinct repositories of scheme information — the first, a private register kept by the Secretary, and the second, a public website.¹¹⁶ During oral argument, the Court queried whether there exists a gap between the two, and if so, the extent of that gap, and the burden it imposes on political communication.¹¹⁷ The joint judgment, with which Steward J agreed,¹¹⁸ noted the existence of the two repositories, but did not consider whether there was a disconnect.¹¹⁹ By contrast, Gageler J and Gordon J each expressed grave concerns about the disconnect.¹²⁰ Gageler J accepted that the object of improving the transparency of foreign influence activities justifies the creation of a public system of registration.¹²¹ However, his Honour took issue with the creation of a ‘secret register’ from which a far more limited subset of information is published on the website.¹²²

Similarly, Gordon J held that the provisions go well beyond the legitimate purpose of minimising the risk of foreign principals exerting undisclosed influence on Australian political processes.¹²³ Her Honour explained that the statutory text evinces a clear legislative intention to create two repositories that ‘do *not* mirror each

¹⁰⁹ *LibertyWorks* (n 1) 511 [90] (Kiefel CJ, Keane and Gleeson JJ); *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ); *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52].

¹¹⁰ *LibertyWorks* (n 1) 511 [87] (Kiefel CJ, Keane and Gleeson JJ).

¹¹¹ *Ibid* 511 [87]–[89] (Kiefel CJ, Keane and Gleeson JJ).

¹¹² *Ibid* 511 [87] (Kiefel CJ, Keane and Gleeson JJ).

¹¹³ *Ibid* 510–11 [86] (Kiefel CJ, Keane and Gleeson JJ).

¹¹⁴ *Ibid* 515 [107]–[108], 516–7 [115]–[116] (Gageler J).

¹¹⁵ *Ibid* 519–20 [129], 522 [138], 527 [159] (Gordon J).

¹¹⁶ *FITS Act* (n 2) ss 42–3.

¹¹⁷ *LibertyWorks* (n 1) 541 [225] (Edelman J); Transcript of Proceedings, *LibertyWorks Inc v Commonwealth* (n 109), 738–40 (Edelman J).

¹¹⁸ *LibertyWorks* (n 1) 545 [246] (Steward J).

¹¹⁹ *Ibid* 502–3 [36]–[37] (Kiefel CJ, Keane and Gleeson JJ).

¹²⁰ *Ibid* 516–17 [115]–[117] (Gageler J), 519–20 [129]–[130], 526 [155]–[156], 527 [159], 527 [161], 527–8 [164] (Gordon J).

¹²¹ *Ibid* 514–15 [105] (Gageler J).

¹²² *Ibid* 516–17 [115]–[116] (Gageler J); see also 515 [107] (Gageler J). See *FITS Act* (n 2) ss 16(2)(d), 34(3)(d), 39(2)(d), 42–3.

¹²³ *LibertyWorks* (n 1) 519 [126]–[128], 530 [175], 532 [184], 533 [187] (Gordon J).

other'.¹²⁴ Separate provisions deal with the information to be included on the register and the website.¹²⁵ The latter is identified with precision,¹²⁶ whereas the former includes 'any other information or documents the Secretary considers appropriate'.¹²⁷ Gordon J provided examples of information that must be placed on the register but not on the website, in order to illustrate the potentially 'significant divergence' between the two.¹²⁸ First, the Secretary may require a registrant to provide any information that would help them understand the intermediary relationship.¹²⁹ This could include contemporaneous records of meetings, financial transactions, and correspondence. Every document accompanying an application for registration must be placed on the register,¹³⁰ but only certain information needs to be placed on the website.¹³¹ Second, the Secretary may place on the register any information that is relevant to the management and administration of the Scheme.¹³² This might include an email from Person A to the Secretary, providing information about Person B, who Person A suspects is undertaking registrable activities.

It is necessary to address Edelman J's reasoning because his Honour turned his mind to the issue of a disconnect between the two repositories, but reached a conclusion different from the dissenters. Edelman J acknowledged that the larger the gap, the more significant the burden: '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'.¹³³ However, his Honour queried whether there was any gap at all here,¹³⁴ and held that any discrepancy could be justified based on administrative necessity:

this gap is no more than the concomitant of the administrative process that is necessary for appropriate information to be made available to the public. The information ... on the register provides the substratum for the information ... on the public website ... For the website to serve its intended function as a clear and transparent repository, it cannot simply be the site of an information dump. An administrative process is necessary to filter the relevant information ...¹³⁵

Edelman J's justification for the disconnect is unpersuasive because it overstates the logistical burden of organising information on a public register. Notably, the *FITS Act* was modelled on the United States' *Foreign Agents Registration Act of 1938* ('*FARA*').¹³⁶ The Act was developed after close consultation with the American counterparts of the Attorney-General's Department.¹³⁷ Under the *FARA*, however,

¹²⁴ Ibid 527 [160] (emphasis added) (Gordon J). See also 530 [174] (Gordon J).

¹²⁵ *FITS Act* (n 2) ss 42–3.

¹²⁶ Ibid ss 43(1)(a)–(b), (2A); *FITS Rules* (n 40) r 6.

¹²⁷ *FITS Act* (n 2) ss 42(2)(g), 3(c); *LibertyWorks* (n 1) 526 [155]–[156] (Gordon J).

¹²⁸ *LibertyWorks* (n 1) 529 [168] (Gordon J). See also 529 [169]–[172].

¹²⁹ *FITS Act* (n 2) s 16(2)(d).

¹³⁰ Ibid s 42(2)(b).

¹³¹ Ibid s 43(1).

¹³² Ibid ss 42(2)(g), (3)(c); Revised Explanatory Memorandum (n 43) 120 [674].

¹³³ *LibertyWorks* (n 1) 542 [226] (Edelman J).

¹³⁴ Ibid 542 [227] (Edelman J) cf 516–17 [112]–[117] (Gageler J), 529 [168]–[172] (Gordon J).

¹³⁵ Ibid 542 [229]–[230] (Edelman J).

¹³⁶ *FARA* (n 6) §§ 611–21.

¹³⁷ See *FITS Bill Advisory Report* (n 37) 33 [2.108], 35 [2.115], 162 [7.22]; Attorney-General's Department (Cth), Submission No 5 to PJCS, Parliament of Australia, *Review of the Foreign*

all information provided to the Attorney-General *must* be made freely available to the public through an electronic database that is searchable and sortable.¹³⁸ Moreover, registers under other Commonwealth legislation are made public in their entirety.¹³⁹

As Gageler J explained, the disconnect between the ‘secret register’ and the public website highlights the problem inherent in the structure of the Scheme, which is not that the discretions to collect and share information are overly broad, but that they exist at all.¹⁴⁰ His Honour considered that a scheme narrowly tailored to the legislative object would not feature a secret register:

The information to be required from registrants and the information to be made available to the public would be one and the same ... There would be no occasion for the discretionary collection and dissemination of information for other governmental purposes.¹⁴¹

This is supported by the Revised Explanatory Memorandum, which states that ‘[t]o achieve the transparency objective of the scheme, it is essential that information be made publicly available.’¹⁴² Similarly, Gordon J held that the public website is directed at a legitimate purpose, but that the Secretary’s register is not, because there is no rational connection between a non-public register (which is ‘in darkness, not sunlight’), and the object of minimising the risk of undisclosed influence.¹⁴³

VI Open Question: The Ambit and Purpose(s) of the Secretary’s Powers

The extent of the disconformity between the ‘secret register’ and the public website turns on the ambit and purposes of the Secretary’s powers to obtain,¹⁴⁴ store,¹⁴⁵ and disseminate¹⁴⁶ scheme information. The broader the discretion, the wider the gap between the two repositories. As the plurality noted, the *LibertyWorks* decision leaves unanswered ‘large questions’ about the scope of the Secretary’s powers and whether they are confined by the *FITS Act* s 3 transparency object, or whether they might extend beyond this purpose.¹⁴⁷ The plurality, with whom Steward J agreed, declined to address the question because the parties proceeded on the footing that

Influence Transparency Scheme Bill 2017 (January 2018) 6 [13]; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 87 of 2017–18, 16 March 2018) 8. See also Malcolm Turnbull, ‘Transcript of Joint Press Conference: Foreign Interference; Foreign Donations; Same-Sex Marriage; Citizenship’ (Media Release, 5 December 2017) 2.

¹³⁸ *FARA* (n 6) §§ 616(a), (d)(1). Section 616(a) relevantly provides: ‘The Attorney General shall retain in permanent form one copy of all registration statements ... and the same shall be public records and open to public examination and inspection ...’.

¹³⁹ See, eg, *Commonwealth Electoral Act 1918* (Cth) ss 287N, 287Q; *Competition and Consumer Act 2010* (Cth) ss 152BCW(3), (5).

¹⁴⁰ *LibertyWorks* (n 1) 516–17 [115]–[116] (Gageler J).

¹⁴¹ *Ibid* 517 [117] (Gageler J).

¹⁴² Revised Explanatory Memorandum (n 43) 121 [676].

¹⁴³ *LibertyWorks* (n 1) 520 [130], 533 [189] (Gordon J).

¹⁴⁴ *FITS Act* (n 2) ss 16(2)(d), 34(3)(d), 35(3)(d), 36(3)(d), 37(3)(d), 39(2)(d), 45(2), 46(2).

¹⁴⁵ *Ibid* ss 42–3.

¹⁴⁶ *Ibid* ss 52, 53(1).

¹⁴⁷ *LibertyWorks* (n 1) 511 [89] (Kiefel CJ, Keane and Gleeson JJ).

the Secretary's powers are necessarily limited.¹⁴⁸ Only two judges adverted to the issue. Gageler J queried the extent to which the Secretary's powers are limited by the legislative object, whereas Edelman J held that they are heavily confined by it.¹⁴⁹

In light of the implications of their Honours' reasoning, Gageler J's view should be preferred. In Part VI(A)–(B), I argue that: first, the burden imposed by the legislation is potentially severe due to the ill-defined boundaries of the Secretary's powers to obtain and store scheme information; and second, the *FITS Act* operates under the guise of the legitimate object in s 3 and its purpose shifts from transparency to surveillance on the proper construction of the Secretary's powers to disseminate scheme information. I conclude that the Secretary's discretions, when construed in their entirety, are not reasonably appropriate and adapted to advance the legislative object.

A *Statutory Interpretation: Theory versus Practice*

The Secretary's powers to obtain and store scheme information go beyond the object of improving transparency. As Gageler J explained, when the Act is considered as a *whole*, the Secretary's discretions are not confined by the legislative object:

The [Commonwealth's] submission overstated the extent to which applicable principles of statutory interpretation confine the discretions by reference to the stated object ...¹⁵⁰

...

The factors to which the Secretary can have regard in exercising the discretions cannot be confined... to the exclusion of reference to the structure of the scheme of registration of which the discretions form part.

Notwithstanding the limitation of its object to improvement of transparency, no part of the design ... is to confine collection of information from registrants to that to be made publicly available on the website. The discretion to require information ... is rather designed to facilitate each of the 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.¹⁵¹

Indeed, the architecture of the Scheme is such that the Secretary's discretion to obtain information is designed to facilitate various forms of use, including disclosure to enforcement bodies for enforcement related activities.¹⁵² Publication of certain information on the website is but one form of use. Gordon J also noted that powers to collect and share information are 'ordinarily ... "limited by the purpose for which the power was conferred"'.¹⁵³ Here, however, the Act expressly defines a wider set of purposes for which the Secretary may lawfully communicate scheme information.¹⁵⁴

¹⁴⁸ Ibid 508 [70], 511 [87] (Kiefel CJ, Keane and Gleeson JJ), 545 [246] (Steward J).

¹⁴⁹ Ibid 516 [110], 516 [112]–[113] (Gageler J); cf [220], [227] (Edelman J).

¹⁵⁰ Ibid 516 [110] (Gageler J).

¹⁵¹ Ibid 516 [112]–[113] (Gageler J).

¹⁵² Ibid 516 [113]–[114] (Gageler J).

¹⁵³ Ibid 525–6 [154] (Gordon J), quoting *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423 ('Johns').

¹⁵⁴ *FITS Act* (n 2) s 53(1).

In direct contrast, Edelman J considered that the Scheme would not result in a large dossier of information being held on a government register because the Secretary's powers are constrained by principles of statutory interpretation:¹⁵⁵

An answer to any such challenge ... 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 extent...¹⁵⁶

...

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 invalid'.¹⁵⁷

Edelman J concluded that the Secretary can only collect information that is reasonably necessary for assessing whether registration is required, and for keeping information on the register accurate; any request beyond this is *ultra vires*.¹⁵⁸ His Honour is technically correct insofar as the *Acts Interpretation Act 1901* (Cth) requires the Court to adopt the interpretation that would best achieve the legislative purpose.¹⁵⁹ However, his Honour's analysis is unrealistic because it assumes that the Secretary and their delegates will undertake the requisite analysis, on every occasion, to appropriately qualify their discretion by reference to the legislative object. Even if the Secretary's information-gathering powers are, in theory, qualified by the objects clause, this is unlikely to occur in practice, at least not consistently.

The salient provisions concerning the collection and storage of scheme information are ss 16(2)(d), 42, 45 and 46 of the *FITS Act*. First, under ss 45 and 46, the Secretary may request information from a potential registrant whom the Secretary reasonably suspects might be liable to register,¹⁶⁰ and from any person whom the Secretary reasonably believes possesses information 'relevant to the operation of the scheme'.¹⁶¹ As the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') noted, the scope of 'relevant' information is not defined in the statute, and is likely to be interpreted liberally by the Department, given the broad framing of the legislative object.¹⁶² Second, s 16(2)(d) requires applications for registration to be accompanied by 'any information or documents required by the Secretary',¹⁶³ but neither the Act nor the Rules specify what information may be

¹⁵⁵ *LibertyWorks* (n 1) 540 [220]–[221], 542 [227] (Edelman J); cf 516 [110] (Gageler J).

¹⁵⁶ *Ibid* 540 [220] (Edelman J), citing *Clubb* (n 10) 317–18 [424].

¹⁵⁷ *LibertyWorks* (n 1) 540 [220] (Edelman J), citing *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108, 120 (Latham CJ); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 186–7 (Gibbs CJ); *Walton v Gardiner* (1993) 177 CLR 378, 409 (Brennan J); *Johns* (n 153) 424 (Brennan J), 436 (Dawson J), 453 (Toohey J), 458 (Gaudron J), 468 (McHugh J); *Katsuno v The Queen* (1999) 199 CLR 40, 57 [24] (Gaudron, Gummow and Callinan JJ); *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177, 208–9 [55]–[56] (Kiefel CJ, Bell and Keane JJ), 240 [151]–[152] (Nettle J).

¹⁵⁸ *LibertyWorks* (n 1) 540 [221] (Edelman J).

¹⁵⁹ *Acts Interpretation Act 1901* (Cth) s 15AA.

¹⁶⁰ *FITS Act* (n 2) ss 45(1), (2).

¹⁶¹ *Ibid* ss 46(1), (2).

¹⁶² *Ibid* s 3; *FITS Bill Advisory Report* (n 37) 140 [6.59]–[6.60], 149 [6.91].

¹⁶³ *FITS Act* (n 2) s 16(2)(d).

required.¹⁶⁴ Third, under s 42, the Secretary must keep a non-public register, which includes ‘any other information or documents the Secretary considers appropriate’.¹⁶⁵ The Revised Explanatory Memorandum states that this provision is intended to capture information that might not relate to a registrant, but is nevertheless ‘relevant to the scheme’s management and administration’.¹⁶⁶ However, the text and structure of the Act does not necessitate such a narrow interpretation of s 42(3)(c). When construed in light of the previous provisions, it supports a broad construction of the Secretary’s powers to obtain and store information on the non-public register.

As to the practical administration of the Scheme, it is apt to note that two former Prime Ministers, Malcolm Turnbull and Kevin Rudd, both of whom are registrants,¹⁶⁷ have questioned the Department’s broad interpretation of its powers.¹⁶⁸ Malcolm Turnbull queried ‘whether the legislation’s objective can be achieved with a lighter, simpler regulatory burden’.¹⁶⁹ Kevin Rudd described the Department’s interpretation as ‘sweeping’, ‘expansive’, ‘absurd’,¹⁷⁰ and a ‘waste of both officials’ time and taxpayer funds’.¹⁷¹ He also criticised the discrepant interpretations adopted by the current and former Department Secretaries regarding the ambit of their information-gathering powers.¹⁷² Another former Prime Minister, Tony Abbott, who is also a registrant,¹⁷³ warned that it is easy for the bureaucracy to turn ‘well-intentioned government policy into something which turns out to be radically different to what their ministers intended’.¹⁷⁴

¹⁶⁴ *FITS Bill Advisory Report* (n 37) 131 [6.28], 275 [10.159].

¹⁶⁵ *FITS Act* (n 2) s 42(3)(c).

¹⁶⁶ Revised Explanatory Memorandum (n 43) 120 [674].

¹⁶⁷ See Attorney-General’s Department (Cth), ‘Malcolm Turnbull’, *Transparency Register* (Web Page, 4 August 2021) <<https://transparency.ag.gov.au/Registrants/Details/0b09120d-8aea-eb11-814e-0050569d2348>>; Attorney-General’s Department (Cth), ‘Kevin Rudd’, *Transparency Register* (Web Page, 7 October 2022) <<https://transparency.ag.gov.au/Registrants/Details/4612496a-b15b-eb11-8147-0050569d2348>>.

¹⁶⁸ See Daniel Hurst, ‘“Such a Difficult Website”: Malcolm Turnbull’s Tech Troubles with Foreign Influence Register He Created’, *The Guardian* (online, 28 October 2021) <<https://www.theguardian.com/australia-news/2021/oct/28/such-a-difficult-website-malcolm-turnbulls-tech-troubles-with-foreign-influence-register-he-created>>.

¹⁶⁹ See Anthony Galloway, ‘Not Intended or Contemplated’: Turnbull Says Foreign Influence Laws Need Review’, *The Sydney Morning Herald* (online, 6 August 2021) <<https://www.smh.com.au/politics/federal/not-intended-or-contemplated-turnbull-says-foreign-influence-laws-need-review-20210805-p58g20.html>>.

¹⁷⁰ See Katharine Murphy, ‘Kevin Rudd to Register under Foreign Influence Scheme but Labels Government Guidance “Absurd”’, *The Guardian* (online, 24 December 2020) <<https://www.theguardian.com/australia-news/2020/dec/24/kevin-rudd-to-register-under-foreign-influence-scheme-but-labels-government-guidance-absurd>>.

¹⁷¹ See Daniel Hurst, ‘Kevin Rudd Registers Interviews with BBC and Radio NZ but Insists “I Am Not a Foreign Agent”’, *The Guardian* (online, 21 January 2021) <<https://www.theguardian.com/australia-news/2021/jan/21/kevin-rudd-registers-interviews-with-bbc-and-radio-nz-but-insists-i-am-not-a-foreign-agent>>.

¹⁷² *Ibid*; Murphy (n 170).

¹⁷³ See Attorney-General’s Department (Cth), ‘Anthony John Abbott’, *Transparency Register* (Web Page, 8 March 2022) <<https://transparency.ag.gov.au/Registrants/Details/55c28318-f308-eb11-8143-0050569d617d>>.

¹⁷⁴ See Janet Albrechtsen and Joe Kelly, ‘Tony Abbott Declares: I’m Not an Agent of Foreign Influence’, *The Australian* (online, 1 November 2019) <<https://www.theaustralian.com.au/nation/>>

B *Shift in Purpose: From Transparency to Surveillance*

The Secretary's powers to disseminate scheme information amount to legislative overreach because they operate as an illegitimate surveillance mechanism. The purpose of the *FITS Act*, as stated in the objects clause, is to improve the transparency of activities undertaken by intermediaries,¹⁷⁵ yet the practical effect of s 53 is to enable government surveillance. Where the meaning of a specific provision is plain and unambiguous, an objects clause cannot override it.¹⁷⁶ As Cole JA stated in *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd*, 'whilst regard may be had to an objects clause to resolve uncertainty or ambiguity, the objects clause does not control clear statutory language, or command a particular outcome of exercise of discretionary power'.¹⁷⁷ Section 53 of the *FITS Act*, when construed in light of s 52, reveals ulterior purposes for which the Secretary may communicate scheme information. The subtle augmentation of the legislative purpose is potentially insidious. Indeed, Gordon J warned that '[t]he burden is significant or severe because "[t]he finger of government levelled against" registrants "is ominous"; "the spectre of a government agent will look over the shoulder" of those who register under the scheme.'¹⁷⁸

The salient provisions concerning the legislative object are ss 52 and 53(1). Section 52 ('authorisation—purposes of the scheme') empowers scheme officials to communicate scheme information for the purposes of performing functions or exercising powers under the Scheme. By contrast, s 53 ('authorisation—other purposes') empowers the Secretary to disclose scheme information for a range of 'other purposes' including 'enforcement related activity', 'protection of public revenue', and 'protection of security', pursuant to the table in s 53(1). There is no requirement that these additional purposes advance the transparency object. Notably, the definition of 'enforcement related activity' includes the conduct of surveillance, monitoring, and intelligence-gathering activities.¹⁷⁹ Once the purpose is engaged, the Secretary is permitted to share the information with a host of enforcement bodies, including the police, Director of Public Prosecutions, Immigration Department, regulatory bodies, and crime and corruption commissions.¹⁸⁰ As the PJCIS noted, the definition of 'enforcement body' captures a broad range of agencies at all levels of government; it includes *any* agency 'to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction'.¹⁸¹

politics/tony-abbott-declares-im-not-an-agent-of-foreign-influence/news-story/da7994187fc74acd6797c3d5918b77a0>.

¹⁷⁵ *FITS Act* (n 2) s 3.

¹⁷⁶ *Lynn v New South Wales* (2016) 91 NSWLR 636, 647 [54] (Beazley P; Gleeson JA agreeing) ('Lynn'); *Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470, 480 [48]; *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415, 447–8 [145].

¹⁷⁷ *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 78 (citations omitted) (Cole JA), followed in *CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* (2012) 297 ALR 289, 314 [99] (Robertson J); *Lynn* (n 176) 647 [54] (Beazley P; Gleeson JA agreeing).

¹⁷⁸ *LibertyWorks* (n 1) 531 [179] (Gordon J), quoting *United States v Rumely*, 345 US 41, 57 (1953).

¹⁷⁹ *FITS Act* (n 2) s 53(1) table, item 1; *Privacy Act 1988* (Cth) s 6(1) (definition of 'enforcement related activity').

¹⁸⁰ *FITS Act* (n 2) s 53(1).

¹⁸¹ *FITS Bill Advisory Report* (n 37) 144 [6.73]. See also 144 [6.74]. See also Attorney-General's Department (Cth), Submission No 5.1 to PJCIS (n 69) 42 [41].

Additionally, item 4 of the table empowers the Secretary to communicate scheme information for any other purpose prescribed by the Rules.¹⁸² As the PJCIS noted, the legislation does not specify any matters that the Secretary must consider as a precondition to exercising their powers.¹⁸³ Moreover, the ‘other purposes’ are prescribed not in the primary legislation, but in secondary legislation in the form of Rules,¹⁸⁴ which are subject to even less scrutiny than regulations.¹⁸⁵ While the Revised Explanatory Memorandum states that this will be ‘kept narrow’¹⁸⁶ and limited to necessary matters, it provides no specific examples of how the Government envisages the power will be exercised.¹⁸⁷ Nothing in the Act requires that the rule-making power be limited to a ‘narrow’ prescription of additional purposes.¹⁸⁸ The PJCIS stated that significant matters such as this should be prescribed in the primary legislation unless there is a sound justification for using delegated legislation.¹⁸⁹ The Australian Information Commissioner also noted that where individual privacy is affected, it is more appropriate to stipulate in the primary legislation the requirements for exercising discretionary powers to deal with personal information.¹⁹⁰

There are two potential responses available to the Commonwealth — neither of which are satisfactory. First, it might be argued that ultra vires exercises of power can be dealt with by way of judicial review of administrative action. This was suggested by the plurality.¹⁹¹ The problem with this is that an individual whose information has been shared with government authorities is unlikely to even know that the Department has authorised such a communication in the first place.¹⁹² They would be in no position to bring such an action. Second, it might be argued that s 53 can be salvaged by reading down or severance. As to reading down, the Secretary’s powers to disseminate scheme information for ‘other purposes’ might be limited to circumstances where those purposes are incidental to the primary purpose of promoting transparency. During the hearing, Gageler J asked the Solicitor-General whether the Secretary could collect information for governmental purposes other than ensuring the transparency of intermediary relationships. The Solicitor-General explained that s 53 does not change the purpose for which information may be gathered, but merely extends the way it may be used in

¹⁸² *FITS Act* (n 2) ss 53(1) table, item 4, 71(1).

¹⁸³ *FITS Bill Advisory Report* (n 37) 142 [6.69].

¹⁸⁴ On the proliferation of delegated legislation, see generally Denise Meyerson, ‘Rethinking the Constitutionality of Delegated Legislation’ (2003) 11(1) *Australian Journal of Administrative Law* 45, 50–1.

¹⁸⁵ *FITS Bill Advisory Report* (n 37) 131 [6.28], 146 [6.82], 149 [6.91]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 1 of 2018, 7 February 2018) 66 [1.223], 66–7 [1.226]–[1.230]; Department of Parliamentary Services (Cth) (n 137) 11.

¹⁸⁶ Revised Explanatory Memorandum (n 43) 138 [780].

¹⁸⁷ *Ibid* 137–8 [779]–[780].

¹⁸⁸ Senate Standing Committee for the Scrutiny of Bills (n 185) 67 [1.228].

¹⁸⁹ *FITS Bill Advisory Report* (n 37) 149 [6.91]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 185) 66 [1.223], 67 [1.230].

¹⁹⁰ Office of the Australian Information Commissioner, Submission No 17 to PJCIS, Parliament of Australia, *Review of the Foreign Influence Transparency Scheme Bill 2017* (23 January 2018) 6.

¹⁹¹ *LibertyWorks* (n 1) 508 [70] (Kiefel CJ, Keane and Gleeson JJ).

¹⁹² On the limits of judicial review, see generally Allars (n 3) 192.

circumstances where an ‘*incidental consequence*’¹⁹³ of the information acquired for the transparency purpose is that it happens to be relevant to one of the ‘other purposes’.¹⁹⁴ The problem with this answer is that it places too much faith in the ability of the Secretary and their delegates to undertake a complex analysis of their broadly-defined discretions every time they exercise those powers. Even the High Court cannot agree on the scope of the Secretary’s powers. As to severance, the problem, as identified by Gageler J, is that it requires the Court to engage in the legislative process.¹⁹⁵ As Gordon J explained, the gap between the two repositories cannot be bridged by limiting the information gathered by the Secretary to what appears on the public website because this would require the Court to redesign the architecture of the entire scheme.¹⁹⁶

The political climate in which the *FITS Act* was conceived, and in which it continues to operate, also supports the contention that s 53 operates as a surveillance mechanism. Since 2016 ASIO has repeatedly warned that almost every sector of Australian society is a potential target of extensive and sophisticated foreign interference.¹⁹⁷ In 2021, ASIO stated that espionage and foreign interference will become Australia’s principal security concern over the next five years.¹⁹⁸ In recent years, several high-profile politicians including Sam Dastyari,¹⁹⁹ Kristina Keneally,²⁰⁰ Malcolm Turnbull,²⁰¹ and Julie Bishop,²⁰² have been linked to Chinese political donors. In 2019, the Senate established the Select Committee on Foreign Interference through Social Media ‘to inquire into ... the risk posed to Australia’s democracy by foreign interference through social media’.²⁰³ More recently, in 2020

¹⁹³ Transcript of Proceedings, *LibertyWorks Inc v Commonwealth* (n 109) 2890 (emphasis added) (SP Donaghue QC, Solicitor-General of the Commonwealth).

¹⁹⁴ *Ibid* 2891–2 (SP Donaghue QC, Solicitor-General of the Commonwealth). See also *LibertyWorks* (n 1) 511 [88]–[89] (Kiefel CJ, Keane and Gleeson JJ).

¹⁹⁵ *LibertyWorks* (n 1) 517 [116] (Gageler J).

¹⁹⁶ *Ibid* 519–20 [129]–[130], 533 [188] (Gordon J).

¹⁹⁷ ASIO, *ASIO Annual Report 2016–17* (2017), 3, 4, 12, 23; ASIO, *ASIO Annual Report 2017–18* (n 37) 3, 25, 27; ASIO, *ASIO Annual Report 2018–19* (2019) 26; ASIO, *ASIO Annual Report 2019–20* (2020) 4, 23, 25; ASIO, *ASIO Annual Report 2020–21* (2021) 20, 43 (*ASIO Annual Report 2020–21*).

¹⁹⁸ *ASIO Annual Report 2020–21* (n 197) 4; ASIO, *Director General’s Annual Threat Assessment* (9 February 2022) <<https://www.asio.gov.au/resources/speeches-and-statements/director-generals-annual-threat-assessment-2022>>.

¹⁹⁹ See Anna Henderson and Stephanie Anderson, ‘Sam Dastyari’s Chinese Donations: What are the Accusations and is the Criticism Warranted?’ *ABC News* (online, 5 September 2016) <<https://www.abc.net.au/news/2016-09-05/sam-dastyari-chinese-donations-furore-explained/816588>>;

Lucy Sweeney, ‘Sam Dastyari Resigns from Parliament, Says He Is “Detracting from Labor’s Mission” amid Questions over Chinese Links’, *ABC News* (online, 12 December 2017) <<https://www.abc.net.au/news/2017-12-12/sam-dastyari-resigns-from-parliament/9247390>>.

²⁰⁰ See Anthony Galloway, ‘Labor’s Kristina Keneally Met with Head of United Front Group’, *The Sydney Morning Herald* (online, 20 October 2021) <<https://www.smh.com.au/politics/federal/labors-kristina-keneally-met-with-head-of-united-front-group-20211020-p591k2.html>>.

²⁰¹ Henry Belot and Matthew Doran, ‘Malcolm Turnbull Dined with Wealthy Chinese Donor Days after Company Gave \$40k to Queensland LNP’, *ABC News* (online, 24 November 2017) <[https://www.abc.net.au/news/2017-11-24/malcolm-turnbull-dined-with-liu-xiaodong-after-\\$40k-donation-lnp/9187476](https://www.abc.net.au/news/2017-11-24/malcolm-turnbull-dined-with-liu-xiaodong-after-$40k-donation-lnp/9187476)>.

²⁰² Gina McColl and Philip Wen, ‘Foreign Minister Julie Bishop’s Links to Chinese Political Donors’, *The Sydney Morning Herald* (online, 25 August 2016) <<https://www.smh.com.au/politics/federal/foreign-minister-julie-bishops-links-to-chinese-political-donors-20160823-gqzauy.html>>.

²⁰³ Parliament of the Commonwealth of Australia, *Senate Journals*, 5 December 2019, 1127. See also 1128. Note that the Committee produced an interim report in December 2021 but was unable to

the Morrison Government introduced the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth), which empowers the Minister for Foreign Affairs to invalidate or prohibit the negotiation of foreign arrangements between State or Territory entities and foreign entities, where such an arrangement would be inconsistent with Australia's foreign policy.²⁰⁴ In 2021, this legislation was used to cancel four arrangements between the Victorian Government and China.²⁰⁵ At the time of writing, the Minister is considering whether to cancel a 99-year lease of Darwin Port granted in 2015 by the Northern Territory government to a Chinese state-owned corporation.²⁰⁶ In light of this political context, it is unsurprising that the Department has adopted a broad approach to the collection and dissemination of information under the *FITS Act*, even where the connection to the transparency purpose is rather tenuous.

VII Conclusion

The High Court's split decision in *LibertyWorks* illustrates the difficulties that arise when applying the implied freedom jurisprudence to Australia's foreign influence legislation. While the majority upheld the impugned provisions on this occasion, the compelling dissents indicate that the *FITS Act* may not survive a future challenge unless its provisions are more closely tailored to its legitimate object. At present, the Secretary's powers to collect and disseminate scheme information are ill-defined and amount to overreach due to their underlying surveillance function. Statutory interpretation plays an important role in modern bureaucracies where broad discretions are increasingly delegated to the executive. If the Foreign Influence Transparency Scheme were to be reconsidered, the High Court is likely to clarify its interpretation of the ambit of the Secretary's powers, which will in turn determine the proper weight to be placed on the disconformity between the two repositories of scheme information.²⁰⁷

complete its inquiry and final report due to the prorogation of Parliament and the 2022 Election: see Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Progress Report* (21 April 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Interference_through_Social_Media/ForeignInterference/Progress_Report>.

²⁰⁴ *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) ss 22, 24, 35, 36. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2020, 6489 (Christian Porter).

²⁰⁵ Tim Callanan, 'What is China's Belt and Road Initiative and What Were the Four Deals the Federal Government Tore Up?', *ABC News* (online, 22 April 2021) <<https://www.abc.net.au/news/2021-04-22/what-was-in-victoria-belt-and-road-deal-with-china/100086224>>.

²⁰⁶ See Benjamin Herscovitch, 'Relations with China Still on Edge Despite Leaders' Meeting', *The Sydney Morning Herald* (online, 15 November 2022) <<https://www.smh.com.au/world/asia/relations-with-china-still-on-edge-despite-leaders-meeting-20221115-p5byfo.html>>; James Massola, 'Port of Darwin Lease to be Reviewed: Anthony Albanese', *The Sydney Morning Herald* (online, 8 June 2022) <<https://www.smh.com.au/politics/federal/port-of-darwin-lease-to-be-reviewed-anthony-albanese-20220608-p5as1e.html>>; Jano Gibson, 'Consider Reclaiming Darwin Port from Chinese Company Landbridge, Committee Advises Federal Government', *ABC News* (online, 17 March 2021) <<https://www.abc.net.au/news/2021-03-17/government-urged-consider-reclaiming-ownership-darwin-port/13256968>>.

²⁰⁷ Future developments may inform the drafting of a similar scheme in the United Kingdom, known as the 'Foreign Influence Registration Scheme' (FIRS). The FIRS was supposed to be introduced in May 2022 as part of the National Security Bill 2022 (UK) that is currently before the UK Parliament, but it was omitted at the last minute and recently introduced by way of amendment: see United Kingdom, *Parliamentary Debates*, House of Commons, 16 November 2022, vol 722, col 722–93;

United Kingdom, *Parliamentary Debates*, House of Commons, 6 June 2022, vol 715, col 568–640. See also Home Office (UK), *Legislation to Counter State Threats (Hostile State Activity): Government Consultation* (Consultation Paper, 13 May 2021) 31–5 <<https://www.gov.uk/government/consultations/legislation-to-counter-state-threats>>. In Canada, Bill S-237 is currently before the Parliament of Canada. If it becomes law, individuals acting on behalf of a foreign principal will be required to file a return when they undertake specific actions with respect to public office holders, and also establish a public registry in which all returns must be kept: Bill C-237, *An Act to Establish the Foreign Influence Registry and to Amend the Criminal Code* (2nd sess, 44th Parl, 2022) cls 5–6 (First Reading, 24 February 2022) <<https://www.parl.ca/legisinfo/en/bill/44-1/s-237>>.