



Law Council
OF AUSTRALIA

15 June 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Office of the President

By email: pjcis@aph.gov.au

Dear Mr Hastie

Proposed amendments to the Foreign Influence Transparency Scheme Bill 2017 (FITS Bill)

1. Thank you for the opportunity for the Law Council to provide an additional written submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) review of the FITS Bill in light of the extensive proposed amendments provided to the Committee by the Attorney-General.
2. This submission has been prepared with the assistance of the Law Council's National Criminal Law Committee, Administrative Law Committee, Foreign Investment Committee, Not-for-Profit Legal Charities Group and Law Firms Australia.
3. The Attorney-General provided the Committee with a range of proposed amendments to the FITS Bill. The Attorney-General's amendments, in summary:
 - Limit who would be considered to be a 'foreign principal';
 - Narrow the instances where a person will be taken to be acting under the influence of a foreign principal by removing the term 'control' and removing the concept of 'funding or supervision' and 'collaboration' with a foreign principal;
 - Narrow the definition of 'activity for the purpose of political or governmental influence' to where there is a 'sole or primary purpose, or a substantial purpose' of influencing political matters;
 - Broaden the exemption for legal advice beyond just representation in proceedings, including in relation to an administrative process of a government involving the foreign principal;
 - Expand exemptions for: religious activities; government, commercial or business pursuits; industry representative bodies and personal representation in relation to administrative processes;
 - Clarify that the Act would not affect the law relating to parliamentary privilege or legal professional privilege and that the Secretary's power to obtain information and documents does not extend to circumstances in which these privileges apply;

- Limit the definition of ‘communications activity’ so that broadcasters, carriage service providers and publishers will not be required to register where they are undertaking their ordinary business on behalf of newly defined foreign principals; and
 - Create a transparency notice scheme that would allow the Secretary of the Attorney-General’s Department to issue transparency notices determining a person or organisation a foreign government related entity of individual for the purposes of the scheme.
4. This submission makes the following comments on the amendments of substance.

Improvements

5. Many of the amendments appear to pick up points raised by the Law Council in its submissions to the Committee dated 22 January 2018 and 15 February 2018.
6. The definition of ‘undertaking activity on behalf of a foreign principal’ (proposed section 11) is an improvement as it narrows the instances where a person will be taken to be acting under the influence of a foreign principal by removing the term ‘control’ and removing the concept of ‘funding or supervision’ and ‘collaboration’ with a foreign principal. As the Committee may recall, the Law Council recommended a definition aligned with the laws of agency, which is similar to the current proposal.
7. The removal of ‘funding’ in proposed paragraph 11(1)(e) assists charities (as well as the narrowing of the definition of foreign principal) as it is now clear that the charity would need to be following orders or a direction of a foreign principal and the foreign principal is connected with a foreign government. This also addresses the concern that the Law Council raised regarding the person not having any knowledge of the foreign principal’s involvement (e.g. in the case of a fundraising campaign where donations are received from multiple sources).
8. The definition of ‘activity for the purpose of political or governmental influence’ (proposed section 12) is also an improvement as it narrows activity to the ‘sole or primary purpose, or a substantial purpose’ of influencing political matters. The introduction of a sole, primary or substantial purpose into proposed section 12 is positive, although there may be some ambiguity as to what amounts to ‘a substantial purpose’. **The Law Council suggests** that consideration be given to replacing the term ‘substantial’ with ‘dominant’.
9. The exemption for legal advice (proposed section 25) is now broader than just representation in proceedings, which is an improvement and accords with the Law Council’s and Law Firms Australia’s alternative position. It also extends to primarily the provision of legal advice or legal representation in relation to an administrative process of a government involving the foreign principal. However, **the Law Council recommends** that the test be amended to ‘incidental to’ for consistency with the Federal Lobbying Code.
10. The relationship of the Act to certain privileges and immunities (proposed 9A) notes that the Act does not affect the law relating to parliamentary privilege or legal professional privilege (**LPP**). Further, the Secretary’s power to obtain information and documents does not extend to circumstances in which LPP or parliamentary privilege applies. Again, this is consistent with the Law Council’s previous position to the Committee.

11. 'Communications activity' has also been limited so that broadcasters, carriage service providers and publishers will not be required to register where they are undertaking their ordinary business on behalf of newly defined foreign principals. As the Committee may recall, the Law Council noted that while there were exemptions for publishers and broadcasters, there were concerns as to how it would interact with platforms such as social media. The amendments to 'communications activity' and the limiting of foreign principals appear to at least partly ameliorate these concerns.
12. While the above amendments are welcome, the Law Council emphasises the need for further improvements to be made to the FITS Bill, if it is to proceed.

Further amendments required

Foreign government related entity

13. The proposed definition of 'foreign government related entity' draws in companies where only 15% is owned by a foreign government, government related entity, political organisation or a foreign government related individual and also on other bases which may be difficult to apply. This definition does not align with other relevant Commonwealth legislation (*Corporations Act 2001* (Cth), the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the *Financial Sector (Shareholdings) Act 1998* (Cth)), each of which specifies 20% as the level at which control is assumed. The policy objectives of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the Bill are similar in that they seek to 'regulate' foreign activities in Australia. **The Law Council recommends** the percentage of ownership of which control is to be assumed should be the same: 20%.

Transparency notice scheme

14. The Law Council queries the need for a transparency notice scheme and has concerns about its operation. The only justification provided so far is in the Attorney-General's media release that:

This would allow the Government to investigate and declare where it considers companies or individuals are hiding their connections to foreign governments.

15. This is incorrect. The Secretary has extensive powers under proposed section 45 to investigate whether a person is liable to register in relation to a foreign principal. Moreover, the power to issue a transparency notice is not predicated on any investigation by the Secretary. Indeed, the Bill specifically excludes procedural fairness requirements, including requirements to notify the subject of a proposed transparency notice, and consider submissions made by that person.
16. The Secretary needs only to have a state of satisfaction before issuing a 'transparency notice' (proposed section 14A). The Secretary is not required to observe any requirements of procedural fairness. The notice comes into force immediately and remains until it is revoked. It may be varied during this period. Nevertheless, the notice is *prima facie* evidence that the subject is such an entity or individual (proposed subsection 14B (2)). The Secretary must revoke the notice if the Secretary ceases to be satisfied of the applicable matters, however, again procedural fairness does not apply to this decision (proposed section 14C). The Administrative Appeal Tribunal (**AAT**) may review these decisions (proposed section 14D). No action for defamation lies for any publication related to a transparency notice (proposed section 14E).

17. The satisfaction must meet administrative law standards. In being satisfied that a person is a foreign government related entity/individual, the Secretary must only consider relevant information and not act arbitrarily, in bad faith, or unreasonably.
18. A decision by the Secretary under proposed section 14A is reviewable by the AAT under proposed section 14D and the Law Council welcomes this. As such, the reasons for that decision can be requested (*AAT Act 1975 (Cth)* section 28) and, subject to meeting certain exemptions, including a certificate by the Attorney-General, must be provided (*AAT Act 1975 (Cth)* subsection 28(1)). In turn a decision of the AAT may be reviewed on a question of law by the Federal Court (*AAT Act 1975 (Cth)* subsection 44(1)) and on further review by the High Court. **The Law Council considers** it is essential for effective rights of review that the Secretary provides reasons containing an adequate explanation for these decisions.
19. Further amendments to the Bill should be made to align the transparency notice provisions to general administrative law principles. **The Law Council recommends** that the proposed subject of a transparency notice be given notice of the proposal and a statement of the material facts on the basis of which the Secretary is satisfied that the person is a foreign government-related entity or individual. Some modification of this may be permissible if it is necessary to withhold material facts on national security grounds (for example, revealing sources or methods). The Secretary should be required to accept and take into account submissions from the subject and a reasonable period should be allowed for submissions. The Bill could stipulate that this procedure can be waived if the Secretary reasonably considers that the need for the notice is so urgent that it should be issued without the notification process. In such a case, the Secretary should be required to provide the information to the subject along with the notification to the subject that the transparency notice has been made, recommended in paragraph 22.
20. In proceedings under the Bill, a transparency notice is 'prima facie' evidence of the matters in the notice and further evidence can be presented. So, in an AAT review on the merits, further evidence can be adduced as to the basis on which the Secretary was 'satisfied'. In a judicial review, the Federal Court will also apply administrative law standards, such as whether the state of satisfaction has been reasonably formed.
21. A transparency notice must be publicly available on 'a website' (proposed subsection 43(1A)). The Law Council notes that no particular website is specified. To meet administrative law transparency standards, and to make it easier for users, it would be preferable if a specified website such as that of the Attorney-General's Department were nominated. There is no requirement that the Secretary give a copy of the notice to the subject of the notice. **The Law Council recommends** that the Bill be amended to require a copy to be given to the subject of the notice (see paragraph 20 above).
22. There may be circumstances where a person affected by a notice applies to the Secretary to vary or revoke it. Proposed section 14C gives the Secretary power to vary or revoke a notice. However, in response to an application, the Secretary may refuse to vary or revoke the notice. This could include a case of breach of the Secretary's duty under proposed subsection 14D(2). Such a refusal decision should be subject to review by the AAT. **The Law Council therefore recommends** the insertion into proposed section 14D of a subparagraph vesting jurisdiction in the AAT to review a refusal by the Secretary to vary or revoke a transparency notice.
23. The effect of a transparency notice is to deem the person named in it to be a foreign government related individual/entity. In a prosecution for an offence, the practical

effect of a notice will be, effectively, to shift onto the accused the evidentiary burden of establishing that he/she is not a foreign government related individual/entity. Given that this fact is a critical element of the various offences (see below), the defendant should not bear that burden. **The Law Council recommends that the Bill be amended to state that a transparency notice does not reverse or affect any burden of proof that would otherwise apply.**

24. There is also the potential for the Crown to start a prosecution, get into difficulties and then for a notice to be issued that reverses the evidential burden as described above. It is not appropriate that the prosecution rely on a transparency notice issued after the proceedings are commenced or contemplated. **The Law Council recommends that the Bill be amended to state that the prosecution is not be entitled to rely on a transparency notice in these circumstances.**

Registration

25. Decisions about what to include for the purposes of registration on the website may include deciding what matters are 'commercially sensitive', affect 'national security' or are of a kind otherwise prescribed (proposed subsection 43(2)). Such matters are appropriately handled at the highest political or governmental level. The suggestion that such matters can be undertaken by less senior officials is of concern to the Law Council.
26. The Law Council would appreciate the opportunity to comment on what is contained in any Rules. Given their potential significance, for example, exclusion of reasons for inclusion on the register, matters which in the context of commercial sensitivity and national security could well have an adverse impact on individuals, this is the kind of detail on which the Law Council and other organisations might offer valuable views.

Offence for failure to apply for or renew registration – proposed section 57

27. The Law Council considers that the proposed section 57 as it is currently drafted has the potential to be unworkable and does not appear to make sense.

Proposed subsection 57(5):

28. Proposed subsection 57(1) as currently drafted requires a person to know that the person is required to apply for registration or renew the person's registration under the scheme in relation to a foreign principal by the end of the period and intentional omission to undertake such action. Further, it must then be proved that the person undertook an activity (which is registrable) on behalf of the foreign principal after the end of the period. Absolute liability is said to attach to this physical element of the offence, that is the person undertaking the activity on behalf of the foreign principal.
29. Undertaking an activity involves voluntariness, that is a wilful or intentional action, (conduct) which cannot be excluded by a provision purporting to attach absolute liability. The prosecution still has to prove that the person voluntarily undertook the stated activity. Absolute liability adds nothing to the normal requirements that the defendant engaged in some prohibited act.
30. The defendant's knowledge that they are undertaking registrable action on behalf of the foreign principal is the essence of the offence. **The Law Council recommends that the prosecution should have to prove this element of the offence, including the guilty mind attaching to the conduct.**

31. The same principles as to the application of absolute liability apply to the balance of proposed sections 57 and 57A. **The Law Council recommends that** proposed subsections 57(5) and 57A(5) should be removed from the Government amendments.
32. Further, adding to the complexity of these offences in this way is undesirable in terms of their practical operation.
33. In terms of proposed subsection 57(3), it is unclear as to what is envisaged by a reckless omission to register or renew in proposed paragraph 57(3)(b). If the defendant knew he/she was obliged to do register or renew, as set out in proposed paragraph 57(3)(a) does proposed paragraph 57(3)(b) mean that with that knowledge, the defendant knew he/she was taking a substantial and unjustifiable risk in the omission to register or renew? This does not make sense given that it is necessary to prove (by virtue of proposed paragraph 57(3)(a)) that he/she knew that he/she had to register or renew. Additionally, as the courts have said frequently in relation to recklessness, it should be avoided unless there is a clear case for it. Proposed subsection 57(4) has the same vice. Both sections are also complicated by including the words 'whether the person has omitted to do so'. **The Law Council recommends that**, if it is intended to retain this section, it must be redrafted to remove the uncertainty introduced by the word 'whether'.
34. Given the complicated nature of the obligations under the legislation, the mental element should be stated in very clear words in the section. This would mean for example that proposed paragraph 57(2)(a) should reference intention as per the heading to the offence and that recklessness should be deleted from the heading. It is difficult to understand how it could be proved that there is an intentional omission to register or renew (proposed paragraph 57(2)(b)) when there is only recklessness attaching to the requirement to register or renew (assuming that recklessness is the default fault element for proposed paragraph 57(1)(a)). If however, it is actually intended that proposed paragraph 57(2)(a) have a state of mind of recklessness attached, this should be clearly stated in the provision.
35. The Law Council queries how the same penalty is proposed to apply for knowing the requirements coupled with intentional omission and for knowing the requirements coupled with reckless omission (see proposed subsections 57(1) and (3)). Generally, intentional conduct that the Parliament determines to be of such significance to warrant a criminal offence would attract a higher penalty than an offence proved on the basis of reckless omission.

Offence for giving notice of end of liability to register while still liable to register – proposed section 57A

36. Similarly, proposed subsections 57A(2) and 57A(4) should clearly identify the fault element given the complex structure of the proposed offences and that imprisonment attaches.
37. The same issue arises with this offence provision in terms of the proposed introduction of absolute liability having the potential to render the offence provision nonsensical.

Defences

38. Specific defences are proposed in subsection 59(2) of the Bill. However, it is unclear why there are not specific defences for the more serious proposed offences in

sections 57 and 57A of the Bill. **The Law Council recommends that this is considered further prior to the Bill's passage in the Parliament.**

Self-incrimination, use of information for other purposes and disclosure to other agencies

39. The Law Council is concerned about the abrogation of self-incrimination where only a use immunity applies (proposed sections 45-47). The privilege against self-incrimination is a common law right that protects a person from compulsion to answer a question or produce a document. **The Law Council recommends that** given this is not a voluntary scheme and registration is in practical affect compelled, a derivative immunity should apply in addition to a use immunity.
40. When the Secretary has exercised the power under proposed section 46 to compulsorily obtain information, the privilege against self-incrimination being abrogated (proposed section 47), the Secretary is free to use that information for purposes other than the issue of a transparency notice and maintenance of the register. This is the effect of proposed section 53 and the table it contains. The Secretary may use the information for the purposes of a 'law enforcement related activity' by an 'enforcement body' as defined in the *Privacy Act 1988* (Cth), by disclosing it to the enforcement body. Information may also be used and disclosed to the relevant agencies for the purposes of protecting public revenue, protecting security, and for other purposes prescribed by the Rules. Disclosure is lawful regardless of whether the Secretary issues a transparency notice. These purposes go beyond the stated object in proposed section 3 of the FITS Bill and underline the seriousness of the abrogation of the privilege against self-incrimination. **The Law Council recommends** review of the table in proposed section 53.

Civil penalties

41. The Law Council maintains its view as expressed in its initial written submission to the Committee that consideration should be given to the availability of civil penalties to enforce compliance with the scheme rather than criminal penalties.

Thank you for the opportunity to provide a supplementary submission on these matters.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division [REDACTED] [REDACTED] in the first instance, if you require further information or clarification.

Yours sincerely

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President