

Report

Referral

1.1 On 11 September 2019, the Senate referred the following matter to the Committee of Privileges (committee) for inquiry and report:

The development of a foreign influence transparency scheme to apply to parliamentarians, with particular reference to:

- a) the imposition on senators of similar transparency obligations to those in the legislative scheme established under the *Foreign Influence Transparency Scheme Act 2018*;
- b) consideration of the legislative scheme, and the report of the Parliamentary Joint Committee on Intelligence and Security on the enabling legislation, in particular, the recommendations relating to the introduction of a parallel scheme adapted to the parliamentary environment; and
- c) any related matter.¹

1.2 The resolution referring the inquiry also provided:

The [committee] consult with the equivalent committee in the House of Representatives with the aim of agreeing a single parliamentary foreign influence transparency scheme to apply uniformly, together with uniform processes for its implementation for members and senators.²

1.3 The inquiry was referred on the motion of Senator Patrick. The committee therefore sought his views on the matter, inviting him to make a submission. Senator Patrick provided both a submission and a supplementary submission.

Background

1.4 The Foreign Influence Transparency Scheme (Executive FIT Scheme) is established by the *Foreign Influence Transparency Scheme Act 2018* (FITS Act). The Executive FIT Scheme:

...introduces registration obligations for persons or entities who have arrangements with, or undertake certain activities on behalf of, foreign principals. It is intended to provide transparency for the Australian Government and the Australian public about the forms and sources of foreign influence in Australia.³

1 *Journals of the Senate*, No. 14 – 11 September 2019, p. 432.

2 *Journals of the Senate*, No. 14 – 11 September 2019, p. 432.

3 Foreign Influence Transparency Scheme Bill 2017, Revised Explanatory Memorandum, p. 2.

1.5 Prior to being passed by both Houses, the FITS Act was the subject of an extensive inquiry by the Parliamentary Joint Committee on Intelligence and Security (PJCIS). The PJCIS noted:

Members of parliament perform a range of duties that bring them into contact with foreign governments and entities...

...

Although it is important that parliamentary privilege is not abrogated, the [PJCIS] considers that members of parliament should not as a result be excused from the transparency obligations placed on other members of the public. The [PJCIS] strongly endorses the principle that senators and MPs should be transparent about when they are representing foreign government and related interests. However, given the unique nature of Parliamentarians' work, and the unique status of the Parliament and its privileges, it is more appropriate that the Parliament establish its own registers.⁴

1.6 The PJCIS concluded its deliberations with the following recommendation:

The [PJCIS] recommends that the [FITS] Bill be amended to provide that the Foreign Influence Transparency Scheme does not apply to members of the House of Representative or Senators.⁵

1.7 This recommendation was adopted by Government and the FITS Act exempts members of Parliament from the scheme.⁶

Lapsed inquiry – 45th Parliament

1.8 Having recommended that federal parliamentarians be excluded from the Executive FIT scheme, the PJCIS continued:

The [PJCIS] further recommends that the House of Representatives and the Senate develop a parallel parliamentary foreign influence transparency scheme, imposing on Members and Senators similar transparency obligations to those in the Bill, but appropriately adapted for the parliamentary environment.

In developing that parallel scheme, the Houses should consider all conduct undertaken by Members and Senators in the course of their duties as parliamentarians, including conduct not directly related to proceedings in the Parliament. The scheme should be administered independently within the Parliament, and include

- an obligation to report registrable activities undertaken on behalf of a foreign principal, or registrable arrangements with a foreign principal, appropriately adapted for the parliamentary environment,

4 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017*, June 2018, pp. 272–273.

5 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017*, June 2018, Recommendation 29, p. 274.

6 *Foreign Influence Transparency Scheme Act 2018*, section 25A.

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- a power for the administrator to obtain information and documents, and
 - appropriate sanctions for non-compliance.⁷

1.9 On 18 October 2018 the Senate referred to the committee an inquiry into the development of a foreign influence transparency scheme. The terms of reference for that inquiry in the 45th Parliament were slightly different to the current inquiry's terms of reference. Specifically, the committee was asked to inquire into:

The development of a foreign influence transparency scheme to apply to parliamentarians...with particular reference to:

- (a) the imposition of transparency obligations similar to those imposed by the scheme established in accordance with the *Foreign Influence Transparency Scheme Act 2018*;
- (b) the timetable for the implementation of the executive's scheme;
- (c) the recommendations of the Parliamentary Joint Committee on Intelligence and Security relating to the introduction of a parallel scheme adapted to the parliamentary environment; and
- (d) any other matter.⁸

1.10 As recommended by the PJCIS, an inquiry on the development of a parliamentary foreign influence transparency scheme was also referred to the House of Representatives' Standing Committee of Privileges and Members' Interests on 25 October 2018, enabling the two committees to consider the matter jointly while respecting comity between the Houses.

1.11 As part of its inquiry in the 45th Parliament, the committee:

- met with members of the House of Representatives' Standing Committee of Privileges and Members' Interests to discuss a uniform scheme and agreed to form a working group; and
- received a private briefing from officers of the Attorney-General's Department on the implementation of the Executive FIT Scheme and potential issues in relation to the development of a Parliamentary FIT Scheme.

1.12 The committee's inquiry lapsed at the end of the 45th Parliament, before the committee had an opportunity to present a report. However, it had examined the principles of the executive scheme and identified some concerns as to how the scheme would operate in the parliamentary sphere, including the financial impact.

7 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017*, June 2018, Recommendation 29, pp. 274–275.

8 *Journals of the Senate*, No. 125 – 18 October 2018, p. 4001. As with the current inquiry, the referral in the 45th Parliament included provision for the committee to consult with the equivalent committee in the House of Representatives with the aim of developing a single scheme with uniform processes.

Executive FIT Scheme

1.7 The key elements of the Executive FIT Scheme are:

- persons undertaking certain activities on behalf of a foreign principal are required to register;
- certain activities or classes of persons are exempt from the scheme;
- registrants are required to disclose information about the nature of their relationship with the foreign principal and activities undertaken pursuant to that relationship (both at the initial point of registration and on an ongoing basis for the duration of the relationship);
- the scheme provides for information about registrants and their registration to be made publicly available, to serve the transparency purposes of the scheme;
- the Secretary of the Attorney-General's department may exercise information gathering powers to 'support compliance'; and
- the scheme includes criminal offences for non-compliance.

1.13 A 'foreign principal' is defined in the FITS Act as:

- foreign government (includes government or authority of country or region);
- foreign government related entity (includes companies, executive committees, political organisations);
- foreign political organisation (includes political party or organisation with political objectives); and
- foreign government related individual.

1.14 A person is liable to register under the Executive FIT Scheme when they undertake an activity on behalf of a foreign principal that is registerable in relation to the foreign principal, or they enter a registerable arrangement with a foreign principal. The FITS Act sets out conduct that constitutes registerable activities, namely:

- parliamentary lobbying in Australia on behalf of a foreign government;
- general political lobbying, communications activity or disbursement activity in Australia for the purpose of political or governmental influence.

1.15 The FITS Act also provides a list of exemptions to the Executive FIT Scheme to 'ensure that a person does not have to register under the scheme for certain activities that commonly involve arrangements with foreign principals'.⁹

1.16 Under the same provision that exempts federal parliamentarians from the Executive FIT Scheme, state and territory parliamentarians are also exempted.¹⁰

9 *Foreign Influence Transparency Scheme Act 2018*, section 15. See sections 24 to 29F for the specific exemptions.

10 *Foreign Influence Transparency Scheme Act 2018*, section 25A.

1.17 The FITS Act also provides for exemptions in circumstances prescribed by the Rules.¹¹ The Rules provides an exemption for a person who is: employed under the *Members of Parliament (Staff) Act 1984* (MOP(S) Act); a consultant engaged under the MOP(S) Act; or a Commonwealth public official, and:

- undertaking the activity is within the scope of the functions that the person undertakes in the person's capacity as such a person; and
- at the time the activity is undertaken, the identity of the foreign principal is either apparent to all persons with whom the person is dealing or disclosed to them.

Resourcing of the Executive FIT Scheme

Funding for the Executive FIT Scheme

1.18 The Mid-Year Economic Fiscal Outlook 2017–18 (MYEFO 2017–18) provided for \$2.2 million in funding for the Executive FIT Scheme over the forward estimates, and confirmed a total of \$3.2 million in funding over four years from 2018–19.¹² In answers to questions on notice, the Attorney-General's Department provided the following explanation of how that funding was allocated:

The [\$3.2 million in Mid-Year Economic Fiscal Outlook (MYEFO) 2017–18] was determined before the Act was passed by Parliament. As such, it was intended to cover the costs of the development and introduction of the scheme as it was conceived upon introduction to Parliament, including:

- staffing costs and [average staffing levels (ASL)] to process registrations, undertake education and outreach, policy work, reporting and other scheme-related administration; and
- staffing costs, ASL and capital funding for IT support and maintenance.¹³

1.19 In addition to the expenditure for the Executive FIT Scheme, MYEFO 2017–18 also identified \$0.8 million in related capital for the Attorney-General's Department.¹⁴ The Attorney-General's Department explained why this funding was required:

The [Attorney-General's Department] also requested \$767,000 of capital funding to build a dedicated IT system and database to store, manage and process registrations.¹⁵

1.20 MYEFO 2018–19 set out additional funding of \$4 million for the Executive FIT Scheme over two years.¹⁶ In answers to questions on notice, the

11 *Foreign Influence Transparency Scheme Act 2018*, section 30.

12 MYEFO 2017-18, Appendix A, p. 137. See also Foreign Influence Transparency Bill 2017, Explanatory Memorandum, p. 3. See also: Replacement Explanatory Memorandum, p. 3.

13 Attorney-General's Department, answers to questions on notice, received 29 May 2019.

14 MYEFO 2017-18, Appendix A, p. 137.

15 Attorney-General's Department, answers to questions on notice, received 29 May 2019.

Attorney-General's Department provided limited information on how this additional funding had been allocated:

Following the passage of the FITS Act through Parliament, in the [MEYFO 2018–19], the department received additional resourcing of 4.3 ASL and \$4 million, terminating on 30 June 2020.

This additional amount was considered necessary to ensure the department is sufficiently resourced to administer the scheme as it was agreed by Parliament.¹⁷

1.21 Table 1 sets out the ASL for the Executive FIT Scheme over the period 2018–19 to 2020–21.¹⁸

Table 1 – Average staffing level per annum for the Executive FIT Scheme

	2018–19	2019–20	2020–21
MYEFO 2017–18	3.9	3.9	3.9
MYEFO 2018–19	2.15	4.3	Nil
Total ASL	6.05	8.2	3.9

Development of IT for the Executive FIT Scheme

1.22 The Attorney-General's Department noted issues in relation to the development of a dedicated IT system for the purposes of the scheme:

The IT system which has been built to support the [Executive FIT Scheme] comprises of multiple application components including a web portal/Public register and a customer relationship management/internal administration portal. This approach has been taken to enable the business area to manage all facets of the scheme in a secured and seamless manner while delivering a positive experience for registrants.

The main difficulty was building a system that was fit for purpose and enabled registrants to meet their legal obligations within a limited timeframe...¹⁹

1.23 The Attorney-General's Department indicated that there had been improvements to layout and functionality since the initial deployment of the system.²⁰ The Department of Parliamentary Services has met with the Attorney-General's Department to discuss whether there could be any interoperability between a

16 Mid-Year Economic Fiscal Outlook 2018–19, Appendix A, p. 157.

17 Attorney-General's Department, answers to questions on notice, received 29 May 2019.

18 Attorney-General's Department, answers to questions on notice, received 29 May 2019.

19 Attorney-General's Department, answers to questions on notice, received 29 May 2019.

20 Attorney-General's Department, answers to questions on notice, received 29 May 2019.

parliamentary register and the executive register. The committee understands that the Attorney-General's Department has advised that this is not possible.

Advertising and outreach

1.24 The Attorney-General's Department outlined some of the education and outreach efforts which had been undertaken to raise awareness of the scheme among potential registrants. Those activities included:

- writing to certain individuals and entities in Australia to ask them to consider whether they have an obligation to register;²¹
- publication of three public notices in major metropolitan and regional newspapers, and in a range of culturally and linguistically diverse newspapers;²² and
- the development and publication of fact sheets.²³

Current operation of the Executive FIT Scheme

1.25 The public register for the Executive FIT Scheme is available [online](#). As at 11 November 2019 there were 50 registrants, who have registered a total of 194 activities.

1.26 Mr Mike Burgess, Director-General of Security, Australian Security Intelligence Organisation (ASIO) was asked during Supplementary Budget Estimates 2019–20 about the number of entries on the register, at that time 184 activities were registered, and whether ASIO was satisfied that the Executive FIT Scheme, as currently constructed, is sufficiently comprehensive:

If your question is, 'Am I satisfied that all the right people who should have registered have registered?' or 'Is that effective?' I would be loath to say yes or no because, again, in some cases, you don't know what you don't know if someone is operating covertly on behalf of someone else.

...

I am agnostic on that number because I know how our foreign intelligence services operate. I would remind you that this scheme is one of many components. It is a tool in your defence kit, if you like, to help harden Australia. So just looking at that number and making a comment on that is actually, from my perspective, meaningless.²⁴

21 Briefing by officers from the Attorney-General's Department, 2 April 2019.

22 Attorney-General's Department, answers to questions on notice, received 29 May 2019. Notices were published to coincide with commencement of the Executive FIT Scheme on 10 December 2018; the end of the grace period on 10 March 2019; and on the issuing of writs for the Federal election on 11 April 2019.

23 Attorney-General's Department, answers to questions on notice, received 29 May 2019. The factsheets are available on the Attorney-General's Department's [website](#).

24 Mr Mike Burgess, Director-General, Australian Security Intelligence Organisation, Legal and Constitutional Affairs Legislation Committee, Supplementary Budget Estimates 2019–20, *Committee Hansard*, 21 October 2019, pp. 45–46.

1.27 There are some recent examples of individuals and organisations being asked to consider registering under the Executive FIT Scheme which may be seen to provide an indicative manner of how the scheme is operating.

1.28 In May 2019, the Attorney-General's Department (AGD) wrote to the CEO of the Nine Network, Mr Hugh Marks, asking that the Nine Network consider registering under the Executive FIT Scheme. The activity which prompted AGD's correspondence was the airing of footage from the Al Jazeera Network, by the Nine Network. The letter from AGD to the Network stated:

Most relevantly to [the Nine Network], one of the categories of registerable activity under the scheme is 'communications activity'. A communications activity involves producing, communicating or disseminating information, in any format, to the public or a section of the public on behalf of a foreign principal for the purpose of governmental or political influence. This would include disseminating such information for the purpose of influencing voters in the Australian federal election.

...

I note Nine Network's 'A Current Affair' segment which aired on 29 May 2019 and broadcast footage which was allegedly obtained from the Al Jazeera Media Network (Al Jazeera). This broadcast depicted a One Nation party candidate engaging in inappropriate conduct. Al Jazeera has since made a public statement stating that the footage was obtained and broadcast without their consent.

It is the Attorney-General's Department's view that, if this broadcast was done on behalf of a foreign principal (Al Jazeera) then it would be a registrable communications activity.²⁵

1.29 Appearing before the Parliamentary Joint Commission on Intelligence and Security, officers from AGD explained the purpose of the letter, particularly considering the letter noted that Al Jazeera had indicated that the footage was obtained without consent:

In that instance we're obviously aware of the Al Jazeera comment, but we didn't possess the factual information to know whether there was any arrangement between Nine and Al Jazeera. So we thought the appropriate thing to do was to raise it and acknowledge that, if that was right, the scheme wouldn't apply and to ask Nine to consider that.²⁶

25 Correspondence from First Assistant Secretary, Institutional Integrity Branch, Attorney-General's Department, to Mr Hugh Marks, Chief Executive Officer and Director, Nine Entertainment Co, dated May 2019.

26 Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group, Attorney-General's Department, Parliamentary Joint Committee on Intelligence and Security, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, *Committee Hansard*, 14 August 2019, p. 40

1.30 In relation to this matter, the Deputy Secretary, Integrity and International Group at AGD, argued that the FITS Act was not intended to have a 'chilling impact' on the ability of news organisations to report:

We wouldn't accept that characterisation. I think the act is intended to have a broad purpose. I think one particular issue to note is that it requires registration for transparency. It in no way limits or prevents any activities from occurring. It merely requires that, if they're done, at the behest of a foreign principle [sic], which is a foreign government or foreign political organisation or another entity linked to a foreign government or foreign political organisation, it be made transparent to the Australian public.²⁷

1.31 The second example the committee is aware of is in relation to the Conservative Political Action Conference (CPAC) held in Sydney in August 2019. According to media reports, the co-host of CPAC, Mr Andrew Cooper, has been asked to provide documents pursuant to the FITS Act so determination can be made as to whether there is a liability to register.²⁸ According to a media report the Attorney-General's Department were seeking to determine the arrangements in place between Mr Cooper's company and the other host of CPAC, the American Conservative Union. Contravention of the notice carries a penalty of six months imprisonment.

1.32 Correspondence was also sent to the former Prime Minister, the Hon Tony Abbott, a presenter at CPAC, asking him to consider, given his obligations under the FITS Act as a former Cabinet Minister, whether he is liable to register under the scheme for the speech he gave a CPAC.

1.33 It is reported that Mr Cooper is refusing to comply with the notice to produce documents and that Mr Abbott has declined to register under the Executive FIT Scheme.²⁹ In response the Attorney-General criticised the administration of the scheme:

'If commonsense interpretations of what clearly and unequivocally constitutes an arrangement with a foreign principal under the terms of the legislation are applied, the legislation will function effectively,' the Attorney-General said. 'This issue will be remedied by upskilling the personnel to increase the common sense.'³⁰

27 Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group, Attorney-General's Department, Parliamentary Joint Committee on Intelligence and Security, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, *Committee Hansard*, 14 August 2019, p. 40.

28 Janet Albrechtsen, 'In pursuit of commonsense', *The Weekend Australian*, November 2-3 2019, p. 17. Section 45(2) of the FITS Act provides the Secretary of the Attorney-General's Department with the power to obtain information and documents from a person where the Secretary suspects that the person is liable to be registered under the Executive FIT Scheme.

29 Janet Albrechtsen, 'In pursuit of commonsense', *The Weekend Australian*, November 2-3 2019, p. 17.

30 Max Koslowski, 'Foreign influence laws won't change after Tony Abbott targeted, Porter says' *The Sydney Morning Herald*, November 5 2019.

Issues in relation to the development of a Parliamentary FIT Scheme

Acting on behalf of a foreign principal

1.34 The committee is mindful that the nature of association where a senator undertakes a registerable activity on behalf of a foreign principal needs to be one in which the association is described as 'an arrangement', 'in the service of', 'on the order or request of' or 'under the direction of' a foreign principal. The committee considers that there is a threshold question of whether a member of the Parliament, acting on behalf of a foreign principal, can also meet the constitutional requirements for eligibility to sit as a senator or a member of the House of Representatives under the *Constitution*. While subsection 44(i) of the *Constitution* was, during the 45th Parliament, the subject of intense focus because of dual citizenship issues, the subsection also serves to disqualify a person who is 'under any acknowledgement of allegiance, obedience, or adherence to a foreign power'. Thus, if a senator is undertaking a registerable activity on behalf of a foreign power, there is certainly a question as to whether that activity would put the senator in breach of subsection 44 (i) of the *Constitution*. There is no apparent restrictions to limit the conduct to parliamentary duties.

Conduct to be covered by a Parliamentary FIT Scheme

1.35 In recommending the establishment of a separate Parliamentary FIT Scheme, the PJCIS's Advisory Report stated:

...the Houses should consider all conduct undertaken by Members and Senators in the course of their duties as parliamentarians, including conduct not directly related to proceedings in the Parliament.³¹

1.36 The *Parliamentary Privileges Act 1987* defines 'proceedings in Parliament' as 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee'³² 'Proceedings in Parliament' includes:

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.³³

31 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017*, June 2018, Recommendation 29, p. 275.

32 Section 16(2) of the *Parliamentary Privileges Act 1987*.

33 Section 16(2) of the *Parliamentary Privileges Act 1987*.

1.37 The committee has substantial reservations about including the activities of parliamentarians which fall within the proceedings of Parliament in a Parliamentary FIT Scheme and expresses concern over how to identify those activities that fall both within parliamentary proceedings and other activities.

1.38 The committee's earlier work in relation to the identification of privileged material seized under search warrants provides guidance in relation to this issue. In its 164th Report, *Search warrants and the Senate*, the committee set out a three-question test for determining whether documents seized under a search warrant came within the definition of 'proceedings in Parliament' for the purposes of a claim of parliamentary privilege over the documents.³⁴

1.39 The committee understands that there may be a need to modify or recast this test to accommodate for the fact that a Parliamentary FIT Scheme is trying to capture complex interactions which are likely to take place mainly through discussions, rather than documentation. In answers to questions on notice, the Attorney-General's Department has indicated that the tabling of meeting schedules would disclose details about those who might be lobbying a member of parliament, however it:

...may not provide the same degree of transparency as is available through the requirements of the FITS Act into the activities the MP themselves undertakes which are not done through a specifically scheduled meeting.³⁵

A scheme will also be required to take into account the activities of ministers acting in their executive capacity.

1.40 In a submission to the committee, Senator Patrick stated that the disclosures required under a Parliamentary FIT Scheme should be at least as 'rigorous and extensive' as the provisions applying to former Cabinet Ministers and recently designated position holders under the Executive FIT Scheme:

Such a minimum disclosure requirement would extend to include *all* activities beyond the categories of "registerable activity" defined in the FITS Act (parliamentary lobbying, general political lobbying, communications activity or disbursement activity). Under such a transparency regime, the types of information and disclosures required to be provided by MPs and Senators would be the same as those provided by former Cabinet Ministers and recent designated position holders under the FITS Act.³⁶

1.41 Senator Patrick then argued that there is a case for a more rigorous reporting and disclosure regime, stating that the majority of exemptions which apply in the Executive FIT Scheme should not apply to a Parliamentary FIT Scheme:

Under such a transparency regime, the exceptions contained in the Foreign Influence Transparency Scheme such as those for humanitarian activities,

34 Senate Standing Committee of Privileges, *Search warrants and the Senate*, 164th Report, March 2017, p. 6.

35 Attorney-General's Department, answers to questions on notice, received 29 May 2019.

36 *Submission by Senator Rex Patrick*, pp. 3–4.

legal advices and representation or legal advice, would not apply. This would properly reflect the primacy of the responsibility of elected MPs and Senators to represent their constituents and the Australian people more broadly.³⁷

1.42 Senator Patrick also favoured extending the period to be covered by disclosures to the time prior to a person being elected to parliament:

...once a person has been elected to Parliament there is clearly a strong public interest for a more extensive disclosure of any activity undertaken on behalf of a foreign principal prior to the MP's or Senator's parliamentary service. When an MP or Senator enters Parliament, they should be prepared to provide a full accounting of any and all activities that [they] have undertaken on behalf of a foreign principal, and any arrangements made with a foreign principal, prior to their parliamentary service – evidence if those activities or arrangements have ceased.

It is consequently recommended that the more extensive disclosure obligations of MPs and Senators should extend to cover a period of ten years prior to the beginning of their parliamentary service.

1.43 In a supplementary submission, Senator Patrick referred to the exclusion of MOP(S) Act Staff and state and territory parliamentarians from the Executive FIT Scheme and suggested that the committee consider how those people could be brought within a Parliamentary FIT Scheme.³⁸

Operation and administration of a Parliamentary FIT Scheme

1.44 The committee has considered the operation of the Executive FIT Scheme, particularly the resourcing and development of it. In the committee's view the obligations of transparency under the Executive FIT Scheme, can be met within the Parliamentary context without the scale and resourcing of the executive register.

1.45 Senators make extensive declarations in relation to financial and business interests on the Register of Senators' Interests. Senators can also be required to provide significant personal information for the purposes of the Register of Senators' Qualification (the Citizenship Register). It is the committee's view that the form for providing information for the Register of Senators' Interest can be amended to provide for a Senator to register activities for a Parliamentary FIT Scheme.

1.46 In his submission, Senator Patrick stated that a Parliamentary FIT Scheme should 'unquestionably be enacted in law'.³⁹ Senator Patrick stated:

A Parliamentary Transparency Scheme would be most appropriately overseen by the Presiding Officers with the Sergeant at Arms and the Usher of the Black Rod appointed to maintain separate registers one for Members of the House of Representatives and the other for Senators....

37 *Submission by Senator Rex Patrick*, pp 3–4.

38 *Supplementary Submission by Senator Rex Patrick*, pp. 1–3.

39 *Submission by Senator Rex Patrick*, p. 7.

Senator Patrick proposed that the Sergeant and Black Rod would have similar responsibilities and exercise similar powers in relation to the Secretary of the Attorney-General's Department in respect of the Executive FIT Scheme.⁴⁰

Penalties for contravention of a Parliamentary FIT Scheme

1.47 The FITS Act sets out a number of offences in relation to failing to register under the scheme and failing to fulfil responsibilities under the scheme. Penalties under the FITS Act include five years imprisonment for failing to apply for registration under the scheme; imprisonment for three years for providing false and misleading information or documents to the Secretary; and a 60 penalty unit fine for failing to fulfil responsibilities under the scheme.⁴¹

Disqualification under the Constitution

1.48 Senator Patrick's submission also looked to the *Constitution* as a basis for punishment, arguing that the penalties for non-compliance for a Parliamentary Scheme should be at least as significant as in the FITS Act, but also suggested 'consideration should be given to heavier penalties'.⁴² Section 44 of the *Constitution* deals with the circumstances in which someone is incapable of being chosen to sit as a senator or Member of the House of Representatives.

1.49 Senator Patrick referred to subsection 44(ii) of the *Constitution*, which provides that a person who has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer, shall be incapable of sitting as a senator or as a member of the House of Representatives:

All offences arising from non-compliance with the Parliamentary Foreign Influences Transparency Scheme should carry a penalty of at least one year imprisonment, thereby ensuring that the conviction of an MP or Senator for an offence arising from any non-compliance with the scheme will result in disqualification from the Parliament.⁴³

Contempt of Parliament

1.50 Under section 7 of the *Parliamentary Privileges Act 1987* (1987 Act), either House has the power to impose fixed terms of imprisonment and fines for contempts of Parliament. In order for a contravention of a Parliamentary FIT Scheme to be considered a contempt, it would need to meet the essential element in the 1987 Act for offences against a House:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its

40 *Submission by Senator Rex Patrick*, p. 8.

41 *Foreign Influence Transparency Scheme Act 2018*, Part 5 – Enforcement.

42 *Submission by Senator Rex Patrick*, p. 9.

43 *Submission by Senator Rex Patrick*, p. 9.

authority or functions, or with the free performance by a member of the member's duties as a member.⁴⁴

1.51 However, rather than take this path, the Senate could opt to include similar provisions to those in the resolution relating to the provision of false statements or omissions from the Register of Senators' qualifications:

Any senator who:

- (a) knowingly fails to provide the material required by this resolution to the Registrar within the required timeframe; or
- (b) knowingly fails to correct an inaccuracy in any material within the required timeframe; or
- (c) knowingly provides false or misleading information to the Registrar;

shall be guilty of a serious contempt of the Senate and shall be dealt with by the Senate accordingly.

A question of whether any senator has committed such a serious contempt shall first be referred to the Standing Committee of Privileges for inquiry and report.⁴⁵

Committee view

1.52 The committee understands the intention of the PJCIS's recommendation that a Parliamentary FIT Scheme be established in parallel with the Executive FIT Scheme. However, what has been demonstrated with the first year of operation of the Executive FIT Scheme is that the scheme has perhaps not functioned as intended.

1.53 In essence, with all its staffing, resourcing and outreach, less than 200 activities have been registered. Further, some of the examples of the Attorney-General's Department emphasising to individuals that they may be liable to register under the scheme, seem to be misdirected, and, according to the Attorney-General, not focussed on the most serious instances of non-compliance.⁴⁶

1.54 There can be no doubt that parliamentarians should be transparent and accountable where they act on behalf of a foreign power. However, there are aspects of the work of parliamentarians which are, rightly, protected by parliamentary privilege and should not be subject to a Parliamentary FIT Scheme.

1.55 The committee does not support a legislative solution. There are already mechanisms in place to accommodate the establishment of a Parliamentary FIT Scheme, without the resourcing required for the Executive FIT Scheme. The Register of Senators' interests could easily be modified to accommodate the registration of activities on behalf of a foreign principal and the punishment as a contempt of

44 *Parliamentary Privileges Act 1987*, section 4.

45 *Journals of the Senate*, No. 68—13 November 2017, p. 2180.

46 Janet Albrechtsen, 'In pursuit of commonsense', *The Weekend Australian*, November 2-3 2019, p. 17.

Parliament is already in place in relation to the giving of false statements and information to the Registrar.

1.56 However, the committee's view is that several factors suggest that the Senate should not proceed with the establishment of a scheme at this point. In particular, the committee notes the absence of any referral on this matter to the House of Representatives Committee on Privileges and Members' Interest. If the House of Representatives does not establish a Parliamentary FIT Scheme to cover members of the House of Representatives, the PJCIS's suggestion of a single parliamentary scheme cannot exist.

1.57 The committee is also acutely aware that even with a Parliamentary FIT Scheme operating in parallel with the Executive FIT Scheme, there would still be a number of key people who would not be covered by either scheme. The committee is concerned at the operation of the current exemption of MOP(S) Act staff from the Executive FIT Scheme. These staff are unable to be covered by a Parliamentary FIT Scheme because although they work for individual parliamentarians, they are, in fact, employed by the Department of Finance.

1.58 The committee also has no power to bring state and territory parliamentarians within the scope of a Parliamentary FIT Scheme.

1.59 The committee is of the opinion that there are a number of substantial difficulties in developing a scheme that sits by a still evolving executive scheme. With its House of Representatives counterpart, it will continue to monitor the implementation of that scheme with a view to developing an appropriate parliamentary scheme.

Senator Deborah O'Neill

Chair

