

## Memorandum of Advice

- 1 This advice concerns whether News Corp Australia ('News Corp'), its officers and employees, and related corporations may have registration obligations under the Foreign Influence Transparency Scheme Act 2018 (Commonwealth) ('the Act').
- 2 In brief, they may be liable to register under the Scheme if they individually or collectively undertake registrable activities on behalf of a foreign principal or enter into a registrable arrangement with a foreign principal (section 18 of the Act).
- 3 The Act makes provision to give meaning to these terms.
- 4 Before considering these terms in detail, it is noted that there are exemptions in Part 2 Division 4 of the Act, to ensure that a person does not have to register under the Scheme for certain activities that commonly involve arrangements with foreign principals (for example, diplomatic and consular activities or activities for the purposes of providing humanitarian aid or humanitarian assistance).
- 5 No exemption exists for media activities as such, and 'communications activity' is expressly included as a registrable activity.
- 6 'Registrable activities' are identified in Part 2 Division 3 of the Act. Under section 21, an activity that a person undertakes on behalf of a foreign principal is registrable in relation to the foreign principal if it is, inter alia, communications activity, in Australia for the purpose of political or government influence on behalf of any kind of foreign principal.
- 7 By definition in section 10, a 'foreign principal' means:
  - (a) a foreign government;
  - (b) a foreign government related entity;
  - (c) a foreign political organisation;
  - (d) a foreign government related individual.
- 8 Section 11 provides that a person undertakes an activity 'on behalf of' a foreign principal if the person undertakes the activity, inter alia, under an arrangement with the foreign principal, or at the request of the foreign principal.
- 9 It does not matter whether consideration is payable for undertaking the activity (section 11(2)).

- 10 Under section 12, a person undertakes an activity for the purpose of political or governmental influence if the sole or primary purpose, or a substantial purpose, of the activity is to influence, inter alia, a process in relation to a federal election or a federal government decision, or proceedings of a House of Parliament, or influence the public in relation to such a process or proceeding.
- 11 'Influence' is defined in section 10 to include 'affect in any way'.
- 12 Under section 13, 'communications activity' is where a person 'communicates or distributes information or material to the public or a section of the public' or 'produces information or material for the purpose of the information or material being communicated or distributed to the public or a section of the public'.
- 13 The activity of News Corp amounts to 'communications activity' within the definition of this section.
- 14 However, section 13(3) deems activity not to be 'communications activity' under the Act where it is undertaken in the ordinary course of the business of the 'disseminator' and it is communicating or distributing, to the public or a section of the public, information or material:
- (i) *by a person other than the disseminator;*
  - (ii) *produced by the disseminator 'only to the extent that the disseminator alters the information or material, without affecting substance, to ensure compliance with the law or to fit time or space constraints';*
- and the identity of that other person (if produced on behalf of another person), or the identity of the producer of the information or material, is either apparent in the communicating or distributing or is disclosed in accordance with rules prescribed under the Act.
- 15 If News Corp therefore communicates or distributes information on behalf of a foreign principal to the public through its media outlets or platforms, the identity of the foreign principal must be apparent or disclosed in the communication to ensure that it is not 'communications activity' which is required to be registered under section 22 of the Act.
- 16 Relevantly, if News Corp through its journalists were to make an arrangement with a foreign principal to communicate information to the public, for the purpose of political or governmental influence, the activity would be registrable unless the identity of the foreign principal is apparent in the information published.
- 17 The Act requires, on its current broad interpretation, the disclosure of the identity of the foreign principal source either directly within the information

communicated to the public or through the registration of the communications activity under the Act.

- 18 Significantly, the registration and disclosure of communications activity undertaken on behalf of a foreign principal, required by the Act for the purpose of transparency or 'sunlight', would appear to override the protection provided to confidential sources.
- 19 The Act criminalises knowingly or recklessly failing to register, not the communication on behalf of a foreign principal in itself.
- 20 These matters may raise issues, not the subject of this advice, as to the validity of the Act in respect of the implied freedom of communication under the Constitution concerning political or governmental matters. The Commonwealth submits that the burden created by mere registration in such circumstances is reasonably appropriate and adapted to the legitimate purpose of the Act so as not to lead to the Act's invalidity: see Commonwealth submissions in *Libertyworks Inc v Commonwealth of Australia* (High Court S10/2020) [https://www.hcourt.gov.au/cases/case\\_s10-2020](https://www.hcourt.gov.au/cases/case_s10-2020).
- 21 An example of relevant activity by News Corp concerned the 'World Exclusive' article on 2 May 2020 under the headline '*China's Batty Science*' reported in the Daily Telegraph. The article stated that the Daily Telegraph had obtained a 15 page 'dossier' produced by 'Western governments' which declared that China had deliberately suppressed or destroyed evidence of the coronavirus outbreak that had cost tens of thousands of lives.
- 22 The article also referred to an investigation by the 'Five Eyes intelligence agencies' of the United States, Australia, New Zealand, Canada and the United Kingdom governments into the leak of the virus from a Chinese research laboratory.
- 23 Other media outlets (The Guardian and the Sydney Morning Herald) subsequently questioned the nature and source of the dossier and claimed that it had been disseminated in political circles of the Five Eyes, prior to the Daily Telegraph article, for political purposes.
- 24 It is not apparent from the article on whose behalf the dossier was communicated except the reference to it being produced by 'Western governments'.
- 25 The lack of identification of the source of the dossier would mean that the communication of that information to the public, for the purpose of political or governmental influence, was potentially registrable 'communications activity' under the Act.
- 26 If a foreign principal had provided the dossier exclusively to the Daily Telegraph, for publication to the public by arrangement or request, then the

'communications activity' was registrable and remains liable to be registered. The identity of the foreign principal would be required to be disclosed for transparency.

- 27 However the 'worldwide' exclusivity would not necessarily mean that it was provided to the Daily Telegraph by an arrangement with or request of a foreign principal. The Act simply ensures that if it had been, the foreign principal should be identified either in the communication itself or by registration under the Act.
- 28 In contrast, the reference in the Daily Telegraph article to the information provided of the investigation by the Five Eyes intelligence agencies did identify the foreign principals, if relevant, on whose behalf such information had been communicated to the public and there was no need to register their identities.

Bret Walker SC

Patrick George

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