Australian High Court declares “foreign interference” laws to be constitutional

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For the second time in a month, Australia’s supreme court last week handed down a far-reaching ruling, dismissing a legal challenge to the reactionary “foreign interference” legislation, introduced by the Liberal-National government in 2018, with the full backing of the opposition Labor Party.

The laws are directed primarily against any political links with China, in line with the escalating anti-China witch-hunt. But they have a far wider anti-democratic scope, with the potential to silence or intimidate dissent.

The *Foreign Influence Transparency Scheme Act* (*FITS Act*) requires registration with government authorities of any political activity in cooperation with a “foreign political organisation.” Failure to register can result in imprisonment for up to five years.

The High Court’s latest decision goes far further than last month’s ruling by declaring that the laws are constitutional, that is, they do not violate the implied freedom of political communication. By 5 votes to 2, the judges insisted that even though the FITS Act undeniably restricts political communication, it is for a “legitimate” purpose—that of preventing “foreign influence” in government and politics.

In May, the High Court unanimously upheld raids and seizures conducted by the Australian Federal Police against John Zhang, a Chinese-born Australian citizen and parliamentarian’s staff member, which had been accompanied by blazing headlines about “Chinese agents” inside the New South Wales state parliament. The police obtained the search warrants on the grounds that Zhang was suspected of committing a criminal offence, under the other main provision, the *Espionage and Foreign Interference Act (EFI Act)*, of “recklessly” seeking to influence Australian politics on behalf of the Chinese government.

Last week, the court rejected a plea by a right-wing group called LibertyWorks, which objected to having to register a 2019 conference in Sydney under the FITS Act. The gathering featured speakers such as former Prime Minister Tony Abbott and British Brexit campaigner Nigel Farage. LibertyWorks had linked up with the American Conservative Union to organise the gathering.

Even though the organisations involved are extremely right-wing, the ruling against them sets a precedent that can be used against any organisation, party, academic institution, publisher or individual that holds a political event or campaign in collaboration with an overseas group.

After the Sydney event, the Attorney-General’s Department asked LibertyWorks for extensive documentation about the conference, to determine if it should be registered under the *FITS Act*. The group did not respond, instead taking its case to the High Court.

The majority judges issued rulings essentially backing the federal government’s case that the limits on democracy were needed to protect parliamentary democracy itself!

That finding was assisted by the fact that LibertyWorks itself accepted that the FITS Act “is protective of Australia’s political and electoral processes.” The judges said “that important purpose” was not outweighed by a “modest burden” on freedom of political communication.

LibertyWorks also agreed with the scare-mongering assertions of the government and the political spy agency, the Australian Security Intelligence Organisation (ASIO), that “espionage and foreign interference activity against Australia’s interests” was “occurring at an unprecedented scale.”

The narrow argument of LibertyWorks was that the FITS Act had a “chilling effect” on its activities, because of “onerous” registration requirements, such as constantly supplying the foreign influence register with updated information and records of activity.

Under the Act, the register secretary, who is the head of the Attorney-General’s Department, may issue notices compelling registrants to produce any “information” or “documents” that the secretary “reasonably believes” could relate to an arrangement with a foreign political entity.

The FITS Act also created offences, such as failure to register or renew registration, and failure to produce documents or fulfill responsibilities under the scheme, with prison terms ranging from six months to five years. Nevertheless, the majority judges said this did not directly

affect political communication.

One majority member, James Edelman, said the register did not impose a "substantial" or "deep" burden on political communication, even though it required records of political activity to be kept for up to ten years. He gave a flavour of the political atmosphere of US-led allegations against China, in which the case arose. Edelman said FITS "acts as a prophylactic to any sinister foreign influence on Australian political processes, in circumstances of a growing global trend of foreign influence operations."

Another majority judge, Simon Seward, whom the government appointed to the court last December, went even further. He called into question the implied freedom of political communication itself, essentially advocating that the court reconsider the existence of the doctrine, which it adopted 30 years ago.

That weak, implied freedom is the only safeguard of the right to political communication, because the Australian constitution, a colonial-era document adopted in 1901, contains no bill of rights or explicit guarantees of basic civil liberties.

In their judgments, the two dissenters, Stephen Gageler and Michelle Gordon, pointed to some of the FITS Act's fundamentally anti-democratic content.

"To be forced under pain of criminal sanction to register under a statutory scheme as a precondition to being permitted to engage in a category of political communication at all is to be subjected to a prior restraint on political communication," Gageler wrote. He said such "restraint" on political activity undercut a "common law freedom" that dated back to the overturn of the absolute monarchy in Britain during the 17th century.

Both Gageler and Gordon objected to the power given to the register secretary to secretly share information about registered groups with intelligence and police agencies.

Gordon said the FITS Act "overreached" by creating a separate repository of "scheme information," which was not made public, for sharing with the security agencies. She noted that the secretive register contradicted the official purpose of the legislation, which was to "improve the transparency" of activities linked to a foreign entity.

Gordon said the secretary had issued a notice under the Act requiring LibertyWorks to provide, among other things, documents that would identify the names of participants, and speakers, at its Sydney event. "Such a disclosure could discourage persons from participating in political discussion out of fear that their political views (especially if controversial) may be made public, or conveyed to law enforcement bodies, and have consequences for them," she noted.

Also demanded were copies, transcripts, video or audio recordings of speeches made by the speakers, summaries of topics covered at the conference, and material produced or distributed promoting the event.

The LibertyWorks event was part of the efforts to develop a Trump-style fascistic movement in Australia, under conditions of collapsing support for the longstanding parties of capitalist rule, Labor and the Coalition. But by targeting this event under the "foreign interference" laws, the authorities sought to clear the way for their use against left-wing and oppositional organisations.

Introduced under intense pressure from Washington to set a global lead for the adoption of such measures, the foreign interference legislation outlaws any supposedly "covert or deceptive" activity" in support of China or any other foreign entity. In last month's Zhang case, the High Court ruled that the use of an encrypted social media platform—of the sort millions of people use for privacy reasons—could constitute "covert" conduct.

The foreign interference legislation is aimed, above all, at criminalising opposition to Australia's role in the US-led preparations for war with China. It can also be used to illegalise the activities of publishers and whistleblowers exposing war crimes and government wrongdoing, as part of the efforts to suppress the emerging struggles of the Australian and global working class.

As the WSWS warned in 2018, the legislation constitutes a sweeping attack on free speech. Never before has it been a crime, punishable by up to 20 years' imprisonment, to work with an overseas group or individual, to seek political change, whether on issues relating to war, the environment, refugees, social inequality or any other political questions.