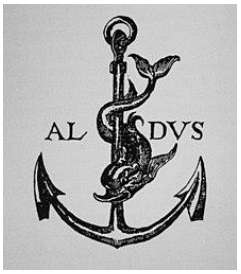

AUSTRALIA'S FOREIGN INTERFERENCE LAWS

Presentation to the ACT Law Society on 4 March 2020 by Bernard Collaery

INTRODUCTION

The first emperor of the Roman Empire, Augustus, deplored rashness in a military commander.[1] Thus, one of his favourite sayings was "festina lente", meaning "make haste slowly".

The classic adage that activities should be performed with a proper balance of urgency and diligence was overlooked in 2018 when two bills rushed through the Senate to apparently counter foreign interference in Australia's national security interests. These two bills were:

- The Espionage and Foreign Interference bill; and
- The foreign influence transparency scheme bill.

Together these bills amount to the biggest overhaul of foreign interference laws in years.

What is foreign interference?

Foreign interference is the invisible hand of foreign states seeking to undermine a target state's interests from within by infiltrating its national institutions and people.

[1] According to the Roman historian Gaius Suetonius Tranquillus.

What do the bills do?

While the threat of foreign interference is real, many legal commentators have expressed concern by the manner in which the new laws were rushed through Parliament and their effects on individual liberties and freedom of political expression.

The first bill introduced new spying offences, updated sabotage offences and a new offence relating to the theft of trade secrets on behalf of a foreign government.

The second bill created a register for individuals or entities undertaking activities on behalf of "foreign principals".

The attorney general, Christian Porter, insisted the laws needed to be passed urgently before the 2008 by-elections, saying that foreign agents were increasingly trying to cause chaos in democratic electoral processes. The apparent need for urgency is confusing given that the laws did not include, for example, a real time register for political donations. Also, the register for individuals or entities undertaking activities on behalf of "foreign principals" was not implemented until long after the elections.

When did the bills come into force?

The new spying offences and the *Foreign Influence Transparency Scheme Act 2018* (Cth) (Scheme) commenced on 10 December 2018.

NATIONAL SECURITY LEGISLATION AMENDMENT (ESPIONAGE AND FOREIGN INTERFERENCE) BILL 2018

This Bill amends the *Criminal Code Act 1995* to:

- amend existing, and introduce new, espionage offences relating to a broad range of dealings with information;

- introduce new offences relating to foreign interference with Australia's political, governmental or democratic processes;

- replace the existing sabotage offence with new sabotage offences relating to conduct causing damage to a broad range of critical infrastructure that could prejudice Australia's national security;

- introduce a new offence relating to theft of trade secrets on behalf of a foreign government;

- amend existing, and introduce new, offences relating to treason and other threats to national security, such as interference with Australian democratic or political rights by conduct involving the use of force, violence or intimidation;

- introduce a new aggravated offence where a person provides false or misleading information relating to an application for, or maintenance of, an Australian Government security clearance;

A further 28 or so Acts were amended to make consequential amendments, for example, to replace certain existing, and introduce new, offences relating to secrecy of information.

Amendments to secrecy and espionage offences

For the sake of keeping my presentation within the allotted timeframe, I will focus on the new foreign interference and espionage laws.

Secrecy

The new laws expand the offences relating to espionage and secrecy to now include the *possession* of classified information. The pre-existing offences only outlawed the *communication* of classified information.

Division 122.1 of the Criminal Code expands the offences of the disclosure of communication of, and dealing in, secret information.

Section 122.4A(1) deals with the communication of secret information and section 122.4A(2) deals with the receipt of that information. I will not read out all of the provisions of the legislation but will let you read it on the screen. In short, the legislation prohibits the communication and dealing with secret information.

Communication of information

(1) A person commits an offence if:

(a) the person communicates information; and

(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(d) any one or more of the following applies:

(i) the information has a security classification of secret or top secret;

(ii) the communication of the information damages the security or defence of Australia;

(iii) the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth;

(iv) the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

Other dealings with information

(2) A person commits an offence if:

(a) the person deals with information (other than by communicating it); and

(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(d) any one or more of the following applies:

(i) the information has a security classification of secret or top secret;

(ii) the dealing with the information damages the security or defence of Australia;

(iii) the dealing with the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against of a law of the Commonwealth;

(iv) the dealing with the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

"Security or defence of Australia" includes the operations, capabilities or technologies of, or methods or sources used by, domestic intelligence agencies or foreign intelligence agencies.[2]

[2] Section 121.1 of the Criminal Code Act.

Dealing with information

A person "deals" with information or an article if the person does any of the following in relation to the information or article:

- receives or obtains it;
- collects it;
- possesses it;
- makes a record of it;
- copies it;
- alters it;
- conceals it;
- communicates it;
- publishes it;
- makes it available.[3]

Defences

The Act outlines some defences to the communication or dealing with such information.

It is a defence to a prosecution for an offence by a person against Division 122.1 if the person dealt with the information:

- In the exercise of the person's power, function or duty as a public official or a person who is otherwise engaged to perform work for a Commonwealth entity; or

- in accordance with an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; or

- and the information was made available to the public with the authority of the Commonwealth; or

- Was doing so for the purpose of communicating the information to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman, the Australian

[3] Ibid, section 90.1.

Information Commissioner or the Law Enforcement Integrity Commissioner – or their approved staff; or

- Was doing so for the purpose of communicating it in accordance with the Public Interest Disclosure Act 2013 or the Freedom of Information Act 1982; or

- Was doing so for the purpose of reporting to an appropriate agency of the Commonwealth, a State or Territory; or

- Was doing so, in good faith, for the purpose of obtaining or providing legal advice in relation to an offence against the Act or the application of any right, privilege, immunity or defence.

- Was doing so in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media and at the time the person reasonably believed that engaging in that conduct was in the public interest.

When is dealing with classified information in the "public interest"?

The legislation does not define "public interest" or the criteria to be weighed in determining what is in the public interest. The legislation only sets out when a person may not reasonably believe that dealing with information is in the public interest:

A person may not reasonably believe that dealing with information was in the public interest if.

- engaging in that conduct would be an offence under:

    - Section 92 of the Australian *Security Intelligence Organisation Act 1979* (publication of identity of ASIO employee or affiliate);

    - Section 41 of the *Intelligence Services Act 2001* (publication of identity of staff); or

    - Section 22, 22A or 22B of the *Witness Protection Act 1994*; or

- That conduct was engaged in for the purpose of directly or indirectly assisting a foreign intelligence agency or a foreign military organization.

In the absence of a statutory definition of what is in the public interest that journalist would have to weigh up the onus of having to prove that the disclosure act was in the public interest against the prospect of being sentenced to five years in gaol.

In our example, let's change the profession of the person from a journalist to an online blogger or a journalist who decides to set up his or her own news site online. The defence refers to "media" but it is not clear that a blogger would fall within the definition of a person "engaged in the business of reporting news".

Arguably, the issue of whether a disclosure is within the public interest might require the consideration of other provisions of the legislation, namely, the expanded definition of Australia's "national security".

Expansion of the definition of "national security"

A large amount of the new offences consist of acts that jeopardise Australia's national security.

"National security" is broadly defined in section 90.4(1) of the Act as including all of the following:

(a) the defence of the country;
(b) the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by subsection (2);
(c) the protection of the integrity of the country's territory and borders from serious threats;
(d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or an activity covered by subsection (2);
(e) the country's political, military or economic relations with another country or other countries.

The expansion of the definition of "national security" criminalises disclosures made in the public interest that would pose no risk to national security, such as government corruption or misconduct.

We can already draw from many examples of government overreach in the name of national security. Legitimate journalistic endeavours that exposed flawed decision making or matters that policy makers and public servants would simply prefer were kept secret have been automatically and conveniently classed as issues of national security.

Let us move on now to the second prong of the foreign interference laws, the Foreign Influence Transparency Scheme ("the Scheme").

THE FOREIGN INFLUENCE TRANSPARENCY SCHEME

The Scheme aims to increase transparency over foreign influence over Australia's political and government processes and the views of the Australian public on political or government matters.

The Scheme imposes registration and other obligations on a person who undertakes or agrees to undertake registrable activities on behalf of a foreign principal unless that person is entitled to an exemption from registration.

What are registrable activities?

Activities covered by the Scheme include:

- parliamentary lobbying in Australia;
- general political lobbying in Australia;
- communications activity in Australia ;
- any activity by a former Cabinet Minister; and
- any activity by a "recent designated position holder".

Communications activity is all circumstances where information or material is disseminated, published, disbursed, shared or made available to the public for the purpose of political or governmental influence.

Disbursement activities in Australia includes the distribution of money or things of value on behalf of a foreign principal for the purpose of political or governmental influence.

For the purpose of the Scheme, it does not matter whether the attempt to influence the decision making is successful or not or even whether there is an element which benefits domestic interests.

What is a "foreign principal"?

There are four types of "foreign principals' under the Scheme:

1. Foreign governments.

2. Foreign political organisations. These include a foreign political party or a foreign organization that exists primarily to pursue political objectives.

3. Foreign government related individuals. These are individuals that are controlled by a foreign principal and are not Australian citizens or Australian permanent residents.

4. Foreign government related entities (FGRE). A company will be a FGRE (and therefore a "foreign principal") if:
    a. a foreign government or foreign political organisation:
        1. holds more than 15% of the issued shares of the company;
        2. holds more than 15% of the voting power in the company;
        3. can appoint at least 20% of the company's board of directors; or
        4. can exercise total or substantial control over the company; or
    b. the directors of the company are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign government or foreign political organisation.

The definition of FGRE captures companies *related* to foreign governments and foreign political organisations, rather than simply companies *controlled* by those foreign bodies. In practice, this concept of relatedness means that it will not always be obvious whether a person is a "foreign principal", particularly a FGRE.

When does a person undertake an activity on behalf of a foreign principal?

A person undertakes a registrable activity on behalf of a "foreign principal" if:

a. the person undertakes the activity either under an arrangement with or in the service, on the order, at the request or under the direction of the "foreign principal"; and
b. both the person and the "foreign principal" knew or expected the person would or might undertake activities that are registrable under the Scheme.

Being a subsidiary of a "foreign principal" does not mean, on its own, that the subsidiary carries out activities on behalf of the "foreign principal". However, companies that are either directly or ultimately owned by a "foreign principal" may still be required to register if the "foreign principal" orders, requests or directs the subsidiary to carry out registrable activities.

Exemptions

Division 4 of the Act outlines a number of circumstances where a potential registrant may not need to register, even if they undertake activities on behalf of a foreign principal, including where:

- the activity is a religious activity undertaken in good faith.
- The organization is a registered charity, the activity is undertaken for a charitable purpose rather than a disbursement activity, and at the time of the activity, it is apparent to the public that the activity is on behalf of a foreign principal and the identity of that foreign principal.
- The activity relates to the delivery of humanitarian aid or assistance.
- the organisation's purpose relates to the arts, the activity is in pursuit of the organisation's artistic purpose, rather than a disbursement activity and at the time of the activity, it is apparent to the public that the activity is on behalf of a foreign principal and the identity of that foreign principal.
- the activity is undertaken by an industry representative body in the way of representing its members.

Obligations under the scheme

If required to register, a person must provide certain information to the Attorney-General's Department, including the nature of the person's relationship with the "foreign principal" and the type of registrable activity undertaken on behalf of the "foreign principal".

Some of the information provided to the Department will be available on the public "transparency register".

Registrants are then subject to a number of ongoing reporting and record-keeping requirements and, if communicating or disclosing information to the public on behalf of the "foreign principal", must disclose this fact in accordance with the requirements of the Scheme. There are also heightened reporting requirements during voting periods.

It is a criminal offence to:

- fail to register under the Scheme;
- fail to fulfil obligations under the Scheme;
- provide false or misleading information to the Department; and

- destroy records with the intent of avoiding or defeating the object of the Scheme.

For new arrangements with or new activities undertaken for “foreign principals”, businesses have 14 days from entering the arrangement or undertaking the activity to register under the Scheme.

Penalties

Offence	**Penalty**
Failure to apply for registration or renew registration.	Imprisonment of up to 5 years.
Provision of false or misleading documents to the Secretary in response to an information notice.	Imprisonment of up to 3 years.
Destruction of relevant records (which the person is required to keep under section 40 of the Act).	Imprisonment of up to 2 years.
Failure to comply with a transparency notice.	Imprisonment of up to 6 months.

The public register

The public register will show information about the activities of registrants and the foreign interests they represent, seeking to provide the Australian Government and the Australian community with an accurate picture of foreign influence in Australia. The public register will be accessible from the scheme's website. The following information will be published on the public register, via the Scheme's website:

- the registrant's full name, and other names they are known by;
- the date that the registrant entered into the relationship with the foreign principal or began undertaking each registrable activity;
- a description of the registrant's relationship with the foreign principal;
- the full name of the foreign principal;
- the foreign principal's country of origin or association; and
- (where relevant) the date registration ended or the date registration expired.

Information that is commercially sensitive, relates to national security or is not true will not be published.

Who is on the public register?

The list includes all of Australia's universities, several Chinese language media organisations and some refugee support advocates.

Some notable entities that are listed on the public register include:

- Norton Rose Fulbright Australia, legal firm is listed as engaging in parliamentary lobbying on behalf of Bradley Sharp, principal from the USA.

- Energy and resource companies, Woodside and Shell, have registered their general political lobbying activities.

- The Australian Academy of Science is registered as engaging in political lobbying on behalf of Malaysia, Mexico, France and China.

- One conspiracy theorist has disclosed that he is emailing Australian politicians on behalf of an American group that believes that the September 11 terrorist attacks were committed by the US Government.

Who is not on the public register?

ABC news reported last year that more than 500 of Australia's biggest companies and not-for-profit organisations were asked to put themselves on the Register. Just 45 people and organisations registered.

One notable individual who is not listed on the public register is Tony Abbott. In the news recently it was reported that Tony Abbott was asked to consider registering as an agent of foreign influence for speaking at a conference organized by the Hungarian government, at which he gave a controversial speech on migration and praised the country's far-right prime minister.[4]

[4] https://www.theguardian.com/australia-news/2020/feb/20/tony-abbott-was-asked-to-register-as-agent-of-foreign-influence-after-migration-speech-in-hungary

Scenarios where a client may require advice in relation to the foreign interference laws

Your client may be…

1. **A senior officer of an Australian university** that:
   - has close relationships, or that acts in conjunction, with international universities or other foreign education bodies; or
   - publishes or distributes material jointly produced by the university and the foreign education body.

   Most Australian universities are not exempt under the non-profit charity exemption.

   Foreign influence over research projects can be an unanticipated risk that can arise at various stages of a project, including research dissemination. By way of example, the risk of indirect foreign influence may arise where a research project is funded by a foreign principal that involves academic commentary on matters of politics or government.

2. **The head of a foreign student body association in Australia** that encourages other students to write to a political candidate on a policy issue.

3. **An ex-minister** who, after retiring from Parliament, obtains a consultancy agreement with a foreign owned entity.

4. **An Australian lawyer** who:

   - Lobbies on behalf of a government owned corporation.
   - Lobbies on behalf of a foreign government.
   - Lobbies on behalf of a like minded political party (such as the Australian Labor Party and the New Zealand Labour Party).

5. **An energy and resource company** who acts as the operator or manager of a joint venture that has participants who are foreign principals, either because they are state owned entities or are partly owned by governments.

CONCLUSION

At a very basic level, I hope you now have some understanding of the key provisions of the foreign transparency laws or at least an awareness of their existence.

Secondly, it is clear that the haste in which the legislation was drafted and passed had far reching consequences. Bipartisanship on national security was so tight that the light could not get in. During the drafting stage the government softened some of the rough edges applying to journalists in established media outlets and so much of the media stopped paying attention.

The consequences of the legislation include the stifling of public discourse on social issues on both sides of politics: ABC journalists' offices were raided last year in connection with the Afghanistan war crime papers; Tony Abbott was accused as an agent of foreign influence by virtue of addressing the US Conservative Political Action Conference in Sydney last August.

Thirdly, armed with the knowledge that the foreign transparency laws escaped scrutiny and serve to criminalise the flow of information in our democracy, it is important for the legal profession to be aware of its role as the essential guardian of human and other rights. As lawyers we can see the potential that the legislation has to create a chilling effect on public policy dialogue and the significant penalties attached to non-compliance. We have a responsibility to continue to insist upon the application of the rule of law, the protection of civil liberties and Government accountability, even in circumstances of heightened security concerns.

Indeed, Justice Kirby explained to the Presidents of Law Associations in Asia Conference:

> "The legal profession needs to be on its guard against pressure for judges and lawyers '... to interpret the law in the government's favour; to secure convictions or uphold administrative detentions; to refrain from challenging the constitutionality of questionable legislation; to accept evidence obtained in dubious circumstances or where its reliability or provenance is unsound; to adjust the burden of proof against the suspect; and to accept curtailed, abbreviated or expedited judicial procedures.'"[5]

I enjoin my legal colleagues to heed the words of Justice Kirby in these turbulent times.

Bernard Collaery
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[5] Kirby J "Independence of the legal profession: Global and regional challenges" (2005) 26 Aust Bar Rev 133.