



Law Council
OF AUSTRALIA

Office of the President

20 June 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjicis@aph.gov.au

Dear Mr Hastie

Proposed amendments to the Foreign Influence Transparency Scheme Bill 2017 (FITS Bill)

1. Thank you for the opportunity for the Law Council to appear before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) on 18 June 2018 as part of its inquiry into the FITS Bill.
2. The Law Council is grateful for the assistance of its National Criminal Law Committee in the preparation of this submission.
3. The Law Council has prepared this supplementary submission in response to a request by the Committee to draft suggested amendments to certain criminal offence provisions in the FITS Bill, namely, proposed sections 57 and 57A.
4. The Law Council's concerns with these proposed provisions were outlined in the Law Council's supplementary submission to the Committee dated 15 June 2018. Under the *Criminal Code Act 1995* (Cth), a person can be reckless as to a circumstance or a consequence. Omission is a physical element. Reckless act or reckless omission does not work.
5. The defendant omits to do something being reckless in this case, as to their obligation to register (i.e. disregarding a substantial and unjustifiable risk that (1) they are required to register, (2) the fact that they are dealing with someone who is a foreign principal and (3) that the activity is registrable).
6. The Law Council's suggested amendments to proposed sections 57 and 57A are marked in track-changes at **Attachment A**.

Thank you for the opportunity to provide a supplementary submission on these matters.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division [REDACTED]
[REDACTED] in the first instance, if you require further information
or clarification.

Yours sincerely

Morry Bailes
President

**Attachment A – Law Council suggested drafting of proposed sections 57 and 57A
Foreign Influence Transparency Scheme Bill 2017**

57 Knowing Failure to apply for or renew registration

Intentional omission to apply or renew knowing required to do so, and registrable activity undertaken

- (1) A person commits an offence if:
- (a) the person knows that the person is required:
 - (i) to apply for registration under the scheme in relation to a foreign principal by the end of a period; or
 - (ii) to renew the person's registration relation to a foreign principal by the end of a period; and
 - (b) the person ~~intentionally~~ omits to do so; and
 - (c) the person undertakes an activity knowing that the person on whose behalf he is acting on behalf of ~~the~~ is a foreign principal and that it is after the end of the period; and
 - (d) knowing that the activity is registrable in relation to the foreign principal.

Penalty: Imprisonment for 5 years.

Intentional omission to apply or renew reckless as to whether required to do so, and registrable activity undertaken

- ~~(2) A person commits an offence if:~~
- ~~(a) the person is required:~~
 - ~~(i) to apply for registration under the scheme in relation to a foreign principal by the end of a period; or~~
 - ~~(ii) to renew the person's registration in relation to a foreign principal by the end of a period; and~~
 - ~~(b) the person intentionally omits to do so; and~~
 - ~~(c) the person undertakes an activity on behalf of the foreign principal after the end of the period; and~~
 - ~~(d) the activity is registrable in relation to the foreign principal.~~

~~Penalty: Imprisonment for 3 years.~~

Reckless omission to apply or renew knowing required to do so, and registrable activity undertaken

- (23) A person commits an offence if:
- (a) the person is reckless about the fact ~~knows~~ that the person is required:
 - (i) to apply for registration under the scheme in relation to a foreign principal by the end of a period; or
 - (ii) to renew the person's registration in relation to a foreign principal by the end of a period; and
 - (b) the person ~~is reckless as to whether the person has~~ omits tinged to do so; and
 - (c) the person undertakes an activity and is reckless to the fact that the person on whose behalf they are acting is a ~~on behalf of the~~ foreign principal and that the activity is occurring after the end of the period; and

- (d) ~~the person is reckless as to the fact that~~ the activity is registrable in relation to the foreign principal.

Penalty: Imprisonment for 3 years.

~~Reckless omission to apply or renew reckless as to whether required to do so, and registrable activity undertaken~~

~~(3A) A person commits an offence if:~~

~~(a) the person is required:~~

~~(i) to apply for registration under the scheme in relation to a foreign principal by the end of a period; or~~

~~(ii) to renew the person's registration in relation to a foreign principal by the end of a period; and~~

~~(b) the person is reckless as to whether the person has for omitting omitted to do so; and~~

~~(c) the person undertakes an activity on behalf of the foreign principal after the end of the period; and~~

~~(d) the activity is registrable in relation to the foreign principal.~~

Penalty: ~~Imprisonment for 2 years.~~

~~Reckless omission to apply or renew knowing required to do so, whether or not registrable activity undertaken~~

~~(4) A person commits an offence if:~~

~~(a) the person knows that the person is required:~~

~~(i) to apply for registration under the scheme in relation to a foreign principal by the end of a period; or~~

~~(ii) to renew the person's registration relation to a foreign principal by the end of a period; and~~

~~(b) the person is reckless as to whether the person has omitted to do so.~~

Penalty: ~~Imprisonment for 12 months.~~

~~Absolute liability~~

~~(5) Absolute liability applies to the part of the physical element mentioned in paragraphs (1)(c), (2)(c), (3)(c) and (3A)(c) which requires the activity the person undertakes on behalf of the foreign principal to be undertaken after the end of a period.~~

Note: ~~For absolute liability, see section 6.2 of the Criminal Code.~~

~~(345) Subsections (1) and; (2), (3), (3A) and (4) do not apply if:~~

~~(a) the person fails to register or apply for renewal of registration only because the person does not provide the information or a document within the applicable period; and~~

~~(b) the person took all reasonable steps to provide the information or document within that period; and~~

(c) the person provides the information or document as soon as practicable after the end of that period.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).

57A Giving notice of end of liability to register while still liable to register

Notice given knowing arrangement still exists, and registrable activity undertaken

- (1) A person commits an offence if:
 - (a) the person gives the Secretary a notice under section 31 (notice of end of liability to register) for the person's registration under the scheme in relation to a foreign principal; and
 - (b) at the time the person does so a registrable arrangement exists between the person and the foreign principal; and
 - (c) the person knows that the registrable arrangement will still be in existence on the day specified in the notice under subsection 31(3) as the day the person's registration in relation to the foreign principal is to cease; and
 - (d) the person undertakes an activity on behalf of the foreign principal knowing that the person on whose behalf they are acting on behalf of is a foreign principal and that it is after that day; and
 - (e) the activity is registrable in relation to the foreign principal.

Penalty: Imprisonment for 5 years.

Notice given reckless as to whether arrangement still exists, and registrable activity undertaken

- (2) A person commits an offence if:
 - (a) the person gives the Secretary a notice under section 31 (notice of end of liability to register) for the person's registration under the scheme in relation to a foreign principal; and
 - (b) at the time the person does so the person is reckless as to:
 - (i) -the existence of a registrable arrangement ~~exists~~ between the person and the foreign principal; and
 - ~~(e)~~ (ii) the registrable arrangement will still being in existence on the day (being the day specified in the notice under subsection 31(3) as the day the person's registration in relation to the foreign principal is to cease); and
 - ~~(c)~~ (d) the person undertakes an activity and is reckless as to the fact that the person on whose on behalf they are acting is a of the foreign principal and that the activity is occurring after that day; and
 - ~~(d)~~ (e) the person is reckless as to the fact that the activity is registrable in relation to the foreign principal.

Penalty: Imprisonment for 3 years.

Notice given knowing arrangement still exists, whether or not registrable activity undertaken

- (3) A person commits an offence if:

- (a) the person gives the Secretary a notice under section 31 (notice of end of liability to register) for the person's registration under the scheme in relation to the foreign principal; and
- (b) at the time the person does so ~~they know that a~~ registrable arrangement exists between the person and ~~that~~ the foreign principal ~~is a foreign principal~~; and
- (c) the person knows that the registrable arrangement will still be in existence on the day specified in the notice under subsection 31(3) as the day the person's registration in relation to the foreign principal is to cease.

Penalty: Imprisonment for 12 months.

Notice given reckless as to whether arrangement still exists, whether or not registrable activity undertaken

- (4) A person commits an offence if:
 - (a) the person gives the Secretary a notice under section 31 (notice of end of liability to register) for the person's registration under the scheme in relation to the foreign principal; and
 - (b) at the time the person does so ~~the person is reckless as to the existence of a~~ registrable arrangement ~~exists~~ between the person and the foreign principal; and
 - (c) the ~~person is reckless as to the~~ registrable arrangement ~~will still being~~ in existence on the day ~~(being the day~~ specified in the notice under subsection 31(3) as the day the person's registration in relation to the foreign principal is to cease).

Penalty: Imprisonment for 6 months.

Absolute liability

- ~~(5) — Absolute liability applies to the part of the physical element mentioned in paragraphs (1)(d) and (2)(d) which requires the activity the person undertakes on behalf of the foreign principal to be undertaken after a day.~~

~~Note: — For absolute liability, see section 6.2 of the *Criminal Code*.~~

- ~~(5) — Subsections (1), (2), (3) and (4) do not apply if :~~

~~(a) the person took all reasonable steps to notify the Secretary of the continuing existence of the registrable arrangement once the person became aware of that fact.:~~

~~— (a) — the person gives notice of end of liability to register while still liable to register only because the person does not provide the information or a document within the applicable period; and~~

~~— (b) — the person took all reasonable steps to provide the information or document within that period; and~~

~~— (c) — the person provides the information or document as soon as practicable after the end of that period.~~

~~Note: — A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).~~