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

By email: pjcis@aph.gov.au

Dear Committee Secretary

Foreign Influence Transparency Scheme Bill 2017

The Australian Financial Markets Association (AFMA) is commenting on the *Foreign Influence Transparency Scheme Bill 2017* (Bill) which will establish a scheme to improve the transparency of activities undertaken on behalf of foreign principals (Scheme).

AFMA agrees with the principle of transparency in public administration. However, the proposed drafting and mechanisms in the Bill to achieve its purpose would have an adverse impact on many organisations, like AFMA, that should be functionally outside of its scope. This is a significant policy and practical concern. Our comments in this submission are directed to address this problem in a manner that enables the objective of the Bill to be achieved in a more efficient and effective manner for the community.

1. Introduction

AFMA is a not-for-profit member-driven and policy-focused industry body that represents around 110 participants in Australia's financial markets and providers of wholesale banking services. AFMA's membership reflects the spectrum of industry participants including banks, stockbrokers, dealers, market makers, market infrastructure providers and treasury corporations. AFMA's members are all regulated under Australian law by one or more financial sector regulators such as ASIC, APRA and AUSTRAC. Our members are therefore subject to existing detailed accountability and public exposure about their activities. AFMA is a transparently run organisation that encourages and values public knowledge about its activities and the worth of financial markets in promoting the prosperity of Australia.

AFMA actively engages with government, politicians and bureaucrats in relation to public policy that impact the effectiveness of Australia's financial markets and the related business of entities who participate in these markets. AFMA's interest, consistent with that of its total membership, lies in the continued development of the financial system so

it better meets the needs of the economy, the government and the broader community. In this context, AFMA has a responsibility to pursue this interest by articulating the opportunities and challenges facing the industry, by developing credible and well-constructed public policy positions and by communicating these positions in a manner that promotes well-informed decision-making by government.

As a trade association that depends on member support, it is in AFMA's own interest for its activities on behalf of members to be transparent. Moreover, given the business and organisational diversity of our membership base, it is necessary for AFMA to present a balanced view in our representations on behalf of the industry. AFMA is likely to be required to Register under the Scheme proposed in the Bill on a significant basis as many of our members are the Australian operations of global enterprises that are captured by the 'foreign business' definition.

2. Key Points

The Bill was introduced suddenly on 7 December 2017 with no prior public consultation with affected organisations such as ourselves. The Scheme that the Bill proposes would have expansive coverage and impose an onerous novel regulatory and compliance burden on many unsuspecting organisations and individuals. The absence of prior consultation is unfortunate given that the unintended consequences of the legislation could have been dealt with at an early policy development stage. This is the first opportunity that the public has had to comment on the Scheme and Bill. AFMA is concerned that the many persons and organisations that will be captured by the Scheme, and hence face serious criminal liability with up to 7 years imprisonment, will not be aware of this opportunity to provide comment to the Committee, especially as it is being dealt with over the summer holiday hiatus period.

Key points in this submission are -

- The unexpectedly onerous regulatory burden that will be placed on many Australian member-driven organisations in the community through the use of overly broad catch-all definitions that do not appear to be the intended target of the Government's policy.
- Differentiation of public advocacy on a collective basis for members from acting in a bilateral way for a foreign principal.
- Inefficient public administration arising from the operation of two lobbying registers.
- Disproportionate harshness of the penalties.
- Underestimation of the Scheme cost to government.
- Proposals to improve the approach to transparency in public administration.
- Drafting recommendations – simple drafting amendments to easily deal with problems identified by us with the Bill consistent with Government policy.

3. Too broad coverage

There is no indication in the Bill's Explanatory Memorandum that would give the Committee an appreciation of the broad class of persons required to register. Deliberately expansive definitions have been used to act in a catch-all manner with some limited exemptions being applied. This will result in many organisations being subject to the registration requirement. For example, sporting associations or arts bodies with non-Australian members such as individuals living here under a non-permanent resident visa, international organisation connections or foreign business sponsorship, that contact the government to seek funding, promote infrastructure development or the holding of an international event in Australia will have to register. Another example of the need to register would be the case of a person who assists a person with immigration issues, who is neither a citizen nor a permanent resident, in making representations on their visa status.

Given that there has been no public consultation on this legislation until now, we are not able to comment in an informed way about the purpose or actual activities that the Bill is designed to capture, as the Explanatory Memorandum provides no real insight around the regulatory impact the legislation will have. Nevertheless, it would be startling that the Government intends the legislation to apply to any activity that may involve a foreign person or organisation and those who act on their behalf in dealing with the Government, government agencies (including welfare agencies) and parliamentarians (apart from the exceptions listed). If that were to be the case, the foreign influence regime will potentially become one of the most wide reaching regimes in the Australian regulatory system.

One of the key definitions that leads to the expansive coverage results from the definition used for 'foreign business' which is a subset definition under 'foreign principal'. A 'foreign business' is defined under section 10 of the Bill to mean a person (other than an individual) that is constituted or organised under the law of a foreign country or of part of a foreign country, or has its principal place of business in a foreign country or part of a foreign country. Australia is an open economy which welcomes and needs foreign investment and services. In the financial services sector there are many businesses that are captured by this definition. For example, it is common for banks to operate locally through a branch under the category of a foreign authorised deposit-taking institution (foreign ADI). Foreign ADIs must be authorised to operate here under the Banking Act 1959 and are subject to prudential regulation by APRA. Broking and other financial market activities like corporate advisory services activities of foreign ADIs are regulated by licensing requirements under the Corporations Act 2001 and are closely scrutinised by ASIC.

Other global commercial businesses incorporated in another jurisdiction will carry on quite extensive sales and other activities without establishing a local subsidiary. Under the Corporations Act a foreign company that is 'carrying on a business' in Australia must register with ASIC as a foreign company. A registered foreign company must have a 'registered office' in Australia and its details will be appear on the ASIC Register and it needs to lodge annual financial statements with ASIC. A registered foreign company must always have a local agent. A local agent of a registered foreign company is responsible for any obligations the company must meet, and may be liable for any breaches or penalties.

The 'foreign business' definition leads into the definition of acting on behalf of a 'foreign principal'. Paragraph 11(1)(b) provides that a person is undertaking an activity on behalf of a foreign principal if the person undertakes the activity in the service of the foreign principal. The term 'in the service of' is not defined and is intended to cover situations where the person's activities fall short of being ordered, directed or requested by the foreign principal, but are still helping or meeting the needs of the foreign principal.

The exemption for 'commercial or business pursuits' in section 29 is very limited and of no assistance in moderating the impact of the law on entities such as AFMA. It only applies in relation to an activity the person undertakes on behalf of a foreign business or individual where that 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. The public policy advocacy that AFMA undertakes as an industry association never relates to the negotiation of a particular contract.

4. Nature of industry public advocacy

Many industry member organisations and amateur member associations have a prime purpose of acting in the service of members and when appropriate seeking to influence policy through public advocacy to government in their collective service.

It appears from reading the Explanatory Memorandum that the drafters of the Bill had a very simple bilateral relationship in mind between a lobbyist and a foreign principal and simple one off instances of communication. It presumes a foreign principal hires a lobbyist to make representations to influence government policy in a simple linear manner leading to a requirement to register under the Scheme. Public policy advocacy is quite different in character. Member organisations like AFMA with over 100 corporate members constantly engage with areas of the government, and particularly with the financial market regulators to improve law and regulation. Such advocacy is carried out on behalf of members as whole and in some instances must take account of a diverse range of member views. That said, where an organisation such as ourselves has a broad membership, some issues may only be relevant to particular classes of members (for example, electricity market issues).

This engagement with government is a two way process. It is not uncommon for government officials, including financial regulators, to approach AFMA for information or advice on market related matters or to suggest activities that AFMA might consider.

In the course of a year AFMA prepares around 60 formal submissions to Government consultations and conducts regular email exchanges, meetings and conversations with government officials. Under the Bill, all information relating to these interactions would become subject to a formal record keeping requirement under subsection 40(2), as this record keeping obligation includes information or material forming part of any communications. This means detailed recording keeping of telephone calls, in person conversations and other ephemeral communications, even where the communication is initiated by a government official. Many if not all of our activities are captured by the concept of acting on behalf of a foreign business and will be the subject of national security surveillance. Failure to meet the record keeping requirement is subject to a strict

liability offence with a penalty of $12,600. Given the precedent seen with other recent strict application of record keeping obligations by AUSTRAC, one would expect each individual failure to properly record a communication would result in a separate charge. A failure to install an effective record keeping system could quickly lead to hundreds of thousands of dollars in fines. Accordingly, it seems that organisations like AFMA will need to look at acquiring a costly IT information management system of the type that would not normally be needed or warranted by the scale of a small not-for-profit organisation with minimal resources. As we have noted, while small organisations with a full-time secretariat like AFMA will struggle to fully meet these obligations, the burden is truly daunting for part-time and volunteer run associations.

While it may be pointed out by the drafters of the Bill that for all of the matters listed in subsection 11(1), the foreign principal must have an awareness of and some role in facilitating the activities as described in subsection 11(3), this does not assist member-driven organisations providing a collective service to their members The Explanatory Memorandum argues that a person would not be considered to be undertaking an activity 'on behalf of' a foreign principal where the foreign principal has no knowledge or awareness of the nature of the activities in question, and it is purely coincidental that the person's actions may in some way benefit, or align with the interests of, the foreign principal. In the case of a member-driven organisation like AFMA our members have clear knowledge and awareness of our advocacy activity which is carried out on the clear understanding that it is on their behalf.

5. Efficient public administration

Another concern is that neither the Bill nor the accompanying Explanatory Memorandum make any reference of how the legislation and the Register Secretary is to supposed to work in relation to the Government's existing Lobbying Code of Conduct and Register of Lobbyists which is administered by the Department of Prime Minister and Cabinet. Why is it administratively efficient to run two parallel registers which have the same objective of providing transparency in public administration? It is also very confusing to the public unfamiliar with the Australian Government's complex organisation to have to search on two different registers. This increases opacity rather than transparency to the public.

The Committee should recommend to the Government that it rationalise its lobbying registration schemes into a single body.

6. Harshness of the penalties

The penalty regime is extremely harsh for what, in many of the Scheme's applications, is pure red-tape from a public perspective. Given the esoteric nature of the Scheme, it is likely that many persons will remain unaware of the requirement to register and threatening to imprison a person for up to seven years for inadvertence to some bureaucratic and administrative rule is totally disproportionate and not in accord with the Attorney-General's Department's own framing offences guide[1].

[1] Attorney-General's Department, 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers', see the Discussion at page 38

7. Underestimation of Scheme costs

If the Scheme is intended to apply in accordance with a standard reading of the legislation, the estimate provided part in the Explanatory Memorandum on the Financial Impact would mean that the Government has not carried-out a meaningful cost/benefit analysis. The Government's estimate of $3.2 million cost for the Scheme administration over 4 years is unrealistic in common sense terms. This is a simple average staffing level calculation for one senior executive with two support staff and allocation of office expenses over 4 years. It does not appear to take into account the capital cost of the IT build for the database and website development and then ongoing maintenance. Given the broad capture of registrable activities, compliance surveillance and enforcement, public education and the scale and sophistication of the IT database system that is needed to deliver the information, an annual budget of $800,000 is misleading. In our view, this Financial Impact analysis strongly suggests that the application of the Scheme is much broader in practice than the Government actually intends.

The higher cost of administration in the absence of some reasonable targeting of the Scheme would in turn lead to concern over the charges that will be imposed on registrants. As a starting point it is objectionable that a registration fees will be charged given that there is no service provided to the benefit of registrants. Transparency around public administration is a public good and should be freely accessible and information easily provided into the system.

Turning now to the regulatory burden that is being imposed on the community by the Scheme, it is noted that no Regulatory Impact Statement (RIS) has been provided with this legislation. AFMA estimates that the cost to it in the first year of installing an information management system and associated staffing costs in introducing, training and maintaining the system and implementing a compliance program is more than $80,000. This estimate would need to be multiplied by the many captured persons that the Scheme will cover, which will range in scale. The Government should complete the process in accordance with its own rules, set out in 'The Australian Government Guide to Regulation' and prepare an adequate RIS to inform the Parliament on the scale of the regulatory burden it is imposing on the community.

We believe that administrative costs would be substantially reduced closer to the original estimate if our recommendations for amelioration of the Bill in section 8 below are followed.

8. Support for transparency

AFMA agrees with the principle of transparency in public administration. However excessive red-tape and complex compliance mechanisms should be avoided as this detracts from efficient provision of timely information to the public at low cost both to registrants and the administrator. Such transparency can be simply achieved through the form of an easily accessed database where registrants could quickly and easily upload required information about activities that seek to influence the law-making and policy implementation process of the Australian Government. Such a register could make visible though a website what interests are being pursued and by whom. In this way, the Register would allow for public scrutiny, giving the public the possibility to track the activities of

persons seeking to influence public policy. Such a database should be freely accessible by members of the public. The model for such a database exists in the European Union in the form of the European Transparency Register. AFMA is a registrant on this register, and we find it simple to upload information without onerous record keeping obligations.

9. Drafting recommendations

A. Foreign business definition

AFMA recommends as an essential priority a simple remediation to the drafting of the definition of 'foreign business' in section 10 so that it means a person (other than an individual) that is constituted or organised under the law of a foreign country or of part of a foreign country, or has its principal place of business in a foreign country or part of a foreign country *and is not registered as a foreign company by the Australian Securities and Investments Commission (ASIC)*. This simple amendment would ensure that foreign companies that have a regulated Australian business are not treated as a 'foreign business'. It would result in the unintended consequence of Australian businesses of foreign companies being treated as foreign principals being dealt with in a satisfactory manner consistent with the policy intentions of the Government.

B. In the collective service of members

The 'in the service of' component of undertaking an activity on behalf of a foreign principal definition would be ameliorated if it was made clear that acting in the *collective service of an organisation's members* is not in the service of a foreign principal. This clarification could be placed for example in section 14 dealing with the 'purpose of activity'.

C. Not-for-profit exemption

The Government's existing Lobbying Code of Conduct and a Register of Lobbyists exempts amongst others "*non-profit associations or organisations constituted to represent the interests of members that are not endorsed as deductible gift recipients*". A similar exemption is contained in parallel state government lobbying registers such as that for New South Wales. AFMA recommends adding this exemption as a simple way to avoid capturing many small volunteer associations.

Yours sincerely

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