PJCIS Inquiry into the Foreign Influence Transparency Scheme Bill 2017

Attorney-General's Department

Response to Submissions

RESPONSE TO SUBMISSIONS

On 13 June 2018 the Parliamentary Joint Committee on Intelligence and Security (the Committee) requested that the department provide a written response to issues raised in submissions provided to the Committee relating to the amendments proposed by the Attorney-General (Submissions 84 and 84.1).

The department has addressed below the key issues raised in the following submissions:

- Submission 4.2 – Law Council of Australia
- Submission 7.2 – Australian Lawyers for Human Rights
- Submission 9.1 – Universities Australia
- Submission 10.2 – Law Firms Australia
- Submission 12.2 – Australian Catholic Bishops Conference
- Submission 13.1 – Australian Professional Government Relations Association
- Submission 19.3– Joint Media Organisations
- Submission 32.1 – Australian Industry Group
- Submission 33.2 – Australian Charities and Not-for-profits Commission
- Submission 34.1 – Community Council for Australia
- Submission 37.1– Australian Major Performing Arts Group
- Submission 40.1 – Australian Conservation Foundation
- Submission 52.1 – The Pew Charitable Trusts
- Submission 57.1 – Oxfam Australia
- Submission 63.1 – GetUp
- Submission 72.1 – Greenpeace Australia Pacific
- Submission 82.1 – Professor Anne Twomey
- Submission 86 – Australian Council of Trade Unions
- Submission 87 – Optus
- Submission 90 – Change.org

The following submissions were considered but did not raise any issues requiring a response or the issues raised are dealt with in the department's responses to other submissions.

- Submission 1.2 – Tony Kevin
- Submission 24.1 – Falun Dafa Association of Australia
- Submission 46.1 – Chinese Community Council of Australia
- Submission 58.1 - Australian Council for International Development

- Submission 60.1 – The Smith Family
- Submission 68.1 – Dr Luke Beck
- Submission 85 – Clerk of the House of Representatives and Clerk of the Senate
- Submission 88– Multicultural Communities Council of NSW
- Submission 89 – Humane Society International
- Submission 91 – Chemistry Australia
- Submission 92 – Global Health Alliance Melbourne

Submission 4.2 – Law Council of Australia

The definition of 'activity for the purpose of political or governmental influence' (proposed section 12) is also an improvement as it narrows activity to the 'sole or primary purpose, or a substantial purpose' of influencing political matters. The introduction of a sole, primary or substantial purpose into proposed section 12 is positive, although there may be some ambiguity as to what amounts to 'a substantial purpose'. The Law Council suggests that consideration be given to replacing the term 'substantial' with 'dominant'.

References to 'dominant' in legislation have the same meaning as 'primary'. The Office of Parliamentary Counsel advises that 'primary' is the preferred, modern form of drafting.

The exemption for legal advice (proposed section 25) is now broader than just representation in proceedings, which is an improvement and accords with the Law Council's and Law Firms Australia's alternative position. It also extends to primarily the provision of legal advice or legal representation in relation to an administrative process of a government involving the foreign principal. However, the Law Council recommends that the test be amended to 'incidental to' for consistency with the Federal Lobbying Code.

The department's view is that incidental activities would fall within the legal advice and representation exemption (at proposed new section 25, as amended by item (48)), as long as the incidental activity relates primarily to the provision of legal advice or representation (as defined in section 25).

The proposed definition of 'foreign government related entity' draws in companies where only 15% is owned by a foreign government, government related entity, political organisation or a foreign government related individual and also on other bases which may be difficult to apply. This definition does not align with other relevant Commonwealth legislation (*Corporations Act 2001* (Cth), the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the *Financial Sector (Shareholdings) Act 1998* (Cth)), each of which specifies 20% as the level at which control is assumed. The policy objectives of the Foreign Acquisitions and Takeovers Act 1975 (Cth) and the Bill are similar in that they seek to 'regulate' foreign activities in Australia. The Law Council recommends the percentage of ownership of which control is to be assumed should be the same: 20%.

The threshold of 15% represents the level of government involvement at which a company can be considered to be *related* to a foreign government or foreign political organisation (as opposed to

controlled). This threshold is consistent with Schedule 1 of the *Broadcasting Services Act 1992*. The thresholds in that Act apply in relation to the deemed control of companies that hold broadcasting and other licences, with the express object of *inter alia* encouraging 'diversity in the control of the more influential broadcasting services'. While ultimately a matter of judgment, the objects of the Broadcasting Services Act and FITS Bill are closely aligned, as both are directed at regulating influential activities.

The Law Council queries the need for a transparency notice scheme and has concerns about its operation. The only justification provided so far is in the Attorney-General's media release that:

This would allow the Government to investigate and declare where it considers companies or individuals are hiding their connections to foreign governments.

This is incorrect. The Secretary has extensive powers under proposed section 45 to investigate whether a person is liable to register in relation to a foreign principal.

The department disagrees with the Law Council's characterisation.

Under section 45 of the Bill, the Secretary has the power to require the production of information from a potential registrant only. Under section 46 of the Bill, the Secretary has the power to require the production from other persons. However, this does not empower the Secretary to make a determination that an individual or entity is a *foreign principal*.

The transparency notice regime provides the Secretary with this power. A registrant will be able to rely on a transparency notice when forming a view as to whether the person or entity is a *foreign principal*.

In relation to transparency notices, the Law Council considers it is essential for effective rights of review that the Secretary provides reasons containing an adequate explanation for these decisions.

Further amendments to the Bill should be made to align the transparency notice provisions to general administrative law principles. The Law Council recommends that the proposed subject of a transparency notice be given notice of the proposal and a statement of the material facts on the basis of which the Secretary is satisfied that the person is a foreign government-related entity or individual.

Section 28 of the *Administrative Appeals Tribunal Act 1975* allows any person who is entitled to apply to the Administrative Appeals Tribunal (AAT) for a review of the decision to request the person who made the decision to give the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The person who made the decision is required to give such a statement to the applicant within 28 days of receiving the request.

Including a similar provision in the FITS Bill is unnecessary as it would be duplicative of the existing law.

A transparency notice must be publicly available on 'a website' (proposed subsection 43(1A)). The Law Council notes that no particular website is specified. To meet administrative law transparency standards, and to make it easier for users, it would be preferable if a specified website such as that of the Attorney-General's Department were nominated.

Section 43 is clear that the Secretary must make the register available to the public via a website. This may be the Attorney-General's Department website or it may be a standalone website. It is clear that the transparency notices must be available on the same website as the register for the scheme.

The department would not support an amendment to prescribe a specified website. This would create challenges in the event of any future changes to the Administrative Arrangements Orders in relation to the FITS Act (once passed). It would also not afford even reasonable flexibility to determine the most appropriate website structure, which may best sit outside the Attorney-General's Department website.

There is no requirement that the Secretary give a copy of the notice to the subject of the notice. The Law Council recommends that the Bill be amended to require a copy to be given to the subject of the notice (see paragraph 20 above).

The department does not consider this necessary, given that the persons or entities who may be subject to a transparency notice are not themselves the subject of obligations under the scheme. The entities will, in many cases, not be located within Australia, The subjects will, in any, event have access to the notifications published online.

The Law Council therefore recommends the insertion into proposed section 14D of a subparagraph vesting jurisdiction in the AAT to review a refusal by the Secretary to vary or revoke a transparency notice.

It is not clear to the department that merits review of a refusal to vary or revoke a transparency notice is necessary. Judicial review would be available under the *Administrative Decisions (Judicial Review) Act 1977*.

There is also the potential for the Crown to start a prosecution, get into difficulties and then for a notice to be issued that reverses the evidential burden as described above. It is not appropriate that the prosecution rely on a transparency notice issued after the proceedings are commenced or contemplated. The Law Council recommends that the Bill be amended to state that the prosecution is not be entitled to rely on a transparency notice in these circumstances.

Subsection 14A(4) states that a transparency notice comes into force when it is issued.

Criminal offences are determined according to the law at the time of the alleged offending conduct. The department does not consider that a prosecution could rely on a transparency notice that was not in force at the time of the alleged conduct.

The defendant's knowledge that they are undertaking registrable action on behalf of the foreign principal is the essence of the offence. The Law Council recommends that the prosecution should have to prove this element of the offence, including the guilty mind attaching to the conduct.

The department considers absolute liability to be appropriate. Absolute liability only applies to the part of the physical element which requires the activity the person undertakes on behalf of the foreign to be undertaken after the end of the period. These facts also forms part of the element at paragraph 57(1)(a) of the offence, for which the prosecution must already prove the fault element of knowledge.

If absolute liability did not apply to the part of the physical element at paragraph 57(1)(c) which requires the activity the person undertakes on behalf of the foreign to be undertaken after the end of the period then the prosecution would need to prove knowledge and recklessness in relation to the same fact, which would be anomalous.

The department notes that in all cases, the prosecution is still required to prove the relevant fact and fault element. The application of absolute liability simply ensures the prosecution does not need to prove two fault elements, or does not need to prove the fault element twice for different paragraphs of the offence.

This will be explained in the Supplementary Explanatory Memorandum.

In terms of proposed subsection 57(3), it is unclear as to what is envisaged by a reckless omission to register or renew in proposed paragraph 57(3)(b). The Law Council recommends that, if it is intended to retain this section, it must be redrafted to remove the uncertainty introduced by the word 'whether'

The application of paragraph 57(3)(b) of the Bill is explained in the Explanatory Memorandum from paragraph 658, see particularly paragraphs 671 and 672.

Specific defences are proposed in subsection 59(2) of the Bill. However, it is unclear why there are not specific defences for the more serious proposed offences in sections 57 and 57A of the Bill. The Law Council recommends that this is considered further prior to the Bill's passage in the Parliament.

The offence-specific defence in subsection 59(2) specifically relates to the content of the offence in subsection 59(1), which relates to failure to comply with a notice. The offences at sections 57 and 57A are very different in nature. The Law Council's submission does not propose what offence-specific defences might be appropriate for sections 57 and 57A. Subsection 59(2) would not be relevant to that offending conduct and could not be directly applied.

The general defences available under Part 2.3 of Chapter 2 of the Criminal Code would be available for all offences in the FITS Bill, in addition to any offence-specific defences.

The Law Council is concerned about the abrogation of self-incrimination where only a use immunity applies (proposed sections 45-47).

Subsection 47(2) establishes a use immunity and a derivative use immunity. This is explained in the Explanatory Memorandum from paragraph 560.

The Law Council maintains its view as expressed in its initial written submission to the Committee that consideration should be given to the availability of civil penalties to enforce compliance with the scheme rather than criminal penalties.

The department addressed this in Submission 5.1 (see page 6). In addition to the points raised in that submission, the department notes that the FITS Bill would need to include significantly greater investigative powers for the department if civil penalties were to be included, for example powers to enter premises and conduct searches under the *Regulatory Powers (Standard Provisions) Act 2014*.

The department does not consider this appropriate, and considers that investigation of the criminal offences in the Bill should be undertaken by appropriate law enforcement authorities.

Submission 7.2 – Australian Lawyers for Human Rights

Subsection 11(3) should be deleted and subsection 11(1) further amended to ensure that the relationship between foreign principal and agent is clearly a direct agency relationship.

As expressed in the department's earlier submissions to the Committee (Submission 5.1), the department disagrees that subsection 11(3) broadens the scope of what it means to be acting 'on behalf of' a foreign principal. Subsection 11(3) requires both the person and the foreign principal to know or expect that the person would or might undertake the activity, and that the person would or might do so in circumstances falling within the scope of sections 20, 21, 22 or 23 of the Bill. This ensures that a person does not need to register simply because their views align with those of a foreign principal, in a situation where the foreign principal has no ability to know that the person will or might engage in registrable activities.

The department notes that the Law Council has indicated in its supplementary submission (Submission 4.2) that 'the Law Council recommended a definition aligned with the laws of agency, which is similar to the current proposal' (paragraph 6).

No criminal penalties should apply, nor should absolute or strict liability apply to any elements of the offences.

The need for criminal offences, including the application of strict liability and absolute liability in the offences presently contained in the Bill, is justified in the Explanatory Memorandum. The justification for including absolute liability for part of a physical element in the proposed amendments is set out above.

It should be made quite clear that outcomes of processes are not included under 'political or governmental influence'

The department does not support an amendment in these terms. Seeking to influence the outcome of a process listed in section 12 is one of the most extreme examples of how foreign influence can be brought to bear in Australia's democratic process. For example, it seems objectively more important to cover a situation where a foreign principal is seeking to influence the outcome of a vote of a House of the Parliament when compared to seeking to influence a process such as the timing of the vote. The outcome of the vote can have a binding effect, and may result in new laws that affect the Australian community. The objects of the scheme would be substantially, and arguably anomalously, undermined by omitting outcomes of processes from section 12.

The amendments proposed to the Bill in Schedule 5 to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* should not be adopted.

The amendments in Schedule 5 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill reflect the Government's decision to cover political campaigners within the definitions in section 12.

The concept of 'a section of the public' should be clarified.

The department considers that this has a plain English meaning that does not need further clarification.

An exception should be made for academic talks and writings; An exception should be made for charitable and advocacy activities

Specific exemptions for academics and charities are not considered to be necessary given the significant narrowing of the definitions of *foreign principal* and *undertaking activity on behalf of a foreign principal* set out in the proposed amendments provided to the Committee by the Attorney-General. If academics or charities engage in registrable activities, or enter a registrable arrangement, on behalf of a foreign principal for the purpose of political or governmental influence, it is not clear why they should be exempted from registration requirements.

The exemption in relation to legal work should be further clarified.

The department's view is that incidental activities fall within the legal advice and representation exemption (at proposed new section 25, as amended by item (48), as long as the incidental activity relates primarily to the provision of legal advice or representation (as defined in section25).

The exemption for legal representation is deliberately limited. If a foreign principal engages a lawyer to represent them in lobbying activities that are not connected to a legal process, and the other requirements of the scheme are met, it would be appropriate for that lawyer to be required to register.

Submission 9.1 – Universities Australia

Universities Australia recommends that the Committee supports Professor Twomey's suggestion that 'under an arrangement with' be more closely defined to cover those situations where a foreign principal exercises some control or direction through the arrangement to conduct registrable activities.

The department has responded to Professor Twomey's comment in the discussion of Submission 82.1, below.

Universities Australia recommends that should the scheme become law, the responsible Department looks to the experience of the implementation of the *Defence Trade Controls Act 2012* to assist with an effective and efficient roll-out.

The Attorney-General's Department will administer the scheme. The department thanks Universities Australia for this useful suggestion and will work with the Department of Defence to benefit from its experience in relation to the *Defence Trade Controls Act 2012*.

Submission 10.2 – Law Firms Australia (LFA)

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 department's view is that incidental activities fall within the legal advice and representation exemption (at proposed new section 25, as amended by item (48)), as long as the incidental activity relates primarily to the provision of legal advice or representation (as defined in section 25).

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.**

This is not the intention of new subsection 11(4) which is intended to deal with the relationship between a foreign owner and a subsidiary. If the relevant activities relate to the provision of goods or services, it is not clear how they would be registrable. The provision of goods or services to a company would not generally appear to constitute a registrable activity for the purposes of the Bill, insofar as it would not appear to constitute 'general political lobbying', 'parliamentary lobbying', 'communications activity' or 'disbursement activity' done for the purpose of political or governmental influence.

To the extent that the provision of such goods or services do constitute a registrable activity, a person will only be required to register if they engage such activities on behalf of a foreign principal. An Australian company can only be a 'foreign principal' if it is a 'foreign government related entity', within the meaning of section 10 of the Bill as amended.

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.

The department does not agree. This would amount to providing procedural fairness, which is not needed due to subsection 14A(3).

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.

If the person affected by the notice wishes to challenge the notice, merits review will be available in the AAT.

If a transparency notice has been issued, the prosecution will be entitled to rely on it. If the person wishes to challenge the validity of that notice in a prosecution then they will be able to do so, in accordance with the ordinary processes for collaterally challenging administrative decisions in the course of a prosecution, where the validity of the decision is relevant to the question of criminal liability.[1] Collateral challenges will generally be permitted in the course of a prosecution: '[O]nly the clearest language in a statute should be held to have taken away the right of a defendant in criminal proceedings to challenge the lawfulness of an administrative decision made against him where the prosecution is premised on its validity' (*Gray v Woollahra Municipal Council* per Whealy J at [111]); nothing in the Bill purports to limit the right of a defendant to challenge the issuance of a notice in a prosecution. If they succeed, the prosecution will be required to prove beyond a reasonable doubt that the entity or person named in the notice is a *foreign principal*.

[1] See, for example: *Ousley v The Queen* (1997) 192 CLR 69; *Gray v Woollahra Municipal Council* [2004] NSWSC 112 regarding an appeal against a magistrate's decision to convict on a charge under the *Environment Planning and Assessment Act 1979* (NSW) of failing to comply with an order under the Act. The defendant argued that she was not obliged to do so because the relevant order was invalid.

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 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.

Subsection 14A(4) clearly states that a transparency notice comes into force when it is issued.

Criminal offences are determined according to the law at the time of the alleged offending conduct. A prosecution could not rely on a transparency notice that was not in force at the time of the offending conduct.

Submission 12.2 – Australian Catholic Bishops Conference

This submission raises concerns that the religious exemption is uncertain and lacks clarity.

Amendment (49) clearly places all religious activity undertaken on behalf of a foreign principal outside the scope of the scheme. This is intended to reflect the exemption afforded under the *Foreign Agents Registration Act* (US) for 'activities in furtherance of bona fide religious… pursuits', as recommended by the ACBC in its original submission.

To the extent that any uncertainty remains about the intended interpretation of the exemption, the Explanatory Memorandum could explain that an activity will be regarded as a religious activity if it is in accordance with the doctrines, tenets, beliefs or teachings of the person's religion or primarily for the purposes of that religion.

Submission 13.1 – Australian Professional Government Relations Association (APGRA)

The revised exemption for 'commercial or business pursuits' lacks clarity as to the circumstances in which it would apply – it is unclear whether the exemption would apply to activities relating to a regulatory approval relevant to a commercial transaction or project. Similarly, where change is sought to legislation or public policy in pursuit of the bona fide commercial or business objectives of the foreign government related entity.

The Explanatory Memorandum for the Bill clarifies (at paragraph 387) that:

> 'commercial or business pursuit' is not defined and is intended to take its ordinary meaning to include activities relating to trade, commerce, buying, selling, dealing and marketing.

This clearly indicates that the term is intended to be interpreted broadly, and includes activities that are related to trade and commerce. Accordingly the department considers that the exemption would apply where the activity related to regulatory approvals for a specific commercial transaction or project.

If the activity related to lobbying in relation to broader legislation or public policy of interest to a foreign government related entity then this would not be considered to be a 'commercial or business pursuit'. This type of lobbying is intended to fall within the scope of the scheme, so that

there is transparency for decision-makers and the public about such activities being undertaken on behalf of a foreign principal.

This can be clarified in the Supplementary Explanatory Memorandum.

APGRA seeks seeking further clarification on what details of registrable activities will be required under the Scheme. We submit that the broad publication of any information beyond the name of the parties and a general descriptor of the type of activity undertaken is not required from a public interest perspective and would serve to prejudice the legitimate interests of a foreign government related entity and their professional advisers.

APGRA submits that the information to be disclosed under the Scheme should be limited to details disclosed under the Lobbying Code of Conduct. Alternatively, should it be determined that the Scheme requires some further disclosure of activity details, this should be limited to pre-determined categories which could include: 'Introduction'; 'Making an amendment of legislation'; 'Development or amendment of government policy or program'; and 'Communication activity'.

The department has previously addressed the information to be collected under the scheme in its response to Questions in Writing (Submission 5.1), see response to question 32 on page 38.

> To achieve the transparency objectives of the Scheme, certain information relating to a person's registration must be collected. The information that is collected is intended to capture the essential details relevant to a person's registration, to ensure that an accurate and comprehensive record is kept.
>
> The information that a registrant is likely to be required to provide includes:
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> - the name of the person and general details (address, occupation, citizenship status and any prior government employment, including position and term of employment)
> - the name of the foreign principal and general details (contact details, nationality, type of foreign principal and general description of business/activities)
> - high level details of the nature of the relationship between the registrant and the foreign principal (e.g. whether there is a contract in place, an informal agreement or otherwise) and whether the person has received / is receiving financial benefits from the foreign principal, and
> - issues of interest which the registrant intends to pursue on behalf of the foreign principal (i.e. environmental issues, defence contracts, a particular vote or policy).

APGRA seeks clarification of the status of foreign pension funds under the definition of 'foreign government related entity', particularly those originally established through legislation by a national or provincial government (common in Canada in particular) and does not believe these should be categorised as foreign government related entities. These foreign pension funds are neither sovereign wealth funds or state-owned enterprises, and their charters make clear that their investment mandates are independent of government and in no way subject to government direction.

The question of whether a foreign pension fund will be *related* to a foreign government is one of fact. The department cannot speculate on whether individual foreign pension funds will meet the criteria in the definition of *foreign government related entity*. If the foreign pension fund does not meet those criteria, it will not be a *foreign principal* for the purposes of the scheme.

APGRA submits that registration should only be required from the point at which relevant activity begins, rather than when advisory arrangements commence.

The department has previously addressed the coverage of arrangements under the scheme in its response to Questions in Writing (Submission 5.1), see response to APGRA's original submission (Submission 13) on page 21.

> Arrangements include contracts and other written agreements – it would not be prudent to exclude these from the Scheme. Under the United States FARA, arrangements are covered, even if no activities are ever undertaken under the arrangement - the Scheme has been developed consistent with this approach.[2]

The department notes that an arrangement with a foreign principal will only be a 'registrable arrangement' within the meaning of the Bill, if it is an arrangement 'to undertake an activity that, if undertaken by the person, would be registrable in relation to the foreign principal.' That is to say, it must be an arrangement to undertake:

- general political lobbying
- parliamentary lobbying;
- communications activities, or
- disbursement activities

on behalf of the foreign principal, for the purpose of political or governmental influence.

Comparatively, an arrangement for a government relations professional to provide 'advisory' services to a foreign principal that do not involve the above lobbying, communications or disbursement services (for example, preliminary advice to the foreign principal about Australian market conditions and regulatory arrangements, in anticipation of entering the Australian market) would not appear to be registrable.

[2] 22 U.S.C. § 611(c)(2).

The Bill should be amended to impose appropriate civil penalties for the offences included.

The department addressed this in Submission 5.1, see response to AGPRA's original submission (Submission 13) on page 21. In addition to the points raised in Submission 5.1, the department notes that the FITS Bill would need to include significantly greater investigative powers for the department if civil penalties were to be included, including to enter premises and conduct searches under the *Regulatory Powers (Standard Provisions) Act 2014*.

The department does not consider this appropriate, and considers that enforcement action under the Bill should be undertaken by appropriate law enforcement authorities considering the application of relevant criminal offences.

Registrant reporting obligations are set out under Part 3, Divisions 2 and 3 of the Bill. We submit that the requirement to update registration details on a per-client, or per-activity/arrangement, basis is impractical. Instead, we suggest that updates should be required once per quarter by a professional adviser for all client activity or advice, representing a more reasonable compliance burden.

The reporting obligations are intended to facilitate the timely provision of current and accurate information to the Scheme.

The potential compliance burden associated with the scheme has been substantially reduced, by narrowing the range of foreign principals in relation to which registration is required. Timely and accurate information is particularly important in relation to activities undertaken, for the purpose of political or governmental influence, on behalf of:

- foreign governments
- foreign political organisations
- foreign government related entities,; and
- foreign government related individuals.

We continue to have a concern as to the extent of the record keeping obligations under Part 3, Division 3 of the Bill, specifically the requirement to retain for five years details of all registrable activities undertaken on behalf of a foreign principal. Many of our consulting members are single person operators or small firms for whom this would represent a substantial compliance burden.

The department has addressed the need for the record-keeping provisions in the Bill in in its response to Questions in Writing (Submission 5.1), see response to APGRA's original submission (Submission 13) on page 21.

The existence of adequate records is essential to the effective administration of the Scheme and will allow for appropriate investigations into potential non-compliance with the Scheme. To achieve the transparency objectives of the Scheme, certain information relating to a person's registration must be collected. The matters in relation to which records must be kept are exhaustively listed in section 40, and include:

- any registrable activities a person undertakes on behalf of a foreign principal
- any benefits provided to the registrant by the foreign principal
- information or material forming part of any communications activity that is registrable in relation to a foreign principal
- any registrable arrangement between the person and the foreign principal, and
- any other information or material communicated or distributed in Australia on behalf of the foreign principal.

Submission 19.3 – Joint Media Organisations

We request that the Committee recommend that the legislation (as passed by the Parliament) be reviewed three (3) years after its implementation. We request that such reviews become standard recommendations for Bills considered by the Committee.

Section 70 of the Bill requires the Minister to cause a review to be conducted of the operation of the scheme before the end of the period of five years after the scheme commences. The Minister must receive a copy of the report and table it in each House of the Parliament within 15 sitting days of the report being given to the Minister.

Paragraph 863 of the Explanatory Memorandum states:

> The time period is framed flexibly, such that a review could occur at any point in time within the five years, so long as it occurs before the end of the period of five years since commencement. Consequently, if practical issues are identified early in the life of the scheme, the formal review could be undertaken after 12 months. This would allow in-depth consideration, including by the Parliament, of the operation of the scheme. It is intended that legislative and policy amendments could be implemented, if needed or appropriate, following this review.

Submission 32.1 – Australian Industry Group

Proposed section 29A reads:

> **A person is exempt in relation to an activity the person undertakes on behalf of a foreign principal if:**
>
> **(a) the person is an entity formed in Australia, or incorporated under a law of the Commonwealth, a State or a Territory (an Australian entity); and**

(b) the person's purpose is to represent the interests of business or a particular sector of business or industry; and
(c) the person has members who are also Australian entities; and
(d) the activity is, or relates primarily to, representing the interests of business, or the particular sector, as a whole.

This exemption is well intended. However, clause (d) is extremely ambiguous in the context of the day-to-day activities of an industry representative body.

The department's strong view is that paragraph 29A(d) is needed. The Attorney-General stated in Submission 80.4:

> This (section 29A) addresses concerns raised in the Committee's inquiry by professional industry bodies that the Bill as introduces imposes an unnecessary regulatory burden on such entities by requiring them to register as they do not represent the interests of any particular foreign principal member. Rather, the professional industry body represents the interests of the industry as a whole, not the interests of the foreign principals who may form part of its membership. If a professional industry body were to lobby on behalf of one of its foreign members (rather than on behalf of the industry as a whole), it may still be required to register.

Deleting paragraph 29A(d) would not achieve the policy intention of the exemption.

Submission 33.2 – Australian Charities and Not-for-profits Commission

No changes have been made to section 11(3) and the ACNC is still of the view that section 11(3) means that simply discussing activities for the purpose of political or governmental influence with a foreign principal could mean that such activities may be considered to be undertaken on behalf of the foreign principal.

The department does not agree that discussing activities with a foreign principal could constitute a registrable arrangement or registrable activities, let alone that there would be any activity on behalf of a foreign principal, for the purpose of political or governmental influence.

As expressed in the department's earlier submissions to the Committee (Submission 5.1), the department disagrees that subsection 11(3) broadens the scope of what it means to be acting 'on behalf of' a foreign principal. Subsection 11(3) requires both the person and the foreign principal to know or expect that the person would or might undertake the activity, and that the person would or might do so in circumstances falling within the scope of sections 20, 21, 22 or 23 of the Bill. This ensures that a person does not need to register simply because their views align with those of a foreign principal, in a situation where the foreign principal has no ability to know that the person will or might engage in registrable activities.

For registration requirements to apply under the Scheme the person or entity must not only be acting on behalf of a foreign principal as defined in the Scheme; they must also engage in registrable activities, which are relatively narrow in scope, for the purpose of political or governmental influence.

The new definitions of *foreign government related entity* and *foreign government related individual* will require charities to ascertain ownership or control structures of entities and allegiance or obligations of individuals. These definitions will increase the regulatory burden.

The potential registrant will be in the best position to make decisions about their requirement to register, including the purpose of the activity or arrangement. The Attorney-General has stated that the onus is on a registrant to do his or her own due diligence. However, it is worth making three points in relation to this onus.

First, although this may increase the regulatory burden in relation to determining whether a foreign company or individual is a foreign principal, the narrowing of the definition of *foreign principal* will mean that:

- fewer charities will ultimately need to register
- to the extent that individual charities may be required to register, they will need to register in relation to fewer foreign principals, and
- overall, the regulatory burden will be significantly decreased.

Second, the Bill does not establish a positive or strict obligation for a person to undertake due diligence, for example, akin to the Customer Due Diligence requirements in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (sometimes referred to as the 'Know Your Customer' requirements) which impose a positive duty on reporting entities to be 'reasonably satisfied' as to the identity or beneficial ownership of a customer.

Third, the Scheme is designed as a transparency mechanism, rather than a punitive enforcement framework. Following passage of the Bill, the department will create guidance material and an education and outreach program. Guidance material will be made available online. The department also intends to provide support to persons who are unsure if they need to register under the scheme.

The ACNC notes the changes to penalties for the criminal offences in the Bill. The ACNC considers that the jail terms are still excessive and may have a detrimental impact on the ability of charities to attract senior staff and responsible persons.

The penalties are considered appropriate in light of the physical and fault elements that apply to the offences.

The financial penalties for offences in the Bill have not changed.

Financial penalties apply to the strict liability offences in the Bill. The penalties of 60 penalty units ($12,600) are consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The penalties are maximum penalties and the court will have its usual sentencing discretion and may determine that a lower penalty is appropriate.

Submission 34.1 – Community Council of Australia (CCA)

It remains unclear whether the amendments may mean foreign principals could encompass organisations such as the World Health Organisation, the United Nations or other non-government entities.

The department does not consider this to be unclear in relation to the World Health Organisation or the United Nations, which are clearly not foreign governments, foreign political organisations, foreign government related entities or foreign government related individuals, and therefore not *foreign principals*.

Chapter 4 of the Criminal Code has long juxtaposed the concepts of 'foreign government' and 'public international organisation', making clear that public international organisations such as the United Nations or World Health Organisation fall within a distinct legal category. This juxtaposition has been replicated in the amendments to Chapter 5 to the Code contained in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, and extended to further distinguish 'foreign political organisations' as yet another, distinct category of entities.

For other non-government entities, their coverage under the scheme will depend on whether they fall within the definition of *foreign government related entity*.

CCA is concerned about what the term political influence may encompass.

Activity for the purpose of political or governmental influence is exhaustively defined in section 12 of the Bill

CCA remains unclear about how the new definition of 'on behalf of' will be enacted.

The department is unsure about the meaning of this concern. The new definition in section 11 will apply according to its terms.

Regarding the new transparency notice provisions, CCA is unclear about how this new power might be applied to charities

The transparency notice provisions allow the Secretary to issue a notice that a particular entity is a *foreign government related entity* or a particular individual is a *foreign government directed individual*. If a charity fell within either of these definitions, it could be the subject of a transparency notice.

Surely it is possible to craft a form of exclusion for Australian registered charities engaged in their approved charitable activities (including advocacy to government) to be excluded from the need to register provided they are clearly not directed by a foreign government.

It is not necessary to include such an exemption because charities will only be required to register to the extent that they engage in registrable activities on behalf of a foreign principal for the purpose of political or governmental influence. The definitions of *foreign principal* and *undertaking activities on behalf of a foreign principal* are proposed to be significantly narrowed by the amendments.

Therefore, any charity that is not operating on behalf of a foreign government, foreign political organisation, foreign government related entity or foreign government related individual will simply not be affected by the registration requirements of the scheme.

Comparatively, it would be appropriate that a charity's links to a foreign principal be transparent on the register if, for example, a charity:

- entered into a contract or agreement with the government of a foreign country, to lobby the Australian Government to prioritise foreign aid funding towards a particular project in that country, notwithstanding that the project might advance one or more charitable purposes listed in subsection 12(1) of the *Charities Act 2013*;
- was directed by a foreign government to lobby the Department of Defence (or senior officials thereof) to approve the export of particular defence technologies or materiel to the foreign country, notwithstanding that doing so might 'advance the security or safety of Australia or the Australian public' by enhancing regional security, within the meaning of paragraph 12(1)(h) of the *Charities Act 2013*;
- routinely follows the directions and requests of a foreign political organisation to publicly disseminate information and material in Australia that promotes the views of that foreign political organisation on key policy and foreign relations issues, notwithstanding that doing so may ostensibly advance one or more charitable purposes listed in subsection 12(1) of the *Charities Act 2013*.

Submission 37.1 – Australian Major Performing Arts Group (AMPAG)

We are concerned that many foreign arts organisations that Australian arts organisations might look to collaborate with would fall under the definition of a 'government related entity' due to their governance structures. Where grant or investment funding for these types of collaborations is sought from government or other federal government bodies (Department of Foreign Affairs and Trade, Department for the Arts. Australia Council for the Arts etc), such activity would potentially be captured under proposed Division 1 Part 2 Sections 11 and 12 –even though the activity would not be understood by anybody as an attempt to influence in the way the legislation is trying to address.

The department does not consider that collaboration between Australian and foreign arts organisations would fall with the definition of *undertaking activities on behalf of a foreign principal* in section 11 of the Bill.

More specifically AMPAG recommends an exemption for not-for-profit arts organisation.

Specific exemptions for not-for-profit arts organisations are not considered to be necessary given the significant narrowing of the definitions of *foreign principal* and *undertaking activity on behalf of a foreign principal* set out in the proposed amendments provided to the Committee by the Attorney-General. If not-for-profit arts organisations engage in registrable activities, or enter a

registrable arrangement, on behalf of a foreign principal for the purpose of political or governmental influence, it is not clear why they should be exempted from registration requirements.

Submission 40.1 – Australian Conservation Foundation

The definition of foreign principal has not been sufficiently narrowed, which means that the relationships that charities have with international partners or counterpart (sister) organisations could still be required to be registered. The definition of 'foreign political organisation' should be explicitly defined. The PJCIS report on the Bill appeared to recommend this, however no such rectification has been proposed in relation to the FITS Bill.

The FITS Bill and National Security Legislation Amendment (Espionage and Foreign Interference) Bill serve very different purposes. The department does not accept that in all cases the definitions across the two bills should be identical.

In each bill, foreign principal and foreign political organisation have different operations in their respective (and distinct) contexts. The definitions in the Espionage and Foreign Interference Bill define the scope of an espionage or foreign interference offence, which is then criminal conduct. The definitions in the FITS Bill establish the context in which activities should be the subject of greater transparency.

Foreign political organisation is defined in section 10 to include foreign political parties. Paragraph 132 of the Explanatory Memorandum states that:

> The definition is not intended to be limited to registered political parties. If an organisation operates as a political organisation in a foreign country or part of a foreign country, or if a foreign country does not have a system of registration for political parties, the organisation would be captured under this definition.

This does not support an interpretation that the definition extends to international advocacy organisations where they are not operating politically. The Explanatory Memorandum could be updated to reflect this intention.

It needs to be made clear that only a direct principal/agency relationship is caught by the legislation. The definition of 'acting on behalf of' has not been consistently narrowed across the Bill. While 'collaboration' and 'funding' are removed from the definition of 'on behalf of' in section 11(1) other terms with similar meanings still remain in of sections 11(1)(a), 11(1)(b) and 11(3).

It is not intended to limit the scheme only to arrangements which directly involve principal/agency relationships. The department notes that the Law Council has indicated in its supplementary submission (Submission 4.2) that 'the Law Council recommended a definition aligned with the laws of agency, which is similar to the current proposal' (paragraph 6).

There remains an exemption in the FITS Bill from registration for commercial or business pursuits, and also for professional industry associations, but not for charitable and public interest work. This assumes that charities pose a greater threat to the integrity of public debate or political discussion than corporations or industry groups, which is false, and unjustifiable. PJCIS should recommend an exemption from registration requirements for charitable and public interest, not-for-profit groups.

The department does not agree with the premise of this concern. The exemption for commercial or business pursuits is intended to place negotiations in relation to specific commercial transactions outside the scope of the scheme. If a charity is engaged in these activities, they will benefit from the exemption in the same way as businesses.

If an activity does not relate to such transactions, and meets all other criteria for registration, then it will be registrable regardless of whether it is undertaken by a charity or a business.

In relation to the industry group exemption, it is not clear to the department that the circumstances relating to charities are the same as those applying to industry representative bodies.

A specific exemption for charities is not considered to be necessary given the significant narrowing of the definitions of *foreign principal* and *undertaking activity on behalf of a foreign principal* set out in the proposed amendments provided to the Committee by the Attorney-General. If charities engage in registrable activities, or enter a registrable arrangement, on behalf of a foreign principal for the purpose of political or governmental influence, it is not clear why they should be exempted from registration requirements.

Submission 52.1 – Pew Charitable Trusts

We are concerned that section 11 could require Pew staff, and Indigenous rangers employed in caring for country, to register as agents of foreign governments as a result of activities such as the above.

Section 11 of the Bill does not, on its own, require anyone to register under the scheme. For a registration requirement to arise, a person or entity must be undertaking registrable activities in Australia, on behalf of a foreign principal, for the purpose of political or governmental influence. These terms are all defined in the Bill, and have been significantly narrowed by the amendments.

The department does not observe these elements in the example provided in the Pew Charitable Trusts submission regarding Indigenous rangers.

Submission 57.1 – Oxfam

The definition of 'acting on behalf of' is broad and uncertain. The definition should be narrowed and clarified by deleting sections 11(1)(a) and 11(3).

The department considers that an arrangement between two parties indicates a level of consideration, structure and planning about the proposed activities. Even though those activities

may go beyond the scope of the other matters listed in section 11, the department considers it appropriate for arrangements to continue to fall within the definition of *undertaking activity on behalf of a foreign principal* in section 11, without further qualification or limitation.

As expressed in the department's earlier submissions to the Committee (Submission 5.1), the department disagrees that subsection 11(3) broadens the scope of what it means to be acting 'on behalf of' a foreign principal. Subsection 11(3) requires both the person and the foreign principal to know or expect that the person would or might undertake the activity, and that the person would or might do so in circumstances falling within the scope of sections 20, 21, 22 or 23 of the Bill. This ensures that a person does not need to register simply because their views align with those of a foreign principal, in a situation where the foreign principal has no ability to know that the person will or might engage in registrable activities.

The definition of 'foreign political organisation' is unclear. 'Political organisation' should be clearly defined to ensure that it does not include international advocacy organisations.

Foreign political organisation is defined in section 10 to include foreign political parties. Paragraph 132 of the Explanatory Memorandum states that:

> The definition is not intended to be limited to registered political parties. If an organisation operates as a political organisation in a foreign country or part of a foreign country, or if a foreign country does not have a system of registration for political parties, the organisation would be captured under this definition.

This does not support an interpretation that the definition extends to international advocacy organisations where they are not operating politically. The Explanatory Memorandum could be updated to reflect this intention.

The Bill should include an exemption for registered charities and public interest not for profits, similar to the exemption proposed for industry associations.

It is not clear to the department that the circumstances relating to charities are as analogous to those applying to industry representative bodies.

A specific exemption for charities is not considered to be necessary given the significant narrowing of the definitions of *foreign principal* and *undertaking activity on behalf of a foreign principal* set out in the proposed amendments provided to the Committee by the Attorney-General. If charities engage in registrable activities, or enter a registrable arrangement, on behalf of a foreign principal for the purpose of political or governmental influence, it is not clear why they should be exempted from registration requirements.

Examples of Oxfam's work that would fall under the Bill

It is not clear to the department that the example provided on page 3 of the Oxfam submission would be registrable, as the purpose of the activity seems clearly to be the delivery of a specific violence prevention program in the Solomon Islands, not political or governmental influence within the meaning of section 12 of the Bill. To the extent that Oxfam then elects to highlight that project as an example of its work when communicating with the Australian Government Department of

Foreign Affairs and Trade, it is not clear that Oxfam is acting *on behalf of* a foreign principal, as required by section 11 of the Bill.

Submission 63.1 – GetUp

It is very unclear what activities would be registrable under this Bill that will not be criminalised under the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Espionage Bill)

The department has previously addressed the interaction between the two Bills, including in its opening statement to the Committee on 31 January 2018 and in Submission 5.1 (page 23.)The Espionage and Foreign Interference Bill criminalises acts of espionage and foreign interference, amongst other conduct. The FITS Bill seeks to provide transparency where a person or entity is acting on behalf of a foreign principal to influence political or government processes. Notably the FITS Bill does not criminalise foreign influence, which is in many instances a legitimate incident of global engagement and collaboration.

The Bill is still untenably broad insofar as it does not adequately define "foreign political organisations", which could include international advocacy and research groups that work independently of any foreign government. "Foreign political organisation" should only include foreign political parties and similar groups that have a close connection to a specific foreign government.

Foreign political organisation is defined in section 10 to include foreign political parties. Paragraph 132 of the Explanatory Memorandum states that:

> The definition is not intended to be limited to registered political parties. If an organisation operates as a political organisation in a foreign country or part of a foreign country, or if a foreign country does not have a system of registration for political parties, the organisation would be captured under this definition.

This does not support an interpretation that the definition extends to international advocacy organisations and research groups not operating as a political organisation. The Explanatory Memorandum could be updated to reflect this intention.

The Bill is still untenably broad insofar as it still requires Australians to register as "agents" of foreign "principals" where no such relationship exists as per the common understanding of the words. Remove proposed subsections 11(1)(a) and 11(3).

The department disagrees with this assertion. The proposed amendments to section 11 significantly narrow what is considered to be *undertaking an activity on behalf of a foreign principal.* The department notes that the Law Council has indicated in its supplementary submission (Submission 4.2) that 'the Law Council recommended a definition aligned with the laws of agency, which is similar to the current proposal' (paragraph 6).

Submission 72.1 – Greenpeace Australia Pacific (GPAP)

GPAP believes the amendments do not address our serious concerns about the definition of 'foreign political organisation' and that subsequently our work, along with Greenpeace International's work, and our foreign offices may still be captured under the definition of a 'foreign political organisation'. GPAP recommends that 'foreign political organisation' be redefined to exclude international charities and advocacy groups.

The department does not agree with this interpretation. *Foreign political organisation* is defined in section 10 to include foreign political parties. Paragraph 132 of the Explanatory Memorandum states that:

> The definition is not intended to be limited to registered political parties. If an organisation operates as a political organisation in a foreign country or part of a foreign country, or if a foreign country does not have a system of registration for political parties, the organisation would be captured under this definition.

This does not support an interpretation that the definition extends to international advocacy organisations where they are not acting politically. The Explanatory Memorandum could be updated to reflect this intention.

The amendments to the definition of 'foreign political organisation' in the FITS bill seem to be contradictory to those in the Espionage and Foreign Interference (EFI) Bill. In such that the EFI bill defines 'foreign principal' as including international organisations such as the United Nations, whilst the amendments to the FITS bill redefines the term to exclude the United Nations.

The FITS Bill and National Security Legislation Amendment (Espionage and Foreign Interference) Bill serve very different purposes. The department does not accept that in all cases the definitions across the two bills should be identical.

In each bill, foreign principal and foreign political organisation have different operations in their respective (and distinct) contexts. The definitions in the Espionage and Foreign Interference Bill define the scope of an espionage or foreign interference offence, which is then criminal conduct. The definitions in the FITS Bill establish the context in which activities should be the subject of greater transparency.

The department is not aware of which amendment GPAP is referring to when it states that 'the amendments to the FITS Bill redefines the term to exclude the United Nations'. The amendments provided to the Committee do not amend the definition of *foreign political organisation* in section 10 of the Bill.

GPAP recommends a clear exemption from registration for international charities, advocacy groups and 'political campaigners' similar to those exemptions made for business and industry.

A specific exemption for charities is not considered to be necessary given the significant narrowing of the definitions of *foreign principal* and *undertaking activity on behalf of a foreign principal* set out in the proposed amendments provided to the Committee by the Attorney-General. If charities engage in registrable activities, or enter a registrable arrangement, on behalf of a foreign principal

for the purpose of political or governmental influence, it is not clear why they should be exempted from registration requirements.

Submission 82.1 – Professor Anne Twomey

The constitutional validity of the proposed law is significantly bolstered by amendments, which focus the Bill more tightly on its legitimate end of making the exercise of foreign influence in relation to political and government matters in Australia more transparent through a registration system.

No response necessary.

The potential effect of the Bill upon the work of universities will be ameliorated by the amendments.

No response necessary.

A question arises about whether foreign universities fall within the definition of *foreign government related entities*.

The question of whether a foreign university will be *related* to a foreign government is one of fact. The department cannot speculate on whether individual universities in foreign countries will meet the criteria in the definition of *foreign government related entity*. If the university does not meet those criteria, they will not be a *foreign principal* for the purposes of the scheme.

In this respect, universities are no different to any other organisation. If the university is closely affiliated with a foreign government or a foreign political organisation then it is appropriate for a person to register if they undertake registrable activities (or enter into a registrable arrangements to undertake such activities) in Australia on behalf of the university for the purpose of political or governmental influence.

An academic may still need to register where they collaborate with counterparts in foreign state universities or research institutes under an 'arrangement'. It would be preferable for the term 'arrangement' in section 11 to be drafted more narrowly to only apply to arrangements that involve 'an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal.

The department considers that an arrangement between two parties indicates a level of consideration, structure and planning about the proposed activities. Even though those activities may go beyond the scope of the other matters listed in section 11, the department considers it appropriate for arrangements to continue to fall within the definition of *undertaking activity on behalf of a foreign principal* in section 11, without further qualification or limitation.

An individual may be uncertain as to whether he or she needs to register because he or she has insufficient information as to whether or not a body with which he or she has an arrangement is a foreign principal and whether or not an activity under that arrangement would be regarded as for the 'substantial purpose' of political or governmental influence.

The potential registrant will be in the best position to make decisions about their requirement to register, including the purpose of the activity or arrangement. The Attorney-General has stated that the onus is on a registrant to do his or her own due diligence. The transparency notice regime also allows the Secretary to issue a notice, which would provide clarity to a potential registrant.

Following passage of the Bill, the department will create guidance material and an education and outreach program. Guidance material will be made available online. The department also intends to provide support to persons who are unsure if they need to register under the scheme.

Submission 86 – Australian Council of Trade Unions

The Bill captures activities that the ACTU or its affiliates may choose to engage in to advocate for the interests of foreign workers resident in Australia pursuant to a temporary visa.

Foreign individuals will only fall within the definition of *foreign principal* under the scheme if they are *foreign government related individuals*.

The amendments propose (at item (11)) that this term would be defined in section 10 to mean an individual:

- who is neither an Australian citizen nor a permanent Australian resident, and
- who is related to a foreign principal that is a foreign government, foreign government related entity or foreign political organisation in either or both of the following ways:
    - the individual is under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal
    - the foreign principal is in a position to exercise, in any other way, total or substantial control over the individual.

It is not clear to the department that the individuals to whom the ACTU submission refers would fall within this definition. If the individuals do not meet these criteria, the registration requirements of the scheme will not arise. If the individuals do meet these criteria then it is not clear to the department why the activities mentioned in the ACTU submission should be exempt from the registration requirements.

The Bill captures activities ACTU or its affiliates undertake in cooperation with overseas trade unions, union confederations and international trade union federations.

The department is not clear which paragraph of the definition of *undertaking activity on behalf of a foreign principal* in section 11 would apply to such activities if paragraph 11(1)(e) (with funding or supervision by the foreign principal) and paragraph 11(1)(f) (in collaboration with the foreign principal) are removed, as proposed by item (25) of the amendments provided to the Committee by the Attorney-General.

There should be an exemption for trade union related activities in Division 4 of Part 2 of the Bill.

It is not clear how trade union activities may be captured by the Bill, and to the extent they are, the basis on which should be exempt. Where a registrable activity is covered, it is because it is undertaken in Australia on behalf of a foreign principal for the purposes of political or government influence. Where that is the case, the policy intent is that the activity be registrable.

Submission 87 – Optus

Optus is a wholly owned subsidiary of Singtel. We are concerned that our ownership structure will capture Optus in the proposed scope concerning foreign government ownership.

Item (26) of the amendments insert a new subsection 11(4) which provides that an activity undertaken by a company registered under the *Corporations Act 2001* 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.

This will ensure that Optus is not considered to be acting 'on behalf of' Singtel simply by virtue of being a wholly-owned subsidiary. However, this will not exempt Optus from registration requirements. Rather it makes clear that a registration requirement does not arise simply because Optus is a subsidiary of Singtel. If however Optus was directed by Singtel to engage in registrable activities in Australia for the purpose of political or government influence, this may still be registrable due to paragraph 11(1)(d).

We would ask that the Committee consider possible exemptions being granted to these restrictions where a relationship makes a positive contribution to Australia's national interest.

The department does not consider such an exemption to be necessary given the amendment to section 11 to insert new subsection 11(4). If a foreign government related entity is directing a subsidiary to engage in registrable activities in Australia for the purpose of political or governmental influence, the department considers that there is a public interest in such activities being transparent.

Alternatively, we ask the Committee to consider the appropriateness of extending to licenced telecommunications carriers the same guidelines as the Attorney-General has proposed for media organisations and publishers (that media organisations and publishers will not be required to register if the identity of the principal is already transparent).

The department does not consider such an exemption to be necessary given the amendment to section 11 to insert new subsection 11(4). If a foreign government related entity is directing a subsidiary to engage in registrable activities in Australia for the purpose of political or governmental influence, the department considers that there is a public interest in such activities being transparent.

Submission 90 – Change.org

As noted above, we welcome the narrowing of the definition of a foreign principal but require further clarification of the definition of "foreign political organisations". We are concerned that the current open-ended definition will give the government broad license on how this is interpreted in practice. We are concerned that the lack of guidance may push platforms and other organisations to make subjective and erroneous determinations about the law that could serve to silence speech. We strongly encourage the government to release a register of organisations considered to be foreign political organizations as part of the final Bill.

Foreign political organisation is defined in section 10 to include foreign political parties. Paragraph 132 of the Explanatory Memorandum states that:

> The definition is not intended to be limited to registered political parties. If an organisation operates as a political organisation in a foreign country or part of a foreign country, or if a foreign country does not have a system of registration for political parties, the organisation would be captured under this definition.

There is no intention to create a register of organisations that are considered to be a foreign political organisation. Following passage of the Bill, the department will create guidance material and an education and outreach program. Guidance material will be made available online. The department also intends to provide support to persons who are unsure if they need to register under the scheme.

Change.org enables our users to sign and start petitions without using their real name, because it is vitally important that people can campaign on the issues that matter to them without fear of retribution. As noted in the petition example above, Josie Pohla initially started her Change.org petition anonymously, because of a domestic violence situation in her family. We note that the Bill states that "media organisations and publishers will not be required to register if the identity of the principal is already transparent…. However, if the disseminator broadcasts or publishes the material as though it was native content, thereby concealing the provenance of the material, registration should be required." Absent a register of foreign political organisations noted in the recommendation above, it is unclear how a platform would identify any anonymous content requiring registration. The Bill needs to provide guidance in this area.

It is not clear that the activity described in the Change.org submission would fall within the definition of *undertaking activity on behalf of a foreign principal* in section 11 of the Bill, as proposed to be amended. The relationship between Change.org and the person creating the petition does not appear to fall within any paragraphs of the definition in section 11.

If the principal is anonymous, it will not be reasonably practicable for a potential registrant to determine whether the registrant was required to register. In this case, the criminal offences for failure to register would not be able to be proved as the necessary fault element would not be able to be established.

We therefore strongly recommend that the Bill in its final form provide detailed implementation guidance for platforms and publishers. We recommend a 'notice and takedown' regime, whereby a platform is not obligated to monitor, remove or restrict content or users under this Bill until it receives a formal government notice, along with a clear mechanism to challenge such notices if needed.

The Bill does not require a platform to monitor, remove or restrict content, accordingly a 'notice and takedown ' regime is not necessary. Rather the Bill requires a person or entity to register where it is undertaking registrable activities on behalf of a foreign principal for the purpose of political or government influence.

It appears that Change.org is of the view that could engage in *communications activity* by providing a platform for users to create petitions to lobby governments about various issues. Even if this is correct, the department's view is that the relationship between Change.org and the person creating the petition could not be considered to fall within the definition of *undertaking activities on behalf of a foreign principal*, within the meaning of section 11 (as amended).