

Email

15 June 2018

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

pjcis@aph.gov.au

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 in relation to the amendments proposed by the Attorney-General to the Foreign Influence Transparency Scheme Bill 2017 ('the Bill'). This is the third submission made by LFA on the Bill, following submissions dated 22 January 2018 ('the first LFA submission') and 2 February 2018.

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 addresses the key amendments proposed by the Attorney-General as they relate to LFA, followed by comments on other amendments. For the reasons set out below, LFA is generally supportive of the key amendments.

1. Key amendments

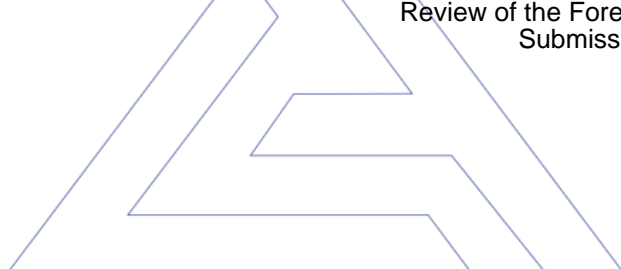
Legal advice or representation exemption (cl 25)

- 1.1 The proposed amendment to cl 25¹ would create an exemption for legal advice or representation as follows:

A person is exempt in relation to an activity the person undertakes on behalf of a foreign principal if the activity is, or relates primarily to, the provision of:

- (a) *legal advice; or*
- (b) *legal representation in judicial, criminal or civil inquiries, investigations or proceedings; or*
- (c) *legal representation in relation to an administrative process of a government involving the foreign principal.*

¹ Amendments proposed by the Attorney-General to the Bill ('proposed amendment'), (48)

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- 1.2 This amendment is similar to the alternative position which LFA advocated in its submission,² and it is generally supported by LFA.
- 1.3 The expansion of the exemption to legal advice and to legal representation in relation to an administrative process of a government involving the foreign principal is appropriate for three broad reasons:
- (a) First, clients of lawyers are made clear in the regular course of legal correspondence. It follows that the interest of the foreign principal will be clear to the relevant decision-makers and to the public at large.
 - (b) Secondly, the Bill as initially drafted would have meant that a number of activities regularly undertaken by law firms would likely be registrable activities. This includes responding to a Commonwealth tender, incorporation of companies, lodgement of debtor petitions, and seeking 'no objection' notifications under the *Foreign Acquisitions and Takeovers Act 1975*. It is sensible that such administrative processes be excluded from the operation of the scheme.
 - (c) Thirdly, the indicia for what constitutes a 'foreign government related entity' under the proposed new definitions³ include matters that may be difficult for a lawyer to determine in the context of ordinary legal practice. These matters may be difficult to determine in relation to the client (to determine whether it is a foreign government related entity) and will be potentially more difficult to determine in relation to an overseas parent of an Australian corporate client.
- In particular, it may be difficult for a lawyer acting for a corporate body to conclude: (i) whether the directors (however described) of the company are under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal, and; (ii) whether the foreign principal is in a position to exercise, in any other way, total or substantial control over the company. The same issues arise with respect to the new definition of 'foreign government related individual.'⁴
- 1.4 It is also appropriate that activities covered by the exemption need not be completely and wholly considered as legal advice or legal representation. Actions in the usual course of legal services 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 exemption. This is achieved by the omission of the words 'solely by way of' and 'solely for the purposes of.'
- 1.5 However, LFA is of the view that the words 'or relates primarily to' should be replaced by 'or is incidental to' to ensure that the test in the chapeau of the exemption is consistent with the language at cl 3.5(f) of the Federal Lobbying Code of Conduct. The adoption of LFA's preferred wording would result in the exemption stating:

A person is exempt in relation to an activity the person undertakes on behalf of a foreign principal if the activity is, or is incidental to, the provision of:

- (a) legal advice, or

² See [4.3] – [4.5]

³ Proposed amendment (11)

⁴ Proposed amendment (11)

- (b) *legal representation in judicial, criminal or civil inquiries, investigations or proceedings, or*
- (c) *legal representation in relation to an administrative process of a government involving the foreign principal.*

Legal professional privilege (proposed cl 9A)

- 1.6 LFA supports the proposed amendment to introduce cls 9A(2) and (3).⁵ It is appropriate that the Bill does not abrogate legal professional privilege and it is consistent with the legal advice or representation exemption, as it is proposed to be amended, at cl 25.

2. **Other amendments**

Undertaking activity on behalf of a foreign principal (cl 11)

- 2.1 The proposed amendments would include a new provision⁶ at cl 11(4). That clause would have the effect that an Australian company would not be deemed to be acting on behalf of a foreign principal merely because it is a subsidiary of the foreign principal. This provision is welcomed, however it is noted that entities providing goods or services to the Australian company may still be caught under cl 11(3).

- 2.2 LFA recommends that proposed cl 11(4) be amended to read:

*An activity undertaken by a company registered under the Corporations Act 2001, **or by a person in connection with the provision of goods or services to such a company**, is not undertaken on behalf of a foreign principal merely because the company is a subsidiary (within the meaning of the Corporations Act 2001) of a foreign principal.*

(emphasis added)

Transparency notice scheme (proposed cls 14A – 14E)

- 2.3 The proposed amendments would create a transparency notice scheme.⁷ The scheme would allow the Secretary of the Department to issue a transparency notice stating that a person is a foreign government related entity or a foreign government related individual if the Secretary is satisfied that the person is such an entity or individual.⁸ The Secretary may also vary a transparency notice in certain circumstances,⁹ and must revoke a transparency notice if they cease to be satisfied that the person is a foreign government related entity or a foreign government related individual (as is relevant to the person).¹⁰

⁵ Proposed amendment (4)


⁶ Proposed amendment (26)

⁷ Proposed amendment (55)

⁸ Proposed cl 14A(1)

⁹ Proposed cl 14C(1)

¹⁰ Proposed cl 14C(2)

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- 2.4 The Secretary is not required to observe any requirements of procedural fairness in making¹¹ varying or revoking¹² a transparency notice. A decision to issue, vary or revoke a transparency notice is a reviewable decision before the Administrative Appeals Tribunal ('AAT').¹³
- 2.5 The effect of a transparency notice is twofold:
- (a) the person the subject of the notice is taken to be a foreign government related entity or a foreign government related individual, as the case may be,¹⁴ and
 - (b) in proceedings, the notice is prima facie evidence of the matters stated in it.¹⁵
- 2.6 LFA makes three observations on the transparency notice scheme.
- 2.7 First, it would be preferable for the Secretary to be required:
- (a) to provide a notice of intention to issue a transparency notice to the proposed subject of the transparency notice,
 - (b) to provide to the proposed subject of the transparency notice a statement of the material facts on which the Secretary is satisfied that the subject is a foreign government related entity or a foreign government related individual (except to the extent that such information should be withheld on specified national security grounds),
 - (c) to provide to the proposed subject of the transparency notice a limited opportunity to make a submission to the Secretary, and
 - (d) to take any submission made by the proposed subject of the transparency notice into account in deciding whether to issue a transparency notice.
- 2.8 The same requirements could apply to the variation of a transparency notice. To account for urgent situations, the Bill could allow the Secretary to waive the requirements in certain circumstances.
- 2.9 Secondly, and as noted above, a transparency notice will be prima facie evidence in proceedings of the matters stated in it. In a prosecution for an offence, a practical effect of a notice will be to reverse the evidential burden; the accused will be required to demonstrate that they are not a foreign government related entity or individual. The defence should not bear that burden, especially as that fact is an important element of offences under the Bill. LFA recommends that the Bill be amended to state that a transparency notice does not reverse or affect any evidential burden that would otherwise apply.
- 2.10 Thirdly, the transparency notice scheme does not preclude the Crown from commencing a prosecution and subsequently issuing a transparency notice in respect of the accused. LFA

¹¹ Proposed cl 14A(3)

¹² Proposed cl 14C(4)

¹³ Proposed cl 14D

¹⁴ Proposed cl 14B(1)

¹⁵ Proposed cl 14B(2)

recommends that the Bill be amended to state that the prosecution is not entitled to rely on a transparency notice after proceedings are commenced or contemplated.

3. **Summary**

3.1 As outlined above, LFA:

- (a) supports the amendments to the exemption for legal advice or representation, but suggests that a further change be made for consistency with the Federal Lobbying Code of Conduct,
- (b) supports the amendments with respect to legal professional privilege, and
- (c) recommends changes to the proposed amendments at cl 11 and new cls 14A - 14D.

3.2 LFA appreciates the opportunity to provide a submission on the Attorney-General's proposed amendments to 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

Mitch Hillier
Executive Director
Law Firms Australia