



Email

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
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Canberra ACT 2600

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Dear Sir / Madam

Parliamentary Joint Committee on Intelligence and Security review of Foreign Influence Transparency Scheme Bill 2017

Law Firms Australia (LFA) appreciates the opportunity to provide a submission on the Foreign Influence Transparency Scheme Bill 2017 ('the Bill').

LFA represents Australia's leading multi-jurisdictional law firms, being Allens, Ashurst, Clayton Utz, Corrs Chambers Westgarth, DLA Piper Australia, Herbert Smith Freehills, King & Wood Mallesons, MinterEllison and Norton Rose Fulbright Australia. LFA is also a constituent body of the Law Council of Australia, the peak representative organisation of the Australian legal profession.

This submission briefly outlines the content and purpose of the Bill before considering whether certain provisions of the Bill are appropriate for achieving its purpose. For the reasons set out below, LFA submits that certain definitions in the Bill and/or the legal advice and representation exemption at cl 25 of the Bill should be amended and that the registration and reporting obligations should be clarified.

1. Overview and purpose of the Bill

- 1.1 If enacted, the Bill will introduce a scheme that will require the registration of persons undertaking certain lobbying activities on behalf of foreign governments, businesses, individuals and other foreign principals. The scheme is to be known as the Foreign Influence Transparency Scheme ('the Scheme').
- 1.2 Registrants will be under an ongoing disclosure obligation to provide information about their relationship with the foreign principal and the lobbying activities undertaken on behalf of that principal.
- 1.3 Criminal offences punishable by terms of imprisonment will be established for persons undertaking registrable activities who knowingly do not fulfil the Scheme's registration obligations, or recklessly do not renew their registration. Strict liability offences will be established for persons undertaking registrable activities who do not fulfil the Scheme's registration obligations.
- 1.4 The purpose of the Bill is outlined in the explanatory memorandum. Broadly, it seeks to ensure through the register that the influence, if any, of foreign actors in Commonwealth decisions and elections is revealed. The need for the Scheme is to overcome the issue of foreign actors using Australian intermediaries to covertly further their interests. This is noted at [3] of the explanatory memorandum, where it is stated:

...it is difficult to assess the interests of foreign actors when they use intermediaries to advance their interests through activities such as lobbying or

communication of information or material. When the relationship between the foreign actor and the intermediary is concealed, the ability to assess the interests being brought to bear on a particular decision or process is limited and ultimately undermines the ability of the decision-maker and the public to evaluate and reach informed decisions on the basis of those representations.

- 1.5 It is important to note that it is not an aim of the Scheme to prevent foreign actors from making representations to, or communicating with, the Commonwealth Government, the federal Parliament, federal political parties or the Australian public at large, but rather to ensure that the identity of the foreign actor that seeks to benefit from such representations is known to relevant decision-makers. This is made clear at [5] of the explanatory memorandum, which states:

The scheme does not prohibit the involvement of foreign actors in Australia's political and governmental processes. Rather, it simply imposes a requirement that, when a person is undertaking activities on behalf of a foreign actor, this is made transparent to the decision-maker and the Australian public, so that they are able to accurately assess the interests being brought to bear.

2. Relevant provisions

- 2.1 Clause 21 of the Bill prescribes registrable activities 'for the purpose of political or governmental influence.' A person will be found to have undertaken an activity for such a purpose if it is a purpose of the activity to influence, directly or indirectly, any aspect of a number of processes, including in relation to a federal election, a federal government decision, political party or proceedings of a House of Parliament.¹
- 2.2 Activities that will trigger registration under the Scheme if undertaken for the purpose of political or governmental influence include 'parliamentary lobbying,' 'political lobbying' and a 'communications activity.'²
- 2.3 Clause 10 of the Bill defines the following key terms:
- (a) 'lobby' is defined as including:
 - (i) to communicate, in any way, with a person or a group of persons for the purpose of influencing any process, decision or outcome; and
 - (ii) to represent the interests of a person, in any process.
 - (b) 'general political lobbying' is defined as lobbying:
 - (i) a Commonwealth public official;
 - (ii) a Department, agency or authority of the Commonwealth;
 - (iii) a registered political party; or
 - (iv) a candidate in a federal election;

¹ The Bill, cl 12

² The Bill, cl 21

unless that lobbying also constitutes parliamentary lobbying.

- (c) 'parliamentary lobbying' is defined as lobbying a Member of Parliament or staff members.
- 2.4 'Communications activity' is defined as an activity where a person 'communicates or distributes information or material'.³
- 2.5 Clause 25 of the Bill contains a narrow exemption with respect to legal advice or representation. A person is exempt from registration obligations under the Scheme with respect to work undertaken on behalf of a foreign principal if the activity is solely, or solely for the purposes of, the provision of legal advice or legal representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings.
- 2.6 The explanatory memorandum states the intent of the provision to be that both legal advice and legal representation must be in relation to judicial, criminal or civil law enforcement inquiries, investigations or proceedings for the exemption to be invoked.⁴ It is noted however that this is not necessarily the case on the present drafting of the provision.
- 2.7 Clause 29 of the Bill contains an exemption with respect to commercial activities taken on behalf of a foreign business or a foreign individual. A person is exempt from registration obligations under the Scheme in relation to an activity undertaken on behalf of a foreign business or foreign individual if:
- (a) the activity is solely, or solely for the purposes of, the pursuit of bona fide business or commercial interests in relation to preparing to negotiate, negotiating, or concluding, a contract for the provision of goods or services; and
 - (b) the activity in no way relates to national security, defence or public infrastructure within the meaning of Division 82 of the Criminal Code.
- 2.8 Clause 34(4) of the Bill states examples of circumstances in which a person who is registered in relation to a foreign principal must give a notice to the Secretary administering the Scheme of a material change of circumstances. The examples are:
- (a) the person starts to undertake another kind of registrable activity on behalf of the foreign principal;
 - (b) another kind of registrable activity is added to the activities the person is to undertake under an arrangement with the foreign principal;
 - (c) the person ceases to be exempt in relation to an activity the person undertakes on behalf of the foreign principal; and
 - (d) consideration starts to be paid, or there is a change in consideration payable, to the person in relation to registrable activities undertaken on behalf of the foreign principal.

³ The Bill, cl 13. As 'information or material' is defined in cl 13(2) of the Bill to include oral, electronic and written information, it is difficult to imagine a circumstance where parliamentary lobbying will not also constitute a communications activity. This may result in unintended consequences for foreign governments in the context of cl 21 and what constitutes a registrable activity.

⁴ Explanatory memorandum, [328]

3. Issues with the scope of the Bill

- 3.1 The definitions in clauses 10, 12 and 13, when read together in cl 21, cover a wide range of conduct. The explanatory memorandum to the Bill explains that this is intentional; the breadth of 'political or governmental influence' is to 'capture all of the persons, entities, structures or processes that are part of Australia's political and governmental architecture,'⁵ and the breadth of 'communications activity' is 'intended to capture the various ways in which information or materials can be communicated, including as technologies and practices change over time.'⁶
- 3.2 The breadth of the definitions associated with registrable activities means great reliance falls upon the seven exemptions in Part 2, Division 4 to ensure that the following activities are excluded from the operation of the Scheme:
- (a) activities that do not fall within the purpose of the legislation, and
 - (b) activities for which the registration burden created by the Scheme outweigh the low risk that the activities represent.
- 3.3 There are a number of activities regularly undertaken by law firms that are likely to be registrable activities if the Bill is enacted that will not fall within the exemptions. A number of such examples are outlined immediately below. They are all registrable as each example:
- (a) involves general political lobbying, including communication with Commonwealth public officials or agencies of the Commonwealth with the purpose of influencing a decision or process, and
 - (b) is for the purpose of political or governmental influence, being to influence, directly or indirectly, federal government decisions or processes for those decisions.

A Responding to a Commonwealth tender

Action: A law firm is engaged by a foreign enterprise to respond to a Commonwealth procurement solicitation. This may be anything from a Request for Information to a Request for a Formal Tender. Advice provided by the law firm is likely to involve specific legal issues, such as what is the effect of a 'liquidated damages' clause.

The law firm will be required to register in respect of the activity of providing the advice because a purpose of the advice is to influence, even though indirectly, a process in relation to a federal government decision, being the procurement decision.

Exemptions: The exemptions will not apply. The advice is not given in the context of judicial, criminal or civil law enforcement inquiries, investigations or proceedings. The advice is also not given in the context of preparing to negotiate, or negotiating, a contract; the Commonwealth at this stage has not indicated whether the response will be successful. Commonwealth request documentation generally expressly states that there is no contract; the request is not to be

⁵ Explanatory memorandum, [149]

⁶ Explanatory memorandum, [118]

considered an offer, and; unless the foreign enterprise is selected as a preferred tender, there will be no contract negotiations.

B Seeking a “no objection” notification under the *Foreign Acquisitions and Takeovers Act 1975*

Action: A law firm is engaged by a foreign principal to act on an acquisition that is a significant action under the *Foreign Acquisitions and Takeovers Act 1975*. This would involve the law firm seeking a 'no objection' letter from the Treasurer under that Act.

Exemptions: The exemptions will not apply. The action is not for judicial, criminal or civil law enforcement inquiries, investigations or proceedings and it is not solely for preparing to negotiate, negotiating, or concluding, a contract, even though it may be connected or related to the preparation of a contract.

C Amendment demands under the *Personal Property Securities Act 2009*

Action: If a foreign enterprise borrows money to buy equipment in Australia, the lender's security interest in the equipment is likely to be registered under the *Personal Property Securities Act 2009*.

If the foreign enterprise pays out the loan, but the registration is not discharged, the foreign enterprise may engage a law firm to act for it in relation to discharging the registration. The firm could give the lender an amendment demand, and in turn apply to the Registrar, being a Commonwealth public official appointed under the Act, to have the registration discharged under Part 5.6 of the Act. The Registrar may, following the Part 5.6 process and provided the Registrar does not suspect the registration is valid, discharge the registration.

Exemptions: The exemptions will not apply. The action is not for judicial, criminal or civil law enforcement inquiries, investigations or proceedings and it does not relate solely to preparing to negotiate, negotiating, or concluding, a contract for the provision of goods or services.

D Bankruptcy

Action: A law firm is engaged by a foreign individual resident in Australia to advise on the individual's financial affairs. The law firm advises the individual to present a debtor's petition to the Official Receiver, being a Commonwealth public official appointed by the Attorney-General, and assists the foreign individual resident to prepare and lodge the petition. The law firm will be required to register in respect of the activities of assisting the foreign individual resident to prepare and lodge the petition.

Exemptions: The exemptions will not apply. The action is not for judicial, criminal or civil law enforcement inquiries, investigations or proceedings and it does not relate solely to preparing to negotiate, negotiating, or concluding, a contract for the provision of goods or services.

E Incorporation of a company

Action: A law firm is requested by a foreign principal to apply to the Australian Securities and Investment Commission to incorporate a proprietary company.

Exemptions: The exemptions will not apply. The action is not for judicial, criminal or civil law enforcement inquiries, investigations or proceedings and it does not relate solely to preparing to negotiate, negotiating, or concluding, a contract for the provision of goods or services.

3.4 In each of these examples, law firms will be preparing or making the application in the name of the foreign principal. As such, the interest of the foreign principal will be clear to the relevant decision-makers and the public at large. The inclusion of such activities as registrable is unnecessary and onerous in light of the purpose of the Scheme. There is no covert foreign influence to be revealed.

4. Possible amendments to scope

4.1 There are two alternative amendments that may be made to the Bill.

4.2 First, the definition of 'lobby' at cl 10 of the Bill should be amended to exclude representations made to Government in the normal course of professional services. There are at least two ways that this could be achieved:

(a) A provision similar to cl 3.5(f) of the Lobbying Code of Conduct could be adopted. It states:

3.5 *"Lobbyist" means any person, company or organisation who conducts lobbying activities on behalf of a third party client or whose employees conduct lobbying activities on behalf of a third party client, but does not include:*

a. ...

f. *members of professions, such as doctors, lawyers or accountants, and other service providers, who make occasional representations to Government on behalf of others in a way that is incidental to the provision to them of their professional or other services. However, if a significant or regular part of the services offered by a person employed or engaged by a firm of lawyers, doctors, accountants or other service providers involves lobbying activities on behalf of clients of that firm, the firm and the person offering those services must register and identify the clients for whom they carry out lobbying activities.*

(b) The approach taken at cls 13(3) and 13(4) of the Bill with respect to the activities of broadcasters, carriage service providers, and publishers of periodicals could be adopted. This would result in cl 10 being amended such that professional service providers, such as lawyers, doctors and accountants, do not undertake lobbying only because they provide a service in the normal course of their profession.

4.3 Secondly, the legal advice or representation exemption at cl 25 should be expanded. Given that the client in receipt of legal advice or representation will always be clear, the narrow application of the exemption to 'judicial, criminal or civil law enforcement inquiries, investigations or proceedings' is unnecessary. That phrase should be omitted.

4.4 Furthermore, the terms 'solely by way of' and 'solely for the purposes of' are unduly restrictive. Although the terms are not defined, the explanatory memorandum states that 'the terms are

intended to convey that activities covered by the exemption at section 25 must be able to be completely and wholly considered as legal advice or legal representation.⁷

- 4.5 Actions that are incidental to the provision of legal advice or representation, for instance providing commercial advice, should not prevent law firms from relying on the cl 25 exemption. LFA submits that cl 25 should be amended to the effect that a lawyer is exempt in relation to an activity the lawyer undertakes on behalf of a foreign principal if the activity is, or is incidental to, the provision of legal advice or legal representation.
- 4.6 Finally, it is important that any registration requirement on lawyers with respect to legal services does not conflict with legal professional privilege obligations. LFA submits that a sub-clause should be included in cl 25 to the effect that if a person provides legal advice or legal representation to a foreign principal that does not fall within the legal advice or representation exemption, then that person's compliance with his or her registration obligations under the Scheme will not result in any waiver or forfeiture of legal professional privilege in relation to that advice or representation, nor will it result in any breach by that person of any of his or her legal and professional obligations to the foreign principal.

5. Reporting requirements


- 5.1 Clause 43(1) of the Bill requires persons to provide a notice to the Secretary administering the scheme of any change in circumstances that would result in information previously provided to the Secretary becoming 'inaccurate or misleading in a material particular.' As the Bill does not specify what information must be provided to the Secretary at registration, and indeed the Secretary may require any information to be provided that they consider appropriate,⁸ this is potentially a very burdensome provision.
- 5.2 Further, cl 43(4)(d) is particularly onerous for law firms as many law firms are engaged on the basis of quotations and estimates. Costs agreements are changed to increase fees if the costs of a matter were underestimated. In some matters, for some clients, this can be a regular occurrence. The Bill would require law firms to report all increases in estimates and cost agreements for registrable activities to the Secretary. It is not clear how the fulfilment of this obligation increases transparency with respect to foreign influence on governmental, parliamentary or political affairs.
- 5.3 LFA submits that registration and reporting requirements should be clarified within the Bill. The reporting burden on registrants should only be as great as to ensure that information necessary to reveal covert foreign influence is provided.

6. Summary

- 6.1 As outlined above, the purpose of the Bill is to ensure that, where relevant, the interests of foreign actors in decisions relating to governmental, parliamentary or political affairs is revealed to decision-makers and the public. The need for the Scheme is to address the issue of foreign actors using Australian intermediaries to covertly further their interests.
- 6.2 The Bill as drafted is such that law firms instructed by foreign businesses to make applications to the Commonwealth Government or its entities would likely be required to register under the Scheme. This is despite the fact that there would be no foreign influence to be revealed given that such applications would be made in the name of the foreign business.

⁷ Explanatory memorandum, [329]

⁸ The Bill, cl 42(2)

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- 6.3 Accordingly, LFA submits that amendments should be made to the definition of 'lobby' at cl 10 of the Bill and/or the legal advice or representation exemption at cl 25 to ensure that lawyers providing advice or representation in the normal course of their professional services are not subject to the Scheme. Registration and reporting requirements should also be clarified.
- 6.4 LFA appreciates the opportunity to provide a submission on the Bill. Please do not hesitate to contact me if the points above require clarification or if LFA can provide further information that will be of assistance to the Committee.

Yours faithfully

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Law Firms Australia