APGRA
Australian Professional Government Relations Association

FOREIGN INFLUENCE TRANSPARENCY SCHEME BILL

SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

The Australian Professional Government Relations Association (APGRA) welcomes the opportunity to make a submission to the Committee on the Foreign Influence Transparency (FIT) Scheme.

APGRA recognises the genuine concerns of the Australian Government in seeking to protect Australia's democracy and government processes from undue foreign influence. However the APGRA is concerned about a number of matters set out in the Bill and particularly the extent to which it places an excessive burden on Australian government relations (and other professional services) firms and their clients.

It is also of significant concern that the Scheme duplicates many of the requirements already set out in the Australian Government's Lobbying Code of Conduct and associated Register and to which APGRA members have significant compliance obligations.

At the same time, there are a number of areas where the Bill's effect is unclear.

We are also of the view that the proposed Scheme is unnecessarily broad and burdensome in the obligations it extends on to professional services firms.

Further, the declaration and registration obligations it creates are likely to create a "haystack" of information which is unlikely to have the effect of creating effective transparency, particularly in relation to the specific areas of national security, defence and foreign policy, where concerns in relation to foreign influence are likely to be of most concern.

To this point, APGRA proposes a more targeted and effective regulatory approach or, alternatively, limiting the disclosure of information under the proposed scheme to government agencies rather than to the general public.

About APGRA

The Australian Professional Government Relations Association (APGRA) represents both third party (i.e. consulting) and "in-house" government relations practitioners.

The purpose of the Association is to:

- Promote high standards of government relations practice in Australia through the establishment and maintenance of a robust industry code of conduct (APGRA Code of Conduct).

- Complement existing regulation of government relations practice in Australia (e.g. Australian Lobbying Code of Conduct) and provide a basis for regular dialogue between government and the profession.
- To protect, promote and advance the interests of government relations professionals on all issues affecting or likely to affect the Australian professional government relations industry.
- Contribute to greater understanding of professional government relations in Australia, and the legitimate and important role the sector plays in a vibrant democratic system.

About Government Relations Practitioners

Government relations professionals play an important role in our representative system of government. Individuals and organisations can and do approach government directly. Some, however, use experts to advise them. Professional government relations practitioners use their knowledge and experience to help corporations, associations, charities and other not for profit organisations interact effectively with, and navigate the processes of, government.

A number of longstanding firms and senior practitioners providing government relations advisory services came together in 2014 to establish an industry self-regulatory body that promotes high standards of, and greater transparency and public confidence in, the provision of professional government relations services. These firms recognise that the community does and should expect the highest level of propriety in the interactions of government relations practitioners with government at the both the elected and non-elected levels.

KEY ISSUES

1. *Is there a basis in fact and experience for this legislation to apply to registered third-party government relations professionals?*

   It is an accepted principle of public policy that regulatory interventions in a liberal democracy should be the minimum possible to achieve a desired policy outcome – whether it be for the encouragement or the prevention of a specific activity.

   In that light, a new scheme of regulation aimed at third-party government relations practitioners (as well as consulting professionals across a range of other disciplines) ought to be able to identify the specific events, circumstances and behaviours that give rise to the proposed regulatory intervention.

   APGRA is not aware of a circumstance where a registered consulting government relations practitioner has undertaken work on behalf of a client which would give rise to concerns of undue influence from a foreign actor or that has not been transparent. The existing obligations of registered parties under the Australian Government's Lobbying Code of Conduct mean that all clients must be listed prior to representations being made.

   A further point in relation to public policy and regulation is that it should be designed in a manner which will most effectively and specifically prevent the undesirable behaviour. For example, this could be achieved through the creation of a specific offence provision where the activity considered to be a threat would be criminalised – as is being implemented elsewhere in the Government's legislative package through the creation of an offence of unlawful foreign interference.

As such, APGRA considers it is unnecessary and excessive to create the extremely broad and wide ranging registration regime proposed in the Bill. A more targeted and effective, approach is set out below as an alternative to the proposed Scheme (see Section 5, below).

This alternative approach will also in large part avoid the duplicative elements of the proposed Bill, as set out in the following section.

2. *Duplication and compliance burden*

As it applies to consulting government relations practitioners, the FIT Scheme in very large part duplicates transparency requirements already in place under the Australian Government's Lobbying Code of Conduct and associated Register, which is administered by the Department of Prime Minister and Cabinet.

In 2008, the Australian Government introduced the Lobbying Code of Conduct and established an online Register of Lobbyists, which is published and freely available on the internet, in real time. At a practical level, this regulatory framework is characterised by high levels of compliance and has operated effectively over the last decade in achieving its stated objectives.

The APGRA supports these arrangements as a balanced and reasonable set of measures to provide public confidence in the activities of consulting government relations practitioners.

According to the Register of Lobbyists home page, the Code and Register were established in 2008:

> *to ensure that contact between lobbyists and Commonwealth Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty.*

The Register of Lobbyists contains a substantial amount of information on registered firms and the persons undertaking 'lobbying' activity. Registration is effectively a minimum requirement to operate as a consulting government relations practitioner. The information set out in the register includes:

- *the business registration details and trading names of each lobbying entity including, where the business is not a publicly listed company, the names of owners, partners or major shareholders, as applicable;*
- *the names and positions of persons employed, contracted or otherwise engaged by the lobbying entity to carry out lobbying activities; and*
- *the names of clients on whose behalf the lobbying entity conducts lobbying activities.*

Under the Code of Conduct, when a government relations professional communicates, "with a Government representative in an effort to influence Government decision-making" they must state:

(i) that they are a registered lobbyist,
(ii) the name of the client they are representing, and
(iii) that their client is included under their registration.

In the view of the APGRA, the present scheme for registration of government relations professionals already satisfies the transparency requirements set out in the FIT Scheme, in respect of consulting government relations practitioners. Further given the openness of Australia's liberal market economy, a majority of clients of many firms offering government relations consulting services are likely to fall within the definition of 'foreign principal'.

Where these clients have already been registered under the Lobbying Code of Conduct for the purpose of making representations to government on their behalf, the FIT Scheme will require an additional registration, but with a different and more substantial set of information requirements, including different timing in relation to registration and updates. Firms registered under the Lobbying Code of Conduct are already subject to significant compliance requirements (as well as those relating to counterpart Lobbying Codes of Conduct that exist at State and Territory government levels) – as proposed, the FIT Scheme would expand this compliance burden considerably and for minimal and questionable benefit.

3. *Competitive neutrality*

The proposed Bill is likely to have a detrimental impact on competitive neutrality for foreign companies in relation to the Australian commercial market, and also the 'market of ideas'.

Requirements to publish information with respect to the content of meetings held with government officials, purely on the basis that the company is foreign owned, operated or based, may place these companies at a tactical and strategic disadvantage. At its most simple level, Australian owned companies will have access to intelligence in respect to the government engagement activities of their competitors. This information will not be required to be published by an Australian company.

Apart from an impact on competitive neutrality, there is also the potential that this position will be viewed as protectionist or an example of economic nationalism. The extent of this concern by foreign companies will depend on the nature and detail of information which will be required to be published under the Scheme and updated on an ongoing basis, and the intensity of administrative oversight applied by the agency responsible for the scheme.

4. *Disclosure to government only*

Under the FIT Scheme as currently drafted, it is proposed to publish online the activities of government relations and other professional services firms taken on behalf of, and commercial arrangements with, foreign principals.

APGRA is concerned that the proposed Scheme will result in the public disclosure of a range of commercially sensitive information. This includes the business information of foreign clients that is legitimately considered as commercial-in-confidence, as well as details concerning their engagement of Australian professional advisers.

Consistent with the above paragraphs, this will result in a potential disadvantage for foreign businesses and foreign public enterprises operating in Australia. Extending this point further, there is the potential for these provisions to harm Australia's international reputation as an open market economy and its attractiveness as a destination for the investment of foreign capital.

Involvement of a foreign company in Australia and its ability to take an interest in the formulation of public policy, seek a regulatory approval or compete for a government procurement opportunity should not be at the expense of divulging commercial-in-confidence information – especially when Australian-owned companies are not required to do so.

A straightforward and simple approach to address these significant concerns would be to amend the Scheme so that information being disclosed would only be divulged to government, for example through a secure online government portal. Disclosures would be protected and confidentiality would be maintained.

This approach would provide government agencies, including intelligence and security agencies, with relevant information concerning foreign influence in relation to Australian politics and government processes.

It would also be consistent with the approach taken under the *Freedom of Information Act 1982* (Cth) (the FOI Act) at sections 47 and 47 G. Under the FOI Act documents disclosing trade secrets or commercially valuable information are exempt from disclosure. These well-established exemptions for commercial-in-confidence information under the FOI Act enhance the confidence of commercial organisations in dealing more openly with government agencies.

5. *An alternative regulatory approach*

The proposed regime establishes an entire scheme and an associated, substantial compliance burden by regulating foreign influence activities and arrangements undertaken through government relations and other professional advisers/consultants.

As identified above, 'lobbying' activity by government relations consultants on behalf of a foreign principal or any other party is already regulated through the Lobbying Code of Conduct. In all cases where a foreign principal (as defined under the proposed Bill) engages a lobbying firm's representations with public officials, this activity will be declared, registered and publicly available for scrutiny under existing arrangements.

In the vast majority of cases, this lobbying activity will be for a genuine business interest. For example, this will include where a foreign-owned company is bidding on a major government contract, seeking a regulatory approval, or advocating for a legislative or policy amendment that impacts their Australian business operations.

There may however be a very limited range of circumstances where a foreign principal is seeking to influence government policy in areas of greater political and security sensitivity. As APGRA understands it, the FIT Scheme is being proposed to provide a high degree of transparency as the most effective way of guarding against any undue foreign influence.

Such concerns are most likely to relate to matters of international and national security policy, where there are attempts to exert 'soft power', or assert interference directly through political processes, aimed at furthering a foreign government's political or national interests. The key policy areas of concern with respect to national actors undertaking these kinds of activities are likely to be in the areas of security, defence and foreign policy.

APGRA therefore suggests that a more efficient and effective approach would be to define the specific policy areas where an engagement must be registered under the FIT regime. Under this alternative proposal, all activities and engagements on behalf

of a foreign principal, as currently defined, would be required to be registered and records maintained, as currently stipulated under the Bill – provided the policy subject matter was directly relevant to the key areas of public concern: i.e. security, defence and foreign policy.

The effect of this approach would be to exclude policy and regulatory activities aimed at advancing ordinary commercial and business interests from the FIT Scheme.

This approach would likely bring to light a more relevant and refined set of responses to the scheme, avoiding a 'haystack' of declared and registered activities that will be of no public interest or utility. Further, given the continuing operation of the Australian Government's Lobbyists Code of Conduct and registration requirements, these engagements and associated 'lobbying' activities will already be declared and publicly listed.

By focusing on those areas likely to be of greatest public concern, this alternative approach is likely to provide greater public confidence in the Government's response.

6. *Transaction context*

In clause 5.2, the Lobbying Code of Conduct specifically provides the ability for a registered party to delay registering a client name in the circumstance where this might result in speculation about a pending transaction involving that client which has not been disclosed under the continuous disclosure obligations of the *Corporations Act 2001* (Cth).

It is important this provision is mirrored in the FIT Scheme if it is legislated in a similar form to how it is currently drafted.

7. *Non-controlling ownerships*

As presently drafted, the Bill regulates the activities of two kinds of foreign corporate entities:

(i) "foreign public enterprises" defined as a company or any other person (other than an individual) controlled by the government of a foreign country or part of a foreign country, and
(ii) "a foreign business" defined, in summary, as a person other than an individual which is either constituted or organised under a law of a foreign country, or has its principal place of business in a foreign country, and is not a foreign government.

The Bill defines "control" to mean effective control, including: majority share ownership, voting power, and ability to appoint a majority of the board. It also includes shadow control, where directors are accustomed or obliged to act in accordance with the directions of a controller.

It is also noted that the definition of a "controlled person" is subjective and, at least in some cases, is likely to require substantial and somewhat intrusive inquiries. At the same time a judgement on whether a company is controlled by a government may be subjective and not always an entirely straightforward question to answer.

Given this, APGRA would propose an amendment to the Bill to provide that it should be sufficient to make reasonable inquiries on the question of whether a company is a controlled by a government of a country or part of a country.

The current definition of controlled entity may mean that a foreign pension fund is considered a "foreign public enterprise", yet by the terms of its constitution it operates (and makes investments) at arm's length from government. It makes little sense to consider such an entity as a foreign public enterprise, and this definition should be amended and clarified in the Bill so that such entities are considered as foreign businesses.

In the event that it is decided that a foreign company is not government controlled, any registrable activity or arrangement will continue to be regulated under the scheme as a "foreign business".

8. *Exemptions for negotiating a contract*

Section 29 of the FIT Bill exempts persons acting on behalf of a foreign principal, provided the foreign principal is a foreign business (i.e. not including foreign public enterprises) or an individual. However this appears to be a very limited exemption on current drafting, relating only to where the third party is engaged in "activity is undertaken solely, or solely for the purposes of, the pursuit of bona fide business or commercial interests in relation to preparing to negotiate, negotiating or concluding a contract for the provision of goods or services."

Paragraphs 370 and 375 of the Explanatory Memorandum appear to indicate this exemption is intended to extend to any meeting in relation to a contract for goods and services, provided the contract does not fall within the areas of national security, defence or public infrastructure. The language in section 29 should be clarified to ensure that the exemption cannot be read narrowly and clearly covers exploratory and other meetings with a Minister or other public official.

9. *Communications Activity*

While APGRA's submission focuses on the Bills as they pertain to consulting government relations professionals, we note too that a number of APGRA members also provide communications advice and services to clients and may be affected by these components, extending further compliance obligations.

The FIT Scheme regulates "Communications Activity" undertaken on behalf of a foreign principal.

Communications Activity is a category of registrable activity under section 21 of the Bill that relates to "activities in Australia for the purpose of political or governmental influence." Disclosures must also be made about the foreign principal as part of the communication activity.

This requirement applies to any kind of foreign principal and so includes foreign businesses, public enterprises, individuals, governments or political parties. APGRA contends that as currently drafted, this provision will serve to unreasonably and unnecessarily constrain the legitimate expression of views on public policy or regulatory issues by foreign companies and individuals.

10. *Burdensome ongoing compliance requirements, record keeping, excessive powers of the Secretary and extreme penalty provisions*

Annual/Biannual renewals of registered activity or arrangements
The Scheme is burdensome and complicated insofar as renewals are required on the anniversary of first registering a registrable activity or agreement There will be fees associated with renewals as well as initial registrations.

It would be preferable if a single, annual date (or dates for biannual updates) was set on which registrations are required to be updated. This would substantially reduce the compliance burden, as well as the risk of inadvertent error.

Election campaign update of registrations
There are special provisions for registrable activities during an election campaign (or designated vote e.g. postal survey). Registrations to "act on behalf of" a foreign principal must be renewed if activity is planned between when the writs for an election are issued and the close of polls (i.e. the election period).

APGRA suggests this is unnecessary given any activity or arrangement will already have been registered and transparency has therefore already been satisfied, under the terms required by the Bill.

Record keeping
Under the proposed Scheme, registrants must keep records in relation to the foreign principal while registered and for 5 years after the end of the registration. Records must be kept on:

- any registrable activities that 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 the 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.

APGRA submits that these requirements are highly burdensome and, in combination with the following point, there need to be clearly stated safeguards on the release of commercially sensitive information.

Disclosable information and the power to access records
Under the proposed Scheme, information to be made publicly available includes: name of the person and foreign principal, description of the kind of registrable activities the person undertakes on their behalf, and other information prescribed. This will potentially include information which is commercial-in-confidence.

Under the FIT Scheme the Secretary has other powers around requiring the provision of any information relevant to the operation of the scheme. These powers are very broad. APGRA contends that any commercial-in-confidence information held by the Secretary or provided to the Secretary following a request under the legislation should be protected from any publication or other public release whatsoever.

Charge
The Foreign Influence Transparency (Charges Imposition) Bill provides the power to charge registrants when they are registering – the explanatory memorandum notes that the charge will not be set at a cost-recovery.

APGRA notes the very substantial and burdensome compliance obligations under the proposed FIT Scheme. These requirements create a broad range of cost and risk burdens on consulting government relations practitioners. Accordingly, APGRA contends that charges should not be imposed for registrants under the Scheme.

Registrable arrangements

As drafted, the FIT Scheme states that a person becomes liable to register when they undertake a registrable activity or a registrable arrangement. A person has 14 days to register from the time they become liable to do so. In the case of a registrable activity this is 14 days from the date of the activity. In the case of an arrangement the liability to register counts from the time it is signed (i.e. 14 days from the agreement being made).

APGRA submits that activity undertaken should be the basis of registration. A specific requirement for potentially earlier registration of an arrangement, which potentially covers multiple service offerings or issues, is potentially burdensome and of no obvious value.

A more reasonable approach would be to only require registration of an arrangement within 14 days of the commencement of any registrable activity, pursuant to that arrangement.

Penalty provisions

Failure to comply with various obligations under the Bill may incur criminal penalties which in a range of cases are extreme. These include penalties for failing to comply with registration requirements of 12 months, five years and seven years imprisonment. Failures in relation to record keeping have penalties of 60 penalty units.

The concept of strict liability is used in relation to various offence provisions.

APGRA is of the view that the criminal penalties set out are not appropriate or proportionate to the relevant offence provisions. Given the breaches concerned, as set out in the FIT Scheme, appropriate civil penalties would be adequate to ensure performance.

APGRA is of the view that it is inappropriate and disproportionate for strict liability to apply in relation to any offence provisions under the FIT Scheme.