Australian Government
Attorney-General's Department

Supplementary submission to the review of the *Foreign Influence Transparency Scheme Act 2018*

Parliamentary Joint Committee on Intelligence and Security

Contents

Introduction

The Attorney-General's Department (the department) welcomes the review by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of the *Foreign Influence Transparency Scheme Act 2018* (FITS Act). The FITS Act established the Foreign Influence Transparency Scheme (the Scheme) which is a transparency measure that supports the integrity of Australia's democratic system. The purpose of the Scheme is to provide visibility of the nature, level and extent of influence on Australia's federal government and political processes by persons acting on behalf of foreign governments and foreign political organisations.

The department made a submission to the review in 2021 which provided:

- an overview of the importance of transparency of foreign influence
- a summary of the Scheme's purpose, objectives and achievements
- information about the department's experience administering and implementing the Scheme, and
- information on potential options to enhance the Scheme's effectiveness and operation.

Opportunities to improve the Scheme and enhance transparency

As outlined in the department's first submission to the review, the Scheme has been effective in building greater awareness and transparency of foreign influence in Australia's federal government and political processes. However, the department has experienced some challenges administering the Scheme and has identified options to improve aspects of the FITS Act to better enable it to deliver on its transparency objective.

This submission provides further information on some of those options where the department has developed more detailed proposals in the intervening period, and also identifies some additional options for the PJCIS to consider. These include options to:

- amend the definition of 'foreign principal' and associated terms, to reduce the complexity of aspects of those definitions and address limitations in their application in particular circumstances
- strengthen the enforcement framework in the FITS Act by introducing graduated enforcement options
- ensure that exemptions to the requirement to register are clear, appropriate and fit for purpose
- improve the operation of the transparency notice regime, and
- make other technical amendments to improve the functionality and administration of the Scheme.

This submission should be read in conjunction with the department's first submission to the review. The first submission included a number of options to amend the Scheme that the PJCIS may wish to consider, including opportunities to affirm the purpose of the Scheme, tailor the obligations on former Cabinet Ministers and recent designated position holders, and enhance operational arrangements. The department continues to support those options. However, the department no longer recommends considering the introduction of infringement notices as part of a graduated set of enforcement options under the FITS Act. This issue is discussed further in Part 2 of this submission.

The department considers that the options outlined in this submission, and the department's first submission, would benefit from consideration by stakeholders, the public and the parliament, including through this inquiry. Several of the options outlined in this submission would have resourcing implications, which would need to be considered should the PJCIS recommend their implementation.

1. The definition of 'foreign principal' and associated terms

The definition of 'foreign principal' is a core component of the FITS Act which requires people and organisations to register if they undertake registrable activities in Australia on behalf of a foreign principal for the purpose of political or governmental influence.

Section 10 of the FITS Act provides that 'foreign principals' are foreign governments, foreign political organisations, foreign government related entities (FGRE) and foreign government related individuals (FGRI). Each of these terms are further defined. Broadly speaking, the FGRE and FGRI definitions are directed at persons over which a foreign government or political organisation exercises control, either legally or in practice.

As noted in the department's first submission to this review, the complexity of these definitions means that it can be challenging for individuals to determine whether the entity they are acting on behalf of is a FGRE or FGRI, even after applying reasonable due diligence. This increases the administrative burden for registrants and likely results in fewer people proactively registering under the Scheme. It also complicates the department's ability to establish whether particular entities are foreign principals within the meaning of the FITS Act, to provide prospective registrants with greater clarity, and to determine if the Secretary of the department should issue a transparency notice.

The department has set out two options to amend the definition of foreign principal for the PJCIS' consideration, which are intended to ensure the legislative thresholds are fit for purpose and to ensure the Act is able to more easily capture non-transparent relationships and arrangements.

Option 1: Targeted amendments to the definitions of FGRE and FGRI

One option would be to make targeted amendments to the definition of foreign principal to address practical issues that have arisen in the implementation of the Scheme, particularly in relation to the definitions of FGRE and FGRI. This option would be consistent with the current purpose of the FITS Act, being to provide visibility of the nature, level and extent of influence on Australian federal political and government processes by persons acting on behalf of foreign governments and foreign political organisations. The amendments would seek to ensure that the FGRE and FGRI definitions are able to capture a broader range of individuals and entities that are under the control or direction of a foreign principal, and would improve the elements of these definitions that have proven most difficult to apply in practice.

The definition of FGRE, in particular, contains a combination of objectively-determinable limbs (such as subparagraphs (a)(i) to (iii) which go to the ownership, voting rights or composition of the board of an entity) and limbs that seek to capture informal relationships of control (such as subparagraph (a)(iv) which deals, among other things, with the circumstance where the directors of an entity are accustomed to act in accordance with the directions, instructions or wishes of a foreign principal). While it is important for the definition to capture informal relationships of control, the limbs of the definition that target informal relationships are typically more challenging to establish. This is because they require prospective registrants or the department to obtain and consider potentially extensive information about the relationship between a foreign principal and the

directors or officers of a company or entity. Such information is rarely in the public domain and may be circumstantial in nature.

As such, it is important that the definitions of FGRE and FGRI reflect the diversity of ways in which a foreign government or political organisation may exercise control over an entity or individual. The department considers that these definitions could be enhanced through targeted amendments, in particular, to:

- broaden the definition of FGRE to capture a wider range of company, governance and management structures that can enable a foreign principal to exercise control over an entity
- expand the scope of paragraph (c) of the definition of FGRE so that it better reflects the ways in which foreign governments may legislate to embed political control or influence in entities, and
- extend the definition of FGRI to cover Australian citizens and permanent residents, consistent with the approach that the Act currently takes to Australian companies and organisations which may be FGREs.

Targeted amendments to these definitions are likely to address some of the challenges outlined above. However, the department notes that there will likely continue to be cases where it is not possible to establish a person's link to a foreign government or foreign political organisation to the requisite legal standard, particularly where that link is deliberately concealed.

FGRE definition, paragraph (a) – corporate structures

Subparagraphs (a)(i) to (iii) of the FGRE definition contain thresholds that deal with particular structural features of a company's ownership and control. These limbs provide that a company will be a FGRE if a foreign government or foreign political organisation holds more than 15% of the company's issued share capital or voting power, or is in a position to appoint at least 20% of the company's board of directors.

These limbs of the FGRE definition go to objective features of a company's ownership or control. However, they do not reflect the full range of corporate and governance structures that can enable a foreign principal to exercise control over an entity and therefore limit the application of the Act in practice. The PJCIS may wish to consider recommending targeted amendments to the FGRE definition, set out below, which would allow the Act to capture more complex corporate and governance structures.

(i.) Amending the definition to allow it to capture **chains of holding and subsidiary companies**. The current FGRE definition does not allow the relationship between an entity and foreign principal to be made out through chains of subsidiaries. This is because the definition requires a FGRE to be related to a foreign government or foreign political organisation, but not related via another FGRE. This has made it difficult to apply the Act to complex corporate structures.

(ii.) Amending the FGRE definition to account for **influence over shares or securities** which goes beyond ownership or the holding of rights. As outlined above, subparagraphs (a)(i) and (ii) of the FGRE definition currently apply where a foreign principal 'holds' more than 15% of the issued share capital of or voting power in a company. This has made it challenging to apply the Act in circumstances where the foreign principal has the ability to control the relevant share capital indirectly through an intermediary or subsidiary. Amendments to account for influence over shares or securities based on the

well-established principles in the *Corporations Act 2001* for determining when a person has a 'relevant interest' in shares would address these challenges.

(iii.) Adding a new test in the FGRE definition to capture companies, as well as other entities covered by paragraphs (b) and (c) of the definition, where there is a level of **overlap between the membership of the board, executive committee or senior leadership and a foreign principal's board membership, executive committee membership or senior leadership**. At present, subparagraph (a)(iii) of the definition of FGRE applies where a foreign principal is 'in a position' to appoint at least 20% of a company's board of directors. The proposed amendment would apply to incorporated and unincorporated associations, and a wider range of companies, where there is a practice of appointing directors or executive committee members across related entities as a means of exercising control or influence, but which may not meet the existing legislative thresholds in the FGRE definition.

(iv.) Amendments to **clarify that the Act applies where there is split ownership or control by foreign principals from the same foreign state**. This would place beyond doubt that the control they collectively exercise over an entity can be considered together when attempting to satisfy the FGRE thresholds, consistent with the intent of the existing definition.

FGRE definition, subparagraphs (a)(v) and (b)(ii), and FGRI definition, subparagraph (b)(ii) – total or substantial control

Subparagraphs (a)(v) and (b)(ii) of the definition of FGRE and subparagraph (b)(ii) of the definition of FGRI apply where a foreign principal is in a position to exercise 'total or substantial control' over the entity or individual.

Based on the department's practical experience in administering the Scheme, the threshold of 'total or substantial control' is a high bar. It involves establishing that the foreign principal can exercise a considerable level of control, or control over the essential aspects of the entity or individual. The threshold is relatively straightforward to satisfy in the case of government-owned corporations, noting that such companies would generally also be covered by subparagraph (a)(i) to (iii) of the definition.

The threshold may, however, operate to exclude some companies or entities from being foreign principals for the purposes of the Act, notwithstanding a high degree of foreign government control over key aspects of their activities or operations. This is particularly likely to be the case in circumstances where a foreign government may exercise legal or practical control over key parts or aspects of an entity's activities (such as its strategic objectives, critical investments, or public communications), without exercising control over the entity's day-to-day commercial or operating activities.

The PJCIS may wish to consider recommending that this threshold be amended to more closely align with the concept of control by a foreign power contained in Schedule 13 of the UK Government's National Security Bill, which provides that a person is controlled by a foreign power if the foreign power has the right to direct or control, or actually directs or controls, the person's activities in whole *or in part*. The department considers that it would be appropriate for an entity or individual to be a foreign principal for the purposes Scheme in circumstances where a foreign government or foreign political organisation is in a position to exercise control over the whole of, or part of, the entity's or individual's activities, as outlined above.

FGRE definition, paragraph (c) – requirement to be a member of a foreign political organisation

The test in paragraph (c) of the FGRE definition applies where the foreign principal is a foreign political organisation and a director, officer or employee of the person is required to be a member of that organisation, and the requirement is contained in a law, the constitution or rules or other governing documents of the person. The purpose of this provision is to ensure that entities are captured by the Act in circumstances where:

- the law of the relevant jurisdiction confers significant control or influence over entities on the ruling political party rather than the government itself, which is a more common feature in jurisdictions where, compared to liberal democracies like Australia, there is less separation between the government and the ruling party, or
- the entity has been established by, or for the purposes of, a foreign political organisation (which would generally be reflected in the entity's constitutive documents).

Based on practical experience, the department has found that the current test in paragraph (c) of the FGRE definition does not fully reflect the ways in which foreign governments may legislate to embed party control or influence in entities.

To address this, the PJCIS may wish to consider recommending amendments to this test so it also applies where:

- 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.

FGRI definition – consider whether Australian citizens should be able to be FGRIs

The current definition of FGRI provides that an individual is an FGRI if they are neither an Australian citizen nor a permanent Australian resident, and they are related to a foreign principal in either of the following ways:

- the individual is accustomed or under an obligation to act in accordance with the directions, instructions or wishes of the foreign principal
- the foreign principal is in a position to exercise total or substantial control over the individual.

This definition is intended to capture individuals who are under the control or direction of a foreign principal. As indicated above, currently FGRIs can only be individuals who are neither an Australian citizen nor a permanent resident. This has had two effects. First, it has precluded the department from considering issuing transparency notices to indicate that an individual is a FGRI on the basis that they are under the control or direction of a foreign principal if they are an Australian citizen or permanent resident. Second, it has precluded the department from considering whether third parties undertaking registrable activities on behalf of such Australian individuals may have registration obligations.

The PJCIS may wish to consider the merits of allowing Australian citizens and permanent residents to be FGRIs. Such an amendment would more closely align the definition of FGRI with the definition of FGRE, which can apply to Australian companies and organisations. The department considers that this aspect of the definition of FGRE is a strength of the Act as it recognises that Australian companies and organisations may be subject to the control or direction of a foreign principal, for

example where they are an Australian subsidiary of a foreign government corporation, or the Australian chapter of a foreign political organisation. In a similar way, an Australian citizen or permanent resident may be subject to the control or direction of a foreign government or political organisation.

Amending the definition of FGRI in this manner would expand the scope of registration obligations under the Scheme, as people undertaking registrable activities on behalf of Australians citizens and permanent residents who are FGRIs would also be required to register. However, the existing exemptions to the requirement to register in Part 2, Division 4 of the FITS Act would continue to apply. Of note, section 29B of the FITS Act exempts individuals who make representations on behalf of family members or friends who are also foreign principals, if they are representing them in good faith in relation to a government administrative process or matters affecting their personal welfare.

The department considers that such an expansion would be proportionate, and would ensure a consistent approach to the registration obligations for persons undertaking registrable activities on behalf of other categories of foreign principals.

Option 2: Broaden the scope of the Scheme by expanding the definition of foreign principal

Alternatively, the PJCIS may wish to consider recommending that the definition of 'foreign principal' be broadened, to include:

- foreign governments – consistent with the current definition
- foreign political organisations – consistent with the current definition
- foreign entities – rather than only FGREs, and
- foreign individuals – rather than only FGRIs.

Broadening the definition in this manner would extend the scope of the Scheme so that it applies to a broader range of persons, such as foreign business and foreign public enterprises. This would more closely align the FITS Act with the Foreign Influence Transparency Scheme Bill 2017 (FITS Bill) as it was originally introduced, and with the United States (US) and United Kingdom's (UK) current or proposed foreign influence schemes.

The US is currently the only other like-minded country with an established foreign influence scheme, being the *Foreign Agents Registration Act 1938* (FARA). The UK Government has also introduced a National Security Bill that would, among other things, establish a Foreign Influence Registration Scheme (FIRS). The US FARA and UK FIRS both adopt broader definitions of 'foreign principal' that include foreign businesses and entities. FARA provides that a foreign principal includes foreign governments, foreign political parties, any person outside the US and any entity organised under the laws of a foreign country or having its principal place of business in a foreign country. Similarly, the UK's proposed FIRS provides that foreign principal includes a foreign power (such as a government, government agency, or authority), a foreign body corporate or association established outside the UK.

As a result of these broader definitions, both FARA and the proposed FIRS capture foreign influence exerted by a broader range of actors. In this case of FARA, this broader definition (coupled with the comparatively larger size of the US Government and FARA not requiring the influence activities to be for the purpose of political and governmental influence) has likely contributed to a higher number of registrations under FARA compared to Australia's scheme, and greater transparency about sources of foreign influence in the US. For example, between July to December 2020 (FARA's most recent

public statistics) there were 455 active registrations representing 704 foreign principals under FARA[1], whereas at 12 December 2022 Australia's scheme had a total of 61 active registrations on behalf of 140 foreign principals.

Expanding the definition of a foreign principal in the FITS Act so that it applies to a broader range of persons would have a number of advantages. For example, it would:

- ensure the Act is more easily able to capture government influence that is exercised through purportedly non-government foreign entities, particularly relating to jurisdictions where the distinction between the public and private sectors is less pronounced than in Australia
- provide a more comprehensive picture of all foreign influence on Australia's federal government and political systems, which can occur through foreign governments, organisations, commercial enterprises and individual actors – it would reflect the public interest in knowing about any activities that are undertaken on behalf of any foreign entity that seek to influence Australian federal politics and policy, and
- provide prospective registrants with greater certainty about their obligations and promote a more consistent application of the Scheme by relying on concepts that are more easily understood and simpler to define, such as 'foreign business' and 'foreign individual'.

This option would extend the regulatory burden of registration obligations to more entities and individuals. However, the regulatory burden would only apply to those engaging in registrable activities for the purpose of exercising federal political or governmental influence. The burden associated with registration is also modest, and the Act contains a range of appropriately targeted exemptions that would further mitigate this burden, including for:

- commercial and business pursuits (section 29)
- industry peak bodies (section 29A) and certain registered organisations (section 29E), acting in the interests of their members
- persons making personal representations on behalf of a family member of personal associate (section 29B)
- charities undertaking activities in pursuit of a charitable purpose (section 29C), and
- artistic purposes (section 29D).

This option is likely to have resourcing implications for the department's administration of the Scheme, noting the increase in persons covered by the Scheme, which would need to be considered.

Retain coverage of Australian entities that are controlled by a foreign principal

As noted above, one advantage of the current definitions of FGRE and FGRI is that they capture entities and individuals who are established or based in Australia (who are not Australian citizens or permanent residents), but that are under the control of a foreign government or foreign political organisation. As a result, the Scheme is able to provide transparency about influence activities undertaken on behalf of Australian businesses, organisations and individuals that are subsidiaries of, or acting on behalf of, a foreign principal.

FARA and FIRS differ from Australia's scheme in this respect as they frame their foreign principal definitions around the place an entity is established. FIRS also includes a proposed power for the Secretary of State to specify that an entity is subject to foreign power control, which would potentially capture entities established in the UK on a case-by-case basis.

[1] https://www.justice.gov/nsd-fara/page/file/1514411/download.

If the definition of foreign principal in the Act is expanded, the department considers it would be beneficial to retain this feature of the FGRE and FGRI definitions to enable them to continue to capture onshore subsidiaries and proxies.

2. Introduce graduated enforcement mechanisms

The department seeks to promote compliance by entities and individuals with their obligations under the FITS Act as the most efficient and effective way to achieve the Scheme's transparency objectives. The Act contains statutory information gathering powers and criminal offence provisions. As a matter of practice, the department considers using these powers in cases where the department is concerned that an entity may remain non-compliant following cooperative engagement (such as contacting an entity to recommend that it consider its obligations under the Scheme). The existence of information gathering and enforcement options is important to ensure that entities and individuals comply with the Scheme.

In its first submission, the department set out options to strengthen the enforcement framework in the Act by introducing additional, graduated enforcement options to address non-compliance with the Scheme. One option was to explore a power to issue infringement notices for cases of minor infringements rather than relying on prosecution of criminal offences in all cases. The department has further considered this option in the intervening period and no longer recommends pursuing it. Infringement notice regimes should generally only apply to strict or absolute liability offences involving relatively minor contraventions of the law, where an enforcement officer can easily make an assessment of guilt or innocence. As such, an infringement notice regime may not be suitable for most of the offences in the FITS Act.

Another proposal the department suggested exploring was a power to compel registration. The department continues to consider there would be merit in the PJCIS considering this proposal and has developed two options for consideration:

- a power for the Secretary to list an entity or individual on the Register, and/or
- a power for the Secretary to list an entity or individual on the Register identifying them as being non-compliant with their obligations under the Act.

These options would provide the department with alternative tools to promote compliance, or address non-compliance with the Scheme, short of criminal prosecution, which is not appropriate in all circumstances. As outlined in the Scheme's Compliance Strategy, which is available on the department's website, the department considers referral to the Australian Federal Police for criminal investigation should be reserved for serious cases. Having regard to the objectives and purposes of the Act, may include cases where:

- there is a lack of transparency, meaning there may be a relationship between a foreign principal and an entity or individual which is not clear to the public, and
- this lack of transparency poses a significant risk to government decision-making or informed public debate, for example, where an activity was intended to influence the decision or debate, or where the activity is part of a broader pattern or a systematic and sustained campaign.

Additionally, the Prosecution Policy of the Commonwealth provides that to commence a prosecution there must be sufficient evidence (and reasonable prospects of gaining a conviction) and it must be evident that the prosecution is in the public interest. Obtaining evidence to a criminal standard which satisfies the thresholds in the FITS Act may be difficult in some circumstances, and it may not

be in the public interest to pursue a prosecution in all cases, for example, where the relationship is reasonably transparent despite technical non-compliance (including where the department's engagement with the entity or individual has resulted in greater transparency), or the lack of transparency poses a limited risk to government decision-making or informed public debate.

Power for the Secretary to list an entity or individual on the Register

One option the department raised in its first submission to the review was a power to compel registration. This could involve including a power for the Secretary to register a person where they are liable to register under the Scheme but have failed to do so.

The process for exercising this power could include a requirement to notify the person that they are liable to register and inviting them to make submissions about their registration obligations. If, after considering any submissions, the Secretary remains satisfied that the person is required to register, the Secretary could then register the person. This would ensure procedural fairness and would be consistent with the process for issuing transparency notices under the Act.

If a power to register a person was included, the department would recommend retaining the existing criminal offences for failure to register as an alternative or additional option where a strong public deterrence approach is required or the conduct involved justifies criminal prosecution. Retaining criminal offences as an additional option may also be required to address circumstances where the Secretary registered a person and the person then failed to subsequently maintain their registration as required under the Act.

This option would bridge the gap that currently exists between circumstances where a person knowingly or recklessly fails to register, and circumstances where the Secretary believes a person is liable to register but the person disagrees or is ignorant of their requirement to register.

Power for the Secretary to publicly list non-compliant persons on the Register

The PJCIS could also consider the merits of allowing the Secretary to include information on the public registration indicating that the person did not register voluntarily, or has otherwise not complied with the Act, so as to publicly identify non-compliance and incentivise proactive registration. This would provide graduated enforcement options by enabling the department to take action without escalating directly to criminal prosecution.

A similar power to publicly identify non-compliance exists in Part 4 of the *Lobbying of Government Officials Act 2011* (NSW). Section 12 of that Act requires the NSW Electoral Commission to maintain a publicly accessible 'Lobbyists Watch List' containing the names and other identifying details of any third-party or other lobbyist who contravene that Act or the NSW Lobbyists Code of Conduct.

3. Review existing exemptions

The FITS Act provides for a number of exemptions to the requirement to register in Part 2, Division 4. The department recommends the PJCIS consider whether the current exemptions in the FITS Act are clear, appropriate and fit for purpose.

In the department's first submission to the review, it indicated that a number of exemptions in the Act have the potential to apply too broadly, have an unclear scope or lead to inconsistent outcomes. In particular, the department suggested the PJCIS examine the exemption for registered charities in section 29C and the exemptions for commercial or business pursuits in section 29.

Paragraph 25A(c)—Statutory office holders

In addition to the exemptions identified in the department's first submission, the PJCIS may also wish to consider the exemption for statutory office holders in paragraph 25A(c) of the Act. This paragraph provides an exemption for people undertaking activities on behalf of a foreign principal if they hold any office or appointment under a law of the Commonwealth, or under a law of a State or Territory.

The exemption is not limited to activities undertaken by an office holder in association with their office or appointment. As a result, it would currently operate to exempt statutory office holders who undertake registrable activities in their personal capacity.

It is appropriate to exclude statutory office holders and appointees from the requirement to register activities that they undertake in the course of the duties associated with their office or appointment. However, the exemption in paragraph 25A(c) is significantly broader than similar role-based exemptions. For example, Rule 5 of the *Foreign Influence Transparency Scheme Rules 2018* provides that Commonwealth public officials are exempt from registering activities undertaken in the scope of their official capacity. As a consequence of its narrower application, the Rule 5 exemption allows decision makers and members of the public to be appropriately informed about registrable activities conducted by Commonwealth public officials that fall outside the scope of their official duties. In light of this inconsistency and the significant public interest in registration activities undertaken by statutory office holders in their personal capacity, the department considers that paragraph 25A(c) may apply too broadly.

For the avoidance of doubt, the department considers that the other exemptions set out in section 25, which provide exemptions for members of the Commonwealth (paragraph 25(a)) and State and Territory (paragraph 25(b)) parliaments are appropriate, and do not require further consideration. These exemptions were included in the Act in response to recommendation 29 of the PJCIS's Advisory Report on the FITS Bill to ensure parliamentary privilege is not abrogated. The PJCIS considered that members of Parliament should not be excused from transparency obligations and recommended that the House of Representatives and the Senate instead develop a parallel parliamentary scheme to impose similar obligations on Members and Senators that is appropriately adapted for the parliamentary environment. The department notes the Senate Standing Committee of Privilege's views in its 2019 report, *Foreign Influence Transparency – a scheme for Parliament*, that outlined several factors that suggested that the Senate should not proceed with the establishment of a parliamentary scheme, including the still-evolving nature of the FITS Act, and that the Privileges Committees would continue to monitor the implementation of the Act.

4. Transparency notice framework

Under section 14B of the Act, the Secretary can issue a provisional transparency notice stating that a person is a FGRE or FGRI. This notice is required to be in writing and to include such details as the Secretary considers necessary to identify the person who is the subject of the notice. If the Secretary issues a provisional transparency notice, section 14C provides they must also invite the person who is subject to the notice to make submissions within 14 days of the date of the invitation.

If the person makes submissions about the provisional transparency notice, the Secretary must consider the submissions before the end of the period of 28 days after the date of the invitation. If a notice is not revoked before the end of this period, the provisional transparency notice automatically becomes a final transparency notice.

The PJCIS may wish to consider amendments to the transparency notice regime to improve the level of transparency provided by the notices and to improve the functionality of the regime.

Section 14B—Inclusion of additional information in transparency notices

The PJCIS may wish to consider recommending amendments to section 14B of the Act to authorise or require the Secretary to include additional information in a transparency notice. Although the Secretary is currently required to include details necessary to identify the person who is the subject of the notice, the Act does not require transparency notices to identify the related foreign principal and associated foreign jurisdiction. This does not prevent the Secretary from including this additional information in a notice, and the Secretary has specified the relevant foreign jurisdiction in notices issued to date.

The inclusion of this additional information would increase the level of transparency that notices provide by ensuring the public and government decision makers are aware of the source of the foreign control, in particular when engaging with the entity or individual. It would also be consistent with the type of information that registrants are required to provide as part of their registration.

The department considers that it would be preferable for such a requirement to be set out on the face of the Act, to ensure such information is uniformly included in transparency notices.

Section 14C—Timeframes for responses to and the finalisation of provisional transparency notices

The PJCIS may also wish to consider recommending amendments to the process for issuing a transparency notice, to extend and provide greater flexibility around the period of time the subject of a notice has to provide submissions about provisional transparency notices, and the time the Secretary has to consider any submissions. As outlined above, the subject of a notice currently has 14 days to make a submission to the Secretary about the notice, and the notice becomes final after 28 days of the date of invitation unless the Secretary decides to revoke it. In practice, this means the subject of the notice and the Secretary only have 14 days respectively to draft or consider submissions and seek advice if required. These timeframes are counted in calendar days and are only extended to the next business day if the final day of the timeframe falls on a weekend or public holiday.

This timeframe could create a potential burden on the recipient of a notice, depending on factors such as their level of prior engagement with the department, the language spoken by the recipient, their resources and the complexity of the case. While timely finalisation of notices is consistent with the transparency objectives of the Scheme, it is also important that entities and individuals have sufficient time to provide complete and accurate information. One option the PJCIS may wish to consider, is amendments to allow the Secretary to specify an appropriate response timeframe in the invitation to make submissions, being no less than 10 business days, and an option to extend that timeframe where appropriate.

The fixed timeframe may also prove challenging for the department depending on the volume and complexity of submissions provided by the recipient, whether any documents require translation and whether submissions raise novel legal issues on which advice is required. As such, the department also recommends provisional transparency notices only become final 20 business days after the date submissions are due.

Section 14D and subsection 43(2A)—Publication and entry into force of transparency notices

The PJCIS may also wish to consider whether only final transparency notices, rather than provisional transparency notices, should be published.

The FITS Act currently requires provisional transparency notices to be published on a website and provides that such notices enter into force on publication. However, the subject of a notice then has the opportunity to make submissions to inform the Secretary's decision about whether the provisional transparency notice should become a final transparency notice. Consideration could be given to only publishing final transparency notices so that the Secretary's decision about the status of an entity or individual is only made public after considering all relevant information, including any submissions made by the subject of the notice. This would ensure the transparency notice regime is more closely aligned with standard procedural fairness processes, under which decision makers afford a person the opportunity to be heard before making a decision affecting their interests.

5. Other amendments

The PJCIS may also wish to consider some additional amendments to improve the functionality and administration of the Scheme, and to clarify the operation of some provisions.

Section 11—Activities 'on behalf of' a foreign principal

People and organisations are required to register under the Scheme if they undertake registrable activities on behalf of a foreign principal for the purpose of political or governmental influence. Section 11 of the Act defines 'on behalf of' to include a range of circumstances, including where an individual undertakes the registrable activity under an arrangement with a foreign principal. In order for an arrangement to be captured, at the time the it is entered into, both the person and the foreign principal must have known or expected that the person would undertake the activity in circumstances that would be registrable.

The PJCIS may wish to consider recommending amendments to the definition of 'on behalf of' in section 11 of the Act to clarify that it only captures circumstances where the person undertaking the activities knew or expected the activities would benefit the foreign principal, either directly or indirectly. This amendment would address comments in the judgments of Steward J, Gordon J and Edelman J in *LibertyWorks Inc v Commonwealth of Australia* regarding the breadth of the definition of 'on behalf of'.[2] In particular, it would respond to their concerns that the current definition may extend beyond the established common law concept of agency – such as by capturing collaborative activities that are instigated by the person who is liable to register.[3] These amendments would clarify that the definition does not capture persons who are only acting on their own behalf (and not for the benefit of the principal).

Sections 16, 39, 45 and 46—Clarifying the scope of information that can be required by the Secretary

The PJCIS may also wish to consider recommending minor amendments to ensure that it is clear on the face of the Act that the Secretary's powers to request information at the time of registration, or under information-gathering notices, may only be used for the purposes of administering the Scheme—which would be consistent with the department's practice.

[2] (2021) HCA 18 at [141]-[146], [213]-[216]. *"LibertyWorks".*
[3] LibertyWorks [142] per Gordon J.

At present, sections 16 and 39 of the Act require applications for and renewals of registration to be 'accompanied by any information or documents required by the Secretary'. The types of information routinely required of registrants includes information relating to a person's liability to register or information relating to registrable activities they undertake, such as information or documents setting out the date(s) and purpose of lobbying activities, and the person or group subject to the lobbying. Amendments to these sections could specify that the Secretary may only require the giving of information or the production of documents for the purposes of administering the Scheme. This would ensure there are clear limits on the Secretary's information gathering powers, and avoid any risk that these powers could be misinterpreted as authorising the collection of information for purposes unrelated to the administration of the Scheme.

The PJCIS may also wish to consider recommending an amendment to Division 3 of Part 4 of the Act to clarify that nothing in that Division (which contains the Secretary information gathering notice powers) authorises the Secretary to require information for any purpose other than the administration of Parts 2, 3 or Division 2 of Part 4 of the Act. This would clarify that the information gathering notice powers can only be used for the purposes of administering the Scheme, and cannot be used to gather information for broader purposes.

Section 50—Definition of 'Scheme information'

The PJCIS may also wish to consider recommending amendments to the definition of 'Scheme information'. Paragraph 50(a) of the FITS Act provides that Scheme information is information obtained by a Scheme official in the course of performing functions or exercising powers under the Scheme. This includes publicly-available information the department has obtained for the purpose of considering the application of the FITS Act to a particular entity or individual. The main implication of this is that any disclosure by the department of such publicly-available information must be tracked and included in the annual report disclosure statistics set out in paragraphs 69(2)(k) and (l) (which are discussed further below), which may be of limited transparency value. The PJCIS may wish to consider this issue, and whether this section should be amended so that the definition of Scheme information does not include information that is already in the public domain.

Section 69—Information that must be included in annual report

The PJCIS may also wish to consider the value of including some types of information in the annual report.

Section 69 of the FITS Act requires the Secretary to prepare an annual report on the operation of the Scheme and provides a list of information that must be included in the report. The department is very supportive of measures to ensure transparency in the operation of the Scheme, and robust annual reporting requirements. However, the department considers that some of the information required to be included in the annual report may not provide valuable insight into the operation of the Scheme.

Paragraph 69(2)(j) requires the annual report to include the number of documents produced in compliance with information gathering notices issued under section 46 of the Act. The PJCIS may wish to consider whether this paragraph should be omitted. The volume of documents received in response to information gathering notices will depend on a range of factors, including:

- the complexity and seriousness of the matter under investigation
- the nature and focus of the department's request for information

- the size, complexity and filing practices of the entity that is subject to the notice and the extent of their activities
- the extent to which the entity has previously provided the department with information or documents on a voluntary basis
- whether the department is able to issue a single notice that covers all information or documents required as part of an investigation, or issues multiple notices each covering a subset of that information and those documents, and
- the approach taken by the recipient of a notice to interpreting its scope and extent.

Given these factors, it is unlikely that a reader of the report would be able to draw meaningful inferences from statistical reporting on the number of documents produced in response to notices in a given year, or to meaningfully compare such figures between years. For this reason, the department considers that it is unlikely that reporting on the number of documents obtained in response to notices issued under section 46, in accordance with paragraph (j), materially enhances the transparency of the operation of the Scheme. The department considers that reporting on the number of information gathering notices issued, in accordance with paragraphs 69(2)(h) and (i), provides a reasonable proxy for the level and extent of the department's formal investigative activities under the Act.

Paragraph 69(2)(k) of the FITS Act requires the annual report to include the number of occasions on which Scheme information was communicated in reliance on the authorisation in section 52 (disclosures for the purposes of administering the Scheme) or section 53 (disclosures for certain other purposes, including to police forces, ASIO or prescribed bodies). Paragraph 69(2)(l) requires the inclusion of a list of departments, agencies, authorities or enforcement bodies to which Scheme information is communicated in reliance on the authorisations in section 52 and 53.

The PJCIS may wish to consider amendments to paragraphs 69(2)(k) and (l) to only require the reporting of this information in respect of communications made in reliance on section 53. The department frequently communicates Scheme information to a range of Australian Government bodies in reliance on the authorisation in section 52 (for example, 78 times in the 2020-21 reporting period) in order to effectively administer the Scheme, and queries whether including those disclosures provides meaningful value to the public or government.