ASPI
AUSTRALIAN STRATEGIC POLICY INSTITUTE

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29 November 2021

Submission to the PJCIS Review of the
Foreign Influence Transparency Scheme Act 2018

1. We are pleased to provide this submission to the PJCIS Review of the Foreign Influence Transparency Scheme Act 2018. ASPI does not take corporate positions on any policy issue. As such this submission reflects the views of the authors only.

A case study of enforcement failure: the Chinese Communist Party's United Front

2. The enforcement of the Foreign Influence Transparency Scheme (**FITS**) has been at odds with that scheme's purposes. One striking case study illustrates this better than any other. It relates to the United Front Work Department (**UFWD**) of the Chinese Communist Party (**CCP**).

3. The UFWD coordinates a network of organisations and individuals that further the CCP's strategic objectives both at home and abroad. Xi Jinping has described it as "an important magic weapon for strengthening the party's ruling position [and] realising the China Dream of the Great Rejuvenation of the Chinese Nation."[1] One of its objectives is to exert political influence on the CCP's behalf in countries like Australia.

4. The operation of United Front groups in Australia is well recognised. Indeed, there has been a "dramatic proliferation" of them.[2]

5. But not according to the Foreign Influence Transparency Register (**Transparency Register**). Not a single organisation or individual is registered there as seeking to exert political influence in Australia on behalf of the CCP.

6. Either the many scholars who have documented the work of the UFWD are all wrong, or there is a fundamental problem with the current approach to enforcement of the FITS. We think it is obvious which of those alternatives is true.

[1] Quoted in Alex Joske, *The Party Speaks to You* (ASPI, June 2020), p4.
[2] Gerry Groot, 'Inside China's vast influence network – how it works, and the extent of its reach in Australia', *The Conversation* (14 August 2019).

7. One scholar has observed, "[t]here's no foolproof way to identify a united front group".[3] This is exactly the problem that the FITS is supposed to fix. It is supposed to shed light on those who exert influence in this country on behalf of foreign powers. That is its entire purpose. Yet when it comes to the United Front — a textbook case, if ever there was one, of foreign influence that should be subjected to disinfectant sunlight — the Transparency Register is silent. That is an abject failure of enforcement.

The purpose of the FITS is to combat foreign interference

8. "Foreign interference" is a label that refers, amongst other things, to foreign governments' efforts to undermine Australia's national security by influencing its political processes in concealed or otherwise undisclosed ways.

9. When the former Prime Minister, the Hon Malcolm Turnbull, introduced the FITS legislation into the Australian Parliament in December 2017, he explicitly framed it as one "pillar" of a broader "counter-foreign-interference [**CFI**] strategy".[4]

10. Another facet of that strategy was the introduction of criminal offences under the specific label of "foreign interference". But as Turnbull made clear in his reference to the FITS legislation as part of a CFI strategy, the insertion of "foreign interference" offences into the *Criminal Code* is not all there is to Australia's legislative response to foreign interference. Nor is Australia's CFI strategy confined to the enforcement of those particular offences.

11. Rather, the *Foreign Influence Transparency Scheme Act 2018* (Cth) (**FITS Act**) also addresses foreign interference. It does so by forcing disclosure of what would otherwise be concealed foreign influence. The rationale for enforced disclosure is that concealed foreign influence *is* foreign interference. Exertion of influence by foreign governments in Australia is permissible only to the extent that the foreign governmental source is transparent. The FITS Act seeks to bring about that transparency. If someone deliberately breaches it, then that constitutes foreign interference.

A change of approach is needed

12. In light of this, and given that it was designed to be an element of a CFI framework, the FITS Act should be enforced in accordance with CFI priorities. Specifically, the focus should be on seeking compliance with respect to the influence activities that pose the greatest risk to Australia's

[3] Alex Joske, *The Party Speaks to You* (ASPI, June 2020), p25.
[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145 (Malcolm Turnbull, Prime Minister).

democratic processes, and hence to our national security. Where the foreign governmental origin of such activities is hidden, they constitute foreign interference.

13. Enforcement of the FITS Act in accordance with its original purpose — that the Act be a pillar of a CFI strategy — necessitates certain changes to the present approach. For one thing, the enforcement posture should not be country agnostic. It should focus on the influence activities of the countries that pose the greatest national security risk to Australia's democracy. For example, one focus should be an organisation explicitly referenced by the former Prime Minister when introducing the legislation — the CCP.[5]

14. Further, the FITS Act should be enforced by the CFI taskforce within the Home Affairs portfolio. The enforcement of an important pillar of Australia's CFI strategy should be entrusted to the Department that otherwise has oversight of Australia's domestic national security landscape.

15. In addition, the reprioritised enforcement approach should be reflected in legislative changes. While the need to allocate scarce public resources always entails a degree of selectivity in the enforcement of any legislative framework, the divergence of what the letter of the FITS Act requires from the CFI objectives that underpin the Act is so great as to warrant legislative change. The proposed legislative change is set out in the attached paper by Daniel Ward, published by ASPI in July 2021, *Losing our agnosticism. How to make Australia's foreign influence laws work*.

A case study: Confucius Institutes at Australian Universities

16. We draw to your attention a concerning development in how the Attorney General's Department has sought to apply, or in this case not apply, the FITS Act towards the 13 Confucius institutes (CIs) located at universities throughout Australia and a larger number of Confucius classrooms in schools.

17. Widespread global attention to the function of these institutes has made it clear in recent years that CIs are, in the words of former CCP Politburo member Li Changchun, 'an important part of China's overseas propaganda set-up', funded by the CCP's propaganda system and focused on enhancing Chinese soft power on campus.[6]

18. In the US, the Trump and Biden administrations have pursued policies designed to reduce the prevalence of CIs on American university campuses. In early 2021, the US National Defense

[5] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145 (Malcolm Turnbull, Prime Minister).
[6] Geoff Wade, *Confucius institutes and Chinese soft power in Australia*, Parliamentary Library, Australian Parliament, 24 November 2014, online.

Authorisation Act banned funding allocations to any university that housed a CI.[7] Since 2018, 81 US universities have closed or announced an intent to close CIs. In June 2021, Colorado State University closed its CI, noting that access to defence funding was a factor in its decision. Around 41 CIs were operating on US campuses in July 2021.[8]

19. While Australian governments have in the past welcomed the role of the CIs in language training, it should be a matter of great concern that the institutes operate autonomously from university management on the questions of whom they employ and what and how they teach—and that they keep secret the terms of their agreements with universities.

20. In June 2021, a Human Rights Watch report on the PRC's activities in Australian campuses concluded that universities should: "Refrain from having Confucius Institutes on campuses, as they are fundamentally incompatible with a robust commitment to academic freedom. The institutes are extensions of the Chinese government that censor certain topics and perspectives in course materials on political grounds, and use hiring practices that take political loyalty into consideration."[9]

21. On the face of it, one might conclude that there's a strong case for the federal government to seek to remove CIs from Australian campuses, but in fact it seems that the bureaucracy has come to a different conclusion.

22. This can be discerned from several university submissions to the PJCIS inquiry into national security risks affecting the Australian higher education and research sector. Globally, CIs were run by a headquarters known as the Hanban, which is a division of the Chinese Ministry of Education. In what was presumably an effort to deflect American pressure to get CIs off US campuses, the Hanban was reorganised, passing the management of CIs to two groups known as the Centre for Language Education and Cooperation and the Chinese International Education Foundation. Those groups in turn devolved responsibilities for running CIs to Chinese universities.

23. To take a specific example, Sydney University has a CI connected to Fudan University. In February 2021, the Attorney-General's Department wrote to the Australian chair of the CI board at Sydney University advising that the CI was regarded as a 'foreign government related entity' under the terms of the FITS Act.

[7] This repeated a similar exclusion in the 2019 National Defence Authorisation Act, according to Human Rights Watch, 'They don't understand the fear we have', 91.
[8] Tim Dodd, 'Unis wary of being caught in the crossfire', *The Australian*, 21 July 2021.
[9] 'They don't understand the fear we have', *Human Rights Watch*, June 2021, 100.

24. The CI was issued with a 'Provisional Transparency Notice' identifying it as a foreign government related entity. The university replied in March 2021 that, while it had been 'in the early stages of discussions' with the Centre for Language Education and Cooperation and the Chinese International Education Foundation to 'amend or replace' its agreement with the Hanban, Sydney University had, in fact, signed an agreement with Fudan University, the terms of 'which we believe ensure that the Institute is not a foreign government entity as defined in the Act'.

25. The Attorney-General's Department replied on 26 March 2021 that 'The new agreement changes the governance arrangement for the Institute significantly … I am no longer satisfied that the Institute is a foreign government related entity for the purpose of the act.'[10]

26. Thus, at the stroke of a pen, it seems that the Hanban has been able to hand the management of CIs to 'a non-governmental charitable foundation',[11] escaping—at least according to the guileless interpretation of the Attorney-General's Department—being captured by the FITS Act.

27. Our position is that, notwithstanding the Hanban's reorganisation of CI management, CI's remain an integral part of the CCP's United Front strategy. In his address marking the 100th anniversary of the foundation of the CCP, Xi Jinping outlined the clear priority the Party puts on united front activities: "In the course of our struggles over the past century, the Party has always placed the united front in a position of importance. We have constantly consolidated and developed the broadest possible united front, united all the forces that can be united, mobilized all positive factors that can be mobilized, and pooled as much strength as possible for collective endeavors. The patriotic united front is an important means for the Party to unite all the sons and daughters of the Chinese nation, both at home and abroad, behind the goal of national rejuvenation."[12]

28. CI's remain an essential element of CCP united front work. Our assessment is that their operations in Australia should be of concern to the Australian government and deserving of closer scrutiny under the FITS Act.

29. Should the committee require it, we would be pleased to elaborate further on any of the points raised in this submission.

[10] University of Sydney, supplementary submission to the PJCIS Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector, 14 December 2020, online. The exchange of correspondence between the university and the Attorney-General's Department is available at 'Foreign Influence Transparency Scheme', Confucius Institute, University of Sydney, no date, online.
[11] Group of Eight, submission to the PJCIS Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector, 18 December 2020, Appendix 2, 6, online.
[12] Full text of Xi Jinping's speech on the CCP's 100th anniversary, *Nikkei Asia* 1 July 2021.

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ASPI

SPECIAL REPORT

Losing our agnosticism

How to make Australia's foreign influence laws work

Daniel Ward

July 2021

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TWENTY YEARS OF ASPI STRATEGY
2001 - 2021

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Daniel Ward is a visiting fellow at ASPI. He's a director and co-founder of Chapel Lane Advisory, a boutique risk and public policy firm.

As general counsel to Prime Minister Scott Morrison, and as senior adviser to Prime Minister Malcolm Turnbull, Daniel was an adviser to two Australian leaders in relation to the introduction of the country's foreign influence and interference legislation.

He helped Morrison and Turnbull to navigate many of the Australian Government's most significant challenges at the intersection of law and public policy. That included industrial relations reforms during the Covid-19 pandemic, Australian parliamentarians' constitutional eligibility for office, novel anti-discrimination legislation, and a range of amendments to federal immigration, electoral and criminal laws.

Before then, Daniel served in the office of the Australian Attorney-General, in which capacity he was widely credited for devising the constitutional means to hold Australia's nationwide plebiscite on same-sex marriage, without requiring the passage of legislation.

Outside the Australian Government, he was a special counsel in the Sydney office of the global law firm Norton Rose Fulbright, and he clerked for the Chief Justice of the Federal Court of Australia.

Daniel has a first-class master's degree in law from the University of Oxford and a bachelor of law degree from the University of Sydney, where he graduated first in his year. He also studied economics, government and classical music.

John Anderson is a sixth-generation farmer and grazier from New South Wales, who spent 19 years from 1989 in the Australian Parliament.

He served as a senior Cabinet minister in the reformist government led by John Howard (1996 to 2005), one of the most successful governments in Australian parliamentary history. This included six years as Leader of the National Party and Deputy Prime Minister.

Acknowledgement

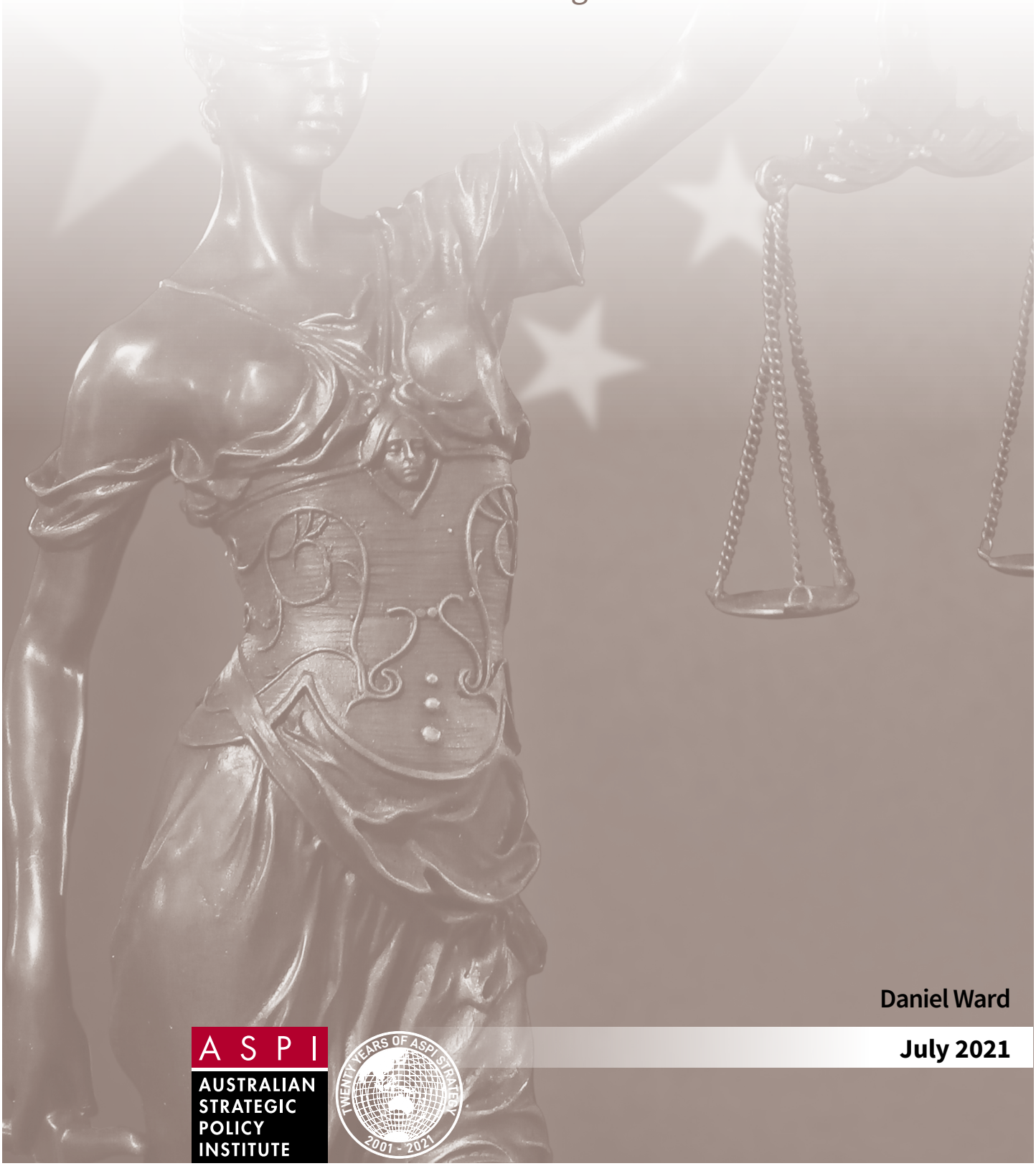
The author would like to thank Peter Jennings, Michael Shoebridge and Tim Wellington for their valuable assistance, feedback and insights. Their input vastly improved the content of the paper. Any remaining faults are entirely the author's responsibility, and the views expressed are entirely his own.

No specific sponsorship was received to fund production of this report.

Cover image: Lady Justice in front of Chinese flag, iStockphoto/Gwengoat.

Losing our agnosticism

How to make Australia's foreign influence laws work



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First published July 2021

Published in Australia by the Australian Strategic Policy Institute

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Foreword

The world in which we live has changed, and continues to change, at a bewildering pace, and in directions that are deeply concerning for a mid-sized country such as Australia. We have benefited hugely from the liberal democratic order that has been effectively underwritten by the United States and has ensured, particularly since 1945, that our region has been safe for democracy and the economic progress that has so stunningly lifted millions of people out of poverty and the tragedy of lives that were 'poor, nasty, brutish and short'.

After the fall of the Berlin Wall in 1989, Francis Fukuyama wrote that the 'end of history' had turned out not to be Marx's version—that of a global communist utopia—but the triumph of democracy. And, indeed, it appeared that democracy had won out and would gradually become the global norm.

We now know that that great hope was misguided, as we watch the emergence of major centres of opposition to freedom and what might still be called the Western model of civilisation. Four major nodes of danger have emerged: Russia, Iran, North Korea and, the largest and wealthiest, China. We have been brought face to face with the reality that the world is now essentially quickening into two major blocks: one made up of those who believe in the liberal democratic model and the international norms it has set in place, and those of an authoritarian bent who seek to undermine and even overthrow that model and those norms.

We must, as a nation, be utterly realistic about the dangers that now confront us. At every level, we need to act with unity, resolve and clear-sightedness, and in ways that recognise both those with whom we must work if freedom is to be secured and those who are opposed to our way of life. At one level, it means that we must at all times seek to behave with decency and transparency and try always to communicate clearly what we believe in and why. We must remain engaged and, as has always been the case, seek to keep that great facilitator of better outcomes for all participants, trade, flowing as freely as possible. At the same time, we should heed Henry Kissinger's advice that a little trade lost can be regained, but freedom lost will not be.

The reality is that, as anyone with even a modicum of awareness knows, China and Russia in particular have been seeking every imaginable opportunity, often aided by rapidly emerging new technologies, to leverage influence in countries like ours: to infiltrate our politics, to steal our intellectual property, to purchase influence by means transparent and otherwise, and to buy assets and even build them in ways that appear to have more to do with pursuing strategic objectives than building economic wealth, jobs and prosperity.

In the face of those emerging patterns of behaviour, the Australian Government has developed legal architecture designed to ensure that attempts to inappropriately interfere in our political and commercial life can be identified and curtailed. The problem is that that architecture is 'country agnostic', which fools no one at all, but which means that scarce resources and the valuable time of many officials is taken up in essentially fruitless exercises, such as applying the same level of surveillance to a speaking invitation for a former Australian prime minister in London or to an American-sponsored conference in Sydney as is applied to, say, a commercially nonsensical application to purchase a sensitive asset by a company that is plainly controlled by the Chinese Communist Party or to register a lobbyist with evident linkages to an authoritarian government.

The crux of the problem is that the laws deny the crux of the problem, which is that some countries by their actions demand a prioritised level of scrutiny and others do not. This fascinating paper by a man who really knows the case, Daniel Ward, mounts a compelling case for bringing the law into alignment with the new reality and our national interest.

The Hon John Anderson AO
Deputy Prime Minister of Australia, 1999–2005

Executive Summary

Country agnosticism, under which Australia's laws treat all foreign influence efforts in the same way, regardless of their source country, is the key failing of Australia's statutory response to foreign governments' influence activities. It has imposed sweeping, unnecessary regulatory costs. It has caused waste of taxpayer-funded enforcement resources. It has diverted those resources from the issues that really matter. And it has brought unnecessary legal complexity. Yet for all that, nobody believes that the laws are truly country agnostic. Not the Australian media, which routinely describe them as 'aimed at' China.[1] Nor, presumably, the media's audience. Nor, certainly, the Chinese Communist Party (CCP), which regards itself as the target, explicitly citing the laws as a key grievance.[2]

Perhaps the greatest cost of country agnosticism is that the current statutory framework isn't as effective as it needs to be. Why? In adopting a country-agnostic stance, we blinded ourselves to the very factor that matters most in evaluating and responding to foreign influence—its source country.

It's time to remove the blindfold. We should recognise this basic truth: foreign influence transparency requirements must be more stringent in relation to some source countries than others.

Greater stringency is needed where the source is a jurisdiction in which the ruling party's means of control permeate the entire society, allowing it to exert power through public and 'private' entities alike. Our laws won't illuminate that kind of authoritarian government's influence in Australia unless they apply to a broad range of conduct and entities.

Conversely, when we cast the legal net as wide in relation to liberal democracies as we must over their authoritarian counterparts, we wind up regulating a lot of activity that doesn't have a foreign government as its ultimate puppetmaster.

Because we permit foreign influence *only on the proviso that its governmental origin is transparent*, everything rides on how effectively that proviso is put into practice. To bring a democratic government's influence efforts out of the shadows, only minimal regulation is needed, but the same can't be said of authoritarian jurisdictions where the tentacles of official power extend further. That contrast between foreign political systems is obvious, yet it's the very thing that country agnosticism insists we ignore.

Accordingly, Australia's foreign influence laws should be amended[3] to adopt a 'tiered model', under which conduct originating in certain 'designated countries' would be subject to greater regulation than activity from other sources. The ministers responsible for the laws should be empowered to designate the source countries that warrant greater transparency. Designation would be based primarily upon an assessment of the foreign state's political system—in particular, the degree to which the foreign government controls ostensibly 'private' entities and deploys them to advance its national security goals. Another relevant factor would be the foreign government's track record of attempting to influence Australians for unwelcome purposes.

1. Introduction

Australia's foreign influence legislation

As the Australian Security Intelligence Organisation has repeatedly warned,[4] Australia faces widespread efforts by foreign governments 'clandestinely seeking to shape the opinions of members of the Australian public, media organisations and government officials to advance their own countries' political objectives'.[5] One foreign government entity—the Chinese Communist Party (CCP)—is a notorious culprit.[6] In recent years, the Australian Government has responded.

In 2018, the Turnbull government legislated the *Foreign Influence Transparency Scheme Act 2018* (FITS Act). The consequence: those who engage in influence activity (such as lobbying or other political communications) must disclose the details where it's on behalf of a 'foreign government related entity'. Particulars appear on a public register.

Two years later, the Morrison government introduced the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Foreign Relations Act). Under that Act, agreements of state and local government bodies with foreign governments are publicly registered. The federal government can terminate them if they're inconsistent with Australian foreign policy.

Together, these Acts constitute the Australian Government's legislative response to foreign influence. The laws are, of course, the product of Canberra's collective executive and parliamentary processes. Prime ministers Malcolm Turnbull and Scott Morrison were very wise to establish this framework. Under their leadership, Australia set an example that's now being emulated in the UK.[7]

As Turnbull and Morrison recognised, we need these laws, and we need them to work.

And when it comes to legislation designed to defend our national sovereignty, we should always be prepared to acknowledge any failings frankly, and make the necessary amendments. Now that Australia's foreign influence laws are in place, there's an opportunity—and an urgent need—to strengthen them so that they work as intended.

The weakness: country agnosticism

There is a serious weakness in Australia's statutory defences against foreign governments' influence efforts. Its name is country agnosticism. Under that precept, the laws treat all foreign influence activities, no matter what their country of origin, the same way. The FITS Act regulates communications on behalf of British and Chinese entities alike. The Foreign Relations Act burdens a local council that enters a sister-city relationship with Honolulu much the same as it burdens a state government that enters a Belt and Road Initiative agreement with the CCP.

With country agnosticism, we took a wrong turn. It is the original sin of Australia's foreign influence laws. It has imposed sweeping, unnecessary regulatory costs. It has caused waste of taxpayer-funded enforcement resources. It has diverted those resources from the issues that really matter. It has brought unnecessary legal complexity. And, as a consequence of all this, it has produced a legal framework that's sporadically obeyed and half-heartedly enforced.

Yet for all that, nobody believes that these laws are truly country agnostic. Not the Australian media, which routinely describe the laws as 'aimed at' China.[8] Nor, presumably, the media's audience. Nor, certainly, the CCP, which regards itself as the target, explicitly citing the laws as a key grievance.[9] So, if country agnosticism was meant to avoid giving anyone the impression that the laws are China-focused, then it has failed. There's been no diplomatic or public relations bang for the agnostic buck.

Country agnosticism is a shrivelled fig leaf in a diplomats' parlour game. And the game is expensive. Its costs are paid by the Australians who must adhere to the laws and finance their enforcement. Those taxpayers pay the premiums for country agnosticism, and are rewarded with a $25 billion[10] CCP trade war. Country agnosticism is an insurance policy that doesn't insure anything.

Perhaps the greatest cost of country agnosticism is that the statutory framework isn't as effective as it needs to be. Why? In adopting a country-agnostic stance, we wilfully blinded ourselves to the very factor that matters most in evaluating and responding to foreign influence—its source country.

The solution

It's time to remove the blindfold. We should recognise this basic truth: foreign influence transparency requirements must be more stringent in relation to some source countries than others.

Greater stringency is needed where the source is a jurisdiction in which the ruling party's means of control permeate the entire society, allowing it to exert power through public and 'private' entities alike. Our laws won't illuminate that kind of authoritarian government's influence in Australia unless they apply to a broad range of conduct and entities. If they cover only what Australians usually understand as government entities—state-owned enterprises, for instance—then they'll largely miss their mark. And they'll do so precisely when it's most important to hit the target; the influence efforts of authoritarian regimes are the very efforts that are most likely to do fundamental damage to our national sovereignty and security.

Conversely, when we cast the legal net as wide in relation to liberal democracies as we must over their authoritarian counterparts, we wind up regulating a lot of activity that doesn't have a foreign government as its ultimate puppetmaster.

When it comes to certain countries, in other words, the regulatory and administrative costs of stringent transparency requirements are worth it; in other cases, they aren't.

Accordingly, Australia's foreign influence laws should be amended[11] to adopt a 'tiered model', under which conduct originating in certain 'designated countries' would be subject to greater regulation than activity from other sources. The ministers responsible for our foreign influence laws should be empowered to designate the source countries that warrant greater transparency. Designation would be based primarily upon an assessment of the foreign state's political system—in particular, the degree to which the foreign government controls ostensibly 'private' entities and deploys them to advance its national security goals. Another relevant factor would be the foreign government's track record of attempting to influence Australians for unwelcome purposes.

Entities without links to designated countries, meanwhile, would be regulated only in 'standard' cases of foreign government control (for example, when they're state-owned enterprises).

A terminological distinction: influence versus interference

This paper adopts a distinction that the Australian Government draws between foreign *influence* and foreign *interference*. The former covers activities such as parliamentary lobbying or political communications to the general public (op-eds, interviews and the like). Those activities are appropriately prohibited *only if* there's a lack of transparency about the fact that a foreign government sits behind them.

Foreign *interference*, on the other hand, refers to the use of 'covert, deceptive, corrupting or threatening means to damage or destabilise [Australia's] government or political processes'.[12] The Turnbull government rightly criminalised that conduct in 2018.[13]

Foreign *interference* must be prohibited irrespective of its source.[14] If someone blackmails a federal minister on behalf of a foreign government,[15] nobody stops to ask which foreign government was involved before forming an opinion. Country agnosticism is appropriate in that context.

But because foreign *influence* is permitted on the proviso that its governmental source is transparent, everything rides on how effectively that proviso is put into practice. To bring a democratic government's influence efforts out of the shadows, only minimal regulation is needed, but the same can't be said of authoritarian jurisdictions where the tentacles of official power extend further. That contrast between foreign political systems is obvious, yet it's the very thing that country agnosticism insists we ignore.

2. The problems with Australia's foreign influence framework

To demonstrate how Australia's foreign influence framework would be strengthened by abandoning country agnosticism, it's first necessary to summarise the difficulties that have been encountered under the existing laws.

1. **Unnecessary regulatory burdens are imposed.** The current framework frequently imposes costs on Australian public and private parties for no benefit whatsoever. Under the Foreign Relations Act, for example, local councils must submit details of sister-city arrangements with, say, Canadian or French municipalities.[16] The resources dedicated to disclosing that information to the Department of Foreign Affairs and Trade (DFAT) could otherwise be devoted to the needs of ratepayers. Yet the federal government has no conceivable interest in regulating friendship arrangements with Canadian or French municipalities.
2. **Taxpayers' enforcement resources are wasted.** The foreign influence legislative framework is administered by two federal agencies: the Attorney-General's Department (AGD) administers the FITS Act, and DFAT the Foreign Relations Act. As things stand, those departments devote finite taxpayer resources to enforcement projects of no public utility. Thus, AGD goes to great lengths to ensure that former prime minister Kevin Rudd registers interviews given to the BBC, on the basis that the British broadcaster is state-owned,[17] even though it operates independently of government under its charter.[18] As Rudd has written, this 'result[s] in the waste of both officials' time and taxpayer funds'.[19] Such episodes must also diminish public respect for the laws.
3. **Enforcement resources are diverted from the issues that really matter.** When taxpayer resources are frittered away like that, there's an opportunity cost: the increased transparency that would come from devoting those resources to cases where a spotlight genuinely needs to be shone.
4. **Excessive complexity increases costs.** In parts, the foreign influence laws attempt to avoid imposing unnecessary burdens by limiting their own ambit in complex ways that preserve the country-agnosticism façade. For instance, in an attempt to lighten Australian universities' burden, the Foreign Relations Act requires them to register their arrangements with foreign counterparts only when those counterparts lack 'institutional autonomy'.[20] But the legislative definition of what it means to lack 'institutional autonomy'[21] itself requires an understanding of the foreign laws governing all the universities' foreign partners. Theoretically, universities must seek legal advice not only from Australian but also from foreign lawyers. What the legislation gives with one hand, then, it arguably takes with the other.
5. **Patchy compliance reduces the schemes' impact.** The wide net cast by the influence framework, combined with its complexity, results in patchy compliance, both because regulated entities are unaware of the laws' scope and also because enforcement resources are spread thin. In turn, that diminishes the value of the public registers. And breaches of the laws are too easily dismissed as the product of ignorance or legislative obscurity.
6. **The risk of unconstitutionality is heightened.** The High Court of Australia recently dismissed a free speech challenge to the constitutionality of the FITS Act.[22] However, of the seven justices, three signalled a strong disposition, at least, to find elements of the FITS Act unconstitutional in a future, differently framed challenge.[23] And the other four emphasised that their decision rested on the narrow basis of the challenge before them.[24] The truth is: the more that the legislation imposes unnecessary burdens, the greater the risk of unconstitutionality.

All six of these failings could be avoided by abandoning country agnosticism. The next sections of this paper explain why.

3. Why country agnosticism is unsuited to foreign influence laws

Wilful blindness

When Australian officials proclaim that Australia's foreign influence laws are country agnostic,[25] what they mean is that the laws regulate certain types of conduct linked to foreign entities, irrespective of those entities' countries of origin. AGD expressed it this way in relation to the FITS Act: 'the Scheme will apply equally to all registrants and does not target particular countries.'[26]

As it turns out, this is the diametric opposite of the correct approach to foreign influence. The reason is clear: the risks posed by any particular activity—and hence the degree of regulation that's warranted—depend upon its source country.

If the influencer is from a free-market democracy, we're unlikely to be alarmed. For one thing, any private entity is more likely to be what it appears to be—that is, genuinely independent from government. Additionally, even where it's the government that seeks to do the influencing, that will often be readily discernible without any need for regulation. And even if it isn't, the influence is unlikely to be for purposes striking at the heart of our polity. In such a case, the benefits—if there are any at all—of imposing a formal disclosure requirement are often not worth the costs.

By contrast, if the source of the influence is a country under the yoke of an authoritarian government, then scrutiny is more likely—not certain, but more likely—to be warranted. There are at least two reasons. First, authoritarian governments are more likely than others to be pulling the strings of ostensibly 'private' actors. Consequently, the Australian public is less likely to be alert to the governmental origins of influence efforts; disinfecting sunlight may be needed.[27] Second, those foreign states are more likely to exert influence to achieve fundamentally undesirable ends; transparency obligations (on pain of criminal prosecution) function as alarm bells. In short, the benefits of imposing regulatory burdens in these instances are more likely—again, not certain, but more likely—to warrant the costs.

If a director of a foreign company's Australian subsidiary conducts a series of radio interviews to shape public opinion on a particular Australian Government policy (say, the construction of a 5G network), is our level of concern unaffected by the political system under which the foreign company operates? A British company isn't legally required to maintain links to the Conservative Party; but its Chinese counterpart must establish a CCP committee.[28] A Swedish telecommunications firm need not suborn itself to the national security goals of its homeland's governing party; but a Chinese telco must 'support, assist and cooperate with the state intelligence work',[29] and operates under the doctrine of 'military–civil fusion'.[30]

Again, a Canadian entity is unlikely to be bound by any edict requiring it to help the world 'understand why the [Chinese] Communist Party and Marxism works and why socialism with Chinese characteristics is good',[31] but a Chinese entity, especially one ultimately governed by a CCP committee, must take Xi Jinping's dictum to heart.

Political systems matter. This is a basic intuition shared by the Australian public, which 'typically place[s] more trust in liberal democracies'.[32] Eighty-seven per cent of Australians trust a liberal democracy such as the UK to 'act responsibly in the world'.[33] That figure is only 26% for Russia, and 16% for China.[34] Australians aren't country agnostic—or rather, they aren't 'regime agnostic'.

To quote another commentator:

> [T]he political system an actor comes from, or is associated with, will be important to assessing the risk of any foreign influence activities that actor engages in. Modern authoritarian regimes which heavily limit domestic influence, do not operate on a rule-of-law basis, and have low respect for human rights are likely to be of most concern.[35]

By embracing country agnosticism, then, we have chosen self-imposed blindness to the very characteristic of foreign influence that matters most—its origin.

Clarifications for the avoidance of doubt

Here, it's necessary to recite 'the obligatory "of courses".'[36]

Of course, not every Chinese entity is bent on undermining Australia's democracy.

Of course, the people who run entities from non-democratic, non-free-market economies often want exactly the same things as their Australian counterparts: to grow a business, to advance human knowledge, to make money, and so on.

Of course, on the flip side, not every agenda advanced by other liberal democracies is in Australia's national interest. That's why a basic level of vigilance is necessary when we're faced with attempts by *any* foreign state to steer Australia in a particular direction.

Partly for that reason, of course, some modes of foreign influence must be made transparent no matter how friendly the foreign state; when a foreign government of any hue engages a former Australian cabinet minister to advise it, the Australian public should know.[37] Closer to home, it's entirely appropriate that the Australian Strategic Policy Institute, the publisher of this paper, be required to disclose its receipt of research grants from foreign government departments, namely, the UK Foreign and Commonwealth and Development Office and the US State Department.[38]

But none of that changes the fact that country agnosticism is a mistaken approach to foreign influence, because its costs are too high.

4. The catch-22 of country agnosticism

The costs of the present approach arise because actual or purported blindness to the most salient feature of foreign influence efforts—their source country—boxes the government into a poor set of legislative options. One of those, of course, is to apply the foreign influence laws universally, extending to the most anodyne conduct originating in the most benign countries. The other option is resort to complex sleights-of-hand—rules that are couched in general terms but which, on closer inspection, are squarely aimed at authoritarian regimes.

When the first option is selected, pointless regulation blankets the country, covering many activities of no conceivable significance. As already observed, that results in wasteful diversion of taxpayers' enforcement resources from the kinds of foreign influence that are truly of concern. But when the government opts for the second choice—when 'country-agnostic' laws are drafted in ostensibly general terms but with specific types of foreign government in mind—the result is needless legal complexity, regulatory obscurity and excessive expenditure on lawyers.

These unpalatable options are elaborated in the next two sections.

5. The burdens of country agnosticism: regulatory overreach

FITS Act: 'political organisations'

Deliberately blind to the source country of foreign influence, Australia's foreign influence legislation trawls a vast ocean of human conduct, heedless of what may be caught in its dragnet—and at what cost. Take the FITS Act requirement that certain activities be registered if they're done on behalf of a 'foreign political organisation'. That term includes not only political parties but also any 'foreign organisation that exists primarily to pursue political objectives'.[39]

If the application of this definition were limited to China, it would make sense; in that country, there can be only one 'organisation that exists primarily to pursue political objectives'—the CCP and its various emanations. By contrast, the nature of liberal democracies is that civil society accommodates many disparate organisations seeking 'to pursue political objectives'. Often, such objectives are opposed to those of the government of the day.

Consequently, when it comes to liberal democracies, the FITS Act ends up requiring disclosure not only of governmental influence, but also of conduct by organisations that have nothing to do with any government. Indeed, they may *actively oppose* their home government. That's how anyone in Australia who works with the American Conservative Union, which is hardly a supporter of the Biden administration, comes to be regulated by a scheme aimed at foreign *governmental* influence.[40] The same is true of the US Chamber Institute for Legal Reform.[41] Or the Indian organisation, Democracy News Live.[42] Or the Institute for War & Peace Reporting.[43]

Meanwhile, as at the date of writing, nobody is registered under the FITS Act in relation to the CCP.

FITS Act: 'under an arrangement'

Nor does the FITS Act regulate conduct only when it's 'on behalf of' a foreign entity, as that phrase is ordinarily understood. The Act also extends to activities done 'under an arrangement with'[44] a foreign entity. An 'arrangement' could be any 'contract, agreement, understanding or other arrangement of any kind'. It could be 'written or unwritten'.[45] When applied to every country on the planet, this element of the Act ensnares conduct 'for no reason whatsoever connected with the object and purpose of the FITS Act'.[46]

As has been observed in the High Court, the inclusion of the broad 'arrangement' element of the scheme is 'self-evidently'[47] intended as an anti-avoidance measure. It aims to block attempts by a foreign entity—the CCP, for instance—to circumvent the Act by operating under a tacit understanding with an agent of influence in Australia (as opposed to issuing explicit directions or instructions).[48] It means that people are required to register even when they aren't, strictly speaking, the CCP's agent.[49]

But because the legislation is country agnostic, this broad concept of 'arrangement' applies not just to foreign organisations, such as the CCP, that may seek to circumvent the Act. It applies to everyone. That leads to 'unintended consequences'.[50] For example, the scheme captures an Australian think tank that collaborates with an American company to host a conference.[51] And it captures interviews with legally independent public broadcasters in liberal democracies because they're conducted 'under an arrangement' with the broadcaster.[52]

A broad anti-avoidance provision of this kind, with its unintended consequences, is a product of country agnosticism. Were it not for agnosticism, the FITS Act's anti-avoidance elements could be tailored to the specific governments that will attempt to circumvent the scheme, and to their expected methods of doing so.

FITS Act: 'substantial control'

The FITS Act also requires registration in relation to activities on behalf of entities over which a foreign government is 'in a position to exercise … substantial control'.[53] Yet, even in liberal democracies, there may be many entities that theoretically match that description. As Anne Twomey has observed, for example, some public Western universities may theoretically be subject to government control in certain circumstances, even though, in practice, they're independent.[54]

And it isn't just universities. Under Australian laws, large parts of the private sector can be subject to an extraordinary degree of government control under particular circumstances.[55] The FITS Act requires Australians to be familiar with equivalent foreign laws, the world over. Without that familiarity, they can't know whether a foreign government is 'in a position to exercise … substantial control' over their foreign partners.

Potential Australian registrants aren't the only ones forced into pointless examinations of foreign regulatory settings; the same is true of bureaucrats administering the scheme. Thus, rather as Twomey predicted, taxpayer resources have now been squandered on absurd exchanges between AGD and former Australian ministers in relation to their links to British universities.[56] And AGD has had the Australian Academy of Science register in relation to its collaboration with the British Royal Society.[57]

Foreign Relations Act

The Foreign Relations Act also shows how country agnosticism produces excessive red tape. The Act requires state and local government bodies, including universities, to report any arrangement that they enter with a foreign government body, whether that foreign government be the world's most repressive dictatorship or its most liberal democracy. The federal government must then assess those arrangements for their consistency with Australia's foreign policy. Over the first two years of its operation, the scheme will cost DFAT alone $25 million of Australians' money.[58] And that ignores what taxpayers will pay for their local and state governments and universities to comply with the scheme.

Among the arrangements that have required DFAT scrutiny are:

- a 1988 friendship pact between Hunters Hill Council and the French hamlet of Le Vésinet (population 15,000)
- a memorandum of understanding concerning exchanges of drivers' licences with Ontario
- Darwin's sister-city agreement with the Greek municipality of Kalymnos
- a Western Australian Museum arrangement with the trustees of the British Museum.

When Parliament considered the proposed Foreign Relations Act, local governments warned of 'an undue burden on Councils' as well as on DFAT.[59] The states echoed the concern. The NSW Government, for instance, flagged the 'administrative burden on both Commonwealth and State bureaucracies'.[60] By contrast, Clive Hamilton reassured Australian public bodies that they would come to 'see the new law not as a regulatory burden but as a framework in which they can cooperate with the federal government to carry out due diligence on their foreign partners'.[61] The new scheme was now required, in Hamilton's view, because

> until recently it has not been evident that *a foreign state* has been building relationships with subnational governments and with universities as a means of influencing or interfering in Australia's foreign policy and shaping the national conversation in ways more favourable to *the foreign state*.[62]

Hamilton therefore had in mind 'due diligence' in relation to only one foreign state: China. Due diligence is required only because of Australian public authorities' 'state of innocence'[63] in relation to the 'systematic, coordinated and well-resourced campaign by the [CCP] to extend its influence into the major institutions of democracy in Australia'.[64]

But, as we have seen, the Foreign Relations Act covers much more than the CCP. It covers Le Vésinet. It covers Kalymnos. It covers the trustees of the British Museum. There's a gaping mismatch between Hamilton's diagnosis of the problem and our response to it. And that mismatch is costly. When a DFAT official spends time reviewing Ontario's drivers licence arrangements, that's time not spent on the very issue that Hamilton identifies. Resources devoted to analysing links between Hunters Hill and Le Vésinet are taken away from scrutinising relations between Gold Coast City Council and Wuhan, China.[65]

6. The burdens of country agnosticism: legal complexity

In certain parts, Australia's foreign influence framework attempts to avoid these pitfalls by taking aim at specific authoritarian vectors of influence, under cover of neutral, country-agnostic statutory language. The widespread flouting of these laws suggests the linguistic disguise has been too effective. Instead of being able to consult a simple list of designated source countries, private parties and public enforcers in Australia must wade through foreign countries' regulations and political realities to understand how Australia's own laws operate.

This section describes two examples of this phenomenon.

The FITS Act 'Leninist clause'

Unlike the sweeping bill originally introduced into parliament,[66] the FITS Act, as ultimately passed, imposes transparency requirements only in relation to 'government-related' foreign entities and individuals.
In Anglo-Australian law, 'government-related' would traditionally mean one of two things: a foreign government itself (including its agencies and personnel); or companies over which the government exercises control by virtue of ownership (that is, state-owned enterprises). Sure enough, those concepts found their way into the legislative definition of 'foreign government related entity'.[67]

But it can't be ignored that, in some political systems, even 'private' entities in which the government has no stake *do*, nevertheless, come under the control of the ruling political party. Take 'private' companies established in China. Article 19 of China's company law provides:

> In a company, an organization of the Communist Party of China shall be established to carry out the activities of the party in accordance with the charter of the Communist Party of China. The company shall provide the necessary conditions for the activities of the party organization.[68]

Richard McGregor has described the outcome of this law as follows:

> 'The Party's presence [in 'private-sector' companies], straight out of the Leninist playbook, [is] more than just a monitoring device. It [is] a kind of political insurance policy, a sleeper cell to be activated in a crisis.'[69]

Yet, according to one 2017 survey, 80% of foreign institutional investors either didn't know the role of CCP committees in Chinese companies or didn't even know CCP committees existed at all.[70] What can be expected of Australians who aren't experienced capital market participants?

The current CCP leadership has zealously enforced its law on CCP committees.[71] The committees are in a position to exercise ultimate control over Chinese companies.[72] They're answerable not to the dictates of a free market but to the CCP's ideological apparatus. They're a potential tool of governmental influence.

Accordingly, the Australian Government opted for a definition of 'foreign government related entity' that attempts to address this issue in an ostensibly country-agnostic way. The Act provides that a corporate person is government-related if it has a particular relationship with a 'foreign political organisation' (such as the CCP). That relationship is expressed as follows:

> (i) a director, officer or employee of the person, or any part of the person, is required to be a member or part (however described) of that foreign political organisation; and
>
> (ii) that requirement is contained in a law, or in the constitution, rules or other governing documents by which the person is constituted or according to which the person operates.

This is a 'Leninist clause'. If a director, officer or employee of a company or other entity is required to be a party member, then that entity is foreign government-related for FITS Act purposes. And that means influence activities on the entity's behalf must be registered. The same is true if a 'part (however described)' of the entity is required to be a party committee.

What does this mean for Australian subsidiaries of Chinese companies? As one High Court judge has observed, such a subsidiary will have disclosure obligations if it acts 'under an arrangement' with a foreign company that's itself foreign government-related.[73] That includes foreign companies with CCP committees.[74] Further, on one view, an entire Chinese corporate group (including its Australian subsidiary) might qualify as a single 'foreign government related entity'—assuming it includes a CCP committee—because of the Act's expanded definition of the term 'person'. Ordinarily, that word describes only a natural person or single body corporate, but not in the FITS Act, where it also encompasses unincorporated 'associations' and 'organisations'.[75] That might include corporate groups.

Since 2014, China's 'private sector' has accounted for the majority of the country's investment in Australia (by number of deals).[76] One might therefore expect to find numerous entries on the FITS register in relation to, say, political communications on behalf of 'private' Chinese firms. Yet an examination of the 39 active entries in the register in relation to Chinese foreign principals[77] reveals only one that appears to be 'private'.[78]

Thus, for example, if the FITS register is to be believed, at least one of the following statements must be true:

- The Huawei corporate group, at least since March 2019,[79] has flouted Chinese law and has no CCP committee.[80]
- Nobody in Australia has tried to influence political opinion on Huawei's behalf after that time.[81]
- Huawei's Australian subsidiary went rogue at that point, no longer representing its Chinese parent.

Overall, either China's 'private' investors are among the least politically active in Australia, or the FITS Act is simply disobeyed and not enforced.

Any disobedience need not be deliberate. The Act is unnecessarily opaque, relying on uncertain legal terminology and a knowledge of foreign legal frameworks to target a specific form of influence while maintaining the façade of country agnosticism. Being country agnostic, the Act is also blind to the zealousness with which foreign laws are enforced. The legislation is self-defeating; its own obscurity permits the continued obscurity of the very kind of foreign influence activities that it aims to bring into the open.

The Foreign Relations Act 'Leninist clause'

The Foreign Relations Act also attempts to avoid the perils of regulatory overreach while preserving the patina of country agnosticism. The government heeded universities' complaints about having to wade through 'tens of thousands'[82] of exchange and collaboration agreements with foreign universities. Instead, the Foreign Relations Act covers only those arrangements of domestic universities with foreign counterparts that lack 'institutional autonomy'.[83] A university lacks 'institutional autonomy' only if a foreign government 'is in a position to exercise substantial control'[84] over it.

This language is reminiscent of the FITS Act. But the government sought to avoid the FITS Act's ambiguities (discussed above) by establishing three alternative criteria for 'substantial control':[85]

> (a) a majority of the members of the university's governing body are required, by a law or the university's governing documents, to be members or part of (however described) the political party that forms the foreign government;
>
> (b) education provided or research conducted at the university is required, by a law or the university's governing documents, to adhere to, or be in service of, political principles or political doctrines of:
>
> (i) the foreign government; or
>
> (ii) the political party that forms the foreign government;
>
> (c) the university's academic staff are required, by a law or the university's governing documents, to adhere to, or be in service of, political principles or political doctrines referred to in paragraph (b) in their teaching, research, discussions, publications or public commentary.

Under Article 39 of China's *Higher Education Law*, universities that are 'run by the State' are ultimately governed by CCP committees. Specifically, they're run by a president 'under the leadership of the primary committees of the Communist Party of China'. Those committees 'exercise unified leadership', adhering to the 'principles and policies of the Chinese Communist Party'. They must 'keep to the socialist orientation in running the schools', providing 'guidance to ideological and political work and moral education in the institutions'.[86]

As for 'private' Chinese universities (to the extent that they exist in a system in which the 'vast majority' of universities are publicly funded[87]), 'most privately funded institutions also have a Party secretary', who 'lead[s] through the Party committee'.[88]

It isn't hard to see how the 'substantial control' definition in the Foreign Relations Act covers Chinese tertiary education institutions. Is this a case of successful *faux* country agnosticism?

This provision is so obviously targeted at a particular brand of foreign authoritarianism that, arguably, it can't be described as country agnostic. More importantly, while the clause is as narrowly tailored as possible within a framework that's at least ostensibly country agnostic, it continues to impose an unnecessary burden on those who have to adhere to it.

It does so, rather like the FITS Act, by using apparently country-neutral language that requires Australians to know the content of foreign laws—national, provincial and local. Australian universities' compliance officers will often find the laws hard to locate, and even harder to interpret. Foreign institutions' governing documents are in the same basket. Why require Australian universities to jump these hurdles, when the Australian Government could simply list the countries to which the scheme applies? Why should funds be diverted from the education of Australian students into an expensive legal opinion on the effects of a particular jurisdiction's higher education laws?

7. Supposed rationales for country agnosticism

Given its costs, country agnosticism must have strong arguments in its favour. Australians must be reaping a dividend for their troubles. Yet an examination of the supposed rationales for country agnosticism reveals little by way of public benefit.

Avoidance of diplomatic offence

The most obvious possible rationale for country agnosticism is a desire to dodge economic harm to Australian taxpayers by avoiding diplomatic offence to an important trade partner. There's an immediate problem, though: nobody believes that Australia's foreign influence laws are truly country agnostic. The Australian press routinely describes them as 'aimed at' China.[89] Ditto the CCP's media outlets.[90] Most importantly, the Chinese party-state itself is having none of it.

In its famous enumeration of 14 grievances with the Australian Government in November 2020, the Chinese Embassy in Canberra specifically described Australia's 'foreign interference legislation' as 'targeting China … in the absence of any evidence'. And, said the embassy, the Foreign Relations Act is 'targeting towards China [*sic*] and aiming to torpedo the Victorian participation in B&R [the Belt and Road Initiative]'.[91]

In short, nobody buys this country-agnosticism charade. If it was a diplomat's attempt to deprive the CCP of a pretext for claiming to be offended, then it has failed. All those costly and unnecessary impositions on Australian civil society in relation to harmless links with liberal democracies have scarcely availed Australia's barley, beef, coal, copper, cotton, seafood, sugar, timber and wine producers.

Australians pay the country-agnosticism premium, and then—at least to the extent that the CCP's trade persecution has any effect[92]—they pay for the very repercussions that they had paid the premium to avoid. It's an insurance policy that doesn't insure anything.

Must we now go on paying the premium for fear of fresh CCP depredations if we were to abandon country agnosticism? That would be to trade away the effectiveness of our foreign influence laws in order to appease the very regime whose conduct most warrants those laws' enforcement. And as Malcolm Turnbull has observed, that is exactly what me must not do: 'you cannot compromise national security in the face of bullying'.[93]

In any event, if the priority is for Australian ministers and officials to be able to mouth the bromide that our foreign influence laws 'do not target any one particular country',[94] then the proposal outlined below would preserve that ability. As has been acknowledged, some forms of foreign influence (former cabinet ministers pressed into foreign government service, or state memorandums of understanding with foreign national governments) will always be covered, no matter which foreign country is involved. And, under the proposal below, even where obligations apply only in relation to 'designated' foreign countries, China wouldn't be the only country designated. It would be joined on a list by what DFAT might call its 'likeminded's'—other countries under authoritarian regimes, such as Russia.

A diplomatic 'white lie'

A variant of the 'avoidance of offence' rationale might be that the Australian Government doesn't really expect anyone to buy country agnosticism, but it's a 'white lie' that helps smooth relations with Beijing. It's the non-existent 'prior commitment' excuse for declining a dinner invitation; everyone knows it isn't true, but it avoids confrontation and damage to relationships. White lies like that are a costless form of politeness, but, as we've seen, country agnosticism is anything but costless. And it certainly hasn't fostered any kind of friendly government-to-government relations with Beijing.

Discrimination and 'xenophobia'

Another argument is that the Australian Government is constrained to maintain country agnosticism because any alternative would be 'discriminatory', 'xenophobic', or perhaps 'Sinophobic blathering'.[95]

As should be obvious, any abandonment of country agnosticism would have nothing whatsoever to do with 'race, colour, descent or national or ethnic origin' (to quote the *Racial Discrimination Act 1975*). Instead, it would have everything to do with the politico-legal systems of Australia's foreign counterparts—China, Russia and others. Chinese companies aren't different from their Western counterparts because of some racial distinction; they're different because they're bound by the whims of a Leninist political party and its legal system.[96]

Of course, the abandonment of country agnosticism would entail being *discriminating*; different circumstances would be treated differently. That's what sophisticated legal systems do. The High Court has repeatedly confirmed that it is, in fact, one aspect of the principle of equal justice: 'Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect.'[97] In the case of foreign influence, divergences between foreign political systems are that 'relevant respect'.

Social cohesion

A related argument might be that Australia's social cohesion requires country agnosticism. Unlike arguments about 'Sinophobic blathering', this one deserves to be taken seriously.[98] Plainly, the Australian Government must make every effort to resist the CCP, where appropriate, without that resistance reflecting poorly on the diverse groups of Australians with Chinese ethnicity.

But, as has been observed, Australia's foreign influence laws have *already* been widely portrayed as targeting China. The Chinese party-state is *already* the focus in the popular imagination. To abandon country agnosticism would merely be to align the content of the laws with what's *already* the popular perception, and thereby to strengthen them markedly.

The way for the Australian Government to preserve social cohesion isn't to maintain ineffective, overly burdensome laws on the statute book. Instead, it's to carefully differentiate, in its messaging, between an authoritarian regime and an ethnic diaspora.[99] Yes, China would be on the list of designated countries under the proposal in this paper. But no, that would have nothing to do with ethnicity. It would have everything to do with how the government and laws of that country happen to operate.

In fact, Australians (including many Chinese-Australians[100]) are *already* wary of the Chinese party-state,[101] and most Chinese-Australians don't perceive this to be causing endemic anti-Chinese-Australian racism.[102] Despite the best efforts of the CCP, the Australian public seems capable of distinguishing between an ethnicity and a Marxist-Leninist political party.

Trade law

Another possible argument in favour of country agnosticism is that it's mandated by Australia's international trade law obligations, which require Australia to treat certain Chinese investments in Australia (including Chinese companies) no less favourably than it treats Australian and other countries' investments.[103]

Those obligations are enforceable through arbitration processes, which could be initiated by a Chinese investor through the China–Australia Free Trade Agreement (ChAFTA)[104] investor-state dispute settlement (ISDS) process.[105] Or they could be initiated by China itself.[106]

Four observations should be made.

First, it's clear that the CCP (which famously ignored the ruling of an international arbitral tribunal in a dispute concerning the South China Sea[107]) will use trade law as a weapon against Australia for more or less spurious reasons whenever it's opportune to do so.[108] Fear of this eventuality is a poor reason to refrain from ensuring that laws designed to safeguard Australia's sovereignty are as effective and minimally intrusive as possible.

Second, Chinese investors aren't prolific users of ISDS mechanisms. Despite China having entered into 138 bilateral investment treaties since 1982,[109] Chinese investors have invoked ISDS procedures only eight times.[110]

Third, the abandonment of country agnosticism wouldn't result in the *prohibition* of any conduct by Chinese entities; foreign influence laws merely require transparency. It's therefore difficult to see what financial damage a foreign enterprise would incur. In the case of the FITS, there would be the administrative costs incurred by those engaged in influence activities on behalf of Chinese enterprises. At least some of those costs might be borne by the enterprises themselves, but they would hardly rise to the level of financial damage that usually prompts investor-state arbitration,[111] particularly given the exorbitant cost of such proceedings.[112]

Fourth, although this isn't the place to evaluate the merits of the various legal arguments that might be made, China or a Chinese investor would face a number of difficult issues. Among them are whether Chinese enterprises engaging in influence operations are 'in like circumstances' to Australian or other foreign counterparts;[113] customary international law exceptions to the obligation to adhere to treaties, such as a 'fundamental change in circumstances';[114] the 'public order' exception in Article XIV of the General Agreement on Trade in Services;[115] Australia's carve-out with respect to national security measures addressed at 'proposals' for foreign investment;[116] and so on. It isn't certain that an arbitral tribunal would resolve all or any of those issues in China's favour.

8. Previously proposed fixes

Although there's little to recommend country agnosticism, it's nevertheless worth considering whether Australia's foreign influence framework could be meaningfully improved without abandoning it. Two previous sets of recommendations are considered in this section.

China Matters

The China Matters think tank has labelled the Foreign Relations and FITS Acts 'flawed' on the basis that they're 'too widely cast' and 'poorly focused'. Its authors believe those problems arise from 'scrutinising links and connections, rather than improper conduct'.[117] The authors recommend 'tightening expansive definitions and focusing more clearly on the most damaging *interference* efforts'.[118]

It isn't clear whether that recommendation means the authors think that mere influence, as opposed to interference, can never be damaging and should therefore never be regulated. The paper, although titled 'What should Australia do about its foreign *interference* and espionage laws?',[119] deals in large part with the Foreign Relations and FITS Acts, which have little to do with foreign *interference*, as opposed to *influence*. Bewilderingly, having themselves failed to make that distinction, the authors recommend that the government 'distinguish clearly the dividing line between influence and interference'.[120]

In any event, focusing on 'conduct', irrespective of its source country, is precisely what the legislation already does, and that's precisely what's wrong with it. When it comes to foreign influence, the threat level of conduct depends on its source. The only way of 'focusing more clearly on the most damaging [influence] efforts' is to take account of their origin because, as the think tank's name recognises, country matters. And yet that is precisely the characteristic that's currently obscured by a legislative blindfold. China Matters doubles down on the existing mistake.

ANU National Security College

Meanwhile, in a paper for the ANU's National Security College, Katherine Mansted correctly observes, in relation to foreign *interference*, 'Australia should retain its country agnostic approach, … since these offences hinge on objective qualities, not the foreign actor's intent, or actual harm caused.' In relation to *influence*, by contrast, Mansted concludes that the country-agnostic principle needs 'modification'. This is because 'influence is a relational concept', meaning that 'the level of risk will depend on a range of contextual factors.' Those include 'Australia's bilateral relations with the influencing country', the 'influencing country's broader foreign policy and strategic objectives', and the way in which the influencing country 'responds to and uses influence in its own political system'. Note: all three of those factors depend on the identity of the country where the influence efforts originate. Despite that, Mansted cautions, 'no activity should be deemed risky or problematic merely because of its source country.'[121]

It isn't clear what, if any, legislative amendments Mansted's proposed 'modification' to country agnosticism entails. If her preferred 'country agnostic but context-aware'[122] approach is meant to entail selective, 'context-aware' enforcement of country-agnostic laws, then that merely entrenches an element of executive discretion that's highly undesirable from a rule-of-law perspective,[123] while eliminating none of the laws' unnecessary regulatory burdens.

If, on the other hand, the 'modification' to country agnosticism is meant to take legislative form, then it's difficult to see how the laws could be rendered 'context-aware' without also making them 'country-aware'. And, if the laws are 'country-aware', then that, by definition, spells the end of country agnosticism.

To be clear: Mansted's proposition that nothing should be 'deemed risky or problematic merely because of its source country' is correct, so far as it goes, but it doesn't go very far. As has already been acknowledged, we shouldn't regard as nefarious every attempt by a Chinese company, for instance, to influence Australian politics. Australia's foreign influence laws don't, and shouldn't, prohibit such conduct merely because of its source. But that doesn't make the source irrelevant for all purposes. On the contrary, if our approach to foreign influence is truly to be 'context-aware' then it must require that kind of conduct to be made transparent. And it must do so merely because the source is a country whose party-government blurs or altogether obliterates the public/private distinction, practises a doctrine of 'military–civil fusion',[124] and seeks to teach the world that 'Marxism works'.[125]

9. The tiered approach: a preferable model

A better model for Australia's foreign influence framework would be a tiered approach that's responsive to the source country of influence efforts.[126] It would retain the current agnosticism with respect to limited categories of conduct—the categories that should be transparent no matter how friendly the foreign country—but other categories of conduct would be regulated only when linked to certain source countries that the Australian Government would be empowered to designate by legislative instrument.[127]

A country would be designated primarily on the basis that its government controls ostensibly 'private' entities and deploys them to advance its national security goals. That attenuation of the public/private distinction is the key reason for subjecting influence efforts originating in an authoritarian jurisdiction to greater scrutiny. It would also be relevant to consider whether the government of the country had a history of attempting to influence Australians for malign purposes.

FITS Act

Under a 'tiered' FITS Act, anti-avoidance provisions wouldn't apply across the board; they would apply only where there's an elevated likelihood of avoidance attempts by designated countries' governments. Similarly, political communications on behalf of an ostensibly non-government-related foreign entity (a privately owned company or think tank, for example) would fall within the scope of the Act only when the entity's home is a designated country. This would spare Australians the need to become experts on foreign regimes and their laws in order to understand the operation of the Act.

In this way, 'private' Chinese telecommunications companies or infrastructure funds and their Australian subsidiaries would be subject to mandated transparency even while their counterparts from liberal democracies are not.

Again, AGD wouldn't need to chase Kevin Rudd over appearances on the British public broadcaster, but it *would* be required to chase him in relation to speeches given at Beijing 'NGO' forums, because China would be a designated country.

At the same time, as has been emphasised, elements of country agnosticism would be retained. If a former cabinet minister does anything in the service of a foreign government department, for instance, the Australian taxpayers who once paid that politician's salary should know about it, whatever the foreign government in question.

Foreign Relations Act

The same tiered approach should be adopted in the Foreign Relations Act. Some arrangements—in particular, those between Australian states and foreign national governments (as opposed to subnational units such as provinces or municipalities)—would remain covered by the scheme, irrespective of which foreign country is involved. To that extent, the Act would remain country agnostic.

However, other categories of arrangement would be excluded altogether from the scope of the Act, unless they relate to a foreign country designated by the Foreign Minister. Thus, for instance, sister-city agreements would fall outside the scheme unless they were with, say, a Chinese municipality. That distinction would recognise that 'in the case of China, sister-city agreements aren't spontaneous expressions of the desire for cultural and economic exchange between two cities' but are instead coordinated by a united front agency that 'systematically advances the [CCP's] political and strategic goals.'[128]

In addition, the tiered model may enable the Australian Government to *expand* the operation of the Foreign Relations Act in at least one key respect. Currently, the Act excludes from its ambit any arrangement of a state or territory government with a foreign company operating on a commercial basis (including state-owned enterprises and the notionally 'private' companies of authoritarian jurisdictions).[129] Within the constraints of country agnosticism, that carve-out avoids creating significant sovereign risk. However, under the tiered model, the Act could be amended to cover state and territory arrangements with state-owned enterprises and 'private' companies only of 'designated countries'. That would minimise the sovereign risk problem that otherwise arises under country agnosticism, while also providing a means to terminate arrangements that the government regards as problematic (subject, of course, to relevant constitutional constraints[130] and to the trade law considerations identified above). Depending on the outcome of the Defence Department's review,[131] one such arrangement might be the Northern Territory's lease of the Port of Darwin to Landbridge, a 'private' Chinese corporate group.[132]

10. Foreign precedents for the tiered approach

The proposal for a tiered approach isn't novel. From 1 July this year, as a result of a bill passed unanimously by both houses of the Florida legislature, that state's statute book addresses foreign influence, requiring public entities and higher education institutions to disclose grants from foreign sources.[133] Importantly, the law imposes certain duties only with respect to what it labels 'foreign countries of concern'—a group that includes China, Russia and Cuba, among others.

In some of its provisions, the law creates transparency obligations with respect to the receipt of funds from *any* foreign source, but other more targeted provisions address only dealings with 'foreign countries of concern'. In other words, Floridian legislators recognised that, in some instances, financial flows from *any* foreign source require disclosure, but that, in other cases, society can be spared the red tape unless *particular* foreign sources are involved.

At the US federal level, legislators see the need to update the Foreign Agents Registration Act (FARA),[134] which was originally aimed at exposing Nazi influence in the US during the 1930s. Since 2007, 54 bills have been introduced into the US Congress to amend it.[135] Some of them would tailor the regulatory burden of registration to the foreign state in question. For instance, a bill introduced in 2020 by Republican Senator Mitt Romney, among others, would empower the US executive branch to 'establish enhanced reporting requirements' under the FARA 'for agents representing foreign principals of a designated "country of national security concern".'[136] The President would have the power of designation.[137]

The design of the proposal by Romney and his colleagues is preferable to the Florida statute, because it accommodates the possibility that relations with foreign states, as well as those states' methods of exerting influence, will change over time; it gives the executive the ability to adapt, without the need for legislative amendment. It thereby avoids a problem identified elsewhere as the risk that legislative definitions become 'outdated as actors, and their approaches, evolve'.[138]

Meanwhile, in the UK, Conservative MP Bob Seely has suggested that the British foreign influence scheme could 'adopt a two-tier approach to regulation':

> For democratic or allied foreign states and their proxies, a basic standard of transparency would be required. For hostile, adversarial, and authoritarian states and their named proxies, there is a much higher set of requirements that need to be met. The threat to democratic transparency from Chinese state entities or Russian oligarchs is greater than, for example, the New Zealand Tourist Board.[139]

So far, that insight has fallen on deaf ears. The British Government has emphasised that its Australian-inspired proposal for a Foreign Influence Registration Scheme is 'not targeted at any specific country'[140] and is 'intentionally designed to be country and actor agnostic'.[141]

For the sake of British taxpayers, let us hope that their elected representatives heed the lessons of Australia's experience with country agnosticism.

Notes

1 See, for example, Phillip Coorey, 'Andrews hits back on China deals', *Australian Financial Review*, 28 August 2020; Matthew Killoran, 'Foreign deals crackdown', *Courier Mail*, 27 August 2020; Foreign Affairs Minister Payne's interview with Ben Fordham on 2GB, *Gov Australia Live*, 27 August 2020; Tony Walker, 'Yang Hengjun case a pivotal moment in increasingly tense Australia–China relationship', *The Conversation*, 28 August 2019; Nick Macfie, Tom Westbrook, 'China warships leave Sydney after surprise visit raises hackles', *Reuters Australian and New Zealand Top News*, 7 June 2019; Primrose Riordan, 'Pacific pact to counter China push', *The Australian*, 6 July 2018; Tom McIlroy, 'Don't overstate China irritants: Ciobo', *Australian Financial Review*, 7 June 2018; Nick McKenzie, Richard Baker, 'MPs offer lifeline for China book ditched by publishers', *Sydney Morning Herald*, 6 February 2018; Paul Maley, Primrose Riordan, 'Letter shows Huang still in charge of Beijing front group', *The Australian*, 2 February 2018; Phillip Coorey, 'Ghost of 2007 defeat haunts Libs', *Australian Financial Review*, 13 December 2017; Paul Maley, Rowan Callick, 'China's agents of influence run for cover', *The Australian*, 17 November 2017.

2 Jonathan Kearsley, Eryk Bagshaw, Anthony Galloway, '"If you make China the enemy, China will be the enemy": Beijing's fresh threat to Australia', Sydney Morning Herald, 18 November 2020, online. The laws are thus, presumably, a reason for the CCP's $25 billion campaign of trade persecution against Australians.

3 Some of the deregulatory elements of the 'tiered approach' proposal could be achieved using the rule-making powers in the legislation: see, eg, Foreign Relations Act, s. 8(1)(l); FITS Act, s. 30. However, it is unlikely that the proposal here could be fully implemented without amending the primary legislation, especially if the goal is (as it should be) to make the framework simpler, rather than more complex.

4 Australian Security Intelligence Organisation (ASIO), *ASIO annual report 2017–18*, Australian Government, 2018, 3, 25; ASIO, *ASIO annual report 2019–20*, Australian Government, 2020, 3; Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Foreign Influence Transparency Scheme Bill 2017*, Australian Parliament, 2018, 2–5.

5 *LibertyWorks Inc v Commonwealth* [2021] HCA 18 (*LibertyWorks*), [8] (Kiefel CJ, Keane and Gleeson JJ).

6 See, generally, Alex Joske, *The party speaks for you*, ASPI, Canberra, 2020, online; Clive Hamilton, *Silent invasion*, Hardie Grant, 2018; Clive Hamilton, Mareike Ohlberg, *Hidden hand*, Hardie Grant, 2020.

7 Home Office, *Legislation to counter state threats (hostile state activity): government consultation*, UK Government, May 2021.

8 See, for example, Phillip Coorey, 'Andrews hits back on China deals', *Australian Financial Review*, 28 August 2020; Matthew Killoran, 'Foreign deals crackdown', *Courier Mail*, 27 August 2020; Foreign Affairs Minister Payne's interview with Ben Fordham on 2GB, *Gov Australia Live*, 27 August 2020; Tony Walker, 'Yang Hengjun case a pivotal moment in increasingly tense Australia–China relationship', *The Conversation*, 28 August 2019; Nick Macfie, Tom Westbrook, 'China warships leave Sydney after surprise visit raises hackles', *Reuters Australian and New Zealand Top News*, 7 June 2019; Primrose Riordan, 'Pacific pact to counter China push', *The Australian*, 6 July 2018; Tom McIlroy, 'Don't overstate China irritants: Ciobo', *Australian Financial Review*, 7 June 2018; Nick McKenzie, Richard Baker, 'MPs offer lifeline for China book ditched by publishers', *Sydney Morning Herald*, 6 February 2018; Paul Maley, Primrose Riordan, 'Letter shows Huang still in charge of Beijing front group', *The Australian*, 2 February 2018; Phillip Coorey, 'Ghost of 2007 defeat haunts Libs', *Australian Financial Review*, 13 December 2017; Paul Maley, Rowan Callick, 'China's agents of influence run for cover', *The Australian*, 17 November 2017.

9 Jonathan Kearsley, Eryk Bagshaw, Anthony Galloway, '"If you make China the enemy, China will be the enemy": Beijing's fresh threat to Australia', Sydney Morning Herald, 18 November 2020, online. The laws are thus, presumably, a reason for the CCP's $25 billion campaign of trade persecution against Australians.

10 Roland Rajah, 'The big bark but small bite of China's trade coercion', *The Interpreter*, 8 April 2021.

11 Some of the deregulatory elements of the 'tiered approach' proposal could be achieved using the rule-making powers in the legislation: see, for example, Foreign Relations Act, s. 8(1)(l); FITS Act, s. 30. However, it is unlikely that the proposal here could be fully implemented without amending the primary legislation, especially if the goal is (as it should be) to make the framework simpler, rather than more complex.

12 *LibertyWorks* at [9] (Kiefel CJ, Keane and Gleeson JJ); see also DFAT, 'Department of Foreign Affairs and Trade submission to the Select Committee on Foreign Interference through Social Media', 13 March 2020, 3; ASIO, *ASIO annual report 2017–18*, Australian Government, 2018, 25; Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Foreign Influence Transparency Scheme Bill 2017*, Australian Parliament, 2018, 6–7, 9–11, 17, 166–167; ASIO, *Director-General's annual threat assessment*, Australian Government, 2020, 9.

13 *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cwlth).

14 'Australia's C[ountering] F[oreign] I[nterference] Strategy is country agnostic': DFAT, 'Department of Foreign Affairs and Trade submission to the Select Committee on Foreign Interference through Social Media', 13 March 2020, 3.

15 See *Commonwealth Criminal Code*, s. 92.2(1), inserted by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cwlth).

16 These are available to be searched at DFAT's *Foreign Arrangements Scheme* website, online.
17 See Kevin Rudd's Foreign Influence Transparency Scheme register entry in relation to the BBC on AGD's *Transparency Register* website, online.
18 Royal Charter for the continuance of the British Broadcasting Corporation, 2017, Article 3.
19 See Rudd's Foreign Influence Transparency Scheme register entry in relation to the BBC on AGD's *Transparency Register* website, online.
20 Foreign Relations Act, s. 8(1)(i).
21 Foreign Relations Act, s. 8(2), (3).
22 *LibertyWorks*.
23 *LibertyWorks*, [92] (Gageler J); [128]-[130] (Gordon J); [296]-[297] (Steward J). Surprisingly, for a judge apparently appointed for his judicial conservatism, Steward J devoted 47 paragraphs to an explanation of why he 'may well have decided' (at [248]) that a certain element of the FITS Act was invalid, despite the plaintiff having 'made no such claim' (at [248]). Judicial conservatism appears to have evolved considerably since the days when Dyson Heydon (hitherto thought to be its arch exponent) wrote, 'it is wrong to deal with issues which, even though they have been raised, are not issues which it is necessary for the specific outcome of the case to deal with. It is even worse to deal with unnecessary issues which have not been raised. A badge of suspicion must attach to a judgment which, after setting out various issues and arguments, says "Though it is not necessary to decide this point, in deference to the careful submissions of the parties, the court will deal with it."': Dyson Heydon, 'Judicial activism and the death of the rule of law', *Otago Law Review*, 2004, 10:493. As to the apparent conservative bases for Steward J's appointment, see Michael Pelly, 'A High Court steward for conservatives', *Australian Financial Review*, 17 June 2021.
24 *LibertyWorks*, [86]-[90] (Kiefel CJ, Keane, Gleeson JJ); [196]-[197], [217] (Edelman J).
25 The Australian Government's adherence to the mantra of country agnosticism is proclaimed explicitly. The Chief Legal Officer of DFAT, for instance, emphasised that the Foreign Relations Act is 'country and arrangement agnostic', Senate Foreign Affairs, Defence and Trade Committee, Hansard, 13 October 2020.
26 AGD, 'Attorney-General's Department submission', Parliamentary Joint Committee on Intelligence and Security Inquiry into the Foreign Influence Transparency Scheme Bill 2017, January 2018, 10.
27 See Louis D Brandeis, 'What publicity can do', *Harper's Weekly*, 20 December 1913, 10.
28 *Company Law of the People's Republic of China*, Article 19, online.
29 *National Intelligence Law of the People's Republic of China*, Article 7, online.
30 See, for example, Emily Weinstein, 'Don't underestimate China's military–civil fusion efforts', *Foreign Policy*, 5 February 2021, online.
31 Bill Birtles, 'Xi Jinping hints at a shift in China's "wolf warrior" diplomacy. But does this mean we'll see a change in relations with Australia?', *ABC News*, 4 June 2021, online.
32 Natasha Kassam, *Lowy Institute Poll 2020*, Lowy Institute, June 2020, 6.
33 Natasha Kassam, *Lowy Institute Poll 2021*, Lowy Institute, June 2021, 6.
34 Kassam, *Lowy Institute Poll 2021*, 6.
35 Katherine Mansted, *The domestic security grey zone: navigating the space between foreign influence and foreign interference*, National Security College, Australian National University, February 2021, 12.
36 Mark Steyn, 'The future belongs to Islam', *Macleans*, 20 October 2006.
37 See, for instance, Alexander Downer's registration in relation to assistance given to the Government of Gibraltar in negotiating a free trade agreement with Australia on AGD's *Transparency Register* website, online.
38 Entry for ASPI, *Transparency Register*, online.
39 FITS Act, s. 10 (definition of 'foreign political organisation').
40 *LibertyWorks*.
41 US Chamber Institute for Legal Reform, *Transparency Register*, online.
42 Democracy News Live, *Transparency Register*, online.
43 Institute for War & Peace Reporting (IWPR), *Transparency Register*, online.
44 FITS Act, s. 11(1)(a)(i).
45 FITS Act, s. 10 (definition of 'arrangement').
46 *LibertyWorks* at [295] (Steward J).
47 *LibertyWorks* at [266] (Steward J).
48 *LibertyWorks* at [266] (Steward J).
49 *LibertyWorks* at [213] (Edelman J); [251] (Steward J).
50 *LibertyWorks* at [266] (Steward J).
51 See generally the facts of the *LibertyWorks* case.
52 See the earlier discussion in relation to Kevin Rudd and the BBC.
53 FITS Act s. 10 (definition of 'foreign government related entity').
54 Anne Twomey, 'Supplementary submission on the Foreign Influence Transparency Scheme Bill 2017', 3 June 2018.
55 See, for example, the ministerial directions powers in the *Liquid Fuel Emergency Act 1984* (Cwlth). See also the *Security Legislation Amendment (Critical Infrastructure) Bill 2020*.

56 For instance, AGD initially suggested to former Prime Minister Kevin Rudd that he should register as a result of mere enrolment as a student at the University of Oxford. And, apparently as a result of additional correspondence, Rudd is now registered in relation to Arizona State University because he was interviewed there by another former Australian minister, Julie Bishop. Oddly, Bishop herself isn't registered. Arizona State University (ASU), *Transparency Register*, online.

57 Royal Society of London, *Transparency Register*, online.

58 Australian Government, *Budget 2020–21: Budget Paper no. 2*, 6 October 2020, 86.

59 Adrian Beresford Wylie, 'Australian Local Government Association submission to Senate Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020', 30 September 2020, 1.

60 Department of Premier and Cabinet, 'NSW Government submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade inquiry into the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020', NSW Government, 2020.

61 Clive Hamilton, 'Submission to the Senate Committee on Defence, Foreign Affairs and Trade, Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020', 12 October 2020 (Hamilton submission), 1.

62 Hamilton submission, 1 (emphasis added).

63 Hamilton submission, 1.

64 Hamilton submission, 1.

65 DFAT, 'Memorandum of understanding to establish a friendly city relationship with Wuhan, China', *The Public Register*, 2015, online.

66 Incredibly, the Foreign Influence Transparency Scheme Bill 2017 would have imposed transparency requirements in relation to activities on behalf of *any* 'foreign business' (whether or not related in any way to a foreign government) and *any* 'individual who is neither an Australian citizen nor a permanent Australian resident' (again, whether or not related in any way to a foreign government). See definition of 'foreign principal' in clause 10 of the Bill.

67 FITS Act, s. 10 (definition of 'foreign government related entity', paras (a) and (b)).

68 *Company Law of the People's Republic of China*, Article 19, online.

69 Richard McGregor, *The party*, Penguin, 2012, 216.

70 Jamie Allen, Li Rui, *Awakening governance: the evolution of corporate governance in China*, Asian Corporate Governance Association, 2018, 39.

71 Richard McGregor, 'How the state runs business in China', *The Guardian*, 25 July 2019; Federica Russo, 'Politics in the boardroom: the role of Chinese Communist Party committees', *The Diplomat*, 24 December 2019. In relation to the role of CCP committees in Chinese tech companies, in particular, see 'Thematic snapshot: party-state activities', *Mapping China's Tech Giants*, ASPI, Canberra, 2021, online.

72 McGregor, 'How the state runs business in China'; Russo, 'Politics in the boardroom: the role of Chinese Communist Party committees'.

73 *LibertyWorks* at [216] (Edelman J).

74 As one law firm has expressed it, 'difficult questions … may … arise in the context of operating within a corporate group where objectives are shared amongst members of the group'; Jacqui Wootton, Jodi Kerley, 'The Foreign Influence Transparency Scheme has commenced: are you required to register?', Herbert Smith Freehills, 13 March 2019, online.

75 FITS Act, s. 10 (definition of 'person').

76 KPMG, *Demystifying Chinese Investment in Australia*, 2015, 2016, 2017, 2018, 2019, 2020.

77 As at 19 June 2021.

78 The reasons for the registrations in relation to ESR Investment Management 2 (Australia) Pty Limited are obscure.

79 The deadline for registration of pre-existing 'arrangements' under the *Foreign Influence Transparency Scheme Legislation Amendment Act 2018*, schedule 1, clause 6.

80 At least as at 27 June 2018, the then chairman of Huawei Australia, John Lord, acknowledged that the Chinese parent company did indeed include a CCP branch: John Lord, 'National Press Club of Australia Speech', 27 June 2018, online.

81 Cf Aimee Chanthadavong, 'Huawei urges Australia to embrace better Chinese products', *ZDNet*, 18 September 2019; Kieran Adair, 'Nick Xenophon: "No evidence" to justify Australia's Huawei ban', Xenophon-Davis, 27 July 2020, online.

82 University of Technology Sydney, 'UTS submission to Senate Foreign Affairs, Defence and Trade Legislation Committee on Foreign Relations Bill', 2020.

83 Foreign Relations Act, s. 8(1)(i).

84 Foreign Relations Act, s. 8(2).

85 Foreign Relations Act, s. 8(3).

86 *Higher Education Law of the People's Republic of China*, online.

87 Hua Jiang, Xiaobin Li, 'Party secretaries in Chinese higher education institutions: what roles do they play?', *Journal of International Education and Leadership*, 2016, 6(2):2.

88 Hua Jiang, Xiaobin Li, 'Party secretaries in Chinese higher education institutions: what roles do they play?', 2.

89 See, for example, Phillip Coorey, 'Andrews hits back on China deals', *Australian Financial Review*, 28 August 2020; Matthew Killoran, 'Foreign deals crackdown', *Courier Mail*, 27 August 2020; Foreign Affairs Minister Payne's interview with Ben Fordham on 2GB, *Gov Australia Live*, 27 August 2020; Tony Walker, 'Yang Hengjun case a pivotal moment in increasingly tense Australia–China relationship', *The Conversation*, 28 August 2019; Nick Macfie, Tom Westbrook, 'China warships leave Sydney after surprise visit raises hackles', *Reuters Australian and New Zealand Top News*, 7 June 2019; Primrose Riordan, 'Pacific pact to counter China push', *The Australian*, 6 July 2018; Tom McIlroy, 'Don't overstate China irritants: Ciobo', *Australian Financial Review*, 7 June 2018; Nick McKenzie, Richard Baker, 'MPs offer lifeline for China book ditched by publishers', *Sydney Morning Herald*, 6 February 2018; Paul Maley, Primrose Riordan, 'Letter shows Huang still in charge of Beijing front group', *The Australian*, 2 February 2018; Phillip Coorey, 'Ghost of 2007 defeat haunts Libs', *Australian Financial Review*, 13 December 2017; Paul Maley, Rowan Callick, 'China's agents of influence run for cover', *The Australian*, 17 November 2017.

90 See, for example, 'Australian laws should avoid hurting China', editorial, *Global Times*, 29 June 2018, online; Qin Sheng, 'Who's to blame for worsening China–Australia relations?', *Global Times*, 19 May 2021, online.

91 Kearsley et al., '"If you make China the enemy, China will be the enemy": Beijing's fresh threat to Australia'.

92 As to which, see Roland Rajah, 'Vital trade lessons from China's failed attempt at coercion', *The Australian*, 14 April 2021.

93 Malcolm Turnbull, *A Bigger Picture* (Hardie Grant, 2020, ebook), 796.

94 See Michael Walsh, Jason Fang, 'Why do some Chinese-Australians feel targeted by the government's new foreign influence laws?', *ABC News*, 29 March 2019; Colin Heseltine, 'Please explain: Australia's confused China strategy', *AsiaLink*, 27 April 2021.

95 Andrew Clark, 'Sydney Uni's Michael Spence lashes government over "Sinophobic blatherings"', *Australian Financial Review*, 28 January 2018.

96 See John Fitzgerald, *Mind your tongue: language, public diplomacy and community cohesion in contemporary Australia–China relations*, ASPI, Canberra, 2019, online.

97 *Wong v The Queen* (2001) 207 CLR 584 at 608 [65]; [2001] HCA 64 (Gaudron, Gummow and Hayne JJ). And see *Green v The Queen; Quinn v The Queen* [2011] HCA 49 at [28] (French CJ, Crennan and Kiefel JJ).

98 See Fitzgerald, *Mind your tongue*.

99 Fitzgerald, *Mind your tongue*.

100 Forty-six per cent of Chinese-Australians are 'concerned' about the influence of China 'on Australia's political processes': Natasha Kassam, Jennifer Hsu, *Being Chinese in Australia: public opinion in Chinese communities*, Lowy Institute, March 2021, 24.

101 Eighty-two per cent of Australians are 'concerned' about the influence of China 'on Australia's political processes': Kassam & Hsu, *Being Chinese in Australia*, 24.

102 In the midst of the Covid-19 pandemic, 72% of Chinese-Australians felt there was 'not a lot of discrimination' against Australians of Chinese heritage in Australia: Kassam & Hsu, *Being Chinese in Australia*, 20.

103 The possibility arises from Australia's agreement to accord to Chinese investments and investors 'treatment no less favourable than it accords, in like circumstances' to Australian or other foreign investors and investments with respect to the 'management', 'conduct' and 'operation' of those investments. 'Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China' (ChAFTA), 2015, ATS 15, Article 9.3. This is a consequence of the 'National Treatment' and 'Most Favoured Nation' clauses in the relevant treaties (ChAFTA Articles 9.3, 9.4; 'Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments', 1988, ATS 14, Article III(c) (China BIT) (although this latter agreement does not include the 'like circumstances' proviso). Under ChAFTA, subject to various exceptions (see, for example, articles 9.5 (non-conforming measures) and 9.8 (general exceptions)), Australia is obliged, in the eyes of public international law, to treat Chinese companies in Australia no differently from how Australian or other foreign companies are treated 'in like circumstances'.

104 [2015] ATS 15.

105 ChAFTA Article 9.12. See also China BIT, Article XII.

106 ChAFTA Chapter 15, Article 9.12 (footnote).

107 *Republic of the Philippines v People's Republic of China*, PCA case no. 2013-19, 12 July 2016.

108 See Nour Haydar, Stephen Dziedzic, 'China lodges complaint against Australia at World Trade Organisation', *ABC News*, 24 June 2021.

109 Yuwen Li, Cheng Bian, 'China's stance on investor-state dispute settlement: evolution, challenges, and reform options', *Netherlands International Law Review*, 2020, 67(503):504.

110 See table at *Investment Policy Hub*, UNCTAD, online.

111 See Matthew Hodgson, Yarik Kryvoi, Daniel Hrcka, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration* (British Institute of International and Comparative Law, June 2021), 5.

112 Weihuan Zhou, 'Chinese investment in Australia: A Critical Analysis of the China-Australia Free Trade Agreement', *Melbourne Journal of International Law*, 2017, 17(407):428. It's worth noting that the suffering of damages is an explicit prerequisite for the invocation of the ChAFTA's ISDS provisions: ChAFTA articles 9.12(2)(a)(ii), 9.12(2)(b)(ii).

113 ChAFTA articles 9.3, 9.4. As to the complexity of the 'like circumstances' criterion, see, for example, Konrad von Moltke, *Discrimination and non-discrimination in foreign direct investment mining issues*, OECD Forum on International Investment, February 2002.

114 See Susan Rose-Ackerman, Benjamin Billa, 'Treaties and national security', *International Law and Politics*, 2008, 40(437):445–446.

115 Article 9.2(2) of ChAFTA disapplies the investment chapter to a party's measures to the extent that they're covered by Chapter 8 (which addresses trade in services). In turn, Article 16.2(2) adopts Article XIV of the General Agreement on Trade in Services as an exception to Chapter 8.

116 ChAFTA Ch 9, Annex III, Part 1, Section B, Item 5.

117 Melissa Conley Tyler, Julian Dusting, *What should Australia do about its foreign interference and espionage laws?*, China Matters, May 2021, 1.

118 Conley Tyler & Dusting, *What should Australia do about its foreign interference and espionage laws?*, 4 (emphasis added).

119 Emphasis added.

120 Conley Tyler & Dusting, *What should Australia do about its foreign interference and espionage laws?*, 4.

121 All quotes are from Mansted, *The domestic security grey zone: navigating the space between foreign influence and foreign interference*, 17.

122 Mansted, *The domestic security grey zone: navigating the space between foreign influence and foreign interference*, 1.

123 See, for example, Joseph Raz's seminal elucidation of the concept of the rule of law, which contains the following passage: 'The discretion of the crime-preventing agencies should not be allowed to pervert the law. Not only the courts but also the actions of the police and the prosecuting authorities can subvert the law. The prosecution should not be allowed, for example, to decide not to prosecute for commission of certain crimes, or for crimes committed by certain classes of offenders. The police should not be allowed to allocate its resources so as to avoid all effort to prevent and detect certain crimes or prosecute certain classes of criminals': Joseph Raz, *The Authority of Law* (Clarendon, 1979), 218. Plainly, the principle has application beyond the police to other law enforcement agencies, such as AGD.

124 Weinstein, 'Don't underestimate China's military–civil fusion efforts'.

125 Birtles, 'Xi Jinping hints at a shift in China's "wolf warrior" diplomacy. But does this mean we'll see a change in relations with Australia?'.

126 Some of the deregulatory elements of the 'tiered approach' proposal could be achieved using the rule-making powers in the legislation: see, for example, Foreign Relations Act, s. 8(1)(l); FITS Act, s. 30. However, it is unlikely that the proposal here could be fully implemented without amending the primary legislation, especially if the goal is (as it should be) to make the framework simpler, rather than more complex.

127 The legislative instrument could be disallowable by parliament, thus preserving parliament's control over the operation of the legislation: *Legislation Act 2003* (Cwlth), s. 42.

128 Hamilton submission, 3.

129 Foreign Relations Act, s. 8(1)(k).

130 In particular, the requirement to pay 'just terms' for any acquisition of property, under s. 51(xxxi) of the Constitution.

131 Anthony Galloway, '"Strategic own goal": Defence reviews Port of Darwin's Chinese ownership', *Sydney Morning Herald*, 2 May 2021.

132 It does not appear that this outcome could be achieved under the existing *Foreign Acquisitions and Takeovers Act 1975* (Cth) and *Foreign Acquisitions and Takeovers Regulation 2015* (Cth). Amendments made since the lease of the Port of Darwin, which might lead to a different outcome if Landbridge had proposed to enter the lease in 2021 as opposed to 2015, apply only prospectively. See, for example, *Foreign Acquisitions and Takeovers Amendment (Government Infrastructure) Regulation 2016* (Cth), sch 1, item 3; *Foreign Investment Reform (Protecting Australia's National Security) Act 2020* (Cth), sch 1, items 229-231.

133 Florida Senate, CS/HB 7017: Foreign influence, online.

134 22 USC §§611–621.

135 Ben Freeman, Brian Steiner, Tarun Krishnakumar, *Recent proposals to amend the Foreign Agents Registration Act: a survey*, Center for International Policy, April 2021, 2.

136 US Senate Bill S.4272, §403(e) (116th Congress). Sponsored by Republican Senators Risch, Romney and Young, and former Republican Senator Gardner.

137 S.4272, §403(a)(i).

138 Mansted, *The domestic security grey zone: navigating the space between foreign influence and foreign interference*, 7.

139 Bob Seely MP, *Foreign interference unchecked: models for a UK foreign lobbying act*, Henry Jackson Society, February 2021, 21.

140 Home Office, *Legislation to counter state threats (hostile state activity): government consultation*, UK Government, May 2021, 6.

141 Home Office, *Open consultation: legislation to counter state threats*, UK Government, 13 May 2021, online.

Acronyms and abbreviations

AGD	Attorney-General's Department
CCP	Chinese Communist Party
ChAFTA	China–Australia Free Trade Agreement
DFAT	Department of Foreign Affairs and Trade
FARA	Foreign Agents Registration Act (US)
FITS Act	*Foreign Influence Transparency Scheme Act 2018*
Foreign Relations Act	*Australia's Foreign Relations (State and Territory Arrangements) Act 2020*
ISDS	investor-state dispute settlement
UK	United Kingdom

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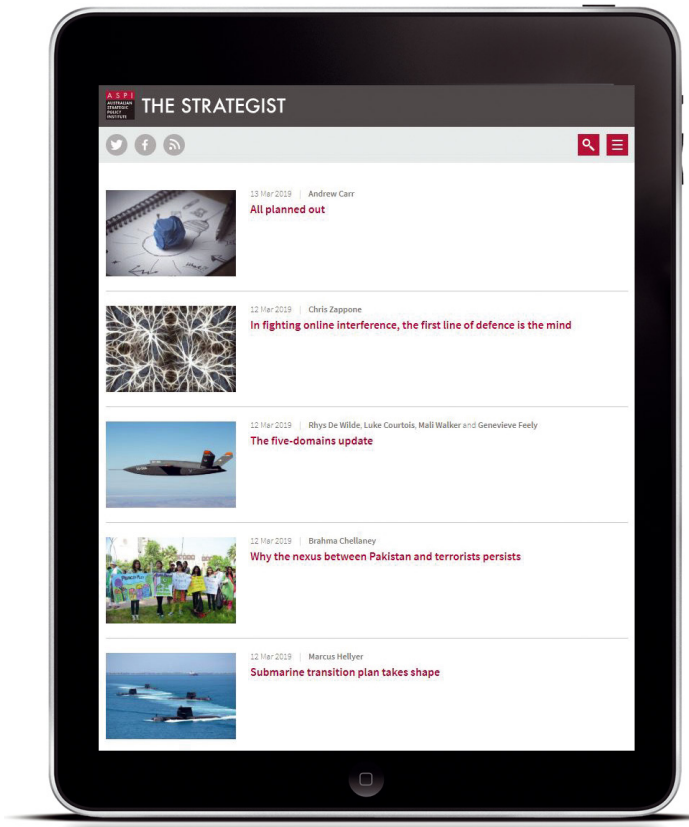

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ISSN 2200-6648