Rethinking universities' foreign interference obligations

Lessons from the High Court

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The Foreign Influence Transparency Scheme Act 2018 (FITS Act) requires persons or entities, including universities, who engage with the Australian political landscape on behalf of a foreign principal, to register under the scheme. The High Court of Australia's recent decision in LibertyWorks Inc v Commonwealth of Australia [2021] HCA 18 may cause universities to rethink their registration obligations. This article: (i) considers the elements of the legislation which trigger an obligation to register; (ii) examines the High Court's decision in LibertyWorks v Commonwealth, with particular emphasis on those parts of the judgment most likely to impact universities; and (iii) concludes by considering common activities undertaken by universities that might attract a requirement to register, and analyses the impact the FITS Act is likely to have on universities seeking to comply with the legislative regime.

Keywords: Foreign interference, LibertyWorks v Commonwealth, foreign principals, registerable activities

Introduction

The *Foreign Influence Transparency Scheme Act 2018* (FITS Act) is Commonwealth legislation which came into effect in December 2018. At its core, the FITS Act requires a person or entity who engages with the Australian political landscape on behalf of a foreign principal to register under the scheme. Since the legislation was enacted, most Australian universities have developed policies and procedures to ensure that they comply with their registration obligations under the statutory regime. The High Court of Australia's recent decision in *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18 (*LibertyWorks v Commonwealth*) is likely to cause universities to rethink those obligations.

The case provides, for the first time, insight from Australia's highest court on the scope of the legislation, suggesting that its application is broader than intended. Universities engage in an extensive range of academic, research and commercial pursuits, and do so often with an international focus. As such, universities need to consider their registration obligations with respect to the FITS Act in a variety of contexts. This article commences by outlining the history and purpose of the FITS Act and considering the main elements of the legislation which trigger an obligation to register, including whether: (i) a person is a foreign principal; (ii) conduct in Australia is undertaken on behalf of a foreign principal; and (iii) such conduct comprises an activity or arrangement requiring registration. The article will then examine the High Court's decision in *LibertyWorks v Commonwealth*, with particular emphasis on those parts of the judgment most likely to impact upon the interaction between the FITS Act and universities. The article will conclude by analysing common activities undertaken by universities that might attract a requirement to register under the FITS Act and discussing the impact the FITS Act is likely to have on universities seeking to comply with the legislative regime.

The FITS Act

The FITS Act is designed to address the risk of foreign interference. Foreign interference can be distinguished from foreign influence in that the latter refers to open and transparent activities undertaken on behalf of a foreign principal that influence government and political systems and processes. Such activities are not in and of themselves detrimental to Australia's interests and amount to routine acts of statecraft. However, foreign influence will amount to foreign interference if it is undertaken using covert, deceptive, corrupting or threatening means to damage or destabilise the government or political processes of a country (Parliamentary Joint Committee on Intelligence and Security, 2018). The promulgation of legislation to address the threat of foreign interference is not a new concept.

The Foreign Agents Registration Act (FARA), on which the FITS Act is based, has been in operation in the United States since 1938. The introduction of the FITS Act in 2018 coincided with an increase in the prevalence of foreign interference in Australia (Parliamentary Joint Committee on Intelligence and Security, 2018). In the most recent Annual Threat Assessment, the Director-General of The Australian Security Intelligence Organisation (ASIO) warned that 'espionage and foreign interference has supplanted terrorism as [Australia's] principal security concern' (ASIO, Director-General's Annual Threat Assessment, 9 February 2022, p.3). Not only are Australian universities not immune from the threat of foreign interference, they are likely targets (ASIO, 2018). ASIO has identified foreign powers clandestinely seeking to shape the opinions of members of the Australian public, media organisations and government officials to advance their own countries' political objectives, including through the recruitment and co-opting of influential and powerful Australian voices to lobby decision-makers. Almost every sector of the Australian community is a potential target for foreign influence but this is said to be particularly true in relation to the university community, among other individuals and organisations (ASIO, 2020).

To safeguard against the threat posed by foreign interference, the Federal Government developed the Counter Foreign Interference Strategy, of which the FITS Act formed part. The object of the FITS Act is 'to provide for a scheme for the registration of persons who undertake certain activities on behalf of foreign governments and other foreign principals, in order to improve the transparency of their activities on behalf of those foreign principals' (FITS Act, section 3). It seeks to achieve this object by imposing registration and other obligations on persons who undertake or agree to undertake certain activities on behalf of foreign principals. A liability to register under the FITS Act arises where: (i) there is a 'foreign principal'; (ii) conduct in Australia is undertaken 'on behalf of' a foreign principal; and (iii) such conduct comprises one or more registerable activities (FITS Act, 2018, section 18). These are involved questions and answering them requires the interpretation of a range of definitions and related provisions in the legislation, and their application to a variety of activities. Each is considered in turn below, with particular focus on those aspects most likely to impact universities.

The first relevant consideration under the FITS Act is whether an entity is a 'foreign principal'. A foreign principal is defined to mean a foreign government, a foreign political organisation, or entities and individuals related to them. There are then a cascading series of definitions which describe what is meant by each concept. The definition of a foreign government is broad enough to capture all levels of government (FITS Act, 2018, section 10). This includes the national government of another country or the instrumentalities of that government, as well as governments of parts of foreign countries, or their instrumentalities. A foreign political organisation is defined to include a foreign political party or a foreign organisation that exists primarily to pursue political objectives (FITS Act, 2018, section 10). An organisation is a foreign political organisation if its primary purpose is to pursue the political objectives associated with governing a foreign country, even if the country does not have a system of registration for political parties (FITS Act, 2018, section 10).

Foreign government related entities include companies or other organisations which have foreign government ownership or decision-making control. For example, where the foreign party is a company it will be deemed a foreign principal where a foreign government or foreign political organisation holds more than 15 per cent of the voting power in the company, can appoint at least 20 per cent of the directors, or if the directors are accustomed, or under an obligation to act in accordance with the directions, instructions or wishes of the foreign principal (FITS Act, 2018, section 10).

Non-corporate entities will be deemed to be foreign principals where the members of the executive committee (however described) are accustomed, or under an obligation (whether formal or informal), to act in accordance with the directions, instructions or wishes of a foreign principal or where a foreign principal is in a position to exercise total or substantial control over the entity (FITS Act, 2018, section 10). A 'foreign government related individual' is defined to mean an individual who is neither an Australian citizen nor a permanent Australian resident who is related to a foreign principal that is a foreign government, foreign government related entity or foreign political organisation by reason that the individual is accustomed, or under an obligation (whether formal or informal), to act in accordance with the directions, instructions or wishes of the foreign principal and/or the foreign principal is in a position to exercise, in any other way, total or substantial

control over the individual (FITS Act, 2018, section 10). Australian universities are likely to encounter and have dealings with entities that meet the definition of foreign principals on a regular basis. An overseas university is capable of being a foreign principal. This could occur where it is accustomed to act in accordance with the directions of a foreign government or where the foreign government is in a position to exercise substantial control over the overseas university. A company for whom an Australian university agrees to undertake research might be a foreign principal where a foreign government owns shares in the company. It is also possible that an Australian university, in organising an international conference on climate change, might engage with an entity that is a foreign principal by virtue of its meeting the definition of a foreign political organisation.

The second consideration in determining whether an obligation to register arises is whether a person is acting 'on behalf of', or enters into an 'arrangement' with, a foreign principal. The circumstances in which a person may undertake an activity on behalf of a foreign principal are broadly defined under the FITS Act. A person undertakes an activity on behalf of a foreign principal if they do so in the service of, on the order or at the request of, or under the direction of, the foreign principal (FITS Act, 2018, section 11). An arrangement with a foreign principal is also broadly defined. An arrangement can be formal or informal, written or verbal, and includes an 'arrangement of any kind, whether written or unwritten' (FITS Act, 2018, section 10). The foreign principal does not need to pay the person to undertake the activity, or provide any other advantage to the person, but at the time the arrangement is entered into, both the person and foreign principal must have known or expected that the person would or might undertake the registrable activity. While overt acts such as entering into a memorandum of understanding with an overseas university or engaging in formal contractual relations with an overseas company will meet the definition of an arrangement, there are circumstances where less formal collaborations or engagements might meet the definition of an arrangement.

The third relevant consideration relates to the types of conduct that amount to 'registerable activities' under the FITS Act (FITS Act, 2018, sections 20-23). They include activities for political or governmental influence, parliamentary lobbying on behalf of a foreign government and certain activities in respect of former Cabinet Ministers. Universities are less likely to engage in parliamentary lobbying on behalf of a foreign government or activities involving former Cabinet Ministers on a regular basis therefore those activities will not be considered further in this article. Table 1 below sets out the types of activities and foreign principals in respect of which activities for political or governmental influence will attract registration obligations.

Table 1: Activities in Australia for political or governmental influence (FITS Act, 2018, section 21)

Item	*Activity*	*Foreign principal*
1	Parliamentary lobbying: (a) in Australia; and (b) for the purpose of political or governmental influence	(a) A foreign government related entity; or (b) A foreign political organisation; or (c) a foreign government related individual
2	General political lobbying: (a) in Australia; and (b) for the purpose of political or governmental influence	Any kind of foreign principal
3	Communications activity: (a) in Australia; and (b) for the purpose of political or governmental influence	Any kind of foreign principal
4	Disbursement activity: (a) in Australia; and (b) for the purpose of political or governmental influence	Any kind of foreign principal

The first point of note is that to be registrable, each of the activities listed in Table 1 must be carried out for the purpose of political or governmental influence. A person undertakes an activity for the purpose of political or governmental influence if the sole or a substantial purpose of the activity is to influence, amongst other matters, a process in relation to a federal government decision (FITS Act, 2018, section 12). Federal government decisions include decisions made by Cabinet, a Minister, a Commonwealth entity and/or a Commonwealth company. It can be a decision of any kind in relation to any matter whether or not the decision is final and whether or not the decision is a formal decision. A person also undertakes an activity for the purposes of political or governmental influence if the sole or substantial purpose of the activity is to influence the public, or a section of the public in relation to one of these processes (FITS Act, 2018, section 12). As to the particular activities captured by the FITS Act, 'general political lobbying' includes any lobbying of a Commonwealth public official, a Department, agency or authority of the Commonwealth or political parties or candidates (FITS Act, 2018 section 10). 'Communications activity' includes the communication, distribution or production of material or information to the public (FITS Act, 2018, section 13), and a 'disbursement activity' is triggered when a person disburses money or 'things

of value' (FITS Act, 2018, section 10). To comply with the FITS Act, those who become liable must register within 14 days (FITS Act, 2018, section 16). The Secretary of the Attorney-General's Department is required to publish certain information regarding registrations on a publicly accessible website (FITS Act, 2018, section 41). Once an activity or arrangement is registered, there are ongoing requirements to report any material changes in circumstances, including updating information to ensure that it is not misleading or inaccurate (FITS Act, 2018, section 34). Registrations need to be renewed every 12 months if the registrant continues to undertake registrable activities for a foreign principal (FITS Act, 2018, section 39). If a registration is not renewed after 12 months, it will automatically expire (FITS Act, 2018, section 33). Serious penalties are imposed for failing to comply with the obligations imposed by the FITS Act. For example, it is a criminal offence to fail to register or renew a registration, carrying with it a term of imprisonment between 12 months to 5 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 (FITS Act, 2018, section 57).

Unlike its US counterpart, the FITS Act does not include an exemption for universities, academics or researchers...

There are a number of exemptions to registering under the scheme (FITS Act, 2018, Part 2 Division 4). If any of the exemptions apply, potential registrants do not need to register even if they undertake activities on behalf of a foreign principal. Exemptions exist for the provision of humanitarian aid or assistance (FITS Act, 2018, section 24), the provision of legal advice or legal representation (FITS Act, 2018, section 25) and religious activities (FITS Act, 2018, section 27). An exemption also exists for registered charities that undertake registrable activities on behalf of a foreign principal in pursuit of the charity's purpose (FITS Act, 2018, section 29C). The registered charities exemption only applies to parliamentary lobbying, general political lobbying and communications activities. It does not apply to disbursement activities. For the exemption to apply to a university, the university must be registered as a charity with the Australian Charities and Not-for-profits Commission and undertake activities in pursuit of a charitable purpose under the *Charities Act 2013* (Cth). In addition, the university 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. Of particular relevance to universities and their personnel is an exemption that applies where a person is undertaking general political lobbying on behalf of a foreign principal for the purpose of political or governmental influence, and the activity relates to a government decision making process in which the foreign principal is required by law to participate (*Foreign Influence Transparency Scheme Rules*, 2018, r (2)). This exemption is likely to be enlivened where, for example, a university or its personnel make representations to the government on behalf of a foreign principal. Such representations may include, for example, providing information to the Department of Home Affairs on behalf of a foreign principal to influence a decision regarding a visa application. Unlike its US counterpart, the FITS Act does not include an exemption for universities, academics or researchers. In a submission to a parliamentary committee, the Commonwealth Attorney-General's Department explained why universities and academics were not exempt from the operation of the scheme 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' (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, 2018).

LibertyWorks v Commonwealth

The case of *LibertyWorks v Commonwealth* provides valuable insight into the interpretation of the FITS Act by Australia's highest court. The case centred on a Conservative Political Action Conference (CPAC) event organised by the plaintiff, LibertyWorks Inc (LibertyWorks). LibertyWorks is a private think-tank 'with an aim to move public policy in the direction of increased individual rights and freedoms, including the promotion of freedom of speech and political communication' (at [1]). In 2018, LibertyWorks agreed to collaborate in organising a CPAC event in Australia with the American Conservative Union (ACU). LibertyWorks was assisted by the ACU in hosting the CPAC event, which included providing the details of potential speakers for the CPAC event. In August 2019, prior to the holding of the CPAC event, the Deputy Secretary of the Attorney-General's Department contacted the President of LibertyWorks advising that the ACU appeared to fall within the definition of a foreign principal and that the CPAC event appeared to be a communications activity for the purpose of the FITS Act. As such LibertyWorks was asked to consider registering its arrangements with the ACU under the FITS Act. This was followed by written notice requiring LibertyWorks to provide information and documentation for the Deputy Secretary to determine whether registration was required under the scheme. LibertyWorks commenced proceedings

in the High Court seeking a declaration that the FITS Act was constitutionally invalid. While LibertyWorks accepted that the ACU is a foreign principal – it being a foreign organisation that exists primarily to pursue political objectives – and that the CPAC event constituted a communications activity, it argued that the registration requirements imposed on individuals who engage in communication activities on behalf of a foreign principal under the FITS Act burdened the implied freedom of political communication as obligation to register would have a chilling effect on people who want to be part of the general political discourse and would therefore have a deterrent effect on political speech (at [69]).

The implied freedom of political communication is an implication drawn from the Australian Constitution and originates from the establishment of systems of representative and responsible government. It operates as a restriction on legislative power meaning that the Commonwealth and State governments cannot make laws that impermissibly burden the implied freedom. To be valid, a law that places a burden on political communication must have a legitimate purpose, which is to say that it must be compatible with the constitutionally prescribed system of representative government. In addition to having a legitimate purpose, the law must be proportionate to the achievement of that purpose. That is, the law must be suitable, necessary and adequate in its balance in its response to the perceived mischief it was designed to address (see *McCloy v New South Wales* (2015) 257 CLR 17).

In the result, five of the seven High Court judges in *LibertyWorks v Commonwealth* found that the provisions of the FITS Act requiring a person to register where they engage in communications activities on behalf of a foreign principal did not impermissibly contravene the implied freedom of political communication. The jointly written judgment of Chief Justice Kiefel and Justices Keane and Gleeson found that whilst the provisions amounted to a modest burden on the freedom of political communication, the purpose of the FITS Act was legitimate and the provisions were suitable and necessary to achieve that purpose (at [77] and [84]). In separate judgments, Justices Edelman and Steward each reached the same conclusion (at [238] and [291]). The two dissenting judges, Justices Gageler and Gordon, each found that the FITS Act was not fit for purpose. They reasoned that the scheme of registration established by the FITS Act has incidents which burden political communication by a registrant to a substantially greater extent than is necessary to achieve the object of improving transparency. Both judges focussed on the fact that the FITS Act establishes two separate repositories of information. The first being the publicly accessible website and second being a repository of information maintained by the Secretary containing additional information provided by registrants which is not made public, but which can be shared with certain government agencies and law enforcement authorities. Justice Gordon expressed the view that 'a non-public register does nothing to minimise the risk of undisclosed influence', rather '[i]t does the opposite.' According to her Honour, a non-public register 'is in darkness, not sunlight' (at [130]). The ultimate outcome of *LibertyWorks v Commonwealth* was that the FITS Act was found not to be invalid. However, that finding must be considered in the context of the narrow basis upon which it was challenged. As is its usual practice when Commonwealth legislation is challenged, the High Court considered only those aspects of the FITS Act challenged by LibertyWorks for the reasons advanced by LibertyWorks. It did not examine in detail the validity of all aspects of the FITS Act. Nonetheless, several of the judges remarked on aspects of the Act which were not the subject of challenge. While the comments are therefore not strictly binding on either those responsible for administering the FITS Act or another court that might be called upon to determine the validity of a different provision, they serve to highlight several features of the Act which those who may be required to register under it would do well to heed.

The High Court's decision emphasises a number of important points about the application of the FITS Act to universities. Several of the judges expressed concern that the extended meaning of acting 'on behalf of' meant that the regulation of registrable activities is not as confined as the ordinary notion of 'on behalf of a foreign principal' might suggest. Justice Gordon observed that activities undertaken on behalf of a foreign principal, as defined in the FITS Act, extend well beyond any ordinary understanding of an agency or employment relationship. The consequence, her Honour explained, is that activities of a collaborative kind that are instigated or principally pursued by the person liable to register (not just those undertaken at the behest or direction of a foreign principal) are captured by the scheme (at [142]). Similarly, Justice Steward expressed concern that the inclusion of the term 'arrangement' had gone 'too far' and led to 'unintended consequences' (at [266]). His Honour stated that the definition of an 'arrangement' was broad and had the potential to capture circumstances where individuals are truly acting in their own interests but may nonetheless become liable to register under the scheme by mere association with a foreign principal. Justice Steward therefore concluded (at [296]):

> if a person does not truly act for a foreign principal, there is no need for transparency; there is no covert source of foreign influence to disclose. It follows that it is arguable that the extension of the FITS Act to those with nothing relevantly to disclose, to those who have nothing relevantly to hide, and to those who act only for themselves, but who, in each case, are nonetheless associated with a foreign principal by participation in an arrangement, is a manifestly disproportionate legislative solution to the aim of minimising undisclosed foreign political influence.'

His Honour held that it was therefore arguable that by reason of the broad definition of 'acting on behalf of' a foreign principal the FITS Act was invalid but expressed no final view because LibertyWorks did not contend for invalidity on this specific basis (at [297]).

The reasons of Justices Edelman and Stewart also suggest the concept of a foreign principal might capture foreign academics and overseas universities and that common university activities, such as holding conferences and publishing academic work may be registerable under the scheme. Justice Steward recognised that the FITS Act could apply to an academic who prepares a paper with the intention of delivering it at an international conference and that a foreign academic could be a foreign principal. His Honour said (at [275]):

> an Australian academic who prepares a paper (that constitutes a communications activity for the purpose of political or governmental influence) under an arrangement or understanding (perhaps to deliver the paper at an international conference) with a foreign academic (who is a foreign principal) who proposes to prepare her or his own paper might be liable to be registered.

Justice Steward also considered that activities such as making a submission to government or jointly hosting a conference might be registerable activities. His Honour said (at [274]):

> A person, for example, might enter into an arrangement to collaborate with a foreign principal, on equal terms, to make a submission to government concerning a matter of public policy. A person might form an equal alliance with a foreign principal to pursue a commonly held political point of view. A person might jointly host a conference with a foreign principal concerning political or governmental issues. Each of these activities might well constitute registrable activities.'

Similarly, Justice Edelman considered that the FITS Act could extend to the publication of research by academic researchers. His Honour said (at [215]):

> The regulation of registrable communications activity might, therefore, extend to communications by academic researchers in Australia whose public research output is conducted with funding from any company in which more than 15 per cent of the issued share capital is held by a foreign organisation that exists primarily to pursue political objectives. If the funding of those communications meant that they were undertaken 'under an arrangement' then they would be registrable communications activities if the academic had a substantial purpose to 'affect in any way' a section of the public, such as an academic audience, in relation to processes in relation to a federal government decision.

Both Justices Edelman and Steward also considered the extent to which the broad definitions of 'acting on behalf of' and 'under an arrangement' could be read down pursuant to section 15A of the Acts Interpretation Act 1901 (Cth). That section provides that Commonwealth legislation is to be interpreted according to the presumption that Parliament intended that the legislation bear a meaning which is constitutionally valid. In other words, if it is possible to construe 'acting on behalf of' and 'under an arrangement' in a way that does not result in an impermissible burden on the implied freedom of political communication, then that construction should be adopted. Justice Stewart rejected a submission that the term 'arrangement' in s.11(1)(a)(i) should be read down by reference to the words 'on behalf of' in s.11(1), reasoning that it would be circular to construe the words of a definition by reference to the term defined (at [276]). Justice Edelman on the other hand considered that the possibility was at least open to read down the term 'under' in the phrase 'under an arrangement' to be constitutionally valid (at [217]). However, as LibertyWorks had not raised the broad definitions of 'acting on behalf of' and 'under an arrangement' as independent grounds for invalidity, no final view was expressed as to whether a reading down could cure the ostensibly unconstitutional provisions.

Scope of FITS Act with respect to university activities

Universities engage in a broad range of academic, research and commercial pursuits. As such, they need to consider their registration obligations under the FITS Act in a variety of contexts. Set out below are examples of common activities undertaken by universities that might attract a requirement to register under the FITS Act, as well as a consideration of the impact the FITS Act is likely to have on universities seeking to comply with the legislative regime.

Research publications and conferences

As suggested in *LibertyWorks v Commonwealth*, there is scope for the FITS Act to apply in respect of conferences and research publications. In the case of the former, the facts of *LibertyWorks v Commonwealth* demonstrate that the holding of a conference can amount to a 'communications activity.' As to the latter, the view was expressed in *LibertyWorks v Commonwealth*, in the passage by Justice Stewart extracted earlier, that 'an Australian academic who prepares a paper ... with a foreign academic (who is a foreign principal) who proposes to prepare her or his own paper might be liable to be registered' (*LibertyWorks v Commonwealth*, at [275]). In each instance, consideration will need to be given to whether the activity was undertaken 'on behalf of' a foreign principal, and whether the activity was undertaken 'for the purposes of political and governmental influence'. As observed in *LibertyWorks v Commonwealth*, the FITS Act redefines the long-established understanding of acting on behalf of

another person and it expands it to capture circumstances where individuals are acting independently and advancing their own interests. Accordingly, an Australian university academic might enter into an arrangement to collaborate with a colleague from an overseas university to publish papers on public health responses to COVID-19. An Australian university might partner with an overseas university to co-host a conference regarding climate change. In each case, it is possible that the Australian academic and the Australian university might be acting 'on behalf of' a foreign principal. A more difficult question concerns whether in each of the examples, the Australian academic and the Australian university are undertaking the activities 'for the purposes of political and governmental influence'. Under the FITS Act, a person undertakes an activity for the purpose of political or governmental influence if the sole or a substantial purpose of the activity is to influence a federal election, a federal government decision, or a section of the public in relation to either of those matters (FITS Act, 2018, section 12). The Explanatory Memorandum to the FITS Act states that a purpose which is 'slightly connected or trivial' will not be the sole or a substantial purpose. It then gives the following example (Revised Explanatory Memorandum, 2018 [237]):

> [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].

While it is trite that slightly connected or trivial reasons are not substantial reasons, there are likely to be situations in which publishing research or holding a conference in order to influence a federal government decision, or a portion of the public in relation to a federal government decision, is not a slightly connected or trivial purpose. In many instances it may in fact be a purpose, in which an assessment of whether it is a substantial purpose must be made.

Research Grant Applications

University personnel regularly engage with overseas universities and other international partners for the purpose of undertaking collaborative research, and other educational activities. Such projects may benefit from Commonwealth funded research grants. Applications for research grants made to the Australian Research Council (ARC) and the National Health and Medical Research Council (NHMRC) are likely to involve 'general political lobbying' under the FITS Act. As previously outlined, lobbying 'for the purpose of political or governmental influence' includes any lobbying the sole, primary or substantial purpose of which is to influence a process in relation to a federal government decision.

A federal government decision in turn includes the decision of a Minister. 'Lobbying' includes any communication with a public official for the purpose of affecting 'in any way' the process, decision, or outcome. An application for grant funding from the ARC or the NHMRC will likely meet this definition because the legislation governing those bodies requires submissions in support of the grant application to be made to a Chief Executive Officer (a Commonwealth public official), who then makes recommendations to the Minister for their decision on funding approval (see Australian Research Council Act 2001 (Cth) section 3 and National Health and Medical Research Council 1992 (Cth) section 51(2)). A registration obligation is most likely to be triggered by the application being made under an arrangement with the foreign principal. If, when the grant application is made, the university and the foreign principal were collectively progressing a current or proposed research project (i.e., an arrangement), which when entered into, both the University and the foreign principal knew might involve a grant application, then the grant application must be registered.

While the requirements to register might be satisfied when dealing with Commonwealth grant applications, it is equally likely that the exemption contained in *Foreign Influence Transparency Scheme Rules*, 2018, r 5(2) will apply such that the activity or arrangement does not need to be registered. The exemption will likely apply because the activity relates to general political lobbying on behalf of a foreign principal for the purpose of political or governmental influence, and the activity relates to a government decision-making process in which the foreign principal is required by law to participate.

Research Centres and Institutes

University-associated research centres and institutes will attract the same registration obligations as their host universities. To date, there have been registrations under the FITS Act by three such bodies. When considering the types of activities requiring registration by universities, it is instructive to consider the activities that have been registered by these bodies.

First, the Griffith Asia Institute, a research centre within the Griffith Business School at Griffith University, has registered various communications and disbursement activities in respect of the Ministry of Foreign Affairs (Japan). The communications activities relate to workshops involving 'strategic thinkers,' a closed dialogue involving policy experts and academics, and trilateral symposiums between Australia, India and Japan. The disbursement activities relate to the provision of an honorarium to the invited speakers and funding for hosts in respect of the communications activities.

Second, the United States Studies Centre at the University of Sydney has registered general political lobbying in respect of the US Department of State. The centre, which was established

by the American Australian Association with the support of an endowment from the Australian Government, registered an arrangement entered into with the US Department of State, to conduct a range of activities in Australia collectively titled 'Indo-Pacific Strategic Futures: Conference and Simulation'. The objectives and expected outcomes of the activity included publishing and disseminating a paper from the conference proceedings to inform US, Australian and regional policymakers about regional geo-strategic and geo-economic policy options.

Third, the Perth USAsia Centre at the University of Western Australia has registered communications activities in respect of both the Ministry of Foreign Affairs Tokyo and the US Department of State. The activities relate to the holding of symposiums and workshops which were funded in part by foreign principals.

Confucius Institutes

There are Confucius Institutes in 13 Australian universities. They are established by partnerships between Australian and Chinese universities and are funded by the Chinese International Education Foundation (formerly Hanban), an organisation affiliated with the Chinese government. The institutes typically offer Chinese language and cultural programs. To date, no Australian university has registered a Confucius Institute under the FITS Act. It is of note that, on 26 February 2021, the Acting Secretary of the Attorney-General's Department issued a provisional transparency notice under section 14B(1) of the FITS Act to the Confucius Institute of the University of Sydney. The notice stated that the Confucius Institute of the University of Sydney had been deemed a foreign government related entity. The notice, however, was revoked 28 days later with the Department stating that '[f]ollowing consideration of changes made to the Confucius Institute's governance arrangements after the provisional transparency notice was issued, the Acting Secretary was no longer satisfied, on the information available, that the Institute meets the definition of a foreign government related entity' (Attorney-General's Department (Cth), Transparency Notices, <https://www.ag.gov.au/integrity/foreign-influence-transparency-scheme/transparency-notices>).

It is not clear from the provisional transparency notice what it was about the Confucius Institute's governance arrangements that caused the Acting Secretary to form the view that the institute was a foreign government related entity, or what change to the governance arrangements caused the Acting Secretary to reverse that view. Whether or not a Confucius Institute meets the definition of a foreign government related entity, an Australian university with links to a Confucius Institute may nonetheless have registration obligations under the FITS Act. The university's partnership with a Chinese university and/or the Chinese International Education Foundation, either of which may be a foreign principal, underpinning the creation of the Confucius Institute may constitute an arrangement requiring registration.

That could occur where at the time the arrangement was entered into it was contemplated that the Confucius Institute would undertake registerable activities. For example, the Confucius Institute of the University of Adelaide, established in partnership with the University of Shandong, hosts an Australia China Emerging Leaders' Summit which brings together Australian and Chinese delegates with a focus on enhancing the understanding between the two nations. If the substantial purpose of such an activity was to influence a federal government policy or decision, then a registration obligation would likely arise.

While the various definitions in the FITS Act may appear highly descriptive and therefore clear in their application, determining whether there is an obligation to register under section 18 of the FITS Act often requires a fact-finding investigation to be undertaken.

Compliance burden

While the various definitions in the FITS Act may appear highly descriptive and therefore clear in their application, determining whether there is an obligation to register under section 18 of the FITS Act often requires a fact-finding investigation to be undertaken. The resulting compliance burden on universities is potentially significant.

The area in which investigation is most likely to be required is in determining whether an entity is a foreign principal for the purposes of the legislation. Where a university is dealing directly with a foreign government or foreign political organisation, the answer to whether the entity is a foreign principal will be straightforward. However, there is a raft of individuals and entities with whom universities and their staff regularly deal where the answer will be less obvious. As identified earlier, overseas universities may meet the definition of a foreign principal where the executive committee of the university is accustomed, or under an obligation, to act in accordance with the directions, instructions or wishes of a foreign principal or where a foreign principal is in a position to exercise total or substantial control over the entity.

To make an informed assessment on these matters, the overseas university's relationship with its government needs to be considered. Relevant considerations may include any

legislation establishing or regulating the university, the structure and operation of the government of the country in which the university operates and the relationship between the university and the foreign government. As is the case in Australia, most universities in the United Kingdom are public bodies in that they receive public funds and are publicly regulated. They nonetheless exercise a high degree of independence from government and are therefore unlikely to satisfy the definition of a foreign principal. A similar case can be made for those universities in the United States which are public bodies. The status of public universities in countries such as China is less clear. Different considerations may apply depending on whether the university falls under the supervision of the Ministry of Education, or whether it is supervised by a branch of defence such as the State Administration for Science, Technology and Industry for National Defence or the People's Liberation Army. Factors which may suggest a Chinese university falls under the definition of a foreign principal include being subordinate to or having close links with China's defence industry, having been granted top secret security credentials, engaging in defence research, or training for military or security personnel. Similar issues may be encountered in determining whether a foreign company is a foreign principal on the basis that a foreign government holds voting power in the company or is in a position to appoint members to its board of directors.

To answer such questions a foreign company's constitutional documents and an understanding of the regulatory environment in which it operates may be required. Such materials and information are not always publicly available. Less obvious is the answer to the question of whether a company's directors are under any obligation to act in accordance with the wishes of a foreign government. In order to comply with the FITS Act, universities may need to develop an effective compliance regime that involves (i) ascertaining the identity of the university's international collaborators; (ii) determining the status of those collaborators under the FITS Act including by reference to material such as any legislation governing their establishment, available information concerning the composition of their boards, shareholdings and decision-making organs; and (iii) implementing systems for gathering further information with respect to these matters.

Conclusion

At the time of writing, 101 individuals and entities had registered under the FITS Act. The registrations are in respect of 205 foreign principals and 395 registerable activities. While no university has registered to date, the case of *LibertyWorks v Commonwealth* may cause universities to rethink their registration obligations. The High Court's decision emphasises several important points about the application of the FITS Act to universities. Firstly, acting on behalf of a foreign principal can include situations where a party is acting purely in their own interest and can include situations where a person collaborates with a foreign principal on equal terms to pursue a matter of common interest. Secondly, the concept of a foreign principal is broad, and can potentially include foreign academics and overseas universities. Thirdly, common universities' activities, such as holding conferences and publishing academic work may be registerable under the scheme.

Armed with this new perspective, universities must consider whether there are situations where all factors are present such that an obligation to register arises. In respect of research publications and conferences, the key questions are likely to be whether a foreign collaborator is a foreign principal and whether a substantial purpose of disseminating research or holding a conference is for political or government influence. The registration of conferences and publications by university associated centres and institutes confirms there are circumstances where a substantial purpose of such activities is for political or governmental influence. In respect of Commonwealth grant applications, the relevant considerations will be whether a research partner is a foreign principal and whether there are any arrangements which, when entered into, both the University and the foreign principal knew might involve a grant application. It is likely, however, that ARC and NHMRC grant applications will be exempt from registration as such activities relate to a government decision-making process and the foreign principal is required by law to participate in that process.

The compliance burden placed on universities by the FITS Act is likely to be substantial. In large part, this is the result of what Justice Steward described as the 'unintended consequences' of the broad reach of the legislation (*LibertyWorks v Commonwealth*, [266]). While the vast majority of university activities will ultimately not require registration, determining whether an obligation to register arises will often require a fact intensive investigation to be undertaken.

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