23 January 2018

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

By email: pjcis@aph.gov.au

Dear Committee Secretary,

The Joint Media Organisations appreciate the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *Foreign Influence Transparency Scheme Bill 2017* (the Bill).

The organisations that make up the Joint Media Organisations are AAP, Australian Subscription Television and Radio Association (ASTRA), Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV Australia, HT&E, MEAA, News Corp Australia, and The West Australian. On this occasion the public broadcasters are not signatories to this submission.

We again raise significant concerns regarding legislation before the Committee for consideration.

RECOMMENDATIONS

- We recommend that the legislation apply ONLY to foreign governments and businesses and/or individuals operating on behalf of foreign governments; and
- Regardless of the above, it is essential that a broad exemption for media organisations be incorporated in the Bill. This is the only way to ensure public interest reporting can continue and Australians are informed of what is going on in their country, and the business of media organisations is maintained.

We do not support the Bill progressing unless these amendments are incorporated into the Bill.

THE STATED PURPOSE OF THE BILL

The impact to media organisations is substantial in both commercial and editorial terms.

We thought it would be useful to re-publish the purpose and intention of the Bill at the outset of this submission.

The impact to media organisations is also the creation of an uneven playing field for business interaction with the Australian government; subjecting media companies of foreign principals operating in Australia to comply with a regulatory scheme, the details of which are not yet known; and likely making ALL media organisations comply with the scheme because of commercial content arrangements.

The Explanatory Memorandum says that the Bill '*establishes a scheme that identifies the forms and sources of foreign influence exerted in Australia*'. It goes on to say '*the scheme will enhance government and public knowledge of the level and extent to which foreign sources may have impact over the conduct of Australia's elections, Government and parliamentary decision-making, and the creation and implementation of laws and policies'.*

It goes on the say that *'the scheme will cover activities which are inherently political in nature, such as lobbying of members of parliament, as well as activities undertaken with the specific purpose of political or government interference'.*

It should be noted that criminal offences apply for non-compliance.

Detailed analysis of the Bill as it relates to the business (commercial) and editorial aspects of media organisations follows.

PREAMBLE

Foreign government influence exerted in Australia – via business or individuals – is a serious matter, and we support the Australian Government turning its mind to this issue and heightening accountability and transparency measures.

However, foreign principals operating businesses in Australia – business or individuals – and not associated or working on behalf of foreign governments to influence the Australian government should not be captured by the Bill. This includes, but is not limited to, media organisations.

RECOMMENDATION 1: THE BILL SHOULD BE CONFINED TO FOREIGN GOVERNMENT INFLUENCE

First and foremost, we recommend that the legislation apply ONLY to foreign governments and businesses and/or individuals operating on behalf of foreign governments for the purpose of influencing the Australian government.

There should be a level playing field for foreign principals – be they businesses or individuals – that operate in Australia and domestic principals (businesses and/or individuals) that operate in Australia to participate in the business of the Australian government. This is particularly so in relation to the intersection of business and government regarding the operating environment – which is the same operating environment experienced by domestic principals.

Foreign principals – businesses and individuals – should not be subjected to the legislation and registration schemes as proposed by the Bill just because they are operating in the Australian business environment. In fact, given that there is an ongoing cost to foreign principals for the ongoing operation of the scheme, and because of the proposed criminal penalties, it seems reasonable to more narrowly target the scheme rather than take a lowest common denominator approach.

While the EM notes that costs will be incurred by foreign principals to register and maintain that registration, the amount of that cost to businesses and individuals is unknown. We also note that nothing else about the

scheme itself – including its administrative burden – is known. This is a less than satisfactory approach to policy implementation.

Again, we recommend that the legislation apply ONLY to foreign governments and businesses and/or individuals operating on behalf of foreign governments.

RECOMMENDATION 2: MEDIA ORGANISATIONS SHOULD NOT BE SUBJECT TO THE BILL. A MEDIA ORGANISATION EXEMPTION MUST BE ADOPTED

In addition to the broad application of the Bill, we hold serious concerns regarding the impact of this proposed law on our media businesses – in terms of both our editorial and commercial activities – regardless of the exceptions drafted in the Bill.

Specifically, it is unclear what the Government sees as the problem that needs to be solved regarding media companies (regardless of their foreign status) and our businesses in the context of foreign influence. This has not been articulated, including in the EM.

This lack of 'reason' is exacerbated as the Bill and the EM seem naïve regarding how media companies operate (commercially) and their role in Australia's democracy (editorially) – again, regardless of their foreign principal status.

Lack of commercial awareness in the Bill, and the commercial consequences that result

The proposed exemptions in sections 13 and 28 suggest some intention to ensure broadcasters and publishers are not captured by the scheme in relation to the content on their platforms. However, the drafting of the exemptions is flawed, and appears to suggest a serious misunderstanding of both the nature of media organisations' businesses and the chain of relationships which form in the business of content distribution. Unfortunately, the construction of the exemptions is so mismatched with media businesses as to make the exemptions inoperable.

To the extent that a media business is described in the EM, it illustrates a lack of understanding of the operation of media businesses and/or rushed drafting. We draw attention to paragraph 213 of the EM. It says:

> *An example of the intended operation of subsection 13(4) is as follows. Person A in Australia has an arrangement with Country X to engage in communications activities on its behalf. Person A pays a news outlet to insert an advertisement in a newspaper urging members of the Parliament to vote against proposed changes to the Australian Government's policy relating to Antarctica. By merely publishing the advertisement, the publisher of the newspaper would not be engaging in* ***communications activity*** *under the Act. Rather, the person who produced the advertisement on behalf of the foreign principal would be engaging in* ***communications activity*** *and subject to the obligations imposed by the Act. The obligation is on Person A to ensure that he or she complies with the requirements of the Act in relation to* ***communications activity*** *(including section 38,which establishes requirements for disclosure of communications activity.)*

The example illustrates what the parties to this submission strongly believe and recommend is the intent of the legislation – that the legislation apply ONLY to:

- foreign governments (Country X in the example); and
- businesses and/or individuals operating on behalf of foreign governments for the purpose of influencing the Australian government (Person A in the example).

However, the drafting of the Bill – and the example in the EM – fundamentally misunderstands the business of media organisations including the commercial relationships for content supply across all categories.

While the EM states that communications activities are not intended to be captured by s.13 merely because media organisations are communicating or distributing information via their services, the wording of the provision does not capture all of the services that are provided by media organisations. For example broadcasters undertake communications activities other than 'broadcast' as they electronically transmit information and materials. Those services should fall outside of the scope of the legislation.

The EM example relates to advertising material – which runs across TV, radio, print and digital media. It could take any/all of the forms of information and material that constitutes communications activity as described at ss.13(2). The EM example describes one way that advertising may be placed. Increasingly Person A is an online advertising exchange.

However, there are many permutations of the example provided in the EM which in our view, would mean the scenario would fall outside the exemptions in the Bill, including but not limited to:

- Person A may be in Australia
- Person A may not be in Australia
- Person A pays an advertising exchange to advertise online
- Person A is an online advertising exchange
- The foreign entity looking to influence the Australian government may be a foreign business or foreign individual operating a business in Australia
- The foreign entity looking to influence the Australian government may be a foreign business or individual residing in Australia

In fact, there may be no Person A – no intermediary as given in the example.

This is an important consideration. There are two (2) primary business models in commercial media – subscription and advertising.

Regarding the advertising model, broadcasters in TV and radio and their digital counterparts, and also print and its digital counterparts, may write and/or design advertisements at the request of advertisers, thereby exercising a modest level of control over the advertising content, ostensibly pushing it outside of the Bill's exemptions. It could be that the advertising content is requested direct from the media organisation by a foreign principal. We are concerned that developing content at the request of a foreign principal would see the media company engaging in 'communications activity' as defined by the Bill and therefore subject to the registration/disclosure obligation. This would be the case even though the media company has no relationship with the foreign principal other than as an advertising client, and despite the fact that the media company is only engaging in 'communications activity' for the purposes of running a business (ie, as opposed the media companies having the purpose of influencing government decisions and processes). In these situations, it is our view that the obligations in the Bill should fall onto the foreign principal, and not the media organisation.

The above analysis indicates that the exemptions in subsections ss.13(3) (for broadcast and carriage service providers) and ss.13(4) for 'periodicals', are meaningless – in fact of no use – in the case of media organisations running ads that they assist to produce as part of their commercial offering.

The perverse outcome of this scenario could be that:

- A foreign principal (in the EM example, Country X) no longer goes direct to the media organisation for the service of advertising content creation or execution, copywriting, image/video sale and placement, or minor editing for formatting – rather the foreign principal goes to an agency for the same service, including ad placement;
- This means that the ad still runs, but the revenue generated by the ad development that would have gone to the media company now goes to an advertising agency because the media organisation that would have previously had some involvement in the creation/production of the ad seemingly merely 'passes through' the content – although will have a contact with the agency or some other entity for the placement of the ad. The outcome is still the same – the ad runs, however there has been a

redirection of revenue from one class of business to another, an outcome which seems completely unrelated to the purpose of the Bill

The above scenario paints a story of the very real impact of the practical operation of the Bill. We are therefore are concerned that the Government is, perhaps indirectly, picking winners in an industry supply chain – without changing any impact on the outcome of the ad running or not.

- Contracts for content supply are typical business arrangements for media organisation

  Contracts for content supply are typical business arrangements for media organisations; and the content – be it news, current affairs or entertainment – may contain information and material from a foreign principal that is attempting to influence the Australian government.

  Media organisations do not merely act as the conduit, or merely 'pass through' content in the same way that a carriage service provider does (the two platforms have differences, despite being grouped together in section 13). In the course of undertaking their commercial and editorial businesses ALL media organisations have contractual arrangements in place for the supply of content – be that for the supply of news, current affairs or entertainment. This means there is a relationship with the content provider that does not exist for platforms whose business is solely distribution (ie, carriage service providers). And each and every one piece of that content may contain information or material from a foreign principal that is attempting to influence the Australian government.

  Even a comedy skit or a cartoon, or news or current affairs may contain information about – say same sex marriage – that may be intended to influence the Australian government in either direction, even after legislation is passed.

  Our concern is that the construction of section 13 misunderstands this fundamental aspect of media businesses and predicates the exemption on the false notion that broadcasters and publishers are mere distribution platforms (or 'dumb pipes').

  To require media companies to be subjected to the scheme because they communicate information and materials and have *an arrangement in place with a foreign principal to undertake communication activities for the purpose of political or government influence* is overreach in the extreme. ALL media companies – regardless of their own foreign principal status – would have to register to mitigate the risk of any content running foul of the scheme. Examples of content supply arrangements are not restricted to Russia Today, they could very well include television programs like The Simpsons, Saturday Night Live, Last Week Tonight with John Oliver, and Jimmy Kimmell. This could feasibly extend to news and current affairs panel programs like ABC's Q&A guest panellists that are, or represent, foreign principals that may be putting a view to influence the Australian government. These are to name but a few in the realm of TV. There are content supply agreements amongst publishers such as The Financial Times and Fairfax's Australian Financial Review, The Guardian's global content, The Wall Street Journal arrangements at News Corp Australia's The Australian. There is also a multitude of podcasts that could illustrate this point.

  It is incomprehensible that by virtue of doing what a media organisation does – informs people via news, current affairs and entertainment – that it would be caught by the scheme regardless of its foreign principal status. The existence of exemptions in the Bill suggests this is not the intention; however the outcome of the drafting is that media organisations would be caught.

  Another perverse result of the Bill could well be that media organisations that are not foreign principals will prefer non-foreign principal content – be that news, current affairs and/or entertainment – enabling domestic principals to influence the government. This could occur because of the substantially decreased burden resulting from offering communication activities to domestic principals

over foreign principals, and domestic principals taking advantage of the relatively decreased red-tape and regulatory burdens on their communication distribution – giving those entities an unnecessary and unfair advantage in influencing the Australian government. This, we assume, is not what the Government intended when it set about designing the Bill including its outcomes.

- Native content

  Native content is a significant part of the media eco-system and a growing revenue stream for media organisations. Native content is often created within media companies, using editorial and content development expertise, to deliver (clearly marked) content for clients. There may or may not be an intermediary involved (akin to Person A in the EM example).

  Those clients can be foreign principals and/or domestic principals.

  Again, there could be significant commercial ramifications for media organisations were this type of content and service supply to fall foul of the Bill. It would also create an uneven playing field which is less burdensome for a media organisation to supply and develop content and distribution for domestic principals. This means that the supply of the service and content distribution to foreign principals would be comparatively more expensive and burdensome and therefore provides disincentives to media organisations for meeting the needs of some clients over others. We are sure this was not, and is not, the intention of the Bill.

Lack of awareness of the editorial role of media organisations in the Bill, and the consequences

Notwithstanding the above commercial issues, media organisations play a vital role in democracies, including Australia's democracy.

- When a media organisation is itself a foreign principal

  All of these issues are exacerbated, at least in the first instance, when the media organisation is itself a foreign principal.

  In the case where the media organisation is itself a foreign principal, issues may arise regardless of whether or not the foreign principal or the content – which may be from another foreign principal – may be attempting to influence government policy. We add that media organisations are entirely within their rights to do this as part of their usual business operations and operating in Australia. Examples could include SBS and ABC funding, media organisations including print and online mastheads arguing for freedom of speech, and commercial television's support for free-to-air sporting events.

  This is another very sound reason why the legislation must be limited ONLY to foreign governments and business and businesses and/or individuals operating on behalf of foreign governments.

- Media organisations are active contributors to Australian society

  Media organisations regularly run campaigns on behalf of consumers, urging governments across the country, including the Federal Government, to take action of specific matters. One of those campaigns was the Sunday Telegraph's 'No Jab No Play' campaign regarding childhood vaccinations and access to childcare service. That campaign did influence the Australian government into taking action. That campaign was undertaken by the Sunday Telegraph, a News Corp Australia masthead, which is a masthead of a foreign principal.

  Under the Bill campaigns like these – that improved health outcomes for children and therefore increased social well being more broadly – may not be able to be undertaken and would at least be

more burdensome to undertake, with compliance with the regime and costs and administrative burdens falling heavily on the media organisation and its journalists.

Not only would it be more burdensome, the exception for news media would not apply in this case due to its extremely narrow range.

The Bill applies to 'traditional' media platforms but does not apply to digital media platforms (like Facebook, Google and Twitter) – the asymmetric application of regulation results in a significantly uneven playing field

The Bill applies to the 'traditional' media platforms (TV, radio and print) but DOES NOT apply to the new digital media platforms like Facebook, Google, Twitter and Netflix.

Those new digital media platforms operate in the same way as 'traditional' media platforms and communications activities of information and materials. They also take advertising from foreign and domestic principals. Yet the two categories – traditional and new digital platforms – are not treated in the same manner under the Bill. While the new digital platforms are not subject to the Bill as a person undertaking communications activity the traditional media companies

The asymmetrical application of regulation in this way is perplexing and brings us back to the question of what it is that the Bill is attempting to 'fix'. It is very likely to result in commercial detriment to the traditional media companies who will wear the burden of communication activities without any workable exemptions; and also be burdened by compliance costs and obligations and the impact on their operations. This is in stark contrast to the new digital platforms that will be unencumbered by such unnecessary regulation.

This is another solid reason for a broad exemption for media organisations is incorporated in the Bill. This is the only way to ensure public interest reporting can continue and Australians are informed of what is going on in their country, and the business of media organisations – including those that serve Australian communities (regardless of their foreign principal status) – is maintained.

THE EXEMPTION FOR NEWS MEDIA (s.28) AND COMMERCIAL OR BUSINESS PURSUITS (s.29) ARE NARROW AND DO NOT PROVIDE ADEQUATE 'EXEMPTIONS' FOR DAY-TO-DAY ACTIVITIES OF MEDIA COMPANIES

- **The exemption for news media is unacceptably narrow and not fit-for-purpose**

  The apparent exemption for news media is drafted so narrowly as to not be fit-for-purpose for any media organisation. As described in detail above, this lack of functionality is particularly so given that any commercial content supply arrangements with a foreign principal may contain material to influence the Australian government and can and will likely include not just content supply for news but also entertainment.

  The purported exemption is further limited by the way it is drafted. It states that the exception applies to foreign principals (businesses or individuals) when *the [communications] activity is solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media.*

  The exceptionally narrow definition is untenable and unacceptable to media organisations.

  The news media exemption would not apply to the 'No Jab No Play' campaign described above. Even if it did apply, given that we have no details about the scheme and its compliance requirements, it is difficult to ascertain whether what would be required (possibly across an entire editorial operation of a media organisation) would stack up from a cost/benefit perspective to run a campaign like 'No Jab No Play' again. Included in this assessment would need to be consideration of whether a government

would take on the issue once raised, given the origin of the issue being raised by a business or individual on a foreign influence register.

- **The exemption for commercial or business pursuits is also narrow and unworkable**

  Like the exemption for news media, our assessment of the exemption for commercial or business pursuits is also narrow in its application and unworkable – heightened by the description at paragraph 210 of the EM which states that it is the intention of the Bill to require registration by any media organisation that has arrangements with a foreign principal.

  We are very firmly of the view that business relationships should not be codified, and these arrangements are no different.

Again, we cannot see that the Government intended outcomes like those we have detailed in this submission. We urge the Committee to assess all potential outcomes of the Bill and its intended and unintended consequences and seek an alternative outcome that does not undermine the business and editorial role of media organisations in Australia – regardless of their ownership status.

Most importantly we ask the Committee not to rush the assessment of the Bill and recommended amendments like previous PJCIS considerations of national security bills and related bills impacting the ability for the media to undertake public interest reporting.

Lastly, we reiterate our recommendations:

- We recommend that the legislation apply ONLY to foreign governments and businesses and/or individuals operating on behalf of foreign governments; and
- Regardless of the above, it is essential that a broad exemption for media organisations be incorporated in the Bill. This is the only way to ensure public interest reporting can continue and Australians are informed of what is going on in their country, and the business of media organisations is maintained.