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Mr Andrew Hastie MP

Chair

Parliamentary Joint Committee on Intelligence and Security

Dear Mr Hastie

Review of the *Foreign Influence Transparency Scheme Bill 2017*

In this submission I invite the Committee to consider whether aspects of the proposed regulation of political speech contained in the above Bill are both unnecessary and inappropriate. I draw particular attention to the possible application of the proposed legislation to Australian academics, researchers, artists and others who receive grants or other assistance from foreign universities and artistic or other institutions.

I also draw attention to possible constitutional invalidity of some of the proposed provisions.

Personal background

I provide the following brief personal background. I am currently a Visiting Fellow in the ANU College of Law at the Australian National University (and a member of the Centre for International and Public Law at the College of Law). This is an honorary, unpaid, appointment. Prior to my retirement from paid employment I was an officer of the Attorney-General's Department and AGS, including over 25 years as an SES officer. In that time I headed several policy and professional Divisions, established the Office of General Counsel and was its first head and appeared as counsel for the Commonwealth in constitutional and other public law cases in the High Court, the Federal Court and other appellate courts.

The nature of the concern

Australia is an open society and Australians are able to participate freely in public debate. The proposed regulation would not prevent Australians from expressing their views but in certain circumstances it would regulate the manner in which they may do so. In particular, in certain circumstances Australians would have to register with a government authority, pay a fee and report on what they do. Many will see a requirement to register with a government authority, pay a fee and report before they can engage in public debate as a remarkable, unprecedented and unwarranted

restriction on personal freedom. To what extent is this regulation necessary? To what extent is this kind of regulation of political speech appropriate?

Any restrictions on or regulation of freedom to engage in public debate surely requires the most careful scrutiny, requires mature consideration, full and open public debate and should not be rushed. The need for any such legislation must be clearly established, the legislation itself should be clear and unambiguous, the operation of the legislation should be no more than is strictly necessary to address the identified need, the legislation should strike a fair balance between any perceived threat and freedom of expression and the operation of the legislation should have appropriate safeguards, in particular, it should not depend on politically exercised discretions.

Examples of potentially adverse impact

I provide the following example to illustrate the potentially adverse effect of the proposed legislation and the manner in which it may burden the free exchange of ideas and public debate by subjecting common activities to government regulation.

In 2002 I was invited to Oxford to present a paper at a high level specialist academic conference, *Global migration: domestic reactions, a comparative constitutional perspective*. My paper was to be on legal aspects of the Australian Government's response to the *MV Tampa* incident. The paper focussed on Australia's international legal obligations under applicable maritime law and refugee law. In the course of the paper I explained that Australia did not give effect to certain international legal obligations. For example, the Australian direction to the *Tampa* to leave Australian waters was contrary to Australia's obligations under the Safety of Life at Sea Convention. Why? The *Tampa* was licensed to carry 40 people. The ship was carrying, in addition to its crew of 27, 438 other people (the rescued asylum seekers). Under the Safety of Life at Sea Convention, Australia was under an obligation to ensure the ship did *not* leave Australian waters in an unsafe condition. I also analysed some complex refugee law issues, in particular whether Australia's action preventing the asylum seekers from accessing Australian courts to pursue their asylum claims constituted breach of Australia's obligations under the Refugee Convention.

I was not paid any fee or other remuneration for my conference presentation but Oxford met my travel expenses (airfare and accommodation for the duration of the conference). My paper attracted much legal and public interest in both England and Australia and I was later invited to deliver the paper in Australian venues. The paper has been published and has been cited in foreign and Australian publications. It dealt with a matter the subject of robust public debate in Australia and may well have informed some of that debate.

Arguably this kind of activity, arranged by and funded by a foreign institution, would in future attract the proposed registration and related requirements.

Australians, particularly academics but also other public figures and members of the arts community frequently receive invitations from foreign institutions to present papers and undertake research and residencies at international conferences and foreign institutions. Funding from a foreign university or a foreign research or artistic institution would appear to be sufficient to attract the relevant part of the registration requirement. Conference presentations may be published and may be re-presented in Australia and broadcast or re-broadcast in Australia. Some of my artist friends have been awarded foreign residencies at foreign artistic institutions. They often give talks at their foreign institutions. They also give talks on their overseas experiences on their return to Australia. These talks may concentrate on artistic matters but may also comment unfavourably on the level of support for the Arts in Australia in comparison with their 'host' country-in that sense the talks can be political.

Prestigious Australian academic institutions, for example, the United States Studies Centre at the University of Sydney, the ANU Centre for Strategic and Defence Studies, the Centre for Arab and Islamic Studies at ANU and the ANU Centre for European Studies may receive funding from foreign sources, public and private. These institutions make enormous contributions to Australian public life. All these kinds of activities are fundamental to the free exchange of ideas in democratic countries.

Not only must an Australian caught by the legislation register with a government authority, the Australian must pay a fee, may be under an obligation to report to a government authority on his or her activities and may be subject to criminal penalties for failure to comply. I believe this would be the first occasion in Australia's history where an Australian would have to pay a government body for the right to engage in public discourse. These are extraordinary and unprecedented intrusions into freedom of speech. I encourage the Committee to consider whether, to the extent that the proposed legislation applies to activities of this kind, the operation of the legislation is too wide.

Constitutional validity

The Committee may also wish to consider whether the constitutional validity of the proposed legislation is open to doubt. Doubts as to constitutional validity arise not because of possible absence of available heads of constitutional power but because the legislation may impermissibly burden the constitutionally implied freedom of political communication.

The practical effect of the registration, fee and reporting requirements is to regulate the manner in which certain political communications may be made. Adopting the first arm of the relevant constitutional test as it is applied by the High Court, the registration and related requirements burden political communications. The first arm of the now well established test in the freedom of political communications cases is clearly established (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, *Wotton v Queensland* (2012) 246 CLR 1, *McCloy v NSW* [2015] HCA 34.)

On the basis that the first arm of the constitutional test is established, the question next arises whether the law is appropriate and adapted to a legitimate end. Are the purpose of the law and the means adopted legitimate? The purpose may be clear enough. What about the means adopted? How should this be tested? One possibility would be to examine the nature and more relevantly the possible effects of foreign 'interference'. Does funding of travel expenses to an Australian researcher to present a scholarly analysis of the Australian Government's response to a public issue represent some sort of threat to Australia warranting regulation of the kind proposed? Does an artist's report on a foreign residency award give rise to foreign interference issues?

What about other kinds of foreign 'interference'? Is the legislation 'appropriate and adapted' in the sense that it properly identifies and regulates the relevant threats? Much is said about alleged interference by large foreign owned corporations and wealthy individuals, for example mining companies, media companies, drug companies and foreign intelligence agencies. Have foreign companies and foreign individuals sought to influence Australian public debate in order to advance their commercial interests? Foreign companies and individuals may provide benefits such as free travel or gifts to Australian politicians. The reports of Senator Dastyari's conversation with Mr Huang generated much debate but little or nothing is known as to how this conversation was made known to the media. Was it 'leaked' by a foreign intelligence agency? Was the purpose of the leak to influence Australian politics?

My point is not that the legislation should address each of these activities. The purpose of the examples is to identify possible fields of foreign interference with a view to assessing whether the

registration and other requirements in the proposed legislation as they apply to the particular circumstances I have identified, such as academics, artists and others, constitute an appropriate mechanism to address a foreign interference problem. If the proposed legislation does not address major aspects of foreign interference, if the regulation of activities by academics, artists and others burdens freedom of political communication without significantly addressing the heart of any foreign interference problem, can it truly be said that the proposed regulation of free speech satisfies the ‘appropriate and adapted’ test? Do the registration and related requirements fail the test of constitutional validity?

Summary

I encourage the Committee to consider whether aspects of the proposed legislation would constitute extraordinary and unprecedented regulation of freedom of political discourse that is unnecessary and inappropriate and, as a minimum, would require extensive community consultation and mature debate. I also encourage the Committee to consider whether the constitutional validity of aspects of the legislation may be open to doubt on the ground that the legislation impermissibly infringes the constitutionally implied freedom of political communication.

Yours sincerely

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