



Monday, 22 January 2018

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email to: pjcis@aph.gov.au

Dear Sir / Madam,

Senate Inquiry - Foreign Influence Transparency Scheme Bill 2017

The American Chamber of Commerce in Australia is writing in response to the request for submissions in relation to the inquiry into the Foreign Influence Transparency Scheme Bill 2017.

The American Chamber of Commerce in Australia - better known as AmCham Australia - was founded in 1961 (as an Australian public company limited by guarantee) by Australian and American businesses to encourage the two-way flow of trade and investment between Australia and the United States, and to assist its members in furthering business contacts with other nations. As AmCham has grown and evolved over the years, its role has expanded to not only represent the views of American businesses, but also increasingly to speak for a broad range of AmCham members who are involved in the Australian business community.

The stated object of the Bill is to require the registration *'of persons who undertake certain activities on behalf of foreign governments, foreign businesses and other foreign principals'*. In assessing the potential impact of the Bill on AmCham and its members and how we and they conduct various activities, we have become concerned that the very broad wording of key definitions in the Bill will have the (possibly unintended) effect of either requiring AmCham to register multiple times in relation to a range of 'foreign principals', or to restrict some of its activities to exclude any person who would come within the definition of *'foreign principal'* (and thereby deprive those persons of the opportunity to participate in discussions about matters that are relevant to the conduct of business in Australia and the Australian business community).

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Our core objections to the scope of the Bill are as follows:

- Because the definition of '*foreign principal*' includes any foreign business or individual who is neither an Australian citizen nor a permanent Australian resident, it is likely that one or more of the participants in a variety of events run by AmCham will happen to be foreign principals. That will then raise the question of whether AmCham would be taken to be undertaking activity '*on behalf of*' that foreign principal.
- The definition of '*on behalf of*' in section 11 of the Bill is very broad, and includes undertaking an activity under an arrangement with a foreign principal, at the request of a foreign principal or in collaboration with the foreign principal. These references arguably could be interpreted to mean that an event run by AmCham in which one or more foreign principals participate (even if the foreign principals are a minority of the participants) is an activity undertaken on behalf of a foreign principal.
- We acknowledge that the registration requirements of the Bill are only triggered if the activity in question is a registrable activity. The types of activities which would require registration under section 21 of the Bill, however, are also very broad. In particular, any general political lobbying in Australia which is '*for the purpose of political or governmental influence*' is a registrable activity in relation to any kind of foreign principal. While on its face the requirement that there be a purpose of political or governmental influence would seem to be reasonable, the various defined terms in the Bill that relate to that requirement again are very broad. As a result, it is possible that any AmCham event that is directed at a Commonwealth public official, a member of a department agency or authority of the Commonwealth, a representative of a registered political party or a candidate in a federal election (all of whom come within the definition of '*general political lobbying*') could be taken to be general political lobbying for the purpose of political or governmental influence.

Definition of '*foreign principal*' in the context of the AmCham membership and event participants

'*Foreign principal*' is defined in the Bill as any of the following:

- a foreign government;
- a foreign public enterprise;
- a foreign political organisation;
- a foreign business; or
- an individual who is neither an Australian citizen nor a permanent Australian resident.

While AmCham understands why the first three types of entities are included in the definition, the rationale for including any foreign business or foreign individual is less clear, especially in a case where the foreign business or foreign individual conducts business in Australia or otherwise has significant contacts with Australia. Such a foreign business or individual may have the same interest as an Australian business or individual in decisions made or to be made by the federal government (because those decisions may affect that business or individual), and therefore should have the same freedom to express a view about those decisions. AmCham respectfully submits that a business or individual that does not have any association with a foreign government or political organisation should not be an object of special scrutiny simply because they are not Australian.

There are many examples within AmCham's membership of foreign individuals who are part of the Australian business community. AmCham has about 500 members, the majority of which are Australian companies or businesses. In addition, over 100 of AmCham's members are the Australian subsidiaries of American (or global) companies. While it is likely that those Australian subsidiaries would *not* be considered to be foreign principals because their businesses are operated through Australian companies, it is common for executives and employees of global businesses to be posted for periods of time in different countries, including Australia.

As a result, a number of representatives of AmCham members are likely to be foreign principals (because they are individuals who are neither Australian citizens nor permanent Australian residents) even though the companies that they represent are not foreign principals. This may also be the case for representatives of Australian companies that are headquartered in Australia but which have significant contacts with other countries (whether because they were founded by non-Australians, because they have significant operations or markets outside of Australia, or for other reasons).

Undertaking activity on behalf of a foreign principal

Under the Bill, the requirement to register only arises if a person '*undertakes an activity on behalf of a foreign principal*'. An activity is '*on behalf of*' a foreign principal if the activity is:

- under an arrangement with the foreign principal;
- in the service of the foreign principal;
- on the order of or at the request of the foreign principal;
- under the control or direction of the foreign principal;
- with funding or supervision by the foreign principal; or
- in collaboration with the foreign principal.

AmCham runs a variety of events, including networking lunches, boardroom discussion lunches, seminars, trade missions both in Australia and overseas, and '*door knocking*' meetings between government officials and representatives of various businesses.

Participants in AmCham events usually pay a fee for that participation, and most events are open to both members and non-members (although non-members pay a higher fee).

AmCham's concern is that, in running events, it would be considered to be undertaking an activity, and that, in inviting or allowing foreign individuals or representatives of foreign businesses to participate in its events, AmCham would be considered to be engaging in an activity under an arrangement with or in collaboration with a foreign principal, and with funding (that is, the payment of the fee) by a foreign principal. This would be the case even when the event is not directed at or for the primary benefit of foreign principals and the foreign principals are a minority of the participants.

Registrable activities

Under section 18 of the Bill, a person is only required to register if the person undertakes an activity on behalf of a foreign principal that is '*registrable*'. Under section 21, a key type of registrable activity is general political lobbying in Australia for the purpose of political or governmental influence.

The definitions of '*lobby*' and '*influence*' are expansive, with '*lobby*' including communicating, in any way, with a person or a group of persons for the purpose of influencing any process, decision or outcome, and '*influence*' including affecting in any way. Moreover, under section 12 of the Bill, in looking at the purpose of an activity, political influence need only be '*a*' purpose of an activity, and it need not be the main or a predominant purpose. Under section 14, the intention of either the person undertaking the activity or the foreign principal is taken into account in considering the purpose of an activity. In addition, the types of processes the influence of which will constitute political or governmental influence include a process in relation to a federal government decision, and a decision includes a decision of any kind in relation to any matter, including administrative, legislative and policy matters, whether or not the decision is final or is a formal decision.

Given the way these expressions are defined in the Bill, any event at which a Commonwealth public official or representative of a department, agency or authority of the Commonwealth is present and which a foreign individual attends with an intention to speak to that official or representative about a federal government decision could be taken to be a registrable activity. AmCham regularly organises events at which such activities could take place (even though those activities may be incidental to the main purpose of the event).

Representatives of AmCham members (as well as non-members) currently participate in AmCham events without any restrictions. If foreign individuals are considered to be foreign principals and the Bill becomes law, AmCham will need to consider the steps that it will need to take in order to either collect information about event participants and their intentions so that it can determine whether it is required to register in relation to any of those participants, or exclude foreign individuals and businesses from AmCham events where federal government officials are to participate (in order not to trigger a requirement to register).

Possible changes to the Bill to address these issues

AmCham believes that the Bill may not actually be intended to extend to the types of activities that are described in this letter. With that in mind, AmCham has some suggestions about ways that the scope of the Bill could be tailored better to capture only the types of foreign principals and activities that should be the focus of the Bill.

- Include in the definition of foreign principal only those foreign businesses and foreign individuals who do not engage in business or work or reside in Australia or who are associated with a foreign government or political party.
- Add an exemption to the Bill for event organisers.
- Require a person to register only if the foreign principal on whose behalf the person is taken to undertake a registrable activity does not participate in the activity. That is, the requirement for a person to register should not apply in a case where the person arranges an activity which the foreign principal personally attends or in which it publicly participates. In that case, the involvement of the foreign principal is fully transparent (because the foreign principal is the one engaging in the activity), and so there is no need for any registration to occur to disclose that involvement.

Thank you for your consideration, and for this opportunity to submit AmCham's views to this inquiry.

Yours sincerely,

April Palmerlee
Chief Executive Officer