Foreign transparency scheme consistent with implied freedom

Samuel Murray reports on *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18

The High Court has held, by a 5:2 majority, that legislation aimed at addressing foreign influence in the Australian political system does not impermissibly burden the implied freedom of political communication. In so holding, the High Court considered that while the implied freedom had been burdened, the burden was reasonably appropriate and adapted to a legitimate end and the legislation, therefore, was valid.

Background

Against the backdrop of international concerns about foreign meddling in domestic elections (such as those addressed in the 2019 Mueller Report) the Commonwealth Parliament in 2018 passed a series of legislative reforms aimed at addressing foreign influence in the Australian political system. One part was the *Foreign Influence Transparency Scheme Act 2018* (Cth) (FITS Act).

In summary, where a person communicates information to the Australian public under an 'arrangement' (or in the service of) a foreign principal, where they expect that activity will be undertaken for the sole or substantial purpose of political or governmental influence, Part 2 of the FITS Act requires that the person register details about themselves and their 'foreign principal' with the Secretary of the Attorney-General's Department. Critically:

- the FITS Act imposes significant reporting obligations on registered persons, such as reporting material changes in circumstances and disbursement activity for the purpose of political and governmental influence (ss 34-35);
- the information received is to be placed on a register of scheme information (s 42), which the Secretary can make available to law enforcement bodies for certain specified purposes (s 53);
- a subset of that information on the register is to be placed on a website available to the public (s 43); and
- Part 5 of the FITS Act also establishes a series of offences arising from non-compliance.

LibertyWorks Inc, a private Australian think tank, partnered with the American Conservative Union to host an event in Australia in 2019 called the Conservative Political Action Conference (CPAC). After LibertyWorks was asked by the Deputy Secretary of the Attorney-General's Department to consider whether it was required to register its arrangements with the American Conservative Union under the FITS Act, it challenged the constitutionality of the FITS Act on the basis that it impermissibly breached the freedom of political communication implied by the Constitution.

The burden and purpose of the FITS Act

The Commonwealth conceded, and every justice agreed, that the FITS Act burdened the implied freedom in conditioning certain political communication on registration with the Secretary (at [54], [195], [108], [175], [195], [289]).

However, there was a dispute between Kiefel CJ, Keane and Gleeson JJ (and Steward J, who largely adopted the reasons in the joint judgment) on the one hand, and Gageler, Gordon and Edelman JJ (who each wrote separate judgments) on the other hand, about the extent of the burden. The former considered that the burden was 'likely to be modest' (at [74]) in that only very few persons would be affected and be deterred from political communication because the requirements following registration were not 'unduly onerous' (at [71]).

By contrast, Gageler and Gordon JJ each considered that to be forced under threat of criminal sanction to be registered under a statutory scheme as a precondition to be permitted to engage in a category of political communication was a form of 'prior restraint' (at [94], [179]), with the likely consequence of 'freezing' political communications activity through deterrence (at [95], [179]). Although Edelman J disagreed with the characterisation of the burden as 'prior restraint', his Honour accepted that it was 'substantial' (at [195]) and that the burden has 'real depth' and places 'substantial constraints and deterrents…which all have a substantial deterrent effect' (at [219]).

Every justice also agreed that the FITS Act had a 'legitimate purpose' in improving the transparency of otherwise undisclosed foreign influence in Australian discourse as a means of minimising the risk of foreign actors exerting influence on the integrity of Australia's political and electoral processes. This was because that purpose enhanced, rather than adversely impinged upon, the system of representative and responsible government prescribed by the Constitution (at [61]-[62], [101]-[102], [105], [184], [208], [246]).

The main issue that separated the justices was the extent to which the operation (and corresponding burden) of the FITS Act was justified and compatible with that purpose.

The application of structured proportionality

The joint judgment of Kiefel CJ, Keane and Gleeson JJ, as well as the separate and concurring judgments of Edelman and Steward JJ, all expressly adopted and applied the three-stage structured proportionality test set out in *McCloy v New South Wales* (2015) 257 CLR 178 for whether such a burden could be justified. In short, a law will satisfy the requirements of proportionality if it is suitable, necessary and adequate in its balance (at [45], [201], [247]). If the answer to all three enquiries is 'yes', then the law is proportionate, which is to say that it is reasonably appropriate and adapted for the legitimate end and, therefore, constitutionally valid.

Structured proportionality has been a disputed part of the High Court's jurisprudence since its adoption by the majority in *McCloy*. Nonetheless, five of the justices found it expressly applicable in the current circumstances. Relevantly, both of the two newest appointees to the High Court, Gleeson J (who joined in the joint judgment) and Steward J, approved its application. Justice Edelman's judgment contains significant discussion of his support for it, in reference to recent academic commentary on the matter (at [199]-[202]).

Each of the four justices who structured their reasons around application of structured proportionality found that the FITS Act satisfied the threefold requirements of suitability (i.e., is the law suitable in that it exhibits a rational connection to its purpose) (at [77], [198], [238]-[239]), necessity (i.e., whether there is an alternative measure available which is equally practicable and less restrictive of the implied freedom and which is obvious and compelling) (at [84], [240]-[242]) and adequate in the balance (i.e., whether it cannot be said that the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom) (at [85], [243]-[244]).

The FITS Act was therefore reasonably appropriate and adapted to the end of promoting transparency, notwithstanding the burden it imposed on the implied freedom and, accordingly, the FITS Act was not constitutionally invalid.

Although Steward J 'largely' adopted the reasons of the joint judgment (at [246], [289]), including agreeing that it was 'apt' to be used in the present case (at [247]), his Honour noted that he had concerns with the scope of the FITS Act insofar as it applied to and defined 'arrangements' between persons and foreign principals. However, in light of the fact that LibertyWorks did not contend for invalidity on that basis, ultimately he did not decide the issue (at [251]-[297]).

Gageler and Gordon JJ

In separate judgments, Gageler and Gordon JJ found that certain provisions of the law were incompatible with the implied freedom (at [119]-[120] and [191]). Both expressed their reasoning largely outside the structured proportionality framework. However, Gageler J noted that if his Honour were to apply the approach, he would have answered 'no' to every question (at [119]). Similarly Gordon J found that there was no rational connection between the non-public register and the purpose of the FITS Act (at [189]) and that the impugned provisions to an extent overreached the legitimate purposes and were not necessary (at [191]).

The main substantive points with which Gageler and Gordon JJ disagreed with the majority were on the burden of the law (as noted above) and the extent of the disconnect between the purpose of the Act and its operation. This was because the purpose of the Act is to increase *public* transparency as to undisclosed foreign influence, but the Act's registration requirements, as found by Gageler and Gordon JJ, go impermissibly beyond that in requiring substantial provision of information for the *non-public* register (the contents of which would be available to law enforcement bodies) (at [116]-[118], [129]-[130], [185]-[191]).

Justice Gageler found that a narrowly tailored scheme of registration to improve public transparency has no place for such a 'secret register' and information required from registrants and on the public website ought to be one and the same (at [117]). Justice Gordon similarly found that the non-public register does nothing to minimise the risk of undisclosed influence and that therefore the disconnect between the two repositories of scheme information could not be justified (at [189]-[191]).

On this point the majority considered that the question of whether the Secretary's power to require information extended beyond information necessary for the purposes of the FITS Act did not arise from the plaintiff's case and did not require consideration (at [86]-[89], [196]-[197], [232]).

Future of the implied freedom

As a consequence of the majority's continued support (particularly with the backing of the newest members of the High Court), structured proportionality survives another day. However, in the conclusion to Justice Steward's judgment, his Honour – unprompted by any of the submissions of the parties – suggested for the first time since Heydon J in *Monis v The Queen* (2013) 249 CLR 92, that the implied freedom may not actually exist (at [249], [298]-[304]). His Honour noted that the ongoing division in the court concerning its precise content is indicative of its 'tenuous nature' and may even demonstrate that it 'was never justified' (at [298], see also [304]). His Honour acknowledged that as it was not challenged in the present case, it would not be appropriate to reach a concluded view on the issue (at [249], [304]), but his Honour all but extended an invitation to future parties to raise its existence as a matter for full argument on a different occasion (at [249]). BN