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**FOREIGN AGENT REGISTRATION SCHEMES IN AUSTRALIA  
AND THE UNITED STATES: THE SCOPE, RISKS AND  
LIMITATIONS OF TRANSPARENCY**

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*Regulators and governments around the world have been active of late in considering the best method by which to hold accountable foreign influence on political processes. Australia's response to this issue was to pass a package of laws, including the Foreign Influence Transparency Scheme Act ('FITSA'), which creates a new public register for those acting on behalf of a foreign principal. This article compares FITSA against the US Act on which it is based: the Foreign Agents Registration Act ('FARA'). It shows that, largely, FITSA is better targeted than FARA towards ensuring that actors that merit registration are caught by its provisions. However, FITSA does not entirely address the potential risks inherent in this style of law. The authors argue that despite the objective of transparency inherent in such schemes, they may ultimately have a disproportionate effect on actors with access to fewer resources. Accordingly, the article proposes high-level principles to rethink this form of regulation based on refocusing foreign agent schemes to their underlying justification, recasting the regulatory net, and recalibrating discussions about 'foreigners'.*

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## I INTRODUCTION

Foreign influence on domestic politics has undoubtedly captured global attention recently. From Russian interference in elections in the United States ('US') to accusations of Chinese hacking,<sup>1</sup> regulators around the world have been active in considering the best method by which to hold accountable such influence on elections, voting and other political processes.

For its part, Australia responded in 2018 by passing three laws aimed at addressing this issue, seeking to increase offences for foreign interference and espionage, ban foreign political donations, and create a new public register for agents acting on behalf of a foreign principal.<sup>2</sup> As there is budding academic literature on the first two topics,<sup>3</sup> the subject of this article is the third pillar, which has thus far not received sustained academic analysis: the *Foreign Influence Transparency Scheme Act* ('FITSA').<sup>4</sup> Heavily based on a US Act from the 1930s, *FITSA* creates a public register for those acting on behalf of a foreign principal in certain circumstances. Those subject to the scheme are required to provide the Attorney-General's Department with a range of disclosure materials.<sup>5</sup> While the approach represents a clear choice by the Australian government to respond to this issue through transparency and disclosure regulation, it must be asked whether this type of regulation is founded in sound principle and, consequently, whether it poses unintended risks.

Accordingly, this article seeks to illuminate this debate by comparing *FITSA* against the US Act on which it is based: the *Foreign Agents Registration Act* ('*FARA*').<sup>6</sup> *FARA* has been described as a 'byzantine scheme of broad restrictions and numerous exemptions in which it is difficult to know whether one is obliged to register'.<sup>7</sup> The experience of *FARA* provides important lessons for Australia, not all of which were heeded in drafting *FITSA*. Foreign agent registration schemes have the potential to capture actors that do not pose a threat to democracy proportionate to the burden created. Despite their objective of transparency, if we

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1 David E Sanger, 'Putin Ordered "Influence Campaign" Aimed at US Election, Report Says', *The New York Times* (online, 6 January 2017) <<https://www.nytimes.com/2017/01/06/us/politics/russia-hack-report.html>>; Michael Vincent, 'Suspicion Falls on China after Cyber Attack on Australian Parliament – and It's Not Surprising', *ABC News* (online, 9 February 2019) <<https://www.abc.net.au/news/2019-02-08/australian-parliament-cyber-security-breach-blame-on-china/10795010>>.

2 *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth); *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth); *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITSA*').

3 See, eg, Joo-Cheong Tham, 'Of Aliens, Money and Politics: Should Foreign Political Donations Be Banned?' (2017) 28(2) *King's Law Journal* 262; Graeme Orr, 'Is My Foreign Yours? The Concept of Foreignness in the Regulation of Political Finance' (2019) 55(2) *Representation* 179; Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia's Anti-Terrorism Laws and Trials* (NewSouth Publishing, 2015); Keiran Hardy and George Williams, 'Strategies for Countering Terrorism: An Australian Perspective' in Genevieve Lennon, Colin King and Carole McCartney (eds), *About Counter-Terrorism, Constitutionalism and Miscarriages of Justice* (Hart Publishing, 2019) 63.

4 *FITSA 2018* (Cth).

5 Hereinafter 'the Department'.

6 22 USCA §§ 611–21 (West 2019) ('*FARA*').

7 Michael I Spak, 'America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder' (1989–90) 78(2) *Kentucky Law Journal* 237, 279.

are able to look past this ideal and, rather, at the ultimate effect of such schemes, past experience shows that they may have a disproportionate effect on actors with access to fewer resources and, accordingly, could be used to quell dissenting voices against government.

Consequently, this article conducts a fine-grained comparative analysis of the respective catching provisions of *FITSA* and *FARA*. That is, who do these Acts render subject to registration? This preliminary threshold question is a useful way of gauging the boundaries of the statutory net cast and, therefore, the regulatory impact of such legislation. Accordingly, this article is structured as follows: Part II provides an overview of foreign agent registration schemes by examining their history, context and aims. Following this, the article develops key principles that should guide the regulatory development of these schemes (Part III). In light of these principles, Part IV compares the scope of *FITSA* and *FARA*. It is argued that *FITSA* is better targeted than *FARA* towards ensuring that actors that merit registration are caught by its provisions, but does not entirely address the potential risks inherent in this style of law, that being to stifle debate, affect registrants disproportionately based on their resources, and stigmatise registrants.

## II FOREIGN AGENT REGISTRATION SCHEMES: HISTORY, CONTEXT AND AIMS

The enactment of foreign agent registration legislation is a recent trend that has proliferated across various continents in the last decade, including Africa, Europe, and Asia.<sup>8</sup> These laws tend to be modelled on the pivotal US *FARA* legislation. *FARA* was originally enacted in 1938 to address concerns over the influence of foreign government propaganda in the US.<sup>9</sup> Renewed scrutiny of *FARA*, however, has been fuelled by evidence of Russian interference in the 2016 Presidential election and the lobbying activities of key Trump campaign officials. For example, former National Security Advisor Michael Flynn retroactively filed a *FARA* registration with the Department of Justice ('DOJ') that revealed he was paid more than \$530,000 to serve as a lobbyist for the Turkish government while serving as a Trump campaign advisor.<sup>10</sup> Former Trump campaign manager Paul Manafort also registered under *FARA* on 27 June 2017, months after it was revealed he had provided services to Ukraine's pro-Kremlin Party of Regions and to former Ukrainian President Viktor Yanukovich.<sup>11</sup>

Following the US example and in line with the general international trend towards adopting foreign agent registration legislation, Australia enacted *FITSA* in

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8 Jacqueline Van De Velde, 'The "Foreign Agent Problem": An International Legal Solution to Domestic Restrictions on Non-Governmental Organizations' (2018) 40(2) *Cardozo Law Review* 687, 697.

9 Cynthia Brown, *The Foreign Agents Registration Act (FARA): A Legal Overview* (Congressional Research Service Report No R45037, 4 December 2017) 1–2.

10 Peter Baker and Matthew Rosenberg, 'Michael Flynn Was Paid to Represent Turkey's Interests during Trump Campaign', *The New York Times* (online, 10 March 2017) <<https://www.nytimes.com/2017/03/10/us/politics/michael-flynn-turkey.html>>.

11 Theodoric Meyer, 'Manafort Registers as Foreign Agent', *Politico* (online, 27 June 2017) <<https://www.politico.com/story/2017/06/27/manafort-foreign-agent-ukraine-240027>>.

2018. *FITSA* is expressly modelled on *FARA* in the US: the terms of reference of Prime Minister Turnbull's request to the Attorney-General to conduct a review of Australia's foreign interference laws mandated that the review consider the creation of a *FARA*-like regime.<sup>12</sup> Upon its introduction to Parliament, Prime Minister Turnbull referred to the Bill as an 'improved version' of *FARA*.<sup>13</sup> Furthermore, in formulating *FITSA*, the Department 'consulted closely with US counterparts to understand how *FARA* operates in practice',<sup>14</sup> noting that 'reports of ... covert foreign influence in the Australian political process'<sup>15</sup> were a key concern during formulation. These reports have tended to centre on alleged Chinese influence. In particular, Labor Senator Sam Dastyari was forced to resign after it was revealed that he advocated in favour of China's position on the South China Sea against his own party's policy, following a meeting with a Chinese lobbyist, Huang Xiangmo.<sup>16</sup> Dastyari later travelled to Huang's home to warn Huang that his phone might be tapped. These incidents sparked the introduction of Turnbull's foreign interference legislative package. Turnbull stated that '[f]oreign powers are making unprecedented and increasingly sophisticated attempts to influence the political process, both here and abroad'.<sup>17</sup>

Concerns of foreign political influence in Australia have continued unabated following the enactment of *FITSA*. In April 2019, questions were raised about Immigration Minister Peter Dutton following reports that he had a private meeting with the same lobbyist, Huang, following Dutton's approval of a request to have a private citizenship ceremony for Huang's wife and daughter inside Dastyari's office in 2015.<sup>18</sup> In March 2019 it was found that an official from the One Nation party had told a representative from an American energy corporation that, with their funding, he could 'change the voting system' and water down gun laws in Australia.<sup>19</sup>

In addition, there have been continual allegations of Chinese espionage by commentators and senior defence officials. In late 2019, former Director-General of the Australian Security Intelligence Organisation ('ASIO'), Duncan Lewis, claimed that the Chinese government is seeking to 'take over' Australia's political

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12 Attorney-General's Department (Cth), Submission No 5 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (January 2018) 5 ('Submission No 5').

13 Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 87 of 2017–18, 16 March 2018) 9 ('*Bills Digest*').

14 Attorney-General's Department (Cth), Submission No 5 (n 12) 6.

15 *Ibid* 9.

16 Aaron Patrick, 'Sam Dastyari Is a Chinese "Agent of Influence": Ex-intelligence Chief', *The Australian Financial Review* (online, 4 December 2017) <<https://www.afr.com/politics/sam-dastyari-is-a-chinese-agent-of-influence-exintelligence-chief-20171203-gzxxkb>>.

17 Claire Bickers, 'Foreign Interference: Malcolm Turnbull Launches Fiery Attack on Sam Dastyari in Question Time', *News.com.au* (online, 5 December 2017) <<https://www.news.com.au/national/politics/foreign-interference-malcolm-turnbull-launches-fiery-attack-on-sam-dastyari-in-question-time/news-story/36f7732cddf516bd81ce607cc72170bc>>.

18 'Turnbull Demands Dutton Explain Dealings with Chinese Billionaire', *SBS News* (online, 9 April 2019) <<https://www.sbs.com.au/news/turnbull-demands-dutton-explain-dealings-with-chinese-billionaire>>.

19 Peter Charley, 'Australia's One Nation Offered "Change to Voting System" for Cash', *Al Jazeera* (online, 28 March 2019) <<https://www.aljazeera.com/news/2019/03/australia-nation-offered-change-voting-system-cash-190327170846167.html>>.

system through its ‘insidious’ foreign interference operations.<sup>20</sup> Journalist Peter Hartcher further alleged that the Chinese government is undertaking an aggressive campaign for political influence over Australia, including over mineral and agricultural resources, media outlets and sea lanes,<sup>21</sup> and that ‘Chinese government-backed patriots living in Australia are aggressively pursuing their homeland’s geopolitical agenda’.<sup>22</sup> Further, ASIO is investigating allegations that Chinese intelligence figures were seeking to install an agent in the Australian Parliament, with the person found dead after approaching ASIO.<sup>23</sup> Aside from dealings with specific individuals, national security concerns contributed to the government’s decision to ban Huawei from taking part in the rollout of 5G mobile infrastructure.<sup>24</sup>

In order to critically interrogate the ambit of foreign agent registration schemes, it is necessary to consider the aims of such legislation. *FARA* in the US was initially legislated as a national security measure. Its policy lay in protecting ‘the national defense, internal security, and foreign relations of the United States’<sup>25</sup> so that the public can appraise politicians’ statements ‘in light of their associations’.<sup>26</sup> Judicial interpretation of *FARA*’s aims have held that it is designed to ‘identify agents ... who might engage in subversive acts’<sup>27</sup> or ‘other similar activities of ... foreign propagandists’.<sup>28</sup> Congress did not, nevertheless, intend to ‘deprive citizens ... of political information, even if such information be the propaganda of a foreign Government’.<sup>29</sup> However, amendments in 1965 shifted the focus of the Act to emphasise the role of foreign lobbyists in influencing government decision-making, with the aim of the amended Act being to provide the public and the government with broader information about the operations and objectives of such lobbyists.<sup>30</sup>

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- 20 Peter Hartcher, ‘“Insidious”: Former ASIO Boss Warns on Chinese Interference in Australia’, *The Sydney Morning Herald* (online, 22 November 2019) <<https://www.smh.com.au/politics/federal/insidious-former-asio-boss-warns-on-chinese-interference-in-australia-20191121-p53cv2.html>>.
- 21 Peter Hartcher, ‘Red Flag: Waking Up to China’s Challenge’ (2019) 76 *Quarterly Essay* 1.
- 22 Peter Hartcher, ‘Power and Paranoia: Why the Chinese Government Aggressively Pushes beyond Its Borders’, *The Sydney Morning Herald* (online, 23 November 2019) <<https://www.smh.com.au/national/peter-hartcher-on-china-s-infiltration-of-australia-20191118-p53bly.html>>.
- 23 Alexandra Beech, ‘ASIO Investigating Reports of Chinese Plot to Install Agent in Parliament’, *ABC News* (online, 25 November 2019) <<https://abc.net.au/news/2019-11-25/asio-says-its-taking-allegations-of-suspicious-death-serious/11733532?pfmredir=sm>>.
- 24 Michael Slezak and Ariel Bogle, ‘Huawei Banned from 5G Mobile Infrastructure Rollout in Australia’, *ABC News* (online, 23 August 2018) <<https://www.abc.net.au/news/2018-08-23/huawei-banned-from-providing-5g-mobile-technology-australia/10155438>>.
- 25 *FARA* § 611.
- 26 *Ibid.*
- 27 *Viereck v United States*, 318 US 236, 241 (Stone CJ for the Court) (1943).
- 28 *United States v Peace Information Center*, 97 F Supp 255, 259 (Holtzoff J) (D DC, 1951). See also *United States v Kelly*, 51 F Supp 362 (Morris J) (D DC, 1943).
- 29 *United States v Auhagen*, 39 F Supp 590, 591 (Letts J) (D DC, 1941).
- 30 Roland A Paul, ‘Foreign Agents Registration Act: The New Amendments’ (1967) 22(3) *Business Lawyer* 601, 602.

Australia's Act aligns with the purpose of *FARA*'s 1965 amendments. *FITSA*'s objective is to improve the transparency of the activities of those undertaking certain activities on behalf of foreign principals.<sup>31</sup> The scheme is 'intended to provide transparency and oversight of the ... ways in which foreign actors ... exercise influence over Australia's political ... systems and processes, including the views of the Australian public on such matters'.<sup>32</sup> There is thus a commonality of aims between *FARA* and *FITSA*, of increasing transparency through the public disclosure of the identity of those who act on behalf of foreign principals.

Upon first contemplation of these Acts, their stated objectives appear reasonable – voters should be informed of influences on elected officials' decisions. This is especially true in light of current heightened geopolitical tensions. Nevertheless, the ultimate effect of foreign actor registration laws may not always align with their objectives. For example, prior to Australia, a range of other states had also implemented foreign agent registration legislation expressly modelled on the US Act, such as Russia, Kyrgyzstan, Ukraine, and Israel.<sup>33</sup> In these jurisdictions, the labelling of civil society groups such as non-governmental organisations ('NGOs') has ultimately had the effect of targeting dissent through burdensome disclosure requirements and the stigmatising label of 'foreign agent'.<sup>34</sup> These laws have been justified – as in Australia – by arguments of transparency, state sovereignty, and national security.<sup>35</sup>

Although *FARA* has not been criticised for targeting dissent in the US, there is evidence that *FARA* violations have been prosecuted selectively.<sup>36</sup> It has also received condemnation for its breadth: while the specificities of its catching provisions are discussed below, generally, the Act has faced criticism for its potential to reduce discussion and debate of government action.<sup>37</sup> This is because such measures create scrutiny and compliance burdens on civil society that can undermine its ability to hold government accountable.<sup>38</sup> That is, a law aimed ostensibly at creating accountability can, ultimately, reduce it. Importantly, when compared to prospective registrants with vast resources at their disposal, such as multinational corporations, the effect of this compliance burden is therefore disproportionate on the actors it targets. Given these issues, it is necessary to consider how foreign actor registration schemes should be formulated in order to maximise their benefits while reducing risks and unintended consequences.

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31 *FITSA 2018* (Cth) s 3.

32 Revised Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth) 2 ('Revised Explanatory Memorandum').

33 Douglas Rutzen, 'Aid Barriers and the Rise of Philanthropic Protectionism' (2015) 17(1) *International Journal of Not-for-Profit Law* 5, 13.

34 Nick Robinson, "'Foreign Agents' in an Interconnected World: FARA and the Weaponization of Transparency' (2020) 69 *Duke Law Journal* 1075, 1090.

35 Rutzen (n 33) 24–33; Van De Velde (n 8) 706–15.

36 Grant F Smith, 'Selective FARA Enforcement: Pakistan's Alleged Agents Prosecuted, Israel's Ignored' (2011) 30(7) *Washington Report on Middle East Affairs* 32.

37 Scott Lewis Landsbaum, 'How to Censor Films without Really Trying: The Beirut Agreement and the Foreign Agents Registration Act' (1989) 62(2) *Southern California Law Review* 685, 702–10; Farrokh Jhabvala, 'The "Political Propaganda" Label under FARA: Abridgement of Free Speech or Legitimate Regulation?' (1987) 41(3) *University of Miami Law Review* 591.

38 Robinson (n 34) 1091.

### III RETHINKING FOREIGN ACTOR REGISTRATION SCHEMES: GUIDING PRINCIPLES FOR IMPROVED REGULATION

As discussed in the previous part, the central aim of foreign actor registration schemes is to enhance transparency. Transparency in government is a democratic ideal, based on the notion that an informed citizenry is better able to participate in government; thus providing an obligation on government to provide public disclosure of information.<sup>39</sup> Transparency is rarely questioned as a political norm in public discourse. A universally embraced principle, lawmakers from all sides often support it as a force for good within democracy,<sup>40</sup> with exuberant exhortations such as ‘sunlight is ... the best of disinfectants’.<sup>41</sup> However, recent contributions to the literature have shown that the meaning of transparency has changed.<sup>42</sup> Pozen demonstrated that while the idea of transparency used to be rooted in progressive ideals ‘such as egalitarianism, expertise, or social improvement through state action’, it has become ‘increasingly tied to agendas that seek to reduce other forms of regulation and to enhance private choice’.<sup>43</sup> This broad notion is supported by two points for our purposes. First, ‘more transparency’ does not necessarily equate to a more informed public. As Bubb and Pildes showed, ‘disclosure ... is often not a realistic way to adequately rectify individual incapacity to make accurate, informed judgments’.<sup>44</sup> Secondly, it has been shown that no direct effect of transparency can be found on actual decision acceptance by voters.<sup>45</sup> The importance of this, therefore, is that people base their political choice on considerations ‘other than ... actual decision-making procedures’.<sup>46</sup> Taking this into account, we are better placed to question arguments by the Australian Attorney-General that, for instance, the foreign agent registration scheme will cause citizens to ‘accurately assess the interests being brought to bear’.<sup>47</sup>

The logic encouraged here is not to say that, by extension, all laws that mandate transparency are without merit. There is a clear place for shining a light on the activities of elected officials and holding them accountable for their actions. Rather, the purpose of this is to allow the reader to critically interpret broad brush

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39 Daniel J Metcalfe, ‘The History of Government Transparency’ in Padideh Ala’i and Robert G Vaughn (eds), *Research Handbook on Transparency* (Edward Elgar, 2014) 247, 249.

40 See, eg, Henry Belot, ‘Bill Shorten Pushes for Federal ICAC-Style Watchdog to Crack Down on Political Corruption’, *ABC News* (online, 30 January 2018) <<https://www.abc.net.au/news/2018-01-30/bill-shorten-pushes-for-federal-anti-corruption-watchdog/9374420>>.

41 Louis D Brandeis, *Other People’s Money and How the Bankers Use It* (Frederick A Stokes, 1914) 92.

42 David E Pozen, ‘Transparency’s Ideological Drift’ (2018) 128(1) *Yale Law Journal* 100.

43 *Ibid* 102.

44 Ryan Bubb and Richard H Pildes, ‘How Behavioral Economics Trims Its Sails and Why’ (2014) 127(6) *Harvard Law Review* 1593, 1598.

45 Jenny de Fine Licht, ‘Transparency Actually: How Transparency Affects Public Perceptions of Political Decision-Making’ (2014) 6(2) *European Political Science Review* 309, 325.

46 *Ibid* 309.

47 Revised Explanatory Memorandum (n 32) 2.

statements that such laws will yield their stated benefits. It is a necessary first step to allow the reader to critique rarely questioned calls for transparency.

Given the risks inherent in foreign agent registration laws, the authors have formulated the following high-level principles, which can be seen as a useful starting point to rethink this form of regulation.

### A Refocusing Schemes to Their Underpinning Justification

It is important to take a wider view of the justifications underpinning a foreign actor registration scheme. This type of legislation is ultimately founded in the concern that citizens should be aware when their elected officials are being influenced by actors whose primary interests do not lie in the overall health of their political processes. In other words, decisions regarding the direction of one's nation should be driven by those who will ultimately be affected by those decisions: citizens and residents. The language often employed is that of preserving a country's self-determination and national sovereignty.<sup>48</sup> If these are, therefore, our foremost concerns, such a law should accordingly be directed at the actors that hold the greatest influence over elected officials' decisions and thus reduce the power of citizens and residents to influence politics. Who are they? While the beauty of democracy lies in its all-encompassing participatory nature, this is undone by the influence of the few who wield disproportionate power through networks and resources to which the average person does not have access.<sup>49</sup> Consequently, foreign actor registration schemes should not simply be aimed at making transparent the influence of actors who in some way possess a 'foreign' element but, more specifically, the influence of such actors who ultimately pose a risk in doing so through their significant resources and links to foreign governments. Such a focus would improve the balance of foreign actor registration legislation in redirecting it to its true underlying policy.

Increasing transparency via the disclosure of the identity of those seeking to influence government will enhance the fairness of the democratic system by correcting the information asymmetry that may develop where individuals and corporations can hide their activities behind closed doors. This goes to the broader concept of 'clientele corruption' referred to by the joint judgment of the High Court in *McCloy v New South Wales*:<sup>50</sup> the danger that government officials will decide issues not on their merits or the desires of their constituencies, but according to the wishes of certain vested interests. The reduction of the risk of regulatory capture of government by vested interests then leads to an instrumental benefit of improving the quality of government decision-making and policy-making, by ensuring that government decisions are made according to merit, rather than skewed towards narrow sectional interests.<sup>51</sup>

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48 Joint Standing Committee on Electoral Matters, Parliament of Australia, *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations* (Report, March 2017) ix.

49 See generally Thomas Christiano, 'Money in Politics' in David Estlund (ed), *The Oxford Handbook of Political Philosophy* (Oxford University Press, 2012) 241, 247.

50 (2015) 257 CLR 178 (French CJ, Kiefel, Bell and Keane JJ).

51 A commentator has referred to this as the 'national economic welfare' rationale: that lobbyists threaten national economic welfare by 'rent-seeking', ie, 'devoting resources to capturing government transfers,



## B Recasting the Regulatory Net

As previously discussed, a necessary step towards applying a critical lens to disclosure laws which upon first glance are reasonable is to recognise that more transparency does not necessarily equate to a more informed society and, by extension, healthier political debate. Pozen describes this as ‘desacralizing transparency’<sup>52</sup> – the process of treating it more like an ordinary administrative norm as opposed to ‘categorical critiques of its absence’.<sup>53</sup> The same principle can and should be applied to foreign actor registration schemes. It follows that, if we can succeed in shifting our political conversation away from absolute assumptions around the virtue of transparency, such legislation should not only be narrower but, more importantly, aimed at holding accountable the powerful few who in reality influence our leaders the most.

The question of who should be covered by such a scheme goes to the normative question of significance, that is, whether the prospective registrant undertakes a significant level or type of activity that warrants closer public scrutiny. If too many individuals and groups are caught within the regulatory framework, this could include those that approach government for minor or personal matters that are not of interest to the wider public, creating a burden on small-bit players and obscuring the major players.

Based on the underpinning justifications of foreign registration laws of sovereignty and national self-determination, the greatest threat arises from foreign governments or foreign political parties seeking to sway a country’s policies, due to their political power, resources, and level of funding – all of which generally eclipse those of foreign individuals and purely private corporations. Thus, the focus of foreign registration schemes should be narrowly targeted to only encompass agents of foreign governments or foreign political parties, who pose the greatest threats to the self-determination of local residents through clandestine channels of political influence beyond that of public diplomacy via formal governmental channels. This should also be extended to individuals and corporations that are linked to foreign governments or foreign political parties, as they can effectively act as agents of foreign governments.

More specifically, the issue of self-determination of national political communities reaches a critical point when there is interference by foreign governments in the processes of forming governments, such as elections,<sup>54</sup> as the very foundational moments of a democracy. As one commentator argued: ‘Without integrity in elections, there could be no legitimate representation in government’.<sup>55</sup> This means that pared to the very minimum, foreign interference

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rather than putting them to productive use’. Lobbyists also tend to lobby for legislation that is itself an inefficient use of government resources, eg, lobbying to keep an obsolete weapons programme: Richard L Hasen, ‘Lobbying, Rent-Seeking, and the Constitution’ (2012) 64(1) *Stanford Law Review* 191, 197.

52 Pozen (n 42) 161.

53 Ibid.

54 Tham (n 3) 268.

55 Jordan E Taylor, ‘The Founding Fathers Knew First-Hand that Foreign Interference in US Elections Was Dangerous’, *The Washington Post* (online, 7 October 2019)

laws should encompass agents of foreign governments or foreign political parties who are seeking to interfere in elections.

Beyond this minimalist approach, there is justification for broadening the regulation of agents of foreign governments beyond merely electoral matters to regulating all attempts by agents of foreign governments who are seeking to influence political, policy or parliamentary issues and processes, as these actions also threaten a nation's political self-determination.

However, expanding the scope of registrants beyond agents of foreign governments and foreign political parties to principals who are foreign individuals and corporations that are not linked to government is more contentious and more difficult to justify. Examples from overseas abound of countries such as Russia and China that have utilised foreign agent legislation to 'silence, eliminate, or bring under state control civil society organizations' by branding such individuals and corporations as foreign agents.<sup>56</sup> For instance, in Russia, non-government organisations have been stigmatised by being required to register as foreign agents 'if they engaged in any "political activity" and received any foreign funding'.<sup>57</sup> As Human Rights Watch observed: 'In Russia the term "foreign agent" can be interpreted by the public only as "spy" or "traitor"'.<sup>58</sup> This led to the shutdown of one third of all Russian NGOs following the introduction of foreign agent restrictions.<sup>59</sup>

Similarly, the Chinese media has accused foreign-funded NGOs of being 'fronts for foreign intelligence services' that sparked the 2014 'umbrella revolution' of Hong Kong.<sup>60</sup> Even in the US, *FARA* has historically been used by government to brand certain films as 'political propaganda', effectively creating a chilling effect by deterring American distributors from importing these films and showing them to the public.<sup>61</sup> We argue, therefore, that foreign agent registration schemes should be limited to agents of foreign governments and foreign political parties, and not individuals or corporations that are not linked to foreign governments.

Another approach could be tiered regulation based on risk, such as adopting a risk assessment framework to determine higher risk groups (eg, employees of foreign governments, members of foreign political parties), who are then subject to more onerous regulation, or exempting certain low-risk groups from regulation, such as charities or not-for-profit organisations.

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<<https://www.washingtonpost.com/outlook/2019/10/07/founders-knew-first-hand-that-foreign-interference-us-elections-was-dangerous/>>.

56 Van De Velde (n 8) 691.

57 Ibid 701.

58 'Russia: Government vs Rights Groups', *Human Rights Watch* (Web Page, 18 June 2018) <<https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle>>.

59 Van De Velde (n 8) 744.

60 Anthony Kuhn, 'China Passes Law Putting Foreign NGOs under Stricter Police Control', *National Public Radio* (online, 28 April 2016) <<https://www.npr.org/sections/parallels/2016/04/28/476060206/china-passes-law-putting-foreign-ngos-under-stricter-police-control>>.

61 Landsbaum (n 37).

### C Recalibrating Conversations around ‘Foreigners’

A further reason that has been held up to critique this style of scheme is the stigmatising effect it may have upon registrants. The prospect of being labelled a ‘foreign agent’ has had the undesirable effect in overseas jurisdictions of ultimately suppressing government criticism by civil society.<sup>62</sup> The burden created by the legislation can therefore have a disproportionate effect on organisations with fewer resources. It follows that if the stigma surrounding ‘foreign influence’ were lessened, a key risk created by foreign agent registration schemes would be nullified.

For instance, as the focus of *FARA* evolved from an anti-propagandist tool into an instrument of ‘modern regulatory control over the sophisticated lobbying activities of foreign agents’,<sup>63</sup> legislators also amended the wording of the Act from using the more loaded term ‘political propaganda’ to the more neutral term ‘informational materials’, and by deleting ‘political propaganda’ from other sections of the Act.<sup>64</sup> These are positive moves to address the stigma attached to being labelled as a ‘foreign agent’.<sup>65</sup>

A broader issue is that there are normative and conceptual difficulties in delineating the ‘foreign’ element of these actors. A problematic assumption underpinning foreign registration schemes is that citizens (and permanent residents under some laws) are the only ones considered to be legitimate actors able to influence domestic policy. This implies that all other residents, including long-term ones, are ‘foreign’ despite any strong and enduring links to the country, and suggests that any attempts by these residents, who are legally classified as ‘foreigners’, to influence government are illegitimate.<sup>66</sup>

In Australia, the debate on foreign interference has zeroed in on actors and entities of Chinese ethnicity, regardless of whether they are citizens or permanent residents, coupled with accusations of insidious influences of the Chinese Communist Party.<sup>67</sup> These clouded discussions about ‘foreignness’ may reflect a fear and wariness of the ‘other’, and a loathing of difference, which has coincided with the rise of populism and nationalism in the West.<sup>68</sup> The muddied waters of the debate and the risk of inflaming public hostility against racial minorities suggest that there is a need for caution in framing the issues and actual threats faced.

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62 Van De Velde (n 8) 706–15.

63 Spak (n 7) 242.

64 *FARA* § 614 (West 1990); cf § 614 (West 1996).

65 Charles Lawson, ‘Shining the “Spotlight of Pitiless Publicity” on Foreign Lobbyists? Evaluating the Impact of the *Lobbying Disclosure Act of 1995* on the *Foreign Agents Registration Act*’ (1996) 29(5) *Vanderbilt Journal of Transnational Law* 1151, 1180.

66 See Tham (n 3).

67 In terms of the two prominent Chinese donors at the centre of the foreign donations debate, Chau Chak Wing is an Australian citizen, while Huang Xiangmo was an Australian permanent resident who was later excluded from Australia: Yee-Fui Ng, ‘The Foreign Donations Bill Will Soon Be Law: What Will It Do, and Why Is It Needed?’ *The Conversation* (online, 28 November 2018) <<https://theconversation.com/the-foreign-donations-bill-will-soon-be-law-what-will-it-do-and-why-is-it-needed-107095>>.

68 Orr (n 3) 180–1.

## D Summary

In sum, the purpose of this part is to lay a foundation for the comparison that follows. If we accept that the ultimate impact of transparency laws may be critiqued, that foreign actor registration schemes have the potential to stifle debate, stigmatise registrants, and affect actors disproportionately based on their resources, it leads us to conclude that these types of laws should, accordingly, be drafted quite narrowly. The respective scopes of the American and Australian Acts are therefore compared and evaluated as such. It is important to reinforce that this does not mean this type of scheme is entirely unjustified. Rather, it is to say that due to the undesirable consequences that a foreign actor registration scheme poses, its application should be limited to individuals and entities which in fact represent the greatest risks to democracy, based on the guiding principles above.

## IV COMPARATIVE ANALYSIS: FARA AND FITSA

What follows is a detailed comparative analysis of the respective scopes of *FARA* and *FITSA* regarding the scope of the terms ‘foreign principal’, ‘agent’ and the activities covered by the legislation. Several exemptions to the scope of *FARA* and *FITSA* will also be considered, in particular those that apply to news organisations, lobbying, academics and charities. Finally, the enforcement mechanisms in the legislation will be compared and contrasted.

### A ‘Foreign Principal’

The broad frameworks of *FARA* and *FITSA* are comparable. *FARA* prohibits a person from acting as an ‘agent of a foreign principal’ without registering with the DOJ.<sup>69</sup> The ‘central issue’<sup>70</sup> therefore, as to whether a person is caught by the Act, is whether a person qualifies as an ‘agent of a foreign principal’. Under *FITSA*, ‘[a] person who undertakes activities on behalf of a foreign principal may be liable to register under the scheme ... depending on who the foreign principal is, the activities the person undertakes and in some cases ... the person’s former status’.<sup>71</sup>

*FARA* firstly defines a ‘foreign principal’ as a government of a foreign country and a foreign political party.<sup>72</sup> However, ‘any person outside of the United States’<sup>73</sup> is also caught by the definition, provided they are not a US citizen living in the US or an entity created under US law. This means that any ‘combination of persons’<sup>74</sup> based in another country or organised under another country’s laws, whether a corporation or non-profit, falls under the definition.

On the other hand, *FITSA* defines a ‘foreign principal’ as a foreign government; foreign government related entity (‘FGRE’); foreign political

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69 *FARA* § 612(a).

70 Brown (n 9) 3.

71 *FITSA 2018* (Cth) s 4.

72 *FARA* § 611(b)(1).

73 *Ibid* § 611(b)(2).

74 *Ibid* § 611(b)(3).

organisation; and a foreign government related individual ('FGRI') – each of which have statutory definitions. FGRE is a definition that received criticism prior to *FITSA*'s implementation.<sup>75</sup> A company, for instance, will be deemed a FGRE if a foreign government or foreign political organisation holds more than 15% of the voting power in the company,<sup>76</sup> can appoint at least 20% of the directors,<sup>77</sup> or can exercise total or substantial control over the company.<sup>78</sup> A FGRE is also deemed if the directors are 'accustomed, or under an obligation (whether formal or informal), to act in accordance with the directions, instructions or wishes of the foreign principal'.<sup>79</sup>

The implications of each Act's conception of 'foreign principal' highlight the potential pitfalls of the definitional scope of foreign agent registration schemes. *FARA*'s significant scope, in that any 'combination of persons'<sup>80</sup> overseas may constitute a foreign principal, renders a considerable amount of bodies subject to registration. Due to the undesirable consequences of a wide net on civil society, *FARA*'s definition should be viewed as a limitation contrary to our guiding principles.

In contrast, that *FITSA*'s definition of 'foreign principal' requires political links (whether it be to a foreign party, government or otherwise) to be caught by the Act should be seen as a strength in ensuring the Act is better targeted towards its stated aims. This departure from *FARA* 'strengthen[s] the proportionality'<sup>81</sup> of *FITSA*, and recognises that the greatest threats which warrant registration are actors with foreign political links, as opposed to all actors which are merely 'foreign'. The definition also addresses one of the counter-narratives to the original Foreign Influence Transparency Scheme Bill 2017 (Cth) ('FITS Bill') (which would have subjected private actors to registration): that by disincentivising investment in Australia through the potential registration of purely private actors, the legislation may have impacted on the 'competitive neutrality of Australia's open economy'.<sup>82</sup> While there remains an argument that the current formulation of 'foreign principal' could affect Australia's relations with trade partners through the registration of actors with links to foreign governments, it appears that in this respect, the Act has nevertheless struck a more reasonable balance than *FARA* between this concern and its stated aim of transparency.

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75 See, eg, Law Council of Australia, Submission No 4.2 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (15 June 2018) 3, recommending that the percentage of ownership at which control is to be assumed should align with other legislation which also seeks to regulate foreign activities.

76 *FITSA 2018* (Cth) s 10 (definition of 'foreign government related entity' paras (a)(i)–(ii)).

77 *Ibid* para (a)(iii).

78 *Ibid* para (a)(v).

79 *Ibid* para (a)(iv).

80 *FARA* § 611(b)(3).

81 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (Advisory Report, June 2018) 249 ('*Advisory Report*').

82 *Ibid* 42. See also John Garrick, 'Agents of Foreign Influence: With China It's a Blurry Line between Corporate and State Interests', *The Conversation* (online, 27 February 2019) <<https://theconversation.com/agents-of-foreign-influence-with-china-its-a-blurry-line-between-corporate-and-state-interests-112403>>.

However, *FITSA*'s conception of a foreign principal does not entirely address the negative implications of *FARA*'s wide net for two reasons. Firstly, the Australian iteration may be likely to cause confusion among prospective registrants. Under the definition of a FGRE, it may be difficult to determine whether a company's directors 'are under an obligation (whether formal or informal) to act in accordance ... with the wishes of [their] foreign principal', for instance.<sup>83</sup> While it is commendable that the Australian government sought to narrow the definition to reduce the compliance burden on registrants,<sup>84</sup> such a reduction may be negligible if there is a large number of persons that remain unsure whether they are required to register. That is, even if individuals and entities do not ultimately register, resources will be expended on determining their position in light of a convoluted framework.

Secondly, *FITSA*'s definition demonstrates the potentially disproportionate effect of the Act on actors with less resources at their disposal to ensure compliance. Consider the following scenario:

The Belgian government wants to influence Australian environmental policy so as to make it more attractive for a state-owned gas company, BelCo, to invest. Jones is an Australian citizen who has previously worked for BelCo and knows its directors very closely. Through conversations, she is of the understanding that if the regulatory environment were to change in Australia, BelCo would invest heavily. Jones incorporates a company in Australia, GasBel – which is not a subsidiary of BelCo. GasBel then engages another Australian, Davis, to act on GasBel's behalf to lobby for change in environmental law.

Since Davis is the lobbyist and potential registrant, the scenario turns on whether GasBel is a foreign principal. As Jones is 'of the understanding' that BelCo would invest if regulations were to change, this would not amount to an 'obligation,'<sup>85</sup> as GasBel retains ultimate discretion. It would also be difficult to argue that GasBel is 'accustomed'<sup>86</sup> to acting in accordance with BelCo's wishes, as this seemingly imports an ongoing, consistent feature of the relationship. The Commonwealth could argue that BelCo is in a position to exercise 'substantial control'<sup>87</sup> over GasBel. However, 'control' may be difficult to make out due to GasBel's retention of discretion.

Whether or not GasBel would ultimately be held to be a 'foreign principal' is a question of fact. Yet, the scenario demonstrates this second limitation of *FITSA*'s definition. Despite the fact that 'foreign principal' is framed more specifically than under *FARA*, actors with deep networks and considerable means may still influence Australian politics without registering. This is therefore an apt example of the potentially disproportionate impact of the registration scheme on actors with less resources at their disposal, as they will be subject to the compliance burden created by the Act. Better resourced corporations and governments, on the other

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83 Law Firms Australia, Submission No 10.2 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (15 June 2018) 2.

84 Attorney-General, Submission No 84 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (15 June 2018) 3.

85 *FITSA 2018* (Cth) s 10 (definition of 'foreign government related entity' para (a)(iv)).

86 *Ibid.*

87 *Ibid* s 10 (definition of 'foreign government related entity' para (a)(v)).

hand, can more easily bear the compliance burden, due not only to their ability to better navigate the potential confusion caused by the definition of a ‘foreign principal’, but to also circumvent the definition. Accordingly, this also does not align with the Act’s objective of improving the transparency of activities of those undertaking activities on behalf of foreign principals.<sup>88</sup>

Our guiding principles indicate that a narrower ambit of legislation that targets foreign governments and foreign political parties as principals is desirable. Our analysis shows that contrary to our guiding principles, *FARA* has been constructed in an extraordinarily broad manner in encapsulating any combination of foreign persons within its ambit. Although *FITSA* is more targeted, it still creates a level of uncertainty about who is covered by the definition of ‘principal’, which may disproportionately impact on less well-resourced actors.

## B ‘Agent’/‘Person Acting on Behalf of’

Another key definition is that of the agent of the foreign principal. Under both Acts, it is immaterial whether an agent is paid.<sup>89</sup> Further, both make express reference to persons who act on the order, at the request, or under the direction of a foreign principal.<sup>90</sup> ‘Agent’ is defined in *FARA* as:<sup>91</sup>

- (1) any person who acts as an agent, representative, employee, or servant, or any person who 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; [and]
- (2) any person who agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to contractual relationship, an agent of a foreign principal as defined in clause (1).

Since DOJ regulations do not provide clarification on the scope of the agency requirement under *FARA*,<sup>92</sup> its interpretation has been left to the courts. However, in interpreting the agency requirement under *FARA*, the few courts that have considered the agent-foreign principal relationship have disagreed on the standard by which it is established.<sup>93</sup>

In *United States v German-American Vocational League*, a 1945 case concerning a propaganda agency of the German Reich, the Court of Appeals for the Third Circuit applied a common law standard of agency, defining it as the relationship born of consent by one person to another that the other will act on his/her behalf.<sup>94</sup> However, in *Attorney General of United States v Irish Northern Aid Committee*, a 1982 case concerning an agent whose foreign principal was the Irish Republican Army, the Court of Appeals for the Second Circuit (‘the Second

88 *FITSA 2018* (Cth) s 3.

89 *Ibid* s 11(2); *Attorney General of the United States v Irish People Inc*, 595 F Supp 114, 118 (Flannery J) (D DC, 1984).

90 *FARA* § 611(c)(1); *FITSA 2018* (Cth) ss 11(1)(a)(iii)–(iv).

91 *FARA* §§ 611(c)(1)–(2).

92 28 CFR § 5.100.

93 *Brown* (n 9) 3.

94 *United States v German-American Vocational League Inc*, 153 F 2d 860, 864 (McLaughlin J) (3<sup>rd</sup> Cir, 1946) (‘*German-American Vocational League*’).

Circuit’) rejected the common law standard in favour of a lower threshold, instead directing its attention to ‘whether the relationship warrants registration by the agent to carry out the informative purposes of the Act’.<sup>95</sup> The approach taken by the Second Circuit appears to be the most practical, since common law agency is founded in principle intending to determine whether an agent has the power to bind their principal and extend liability.<sup>96</sup> *FARA*’s concern is instead founded in the transparency requirements of the Act, which warrants a different standard of agency.

Furthermore, while financial support is one factor to consider, it is not determinative. A 1980 case concerning a partnership between Italian fishermen and an American corporation is illustrative.<sup>97</sup> The District Court there held that, despite the fact that their agreement required the plaintiff to make significant capital contributions, the plaintiff could not show that it exercised ‘control’ over the partnership as it held only a 25% share. Similarly, in a 1986 case in the DC Circuit Court of Appeals concerning a small Irish newspaper, the agency relationship was not established in the absence of a ‘request, order, command or directive’, despite substantial financial support from the foreign principal.<sup>98</sup>

In summary, American appeals courts have interpreted the agency-foreign principal relationship under *FARA* as follows:

- There is no requirement that parties expressly enter into a contract;<sup>99</sup>
- Regardless of the quantum, financial support from a foreign principal is a relevant factor but, alone, is insufficient;<sup>100</sup> and
- While courts have disagreed on the precise standard to be applied,<sup>101</sup> the most sensible approach would appear to be whether the relationship warrants registration by the agent to carry out the informative purposes of the Act, having regard to the specific circumstances such as the specificity of any request and of any group requested.<sup>102</sup>

Perhaps the ‘confusion’<sup>103</sup> caused by the few cases that have interpreted agency under *FARA* is what led Australia to steer clear of the word ‘agent’ in *FITSA*. Under *FITSA*, a person undertakes an activity ‘on behalf of’ a foreign principal if they do so: under an arrangement, in the service of, on the order or at the request of, or under the direction of, the foreign principal.<sup>104</sup> Secondly, at that time, both

95 *Attorney General of the United States v Irish Northern Aid Committee*, 668 F 2d 159, 161 (Moore and Newman JJ, Tenney J) (2<sup>nd</sup> Cir 1982) (*‘Irish Northern Aid Committee’*).

96 American Law Institute, *Restatement of the Law of Agency* (American Law Institute, 1933) § 1.

97 *Michele Amoruso E Figli v Fisheries Development Corporation*, 499 F Supp 1074 (Weinfeld J) (SD NY, 1980) (*‘Michele Amoruso’*).

98 *Attorney General of the United States v Irish People Inc*, 796 F 2d 520, 523–4 (Bork and Scalia JJ, Gesell J) (DC Cir, 1986) (*‘Irish People’*).

99 *German-American Vocational League*, 153 F 2d 860, 864 (McLaughlin J) (3<sup>rd</sup> Cir, 1946).

100 *Michele Amoruso*, 499 F Supp 1074, 1082 (SD NY, 1980); *Irish People*, 796 F 2d 520, 523–4 (Bork and Scalia JJ, Gesell J) (DC Cir, 1986).

101 *Irish Northern Aid Committee*, 668 F 2d 159, 161 (Moore and Newman JJ, Tenney J) (2<sup>nd</sup> Cir, 1982); cf *German-American Vocational League*, 153 F 2d 860, 864 (McLaughlin J) (3<sup>rd</sup> Cir, 1946).

102 *Irish Northern Aid Committee*, 668 F 2d 159, 161 (Moore and Newman JJ, Tenney J) (2<sup>nd</sup> Cir, 1982).

103 Brown (n 9) 3.

104 *FITSA 2018* (Cth) ss 11(1)(a)(i)–(iv).



the person and foreign principal must have known or expected that the person would or might undertake the ‘registrable activity’.<sup>105</sup> While *FARA* includes in its definition of agent someone who is a representative, employee or servant of a foreign principal, *FITSA* employs the term ‘arrangement’.<sup>106</sup> ‘Arrangement’ was intentionally broadly drafted,<sup>107</sup> and is defined to include an ‘arrangement of any kind, whether written or unwritten’<sup>108</sup> – evidently broader than the US conception requiring ‘control’,<sup>109</sup> for example.

It is also necessary to consider circumstances involving multiple intermediaries. In the Explanatory Memorandum accompanying *FITSA*, the Australian Parliament made reference to the Act’s aim of regulating the influence of foreign principals’ intermediaries on Australian politics.<sup>110</sup> On its face, however, *FITSA* is not expressly directed towards relationships that involve more than two links in a chain between a person and a foreign principal. The reference to ‘intermediaries’ contemplates an association between a) a foreign principal and b) an intermediary on the ground in Australia. However, consider again the scenario set out in Part IV(A). In these circumstances, Jones and Davis are Australian persons, and GasBel is an Australian company. Therefore, *FITSA*’s definition of ‘on behalf of’ does not appear to capture dealings which involve multiple intermediaries ultimately leading to a foreign principal such as BelCo. While it could be argued that a person undertaking an activity ‘in the service of a foreign principal’<sup>111</sup> would include relationships where there are more than two links in a chain between a person and their foreign principal, the term ‘in the service of’ is not defined.

An important difference between the respective iterations of the agent-foreign principal relationship is the knowledge requirement in *FITSA*: both the person and foreign principal must have known or expected that the person would or might undertake the ‘registrable activity’,<sup>112</sup> which appropriately narrows the scope of the legislation.

Overall, when compared to *FARA*’s statutory definition of an ‘agent of a foreign principal’, the relationship leading to registration under *FITSA* is broader, due to the wide language employed by section 11(1)(a) (‘under an arrangement with’). On one hand, this scope is tempered by the knowledge/expectation requirement under section 11(1)(b), which was intentionally inserted to limit

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105 Ibid s 11(1)(b). See Part IV(C) below for details on ‘registrable activities’.

106 *FITSA 2018* (Cth) s 11(1)(a)(i).

107 Revised Explanatory Memorandum (n 32) 42.

108 *FITSA 2018* (Cth) s 10.

109 *FARA* § 611(c)(1).

110 See, eg, Revised Explanatory Memorandum (n 32) 8, noting that the Bill’s objective is to ‘enhance ... knowledge of the ... extent to which foreign sources may, through intermediaries ... influence ... Australia’s elections’.

111 *FITSA 2018* (Cth) s 11(1)(a)(ii).

112 Ibid s 11(1)(b).

section 11(1)(a).<sup>113</sup> The drafting of ‘under an arrangement with’ may nevertheless have unintended consequences.

First, contrary to our guiding principles, inherent in this wording is the potential to capture actors which do not, ultimately, pose a threat to Australia’s political functions. Australian Lawyers for Human Rights, for instance, posited that Australian charities could undertake overseas work by ‘arrangement’ with a Pacific Islands government without that charity acting on behalf of the foreign government in the ordinary sense of the word.<sup>114</sup> *FARA*’s narrower definition, where a foreign principal must exercise some control or direction on the agent to conduct covered activities, would still achieve *FITSA*’s objective of improving the transparency of persons who act on behalf of foreign governments and other foreign principals,<sup>115</sup> without requiring seemingly harmless entities to register under the scheme.

Secondly, *FITSA*’s wording presents prospective registrants with a lack of clarity regarding situations involving multiple intermediaries. The GasBel scenario demonstrates this potential for confusion. As was argued with regard to the Act’s definition of a ‘foreign principal’, the impact this lack of clarity may pose is likely to be felt most by smaller organisations which may not be resourced to navigate this framework, thus leading to a reduced influence on political debate. Multinationals such as BelCo, on the other hand, are better placed to indirectly organise multiple intermediaries within Australia which will, ultimately, advocate for their interests. This is a limitation of *FITSA* when compared to *FARA*’s conception, where an agent includes someone ‘whose activities are ... indirectly supervised, directed, controlled, financed or subsidized ... by a foreign principal’.<sup>116</sup> BelCo would accordingly be more likely to be subject to registration under *FARA* than *FITSA*, which can be seen as proportionate to its ability to in fact influence Australian political process.

### C Covered Activities

Both statutes necessitate that, in order for the person to meet the respective definitions of ‘agent’ or ‘on behalf of’, the person must also undertake certain activities. Our guiding principles would suggest that the legislation should regulate attempts by agents of foreign governments to influence political, policy or parliamentary issues and processes, as these actions threaten national self-determination.

An agent must adhere to *FARA* if they undertake in the US, either directly or indirectly, one of the following four activities on behalf of the foreign principal:<sup>117</sup>

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113 Attorney-General’s Department (Cth), Submission No 5.6 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (18 June 2018) 2.

114 Australian Lawyers for Human Rights, Submission No 7.2 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (15 June 2018) 2.

115 *FITSA 2018* (Cth) s 3.

116 *FARA* § 611(c)(1).

117 *Ibid* §§ 611(c)(1)(i)–(iv).

- Political activities;
- Acting as a public relations counsel, publicity agent, information-service employee or political consultant;
- Soliciting, collecting, disbursing or dispensing contributions, loans, money, or other things of value; or
- Representing the foreign principal's interests before a US government agency or official.

Under *FITSA*, whether the person is required to register will depend on who the foreign principal is, the activities the person undertakes, and the person's former status. 'Registrable activities' under *FITSA* are:

- Parliamentary lobbying on behalf of a foreign government;<sup>118</sup>
- Activities in Australia for political or governmental influence;<sup>119</sup> and
- Activities undertaken by former Cabinet Ministers and recent 'designated position holders'.<sup>120</sup>

*FITSA*'s 'registrable activities' are significantly more detailed than the activities covered under *FARA*.

The considerable scope of the four covered activities in *FARA* provides important lessons which, on the whole, Australia appears to have heeded. Firstly, the wide latitude of *FARA*'s activities has led not only to bemused conjecture among prospective registrants, but also a capturing of registrants to which the Act is not ostensibly directed.<sup>121</sup> Astoundingly, '*FARA* practitioners often assume that some of the triggers [for registration] cannot mean what they say';<sup>122</sup> a limitation for which the notable 'dearth of caselaw'<sup>123</sup> interpreting *FARA* does not assist. For example, the broad ambit of 'information service employee' means that providing someone in the US a weather report from Bali on behalf of a foreign principal would be considered a covered activity under *FARA*.<sup>124</sup> As flagged, the breadth of foreign agent registration schemes poses a great risk for civil society.<sup>125</sup> The considerable guidance afforded by *FITSA* in defining 'registrable activities', therefore, significantly reduces this limitation inherent in *FARA*'s conception by ensuring that unintended actors are less likely to be subject to the Act.

Secondly, contrary to our guiding principles, the fact that *FARA*'s wide definition of 'political activities' includes 'almost any advocacy efforts that engage

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118 *FITSA 2018* (Cth) s 20.

119 *Ibid* s 21.

120 *Ibid* ss 22–3.

121 Lawson (n 65) 1166–7, arguing that *FARA*'s absence of clearly defined rules 'may require many more parties to register than originally intended by Congress'.

122 Robert Kelner et al, 'The *Foreign Agents Registration Act*: A Guide for the Perplexed' (2018) 8(11) *National Law Review* 1–7, 2.

123 'Taking Stock of Newly Released *FARA* Advisory Opinions', *Perkins Coie* (Web Page, 18 June 2018) <<https://www.perkinscoie.com/en/news-insights/taking-stock-of-newly-released-fara-advisory-opinions.html>>.

124 Robinson (n 34) 1099.

125 The Council on American-Islamic Relations, for example, has been accused of being a domestic agent of the Muslim Brotherhood due to the *FARA* 'hook': DE Wilson Jr and Andrew E Bigart, 'What Nonprofits Need to Know about the *Foreign Agents Registration Act*' (2011) 22(5) *Taxation of Exempts* 9, 11.

with the public'<sup>126</sup> similarly has the potential to reduce government accountability by civil society. In contrast, *FITSA* requires that all four 'registrable activities' possess a political element. 'Parliamentary lobbying',<sup>127</sup> for instance, is an activity 'which is inherently political in nature'.<sup>128</sup> This wording ensures that the Act is more properly targeted than *FARA* toward capturing actors that merit registration; that is, those who in reality have considerable potential to influence political discourse.

The registrable activities 'for political or governmental influence' under section 21 of *FITSA* also merit attention. In addition to lobbying, this includes 'communications activity': the communication, distribution or production of material or information to the public.<sup>129</sup> While similar to *FARA*'s definition of 'publicity agent', the American definition remains considerably broader by encapsulating those who engage 'directly or indirectly' in the 'publication or dissemination' of 'information or matter of any kind'.<sup>130</sup> It has been said that even Netflix, by replaying *The Great British Bake Off* under a contract with the BBC, could be liable to register as a 'publicity agent'.<sup>131</sup> In the interest of reducing the potential registration of seemingly innocent actors such as these, *FITSA* includes an exemption under subsection 13(3) for those who, in the ordinary course of their business, disseminate material or information produced by someone else and where the identity of the producer is apparent,<sup>132</sup> which should be commended. For example, without clearly disclosing that its monthly edition of 'China Watch' is produced by the *China Daily*, Fairfax newspapers may have been liable to register for disseminating the material of a publication which is owned by the Chinese Communist Party.<sup>133</sup> *FITSA* has, in this sense, improved on *FARA*.

'Disbursement activity' for political or governmental influence is also registrable under section 21, which is triggered when a person disburses money or 'things of value'.<sup>134</sup> By only requiring registration in the event of disbursement *FITSA* has again departed from *FARA* which, as well as disbursement, additionally triggers registration when an agent 'solicits' or 'collects' money or things of value in the interest of foreign principals.<sup>135</sup> There is a clear place for disbursement activity to trigger registration for political influence – those acting on behalf of foreign governments should not be able to covertly buy favourable outcomes through donations and gifts. Yet while this narrower conception should be viewed favourably, the Australian definition remains unclear. While 'things of value' is to

126 Robinson (n 34) 1098.

127 *FITSA 2018* (Cth) s 20.

128 Revised Explanatory Memorandum (n 32) 66.

129 *FITSA 2018* (Cth) ss 13(1)–(2).

130 *FARA* § 611(h).

131 Robinson (n 34) 1114.

132 *FITSA 2018* (Cth) s 13(3).

133 See Joe Kelly and Max Maddison, 'Nine under Fire for China Propaganda', *The Australian* (online, 17 February 2020) <<https://www.theaustralian.com.au/business/media/nine-under-fire-for-publishing-chinese-propaganda/news-story/1a75be67380e46fa783500114c457121>>; Wang Hui, 'China Daily Signs Deal with Fairfax Media, Enters Australian Market', *China Daily* (online, 27 May 2016) <[https://www.chinadaily.com.cn/world/2016liuvisitkza/2016-05/27/content\\_25499648\\_2.htm](https://www.chinadaily.com.cn/world/2016liuvisitkza/2016-05/27/content_25499648_2.htm)>.

134 *FITSA 2018* (Cth) s 10 (definition of 'disbursement activity' para (a)).

135 *FARA* § 611(c)(1)(iii).

be given its ordinary meaning,<sup>136</sup> there is no indication as to whether it is intended to include distribution of very small-value objects or items. Hypothetically, the embassy of France could give plastic wristbands to university students to sell for \$3 on campus, which advocate for Australia to fully implement its Paris Agreement commitments. This would seemingly represent a negligible threat to Australian democratic processes and, in light of the negative consequences of a wide regulatory net, does not appear to be the type of arrangement that should merit registration. It would have been desirable, therefore, for the government to have provided more clarity on the ‘things of value’ it is seeking to capture under ‘disbursement activity’.

*FITSA*, overall, does appear to have struck a more reasonable balance than *FARA* in relation to activities triggering registration, due to both their specificity and the requirement that all four ‘registrable activities’ involve a political element, whether by their nature or the position formerly held by the agent. In this respect, it can be considered an ‘improved version’<sup>137</sup> of *FARA* that is more appropriately aligned with our guiding principles.

## D Exemptions

Whether a person will be caught by either Act will depend on whether any exemptions apply, of which there is a considerable range.<sup>138</sup> While it is beyond the scope of this article to contrast every difference between these exemptions, the following section explores four of note: news organisations, lobbying, universities and charities.

### 1 News Organisations

Unlike *FARA*, *FITSA* does not provide an exemption for news organisations. *FARA*, nevertheless, sets a high bar for news organisations to meet. Cover is only provided for organisations which engage in ‘bona fide’ news; where US citizens own at least 80% of the entity; its directors and officers are US citizens; and the organisation is not controlled by a foreign principal or their agent.<sup>139</sup> It should be noted that the initial FITS Bill did include an exemption for ‘news and media’<sup>140</sup> which was later omitted. The Australian Attorney-General’s Department justified this on that basis that the exemption would only apply to ‘foreign businesses’ or ‘individuals’, which were later removed from the definition of ‘foreign principal’. Even before this removal, in their submission to the Parliamentary Inquiry into the Bill, a group of media organisations (including Fairfax, NewsCorp and Bauer) argued that ‘the construction of the exemptions [was] so mismatched with media businesses as to make [it] ... inoperable’.<sup>141</sup>

136 Revised Explanatory Memorandum (n 32) 30.

137 Department of Parliamentary Services (Cth), *Bills Digest* (n 13) 9.

138 *FARA* §§ 611(d), 612(f), 613; *FITSA 2018* (Cth) ss 24–30.

139 *FARA* § 611(d).

140 Foreign Influence Transparency Scheme Bill 2017 (Cth) s 28 (‘FITS Bill’).

141 Joint Media Organisations, Submission No 19 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (23 January 2018) 3.

That *FITSA* does not provide complete cover for news and media organisations raises a necessary debate between competing interests. On one hand, it is true that ‘communications activities’ (the head of section 21 under which a news organisation is most likely to be caught) can be quite powerful in affecting the opinions of those involved in Australian political processes.<sup>142</sup> When done on behalf of a foreign principal, therefore, there is an argument that this should be transparent so that the public is able to make an informed decision. However, the American experience of *FARA* shows that there is a potential for this type of law to have a chilling effect on the free flow of international ideas.<sup>143</sup> This can be generated by both the cost of compliance and the uncertainty over when and how to do so. In light of such risks inherent in registration schemes and the ideological drift of transparency laws identified in Part III,<sup>144</sup> our guiding principles suggest that *FITSA* would benefit from a news organisation exemption for the following reasons.

The chilling effect that the scheme may have on smaller media groups negates the transparency that the law arguably achieves. Organisations that do not have access to surplus resources to devote to compliance may resist broadcasting ideas from overseas in the fear of being caught by the Act and becoming subject to penalties for non-compliance. The alternative – registration – may also be undesirable due to the stigma associated with the term ‘foreign agent’.<sup>145</sup> The scheme would not have the same impact on large media organisations that have resources to devote to compliance. Large body corporates do not incur the same risk as smaller, independent news groups due to their ability to litigate their case in the event of enforcement. Despite the fact that news organisations play a large role in influencing political discourse, therefore, the *FITSA* scheme is ultimately likely to have an undesired effect on debate without an exemption for news organisations, by strengthening the influence of larger corporations while reducing the role of smaller, independent outlets.

## 2 Domestic Lobbying

*FARA* also includes an exemption for agents otherwise registered under the *Lobbying Disclosure Act of 1995* (‘*LDA*’).<sup>146</sup> The Office of the Inspector General (‘OIG’) found in a 2016 audit that this exemption has been a driving reason for the decline in *FARA* registrations since its insertion.<sup>147</sup> This is because obligations under the *LDA* are less burdensome. For instance, *FARA* does not require that agents be compensated for acting on the foreign principal’s behalf, meaning

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142 Revised Explanatory Memorandum (n 32) 72. However, there is a limited exception in *FITSA 2018* (Cth) s 13(3) that may apply to news organisations, covering those who in the ordinary course of their business disseminate material or information produced by someone else, where the identity of the producer is apparent: see discussion in text at above nn 129–31.

143 Landsbaum (n 37) 703.

144 Pozen (n 42).

145 See above Part III.

146 *FARA* § 613(h); *Lobbying Disclosure Act of 1995*, 2 USCA §§ 1601–14 (West 2019) (‘*LDA*’).

147 Department of Justice (US), Office of the Inspector General, Audit of the National Security Division’s Enforcement and Administration of the Foreign Agents Registration Act (Audit, September 2016) 17 (‘Audit Report’).

volunteers are captured, whereas the *LDA* includes threshold requirements such as that agents need only disclose their activities if they are compensated.<sup>148</sup> The Australian Attorney-General's Department stated that *FARA*'s experience since the *LDA* exemption was 'instructive'<sup>149</sup> in the formulation of *FITSA*. *FITSA* was thus deliberately drafted without such an exemption due to the 'key challenge'<sup>150</sup> that the *LDA* has posed for *FARA*.

It appears Australia was justified in not including an exemption in *FITSA* for those already registered under the Register of Lobbyists ('Register'),<sup>151</sup> Australia's closest federal equivalent to the *LDA*. It is possible that certain persons undertaking lobbying activities on behalf of a foreign principal may be required to register under both *FITSA* and the Register,<sup>152</sup> thereby doubling their compliance burden. However, the Australian Register is not a compulsory nor binding regulatory mechanism as it does not have a legislative basis and is not accompanied by enforcement measures.<sup>153</sup> Despite this article's preceding arguments in favour of a narrower conception of *FITSA*'s catching provisions, this can be seen as an exception. Since *FITSA* is expressly aimed at parliamentary lobbying,<sup>154</sup> such an exemption might have rendered the Act largely toothless. Furthermore, while obligations under the *LDA* and *FARA* are comparable; the same cannot be said for the Australian context, since the Register is not underpinned by legislation and enforcement. Such an exemption would consequently create a much wider loophole in Australia than is currently the case in the US.

### 3 Universities, Academics and Scholastic Pursuits

An additional contrast between the two statutes is that *FARA* includes an exemption for 'any person engaging ... only in activities in furtherance of bona fide ... scholastic, academic, or scientific pursuits or of the fine arts'.<sup>155</sup> As with other sections in the statute, there is 'very little available guidance concerning the scope of the academic exemption'.<sup>156</sup> However, a range of Advisory Opinions released by the DOJ's *FARA* Enforcement Unit repeatedly draw prospective

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148 *LDA* § 1602(10).

149 Attorney-General's Department (Cth), Submission No 5.1 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (31 January 2018) 26.

150 Attorney-General's Department (Cth), Submission No 5 (n 12) 6–7.

151 Attorney-General's Department (Cth), 'The Lobbyist Register', *Australian Government Register of Lobbyists* (Web Page, 2020) <<https://lobbyists.ag.gov.au/register>>.

152 Attorney-General's Department (Cth), Submission No 5 (n 12) 26.

153 Ibid 18. See also Yee-Fui Ng and Joo-Cheong Tham, 'Enhancing the Democratic Role of Direct Lobbying in NSW: A Discussion Paper for the New South Wales Independent Commission Against Corruption' (Discussion Paper, April 2019); Joo-Cheong Tham and Yee-Fui Ng, *Regulating Direct Lobbying in New South Wales for Integrity and Fairness: A Report for the New South Wales Electoral Commission* (Report, August 2014); Yee-Fui Ng, 'Regulating the Influencers: The Evolution of Lobbying Regulation in Australia' (2020) 41 *Adelaide Law Review* (forthcoming).

154 *FITSA 2018* (Cth) s 20.

155 *FARA* § 613(e).

156 Covington & Burling, 'The *Foreign Agents Registration Act* (FARA): A Guide for the Perplexed', *Covington Guide* (Web Page, 27 July 2019) <<https://www.cov.com/en/news-and-insights/insights/2018/01/the-foreign-agents-registration-act-fara>>.

registrants' attention to the importance of the word 'only' in the exemption,<sup>157</sup> meaning that if registrants engage in a wider range of activities, they are not covered. Furthermore, DOJ regulations ensure that the exemption is not available to anyone who engages in 'political activities'.<sup>158</sup>

Australia, conversely, deliberately chose not to include an exemption for academic or scholastic activity in *FITSA*. While the Department reiterated that '[r]eceipt of funding from foreign sources will not in and of itself be sufficient to trigger ... registration',<sup>159</sup> foreign universities and individuals may be deemed foreign principals under the definitions of FGRE and FGRI, respectively. This may ultimately depend on whether the foreign government or political organisation in question is able to exercise 'total or substantial control'<sup>160</sup> over the university or individual.

The Department made its position clear on universities and academics when it stated that 'universities are no different to any other organisation. If [a] university is closely affiliated with a foreign government ... then it is appropriate for a person to register if they undertake registrable activities in Australia on behalf of the university for ... political or governmental influence'.<sup>161</sup> This position was further clarified in the Explanatory Memorandum:

[I]f an academic enters into an arrangement with a foreign principal to study a particular area and produce original research and analysis then this will be the primary purpose of those activities. The fact that it is possible that the results of the research will be conveyed to the government in future to inform policy development would ... not fall within the definition [of political or governmental influence].<sup>162</sup>

The case for a broad academic or scholastic exemption in *FITSA* is not clear cut. One of the university sector's foremost concerns with the initial Bill was that the definition of acting 'on behalf of a foreign principal' included circumstances involving 'collaboration' with overseas actors, which it argued could stifle academic research and limit Australian academics' capacity to carry out essential activities.<sup>163</sup> The Australian Parliament, however – which amended the initial Bill

157 See, eg, Letter from US Department of Justice National Security Division to [addressee deleted], 12 July 2016, 2 <<https://www.justice.gov/nsd-fara/page/file/1038211/download>>; Letter from US Department of Justice National Security Division to [addressee deleted], 12 November 2019, 2 <<https://www.justice.gov/nsd-fara/page/file/1234516/download>>; Letter from US Department of Justice National Security Division to [addressee deleted], 19 November 2019, 3 <<https://www.justice.gov/nsd-fara/page/file/1232921/download>>.

158 28 CFR § 5.304(d).

159 Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 31 January 2018, 17 (Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department), quoted in Parliamentary Joint Committee on Intelligence and Security, *Advisory Report* (n 80) 106 [4.156].

160 *FITSA 2018* (Cth) s 10 (definitions of 'foreign government related entity' para (b)(ii) and 'foreign government related individual' para (b)(ii)).

161 Attorney-General's Department (Cth), Submission No 5.5 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (15 June 2018) 24 ('Submission No 5.5').

162 Revised Explanatory Memorandum (n 31) 44–5.

163 Universities Australia, Submission No 9 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (22 January 2018) 4; Group of Eight, Submission No 11 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (22 January 2018) 1.



to remove ‘in collaboration with’ from the definition of acting ‘on behalf of a foreign principal’<sup>164</sup> – resisted calls for an exemption, by reiterating that ‘the scheme is not intended to capture bona fide or genuine academic pursuits undertaken in collaboration with foreign principals for academic purposes that are not for political influence’.<sup>165</sup> As flagged previously, one can argue this highlights a strength of *FITSA* in that activities require a political element to be registrable.

Despite this, the university sector and academics may still face uncertainty in particular circumstances. It is conceivable, for instance, that an academic in Australia researching under an ‘arrangement’ with a foreign university for the substantial purpose of governmental influence (for example, to improve bushfire response policy) might be required to register under *FITSA* if it were found that the foreign university is regarded as a foreign principal – even if the ‘arrangement’ simply involved the provision of facilities and the exchange of staff.<sup>166</sup> In light of our guiding principles, the potential to capture such small-bit players can be seen as a drawback of *FITSA* with respect to universities, and an apt example of the desirability of refocusing such schemes to their underpinning justification. In our view, it is not clear that the compliance burden registrants in such circumstances may face is outweighed by the need for transparency, when a university academic is in an arrangement for seemingly community-minded purposes. In this example, it is not clear that these types of individuals ultimately pose a risk to Australian democracy that, in turn, warrants capture by *FITSA*.

Nevertheless, that may not by extension mandate the need for a broad academic exemption, due to the reality that some ‘arrangements’ will involve more control by a foreign principal over an academic than simply the provision of facilities and the exchange of staff. If, for instance, a foreign university were held to be a foreign principal under the Act, and its arrangement with an Australian academic were such that the outcome of the academic’s work would be pre-determined so as to be advantageous for the foreign principal, then it is reasonable to expect that such an arrangement would be registrable. For example, there have been allegations that certain academic research collaborations have been used to further the Chinese government’s surveillance and military agenda.<sup>167</sup> Ultimately, the Australian

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164 FITS Bill 2017 (Cth) s 11(1)(f); cf *FITSA 2018* (Cth) s 11(1).

165 Evidence to Parliamentary Joint Committee on Intelligence and Security (n 159) 17, quoted in Parliamentary Joint Committee on Intelligence and Security, *Advisory Report* (n 81) 106 [4.156].

166 Anne Twomey, Submission No 82.1 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (13 June 2018) 2.

167 For instance, the ABC’s Four Corners program alleged that a Chinese company, Global Tone Communication, has a memorandum of understanding with the University of New South Wales to test its technology of mining data in 65 languages at a rate of 16,000 words a second, which the media alleged could be used to assist the Chinese Communist Party’s social credit system, intelligence collection and military-related efforts. Further, two Chinese companies, Haiyun Data and China Electronics Technology Corporation, have research collaborations with the University of Technology Sydney on handwriting recognition and public security video analysis respectively. The media alleged that the technology of these companies has been used in surveillance activities against the 1.5 million Uyghur Muslim minority held in detention camps in the Xinjiang province, which Beijing describes as ‘extremist re-education programmes’: ‘Australian Universities “Helping China to Spy” in Massive Global Operation, Four Corners Reveals’, *News.com.au* (online, 15 October 2019)

Parliament could have narrowed the definition of ‘arrangement’ so as to only include circumstances where an individual is under an obligation to act in accordance with the directions of the foreign principal.<sup>168</sup> Such an amendment would refocus the Act to its underpinning aims and succeed in capturing those people who in fact pose a risk to Australian democracy.

In addition, it is plausible that the Australian government resisted calls for a broad academic or scholastic exemption from *FITSA* due to concerns surrounding the role of bodies such as Confucius Institutes in Australian universities, which promote and oversee Chinese cultural programs on university campuses. Confucius Institutes are a form of cultural diplomacy and image management by the Chinese government to improve the perceptions of China globally.<sup>169</sup> While some commentators describe Confucius Institutes as benign instruments of cultural exchange,<sup>170</sup> others accuse these Institutes of being a propaganda arm of the Chinese Communist Party.<sup>171</sup> The Institutes, which are joint ventures between Australian universities, Chinese universities, and the Chinese government agency Hanban, are evidently a primary concern of the government at present in enforcing *FITSA*. This was highlighted by the Department’s urging of Confucius Institutes to consider whether they must register under *FITSA* in May 2019.<sup>172</sup> It is possible that the Institutes may have sought cover under a broad academic or scholastic exemption if it had been included in the Bill, since there is evidence of this occurring in the US under *FARA*’s broad exemption: the 2016 OIG audit found that the breadth of *FARA*’s exemptions creates a difficulty in determining whether ‘university ... campus groups ... that may receive funding and direction from foreign governments fall within or outside those exemptions’.<sup>173</sup> Viewed in the context of the government’s public actions, therefore, it is clear why it did not want to include such an exemption in *FITSA*.

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<<https://www.news.com.au/national/australian-universities-helping-china-to-spy-in-massive-global-operation-four-corners-reveals/news-story/0f5354ee03ee93ea268c0c3eb2ba7a8a>>.

168 Twomey (n 166) 2.

169 Falk Hartig, ‘China’s Global Image Management: Paper Cutting and the Omission of Politics’ (2018) 42(4) *Asian Studies Review* 701.

170 Edward A McCord, ‘Confucius Institutes: Hardly a Threat to Academic Freedoms’, *The Diplomat* (online, 27 March 2014) <<https://thediplomat.com/2014/03/confucius-institutes-hardly-a-threat-to-academic-freedoms/>>. A 2018 study analysing internal working reports from 50 Confucius Institutes in Asia, Africa, Europe, and Australia found that there was no evidence of propaganda, ie, promoting Chinese leaders’ policy initiatives, but rather an agenda to present an apolitical version of China to global audiences by emphasising traditional Chinese culture and avoiding controversial political topics, such as Tiananmen, the status of Taiwan, and China’s role in Tibet: Hartig (n 169).

171 Marshall Sahlins, *Confucius Institutes: Academic Malware* (Prickly Paradigm Press, 2015); Anne-Marie Brady, *Marketing Dictatorship: Propaganda and Thought Work in Contemporary China* (Rowman & Littlefield, 2008) 159.

172 Hannah Ryan, ‘The Government “Strongly Encouraged” Controversial Chinese Cultural Institutes to Consider Registering as Foreign Agents Ahead of the Election. They Refused’, *BuzzFeed News Australia* (online, 10 September 2019) <<https://www.buzzfeed.com/hannahryan/confucius-institutes-universities-foreign-influence>>.

173 Department of Justice (US), *Audit Report* (n 147) iii.

#### 4 Charities

Unlike *FITSA*, *FARA* does not include an express exemption for charities, but instead has a ‘humanitarian’ exemption for ‘soliciting or collecting ... contributions within the United States to be used only for medical aid and assistance, or for food and clothing to relieve human suffering’.<sup>174</sup> In addition, there is an exemption for those who engage only ‘in other activities not serving predominantly a foreign interest’,<sup>175</sup> which has been described as ‘perhaps the least clear exemption in *FARA*’.<sup>176</sup> Read literally, this exemption could be interpreted to cover *any* act that does not predominantly serve a foreign interest. However, when viewed in light of both § 613(d) as a whole and historical congressional records, a more appropriate interpretation appears to be that it applies only to those involved in trade or commerce.<sup>177</sup>

The original FITS Bill mirrored *FARA* in this respect,<sup>178</sup> and it appears clear that the Australian government was opposed to such an exemption. In response to calls for a charities exemption from Australian Lawyers for Human Rights, it stated: ‘exemptions for academics and charities are not considered to be necessary given the significant narrowing of the definitions of foreign principal and undertaking activity on behalf of a foreign principal’.<sup>179</sup> This position was, however, reversed following a recommendation by the Parliamentary Joint Committee on Intelligence and Security,<sup>180</sup> reportedly the product of a ‘deal between the Coalition and Labor’.<sup>181</sup>

*FITSA*’s inclusion of a charities exemption can be seen as an improvement when compared to *FARA*. Firstly, *FARA*’s humanitarian exemption is narrowly constructed and thus does not cover the work of many charities, in that it does not include the solicitation of funds for any purposes other than medical aid or food and clothing to relieve human suffering.<sup>182</sup> Furthermore, as outlined above, the § 613(d)(2) exemption for ‘other activities not serving predominantly a foreign interest’ is extremely vague and most probably covers only commercial instances which is, naturally, of no use to non-profits and charities.

*FARA* has also been used to target non-profits which, by extension, highlights how it might be used against all charities. For example, in 2018 the US House of Representatives Committee on Natural Resources sent letters to four prominent

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174 *FARA* § 613(d)(3).

175 *Ibid* § 613(d)(2).

176 Robinson (n 34) 1108.

177 The immediately preceding subsection makes express reference to trade and commerce: *FARA* § 613(d)(1). Additionally, congressional records show that a now-removed section that was inserted in 1966 to clarify the meaning of § 613(d)(2) expressly referred to commercial operations: HR REP NO 89-1470, at 7 (1966), cited in Robinson (n 34) 1109.

178 FITS Bill 2017 (Cth); cf *FITSA 2018* (Cth) s 29C.

179 Attorney-General’s Department (Cth), Submission No 5.5 (n 161) 7.

180 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report* (n 81) 270. See also Supplementary Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth) 61 [391].

181 Paul Karp, ‘Charities, Unions and Arts Bodies Win Reprieve from Foreign Influence Register’, *The Guardian* (online, 25 June 2018) <<https://www.theguardian.com/australia-news/2018/jun/25/charities-unions-and-arts-bodies-win-reprieve-from-foreign-influence-register>>.

182 *FARA* § 613(d)(3).

environmental organisations, asserting that they had failed to register as foreign agents under *FARA*.<sup>183</sup> As these letters interpreted *FARA* broadly, it has been argued that the investigation (which ended without conclusion in 2019) sent ‘a chilling message about how members of Congress can use *FARA* in a political manner to target entities with whom they disagree’.<sup>184</sup> We query, ultimately, how bona fide charities may be seen as genuine threats to Australian democracy. That *FITSA* has included a charities exemption, therefore, can be seen as a positive first step toward a narrowly drafted Act which is focused on its underpinning justification of safeguarding Australian political processes from real threats.

Accordingly, charities in Australia must meet four criteria to qualify for *FITSA*’s exemption: firstly, the charity must be registered with the Australian Charities and Not-for-profits Commission (‘ACNC’) and undertake activities in pursuit of a charitable purpose under the *Charities Act 2013* (Cth).<sup>185</sup> The activity in question must not be a disbursement activity, ie, when a person disburses money or ‘things of value’.<sup>186</sup> In addition, the charity must disclose to the public both the fact that it is undertaking the activity on behalf of a foreign principal and the identity of the foreign principal.<sup>187</sup>

While the section 29C exemption is a commendable step away from *FARA*, these are nevertheless four requirements that may impose significant costs and disincentives for prospective registrants seeking to access its cover, which may ultimately have a chilling effect on the advocacy work that charities pursue. Perhaps the most stigmatising of the four requirements is the need to disclose to the public the relationship and identity of the foreign principal. It is conceivable, for example, that WWF Australia would need to disclose the fact that it undertakes activities on behalf of a Rwandan foreign principal if the following were accepted:

WWF is, in its own words, ‘governed by a Board of Trustees’.<sup>188</sup> One such trustee, Eliane Ubalijoro, is a member of Rwanda’s National Council for Science and Technology (‘NCST’),<sup>189</sup> which could be deemed a FGRE due to its status as a Rwandan government body. Ms Ubalijoro, therefore, could be deemed to be a FGRI if her relationship with the NCST is such that she is accustomed to act in accordance with its wishes.<sup>190</sup>

Ms Ubalijoro could therefore be held to be a foreign principal. If the requirements of section 11 (‘undertaking an activity on behalf of a foreign principal’) were made out between WWF Australia and Ms Ubalijoro, and WWF Australia ‘distributes information ... to the public’<sup>191</sup> to influence the public in

183 Robinson (n 34) 1121–2.

184 Ibid 1124.

185 *FITSA 2018* (Cth) ss 29C(a)–(b).

186 Ibid s 29C(c). See discussion regarding ‘disbursement activity’ above in Part IV(C).

187 Ibid s 29C(d).

188 ‘How Is WWF Run?’, *World Wide Fund for Nature* (Web Page, 2020)

<<https://wwf.panda.org/organization/>>.

189 ‘WWF International Board’, *World Wide Fund for Nature* (Web Page, 2020)

<<https://wwf.panda.org/organization/trustees/>>.

190 *FITSA 2018* (Cth) s 10 (definition of ‘foreign government related individual’).

191 Ibid s 13(1)(a).

relation to an environmental decision by the relevant department,<sup>192</sup> it may be liable to register. WWF Australia would thus have the choice of either registering under *FITSA*, or disclosing to the public its relationship with Ms Ubalijoro and her identity when distributing the information.

On the whole, therefore, sub-section 29C(d) has the potential to negate the gains achieved by the inclusion of a charities exemption. As mentioned, the labelling of non-profits overseas has had the effect of targeting dissent by providing ammunition to critics who may seek to label non-profits as ‘foreign agents’ when, in reality, such a label would appear unwarranted in the above example. It is not unimaginable that critics of WWF Australia’s advocacy work would use this as a means of dismissing its concerns. Ultimately, while the Australian Parliament has taken a positive step forward in including a charities exemption, in reality, the exemption is fraught with requirements that may lead to unwarranted stigma. This stigma may have a chilling effect on constructive advocacy in Australia, in turn ‘severely undermining Australia’s open and democratic system of government’.<sup>193</sup> We submit that the potential damage done in such circumstances may not be outweighed by *FITSA*’s aim of transparency.

## E Compliance and Enforcement

Both statutes diverge on certain points of compliance and enforcement. Under *FARA*, agents must submit a registration statement to DOJ once they enter into an agreement with a foreign principal, which must include such information as the nature of the work to be performed and a copy of the agreement.<sup>194</sup> The statement must be filed within 10 days of the agreement, and agents are required to pay a fee of \$305.<sup>195</sup> Every 6 months thereafter, the agent must submit a supplemental statement to DOJ.<sup>196</sup> The agent must also submit to DOJ’s *FARA* Unit any informational materials produced on behalf of foreign principals within 48 hours of transmitting them.<sup>197</sup> When these materials are communicated publicly, they must contain a ‘conspicuous statement’ that they are being distributed on behalf of a foreign principal.<sup>198</sup>

Those who ‘wilfully’ violate *FARA*, such as by failing to register as an agent of a foreign principal, making false statements of material fact, or omitting material facts or documents, can be subject to civil and criminal penalties.<sup>199</sup> Violations may result in fines of up to \$10,000 or five years imprisonment.<sup>200</sup> The Attorney General is also vested with ‘civil injunctive relief’: the power to seek an injunction

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192 *Ibid* ss 12(1)(b), 12(2), 13(1), 21.

193 Australian Council for International Development, Submission No 55 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (15 February 2018) 1.

194 *FARA* § 612(a).

195 *Ibid*; 28 CFR § 5.5(d)(1).

196 *FARA* § 612(b); 28 CFR § 5.203

197 *FARA* § 614(a); 28 CFR § 5.400(a).

198 *FARA* § 614(b).

199 *Ibid* § 618(a).

200 *Ibid* § 618(a)(2).

prohibiting certain actions in violation of *FARA*.<sup>201</sup> Destruction of relevant records by an agent during the period in which recordkeeping is required is also unlawful under *FARA*.<sup>202</sup> *FARA* is administered by DOJ's *FARA* Unit, while *FARA* cases are primarily investigated by FBI agents and US Attorney Offices ('USAO').<sup>203</sup>

Until recently, however, DOJ's enforcement of *FARA* had been extremely limited: the OIG 2016 audit found that between 1966 and 2015, DOJ only brought seven criminal *FARA* cases.<sup>204</sup> Furthermore, until May 2019, its civil injunctive relief had not been used since 1991.<sup>205</sup> The OIG also found that 62% of initial registrations were untimely,<sup>206</sup> all of which raises the question of why enforcement of *FARA* has been so minimal.

First, the OIG noted a distinct lack of a comprehensive Department enforcement strategy for *FARA*: while the *FARA* Unit's enforcement efforts were focused on encouraging voluntary compliance rather than pursuing criminal or civil charges, FBI and USAO staff members were actively pursuing *FARA* criminal charges.<sup>207</sup> The OIG found that this was compounded by the *FARA* Unit's limited staff, consisting of eight members.<sup>208</sup>

The *FARA* Unit also identified as its 'primary enforcement challenge'<sup>209</sup> the difficulty of obtaining necessary information once it identifies potential agents. As a result, it argued that it should be furnished with Civil Investigative Demand authority, which would allow it to compel the production of records or documents it requires to assess potential registrants. Currently, it does not have this power.

Others have argued that *FARA* convictions are inherently difficult to achieve due to the 'wilfulness' *mens rea* in the statute.<sup>210</sup> This was highlighted by a recent high-profile case against former White House counsel and ex-Skadden partner Gregory Craig, who was charged with making false and misleading statements in relation to *FARA* after being hired by Ukraine to author a favourable report about the trial of former Prime Minister Yulia Tymoshenko.<sup>211</sup> The case turned solely on whether Craig's statements to DOJ officials were *deliberately* misleading.<sup>212</sup>

Furthermore, it is evident that *FARA* was simply very far from the public consciousness until individuals associated with the Trump campaign were charged

201 Ibid § 618(f).

202 Ibid § 615.

203 Department of Justice (US), *Audit Report* (n 147) 3.

204 Ibid i.

205 US Department of Justice National Security Division, 'Deputy Assistant Attorney General Adam S Hickey Testifies before House Judiciary Committee at Hearing Titled "Securing America's Elections Part II: Oversight of Government Agencies"' (News Release WL 5391168, 22 October 2019) 4 ('News Release').

206 Department of Justice (US), *Audit Report* (n 147) ii.

207 Ibid 9.

208 Ibid ii, 3.

209 Ibid 19.

210 Emma Mark, 'The *Foreign Agents Registration Act*: The Law That Came in from the Cold' (2020) 56(5) *Arizona Attorney* 22, 25.

211 Ibid 26.

212 Ibid 27. See also 'Case against Ex-Skadden Partner Got Lost in the Weeds', *LAW360* (online, 4 September 2019) <[www.law360.com/whitcollar/articles/1195474/case-against-ex-skadden-partner-got-lost-in-the-weeds](http://www.law360.com/whitcollar/articles/1195474/case-against-ex-skadden-partner-got-lost-in-the-weeds)>.

under the Mueller investigation in 2017. Until then, there existed an atmosphere in which prospective registrants ‘loosely complied, at best’.<sup>213</sup> Enforcement has since sharply increased, with 20 individuals and entities being criminally charged in 2018 alone, more than the total number charged in the 50 years prior.<sup>214</sup> As of October 2019, DOJ was on track to double the number of new registrants when compared to 2016. It is worth noting that *FARA* has since constituted part of DOJ’s ‘China Initiative’, a plan aimed exclusively at countering Chinese national security threats by increasing various enforcement measures.<sup>215</sup>

To comply with *FITSA*, those who become liable by undertaking an activity on behalf of (or entering into a registrable arrangement with) a foreign principal must register within 14 days.<sup>216</sup> The registrant is then required to notify the Secretary of any inaccurate or misleading information they become aware of, and any disbursement activity undertaken for the purpose of political influence.<sup>217</sup> *FITSA* also imposes added requirements during ‘voting periods’: registrants must notify the Secretary that the information they have previously provided is correct, and whether they have undertaken any lobbying or other activities for political influence during the period.<sup>218</sup> This requirement accords with our guiding principle of recasting the regulatory net: it is appropriate that foreign interference laws should encompass actors seeking to interfere in elections, as the foundational moments of a democracy. At all times, registrants must disclose communications activity undertaken for political influence.<sup>219</sup> Registrants must, finally, renew their registration annually and keep records for three years after registration ends,<sup>220</sup> and the Secretary is required to make much of this information publicly available on a website.<sup>221</sup>

Notably, the government did not publish a Regulatory Impact Statement on the FITS Bill – contrary to regular practice.<sup>222</sup> The regulatory burden imposed by *FITSA* is less than that imposed by *FARA* in certain respects, by requiring annual renewal (as opposed to every six months) and not imposing fees on registrants. This appears to have been a wise move by the Australian government, as the OIG’s report showed that *FARA* registrations declined drastically following the imposition of fees in 1993.<sup>223</sup> The work of Australian registrants will nevertheless be impacted by their reporting and recordkeeping obligations under *FITSA* which, as Justice Connect noted, will ‘mean less time and money spent on achieving

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213 Mark (n 210) 26.

214 US Department of Justice National Security Division, News Release (n 205) 4.

215 Department of Justice (US), ‘Attorney General Jeff Session’s China Initiative Fact Sheet’ (Media Release, 1 November 2018) <<https://www.justice.gov/opa/speech/file/1107256/download>>. See also Catherine Matacic, ‘US Attorneys Warn of Upcoming “Spike” in Prosecutions Related to China Ties’, *Science Magazine* (online, 7 February 2020) <<https://www.sciencemag.org/news/2020/02/us-attorneys-warn-upcoming-spike-prosecutions-related-china-ties>>.

216 *FITSA 2018* (Cth) ss 16, 18.

217 *Ibid* ss 34–5.

218 *Ibid* ss 36–7. See also s 10 (definition of ‘voting period’).

219 *Ibid* s 38.

220 *Ibid* ss 39–40.

221 *Ibid* s 43.

222 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report* (n 81) 135.

223 Department of Justice (US), *Audit Report* (n 147) 5.

purpose'.<sup>224</sup> For smaller actors without deep pockets, compliance with *FITSA* may cause a genuine impact on already-strained budgets.

*FITSA* gives the Department a range of enforcement measures which are not available under *FARA* to DOJ. The Secretary has broad powers to require a potential registrant to provide information if it reasonably suspects that person to be liable to register.<sup>225</sup> Furthermore, the Secretary may require *any* person to give them information and documents if they reasonably believe the person (whether a registrant or not) has information 'relevant to the operation of the scheme'.<sup>226</sup> It is not an excuse to claim that the information may incriminate the person.<sup>227</sup> Failure to comply with these notices may result in six months' imprisonment,<sup>228</sup> while providing false or misleading information may lead to three years' imprisonment.<sup>229</sup> While this power is sure to make Australian authorities' tasks easier than their American counterparts, there must remain a concern inherent in the breadth of the authority conferred by the Act. As highlighted by the OIG, such an authority 'can be subject to overreach and abuse if left unchecked'.<sup>230</sup>

The Secretary may consequently issue a 'Transparency Notice' ('TN'), which allows the Department to declare that a person is a FGRE or FGRI.<sup>231</sup> If the Secretary remains satisfied of this fact after the person has made submissions, the Secretary *must* make the TN public on a website.<sup>232</sup> The Secretary is not required to observe procedural fairness in relation to a TN.<sup>233</sup> This power does appear necessary to the Department's enforcement efforts. It is likely that litigation will be far down the track of enforcement choices and, as such, the power to simply declare entities or individuals as foreign-related may prove a persuasive tool for the Department. The Department's TN authority does, nevertheless, create the potential for the government to weaponise *FITSA* by creating stigma through the labelling of actors as foreign-related. Despite the Department's argument that '[t]here is no detriment to a person being named in a transparency notice',<sup>234</sup> this clearly does not take into account the reputational damage associated with the stigmatising label of 'foreign agent' that is likely to ensue.

Part 5 of the Act contains *FITSA*'s enforcement measures and penalties. Penalties for failure to apply for or renew registration are imprisonment between 12 months to five years, depending on whether the omission was intentional or reckless, if the person knew they had to register, and whether the registrable activity was actually undertaken.<sup>235</sup> Similar penalties apply for informing the

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224 Justice Connect, Submission No 50 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (15 February 2018) 7.

225 *FITSA 2018* (Cth) s 45.

226 *Ibid* s 46.

227 *Ibid* s 47.

228 *Ibid* s 59.

229 *Ibid* s 60.

230 Department of Justice (US), *Audit Report* (n 147) 19.

231 *FITSA 2018* (Cth) s 14A(1).

232 *Ibid* s 43(2A).

233 *Ibid* s 14G.

234 Revised Explanatory Memorandum (n 32) 13.

235 *FITSA 2018* (Cth) s 57.



Secretary that the person ceases to be liable when this is not true.<sup>236</sup> Penalties for failure to fulfil one's responsibilities under *FITSA*, such as by failing to keep or destroy records, range from 60 penalty units to two years' imprisonment.<sup>237</sup>

As noted, one criticism of *FARA* was the difficulty of achieving convictions due to its requirement for 'wilful violation'. *FITSA*, therefore, has eased the job of enforcement authorities in Australia by including a suite of offences ranging from reckless to intentional. Despite this, as pointed out by the Law Council of Australia, there may be many instances where foreign influence will occur under less identifiable and covert arrangements.<sup>238</sup> As a consequence, it is possible that 'sophisticated and clandestine influencers will not be deterred by these measures',<sup>239</sup> as opposed to the full force of the scheme being felt by benign entities with overseas links. *FITSA* also does not include any civil penalties, in contrast to *FARA*. If, in the long term, the *FITSA* register is consistently shown to make transparent the actions of small-bit players, it can be argued that civil penalty provisions may have been better targeted toward ensuring the Act is not disproportionately used against those who do not pose real threats to our political system.

*FITSA*'s implementation has, so far, faced criticism. By November 2019, the scheme had resulted in only one notice (requiring information to satisfy the Secretary whether a person is liable to register under the scheme under section 45) being sent out to a potential registrant, despite sending out more than 1500 letters.<sup>240</sup> While eight full-time staff have been employed,<sup>241</sup> this is the same number employed by the *FARA* Unit, which the Unit itself stated was 'limited'.<sup>242</sup>

The Australian Attorney-General was even forced to defend the scheme after former Prime Minister Tony Abbott was asked to join the register, with respect to an address he was to make at the inaugural Australian Conservative Political Action Conference, an organisation founded by the American Conservative Union and linked to the US Republican Party, in August 2019.<sup>243</sup> Event organiser Andrew Cooper is the only person to have received a notice under section 45 from the Secretary. Both Mr Abbott and Mr Cooper strongly declined to cooperate with the request, causing the Attorney-General to clarify that he 'expect[s] [the Department] to demonstrate a focus on the most serious instances of

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236 Ibid s 57A.

237 Ibid ss 58, 61.

238 Law Council of Australia, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Foreign Influence Transparency Scheme Bill 2017* (22 January 2018) 15.

239 Ibid.

240 Anthony Galloway, 'Foreign Interference Scheme Targets Just One Potential Agent of Influence', *The Sydney Morning Herald* (online, 28 November 2019) <<https://www.smh.com.au/politics/federal/foreign-interference-scheme-targets-just-one-potential-agent-of-influence-20191127-p53ep5.html>>.

241 Ibid.

242 Department of Justice (US), *Audit Report* (n 147) ii, 3.

243 Max Koslowski, 'Foreign Influence Laws Won't Change after Tony Abbott Targeted, Porter Says', *The Sydney Morning Herald* (online, 5 November 2019) <<https://www.smh.com.au/politics/federal/foreign-influence-laws-won-t-change-after-tony-abbott-targeted-porter-says-20191105-p537m5.html>>.

noncompliance'.<sup>244</sup> Mr Cooper has flagged his intention to bring his matter to the High Court.<sup>245</sup>

Mr Abbott's circumstances highlight a great deal for our purposes. While *FITSA* does not ostensibly 'target any particular country, nationality, or diaspora community',<sup>246</sup> the Australian government appears to have had particular actors in mind when formulating the Act, none of which are likely to have been Mr Abbott. Nevertheless, under *FITSA*'s current formulation, the former Prime Minister's appearance can be said to make out the elements requiring registration. This demonstrates that the Act has the potential to capture actors which we do not view as genuine threats to our democracy, regardless of one's political leanings. In addition, Mr Abbott's response to the Secretary's letter highlights the stigma one may feel when asked to register. In a sharply worded letter, Mr Abbott retorted: 'Neither speech of mine was given "on behalf" of a foreign principal ... surely senior officials of the commonwealth have better things to do with their time'.<sup>247</sup>

Of interest to the Department regarding China would be the fact that universities have resisted calls to register based on their joint venture relationship with Confucius Institutes, which may set up a 'potentially high-profile test case'<sup>248</sup> for *FITSA*. The Australian Council for the Promotion of the Peaceful Reunification of China has also not registered, despite what experts describe as strong links to the Chinese Communist Party.<sup>249</sup> The Australian Strategic Policy Institute, which is funded by the Australian Department of Defence yet was required to register due to added funding from the US State Department,<sup>250</sup> said it was 'disappointing' that *FITSA* 'had not captured any groups linked to United Front, the Chinese government agency which organises Chinese populations overseas to serve its strategic interests'.<sup>251</sup> Although it is too early to make a definitive evaluation about the Australian Attorney-General's Department's long-term enforcement of *FITSA*, the early enforcement of *FITSA* illustrates the complications that arise due to the uncertainty surrounding the regulatory scope of the legislation.

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244 Janet Albrechtsen and Joe Kelly, 'Abbott: "I'm No Foreign Agent"', *The Australian* (Sydney, 2 November 2019).

245 Joe Kelly, 'High Court to Rule on Foreign Influence Laws', *The Australian* (online, 6 February 2020) <<https://www.theaustralian.com.au/nation/politics/high-court-to-rule-on-foreign-influence-laws/news-story/4ae9371cac2830c4457e9a265970fe70>>.

246 Revised Explanatory Memorandum (n 32) 9.

247 Albrechtsen and Kelly (n 244).

248 Fergus Hunter, 'Foreign Influence Showdown as Universities Decline to Register China-Funded Confucius Institutes', *The Sydney Morning Herald* (online, 21 March 2019) <<https://www.smh.com.au/politics/federal/foreign-influence-showdown-as-universities-decline-to-register-china-funded-confucius-institutes-20190315-p514kq.html>>.

249 Christopher Knaus, 'Chinese Communist Party-Linked Group Not Listed on Foreign Influence Register', *The Guardian* (online, 29 March 2019) <<https://www.theguardian.com/australia-news/2019/mar/29/chinese-communist-party-linked-group-not-listed-on-foreign-influence-register>>.

250 Myriam Robin, 'The Think Tank behind Australia's Changing View of China', *The Australian Financial Review* (online, 15 February 2020) <[www.afr.com/policy/foreign-affairs/the-think-tank-behind-australia-s-changing-view-of-china-20200131-p53wgp](http://www.afr.com/policy/foreign-affairs/the-think-tank-behind-australia-s-changing-view-of-china-20200131-p53wgp)>.

251 Galloway (n 240).

## V CONCLUSION

The real risk of undue influence on Australian democracy by foreign powers is one that should not be overlooked. While today's global interconnectedness means that this threat is increasing, the question remains as to how we, as a society, can best tackle it. Although the aims of foreign influence transparency schemes are noble, this article has shown that by casting a wide regulatory net, such laws can have unintended consequences that are not proportionate to the regulatory burden created: to stifle debate, affect registrants disproportionately based on their resources, and stigmatise registrants.

This article has accordingly recommended guiding principles to reshape foreign actor registration schemes. By recalibrating the legislative scope towards its underlying purpose of preserving a nation's self-determination, foreign actor registration schemes should specifically focus on the influence of actors who ultimately pose the greatest risk of improperly influencing domestic laws through their significant resources and links to foreign governments. Namely, this includes agents of foreign governments or foreign political parties, as well as individuals and corporations that are linked to foreign governments or foreign political parties. By the same token, our guiding principles suggest that lower risk players such as NGOs, news organisations and charities should be exempt from regulation to avoid the unintended consequences seen in overseas jurisdictions, where NGOs have been targeted by governments and stigmatised with the pejorative label of 'foreign agent'. In terms of regulatory activities, our guiding principles suggest that attempts by agents of foreign governments to influence political, policy or parliamentary issues and processes should be covered, to preserve national self-determination.

*FITSA* represents Australia's attempt to address what many believe to be the growing global problem of foreign influence on politics. Our comparison of *FITSA*'s scope with *FARA* shows that, largely, *FITSA* is better targeted towards ensuring that actors that merit registration are caught by its provisions. This is evident in both its narrower definition of 'foreign principal' and its detailed 'registrable activities' – both of which align with our guiding principles by requiring a political element or link to trigger registration.

Nevertheless, the comparison also demonstrates that *FITSA* does not entirely address the potential risks inherent in this style of law. Certain aspects of the Act have been shown to still be likely to cause unjustified confusion among prospective registrants and, accordingly, disproportionately impact lesser-resourced actors, such as *FITSA*'s treatment of news organisations and charities. Additionally, the apparently muddled early enforcement of *FITSA* leaves much to be desired. *FITSA*'s current formulation, therefore, cannot be seen as implementing all the lessons provided by the *FARA* experience.

In summary, foreign agent laws have been enacted in countries spanning diverse continents in the last decade, from Mexico to Malaysia,<sup>252</sup> which all tend to be modelled on the pivotal US *FARA* legislation. Australia has followed this

trend with its enactment of *FITSA* in 2018, in the broader context of a heightened rhetoric of national security and state sovereignty. It remains to be seen how the Australian legislation will be applied and enforced in the long term, but lessons from other jurisdictions show that governments may opportunistically utilise such legislation to silence and denounce those who disagree with them. It is therefore incumbent on Australian policy-makers to advocate a nuanced rhetoric regarding the risks posed by foreign influence, rather than the current sweeping negative polemic associated with ‘foreign interference’.<sup>253</sup> Despite the difficult balancing act this would require of leaders, a recalibration in this sense would reap the benefit of nuanced debate and, consequently, nuanced legislation.

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253 See, eg, Amy Greenbank, ‘Peter Dutton Vows to “Call out” China over Foreign Interference and Cyber Hacks’, *ABC News* (online, 12 October 2019) <<https://www.abc.net.au/news/2019-10-11/peter-dutton-calls-out-china-foreign-interference-cyber-hacks/11595750>>.