Australian Government

Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report:

Review into the operation, effectiveness and implications of the *Foreign Influence Transparency Scheme Act 2018*

JUNE 2024

Introduction

The Parliamentary Joint Committee on Intelligence and Security (the Committee) was required by section 70 of the *Foreign Influence Transparency Scheme Act 2018* (FITS Act) to undertake a review into the operation, effectiveness and implications of the FITS Act within 3 years of commencement of the legislation.

On 27 March 2024, the Committee tabled its final report, 'Review of the *Foreign Influence Transparency Scheme Act 2018*' (the Report). The Report considered the administration and effectiveness of the FITS Act and made 14 recommendations, which focus on legislative reform, enforcement and oversight.

The Government welcomes the Committee's Report and is committed to substantial reform and overhaul of the Foreign Influence Transparency Scheme (the scheme).

The scheme is an important tool to support the integrity of Australia's democratic system and public confidence in our institutions. It is intended to bring to light foreign influence on Australia's political and governmental processes. It is important that there is public visibility of the nature, level and extent of foreign influence. By reducing the space in which foreign influence can be conducted covertly, the scheme can also deter corrupt, deceptive and clandestine activities.

The Government is committed to ensuring the FITS Act is fit for purpose. These significant reforms will be informed by the Committee's findings and build upon the experience of the first five years of the scheme's operation.

Recommendations

Recommendation 1: The Committee recommends that, given the significant flaws in the Foreign Influence Transparency Scheme, substantial reform is required if it is to meet its original intent and justify the compliance burden and resources required to administer it. Mere tinkering will not be sufficient.

Response: Agreed.

The purpose of the scheme is to provide visibility of the nature, level and extent of foreign influence on Australia's government and political processes.

The Government agrees that the scheme has failed to achieve its intended purpose, and that substantial legislative reform is required. The complexity of the current requirements in the FITS Act has led to a range of challenges in administering the scheme.

In the 2024-25 Budget, the Government has committed $71.6 million over the next 4 years to counter the growing threat of foreign interference and espionage in Australia. As part of this package, the Government has provided the Attorney-General's Department with funding of $2.1 million to undertake significant legislative reform of the FITS Act and to improve the scheme's ability to achieve its original purpose.

Recommendation 2: The Committee recommends that the definition of foreign government related entity (FGRE) under section 10 of the *Foreign Influence Transparency Scheme Act 2018* be amended to:

- Recognise a relationship of control through chains of holding and subsidiary companies between the target FGRE and the foreign government or foreign political organisation, no matter how many subsidiaries are involved;
- Recognise influence that may exist through a 'relevant interest' in shares or securities in an entity, similar to the approach taken in sections 608 and 609 of the *Corporations Act 2001*, to capture foreign principals that have influence over shares or securities in a FGRE, but not direct holdings;
- Add a new test to capture companies where there is any significant overlap in personnel between the membership of the board, executive committee or senior leadership of that company and a foreign principal's board membership, executive committee membership or senior leadership. This should apply to all incorporated and unincorporated associations;
- Clarify that ownership or control for the purpose of satisfying the tests to establish an entity as an FGRE includes where multiple foreign principals from the same foreign state are appointed as directors or executive committee members;
- Amend subparagraph (a)(v) and (b)(ii) of the definition of FGRE to replace the requirement for 'total or substantial control' from a foreign principal over an entity with wording to constitute a test of whether the foreign power has the opportunity or ability to direct or control, or actually directs or controls, the entity's activities in whole or in part; and
- Amend paragraph (c) of the definition of FGRE to reflect the multiple ways that political party control or influence can be exercised over an entity, by also recognising an entity as an FGRE when:
    - the foreign principal is a foreign political organisation;
    - a branch of the foreign political organisation has been established in the entity; and
    - the entity is required by law to assist or facilitate the activities of the branch of the foreign political organisation.

Response: Agreed in principle.

The Government agrees that amendments to the definition of FGRE under section 10 of the FITS Act are necessary to ensure that the scheme reflects the different ways in which a foreign principal can exert control over an entity. Further consideration is required to determine the most appropriate form of amendments and ensure there are no unintended consequences from amendments.

Recommendation 3: The Committee recommends that the definition of foreign government related individual (FGRI) under section 10 of the *Foreign Influence Transparency Scheme Act 2018* be amended to:

- Amend current subparagraph (b)(ii) of the definition of FGRI to replace the requirement for 'total or substantial control' from a foreign principal over an individual with wording to constitute a test of whether the foreign power has the opportunity or ability to direct or control, or actually directs or controls, the individual's activities in whole or in part; and
- Remove paragraph (a) of the definition of FGRI, to allow for Australian citizens and permanent residents to be considered an FGRI for the purposes of the FITS Act.

Response: Agreed in principle.

The Government agrees that changes to the definition of FGRI are required to reflect the diverse ways in which a foreign government, foreign government related entity or foreign political organisation may exercise control over an individual. Further consideration is required to determine the most appropriate form of amendments and ensure there are no unintended consequences from amendments.

Recommendation 4: The Committee recommends that exemptions under Part 2, Division 4 of the *Foreign Influence Transparency Scheme Act 2018* be improved by:

- Amending subsection 25A(c) to state that a person is exempt if the activity undertaken on behalf of a foreign principal is 'undertaken by an office holder in association with their office or appointment under a law of the Commonwealth, or under a law of a State or Territory', or words to a similar effect;
- Amending section 29 to remove the broad application of the current exemption for foreign government employees and commercial or business pursuits, to ensure that the exemption only applies to the regular activities of the employee in relation to their employment or the current operation of the commercial business or pursuit. Any amendment related to this exemption should ensure that lobbying or influence activities that may benefit the future state of that foreign principal's interactions with Australian governmental or commercial interests, either through regulation or tender processes, are not exempt from registration under the FITS;
- Amending the registered charities exemption under section 29C to ensure that any person undertaking activities for a charitable purpose, within the meaning of Part 3 of the *Charities Act 2013*, is exempt.
    - To ensure that this expansion is not used for malign purposes, subparagraph 29C(d) also be amended to require that the activity undertaken must be disclosed to the public.

Response: Agreed in part.

The Government supports:

- narrowing the exemption in subsection 25A(c) so that statutory office holders would generally be required to register activities undertaken in their personal capacities, and
- amending the exemption in section 29 of the FITS Act as recommended.

The Government considers that changes are needed to refine the scope of the charities exemption, to meet the important goal of a more consistent application to similar activities of charities and non-charities. However, further consideration is required to ensure there are no unintended consequences from amendments.

The current exemption for registered charities in section 29C exempts a person in relation to otherwise registrable activities if:

a) the person is a registered charity under the *Australian Charities and Not-for-profits Commission Act 2012*; and
b) the activity is undertaken in pursuit of a charitable purpose within the meaning of Part 3 of the Charities Act 2013; and
c) the activity is not a disbursement activity; and
d) at the time the activity is undertaken, both of the following matters are either apparent to the public or disclosed to the public:
    i. the fact that the person is undertaking the activity on behalf of a foreign principal;
    ii. the identity of the foreign principal.

This recommendation, if implemented, would exempt any person conducting an otherwise registrable activity for a charitable purpose, regardless of whether they are a charity registered

with the Australian Charities and Not-for-profits Commission, provided the identity of the foreign principal *and* the activity undertaken are disclosed to the public.

Due to the broad definition of 'charitable purpose' in subsection 12(1) of the *Charities Act 2013*, the Committee's recommended amendment would significantly broaden the scope of this exemption, which could inadvertently lead to the FITS Act exempting charitable activities of non-charities with a political purpose.

The Government will further consider the registered charities exemption as part of the broader review of all exemptions (Recommendation 5).

Recommendation 5: The Committee recommends that the Australian Government review all current and potential exemptions under the *Foreign Influence Transparency Scheme Act 2018*, with a view to including any further amendments to exemptions that may be warranted as part of legislative changes proposed to the FITS. The Committee further recommends that any future Bill put forward to amend the FITS Act, in response to this review or otherwise, be referred to this Committee for review and report.

Response: Agreed in principle.

The Government agrees that all current and potential exemptions under the FITS Act should be reviewed while considering broad opportunities for further reform to the FITS Act (Recommendation 1).

Further, the Government will consider referring any future Bills to amend the FITS Act to the Parliamentary Joint Committee on Intelligence and Security.

Recommendation 6: The Committee recommends that the *Foreign Influence Transparency Scheme Act 2018* be amended in the following ways to improve compulsory registration obligations on former Cabinet Ministers and recent designated position holders:

- Section 22 and 23 registrable activities obligations on former Cabinet Ministers and recent designated position holders be amended to preclude communications activities, as defined in section 13 of the *Foreign Influence Transparency Scheme Act 2018*, from registration where a foreign principal's involvement in that activity is apparent or declared and where the activity is not for the purposes of political or governmental influence in Australia; and
- Section 10 definitions, and related provisions as necessary, be amended so that registration obligations would apply to:
    - Ministers who are former members of the National Security Committee of Cabinet for their lifetime;
    - other former Cabinet Ministers for fifteen years; and
    - recent designated position holders for ten years.

Response: Agreed in principle.

The Government supports tailoring the FITS Act's obligations for former Cabinet Ministers and recent designated position holders to ensure that activity captured by the scheme provides a clear transparency benefit for decision-makers and the public.

The Government supports amending sections 22 and 23 of the FITS Act as recommended. These amendments would reduce compliance burden on former Cabinet Ministers and recent designated position holders who conduct speaking and writing engagements on behalf of foreign principals, such as interviews with state-owned broadcasters and talks at public universities.

The Government generally agrees that shorter timeframes for additional obligations on former Cabinet Ministers and recent designated position holders would be appropriate. The Government will further consider the most appropriate timeframes for additional obligations to apply.

Recommendation 7: The Committee recommends that the *Foreign Influence Transparency Scheme Act 2018* be amended to insert two new enforcement options into Part 5 of the Act, to enable the Secretary of the Department to:

- Register a person (meaning an individual or entity) when they are liable to register but have failed to do so. The Secretary must be required to invite a submission within a reasonable timeframe from the person regarding their apparent liability to register, and if still satisfied after considering any submission that registration is required, then the Secretary is required to register that person; and
- Place information on the register about any person who the Secretary considers should be registered but who has not registered voluntarily, or has otherwise not complied with the Act.

Response: Agreed.

These amendments would provide valuable new tools to promote compliance and address non-compliance with the scheme. Introducing these graduated enforcement measures would allow enforcement action to be taken in circumstances where cooperative engagement has not been successful. This will be progressed as part of the broader legislative reforms.

Recommendation 8: The Committee recommends that the *Foreign Influence Transparency Scheme Act 2018* be amended to:

- Require the Secretary, when issuing a transparency notice, to not only state that the subject is a foreign government related entity or individual, but also identify the relevant foreign principal and foreign jurisdiction to which the notice relates;
- Allow the Secretary to set an appropriate timeframe, of no less than ten business days, for the subject of a notice to make a submission under section 14C of the FITS Act; and provide that a provisional transparency notice becomes final 20 business days after the date set in the invitation to submit if not revoked by then; and
- Amend section 14D and subsection 43(2A) to repeal the requirement that provisional transparency notices be published, and instead provide that only final transparency notices are published and taken to be in force for the purposes of the Act.

Response: Agreed.

These amendments would ensure transparency notices provide a range of information that is commensurate with ordinary registrations under the scheme, ensure adequate time to provide submissions on notices, and afford greater procedural fairness to the subjects of transparency notices.

Recommendation 9: The Committee recommends that the *Foreign Influence Transparency Scheme Act 2018* be amended to:

- Clarify the definition of 'on behalf of' in section 11 so that it only captures circumstances where the person undertaking the activities knew or should reasonably have known that the activities would benefit the foreign principal, either directly or indirectly;
- Clarify information requirements under sections 16, 39, 45 and 46 to explicitly state that the power of the Secretary to request information is limited to the extent of information required for administration of the Act;
- Amend Division 3 of Part 4 to clarify that the Secretary cannot issue information gathering notices for any information other than what is required for the administration of the scheme; and
- Amend section 50 to preclude information gathered from the public domain as 'scheme information' for reporting purposes.

Response: Agreed.

The Government supports these recommendations to improve the functionality of the scheme.

Amending the definition of 'on behalf of' as recommended would address comments made by Steward J, Gordon J and Edelman J in *LibertyWorks Inc v Commonwealth of Australia* (2021) HCA 18 regarding the breadth of the definition of 'on behalf of' and respond to concerns that the current definition may extend beyond the established common law concept of agency.

The proposed amendments to sections 16, 39, 45 and 46, and Division 3 of Part 4 would clarify to registrants and notice recipients that information can only be requested for the purposes of administering the scheme, and cannot be used to gather information for other purposes.

Amending the definition of 'scheme information' to exclude information that is already in the public domain would provide greater flexibility with how such information is used and handled. Personal information collected from public sources for the purposes of the FITS Act would continue to be collected, use and disclosed in accordance with the *Privacy Act 1988* and the Australian Government Agencies Privacy Code.

Recommendation 10: The Committee recommends that, within three months of any legislative amendments to the *Foreign Influence Transparency Scheme Act 2018* resulting from this report coming into effect, the Australian Government establish a working group including the Attorney-General's Department, the Department of Foreign Affairs and Trade and nominated university and higher education stakeholders to review the application of both the Foreign Influence Transparency Scheme and the Foreign Arrangements Scheme, and identify good practice and options to ease the regulatory burden on the sector in complying with both schemes.

Response: Agreed in principle.

The Attorney-General's Department will collaborate with the Department of Foreign Affairs and Trade (DFAT) to consult with the university and higher education sector in relation to the application of the Foreign Influence Transparency Scheme and the Foreign Arrangements Scheme. The Government notes that existing forums, such as the University Foreign Interference Taskforce and the DFAT University Forum, may be appropriate to facilitate this consultation where appropriate.

In implementing this recommendation, the Government will have regard to the timing of the review of the Foreign Arrangements Scheme under section 63A of the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020.*

Recommendation 11: The Committee recommends that the Government review the resourcing of the administering department of the *Foreign Influence Transparency Scheme Act 2018* to ensure that both the level and capacity of staffing is sufficient to support the timely and efficient administration of the scheme, including any workload increases arising from the recommendations of this report.

Response: Agreed.

As part of the department's appropriation, funding is allocated for the administration of the scheme. As noted at Recommendation 1, in the 2024-25 Budget, the Government has provided the department with additional funding of $2.1 million to undertake legislative reform of the FITS Act.

The Government will continue to monitor the department's resourcing to ensure that there is sufficient staffing to support the administration of the scheme and legislative reforms to improve the operation of the scheme.

Recommendation 12: The Committee recommends that the Auditor-General consider undertaking a performance audit of the administration and outcomes to date of the Foreign Influence Transparency Scheme before and/or after the implementation of any changes in response to this report.

Response: Noted.

The Government acknowledges that the inclusion of potential audit topics on the Australian National Audit Office's Annual Audit Work Program is a matter for the Auditor-General.

Recommendation 13: The Committee recommends that section 70 of the *Foreign Influence Transparency Scheme Act 2018* be amended to provide that the Parliamentary Joint Committee on Intelligence and Security initiate a further statutory review of the operation, effectiveness and implications of the Foreign Influence Transparency Scheme, including amendments resulting from the recommendations of this report. This review should commence not less than three years after legislative amendments resulting from this report come into effect.

Response: Agreed.

The Government welcomes the recommendation for a further review of the FITS Act, including any amendments resulting from the recommendations of this report.

Recommendation 14: Noting that the FITS concerns foreign influence not interference, the Committee recommends that the Government refer a review of the operation, effectiveness and implications of the amendments made by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* to the Parliamentary Joint Committee on Intelligence and Security. Such a reference should be couched in terms that allow the Committee to avoid unnecessary duplication or conflict with any relevant reviews being undertaken by the Independent National Security Legislation Monitor.

Response: Noted.

The Independent National Security Legislation Monitor (INSLM) is currently reviewing the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (the Act). Pursuant to subsection 6(1B) of the *Independent National Security Legislation Monitor Act 2010*, this comprehensive review will consider the following provisions of Chapter 5 of the *Criminal Code*:

- Division 82 (sabotage)
- Part 5.2 (espionage and related offences)
- Part 5.6 (secrecy of information).

The Government will carefully consider the INSLM's comprehensive review of these provisions in the Criminal Code and any recommendations made before further references to this Committee are considered.