Australian Government
Attorney-General's Department

Submission to the review of the *Foreign Influence Transparency Scheme Act 2018*

Parliamentary Joint Committee on Intelligence and Security

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Table of Contents

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Introduction

The Attorney-General's Department (the department) welcomes the review by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) of the *Foreign Influence Transparency Scheme Act 2018* (FITS Act). The Foreign Influence Transparency Scheme (the Scheme) was established by the FITS Act. The PJCIS is required by section 70 of the FITS Act to conduct an inquiry into the operation, effectiveness and implications of the Scheme. The department has been responsible for administering the FITS Act and implementing the Scheme since the FITS Act commenced on 10 December 2018. The review by the PJCIS presents an opportunity to ensure that the FITS Act enables the Scheme to deliver on its transparency objectives, and to ensure it is well adapted to the current context in which it operates.

This submission provides:

- an overview of the importance of ensuring transparency of foreign influence
- a summary of the Scheme's purpose, objectives and achievements since its commencement
- information about the department's experience administering and implementing the Scheme to date, and
- potential options to enhance the effectiveness and operation of the Scheme.

The Foreign Influence Transparency Scheme

Purpose

Foreign actors are free to promote and represent their interests in Australian society provided that any influence activity that attaches to our democratic processes is undertaken in an open and transparent manner. When foreign actors interests and ideas are represented openly and transparently, that influence is a welcome contribution to Australian society and democracy. Transparency is a key principle for ensuring integrity within our democratic system. Members of the public and decision-makers in the Australian Government must know whose interests are being promoted in order to make informed decisions within our political and governmental processes.

Foreign influence that is *not* transparent can have serious implications for political sovereignty and national policy. Undisclosed influence can undermine informed decision-making, potentially resulting in foreign interests being prioritised over domestic interests and eroding public confidence in Australia's political and government institutions.

The FITS Act supports the integrity of Australia's federal democratic decision-making processes by providing visibility of the nature, level and extent of foreign influence for decision-makers and the public. The FITS Act applies to all countries equally, requiring that all foreign influence in Australia's democratic system is appropriately disclosed.

The public register established by the FITS Act is the key mechanism for providing this visibility of foreign influence and serves a dual purpose. In addition to being a publicly searchable list available to decision-makers and the general public, the register also acts as a central repository of information

on foreign influence in Australia at the federal level. It casts light on the types of entities and foreign principals that seek to influence political processes in Australia, and the activities they carry out to achieve this purpose. In this way, the register has the potential to be a valuable tool for understanding emerging trends in foreign influence and changes over time. While some information or relationships about an entities connection to a foreign principal may be already be publicly available, for example, via an entities publicly listed website, there is utility in this information being easily accessible in a central location.

The role of the FITS Act within whole-of-government strategy

The FITS Act was introduced in 2017 as part of a package of legislative measures designed to counter the threat of espionage and foreign interference and address the risks of opaque, non-transparent foreign influence. In addition to the FITS Act, the legislative package included new offences for acts of foreign interference and espionage. The role of the National Counter Foreign Interference Coordinator (NCFIC) was also established within the Department of Home Affairs.

The package of legislative measures reflects that influence activities exist on a spectrum between disclosed influence that is welcome in a democracy, and clandestine, deceptive or corrupting interference that warrants substantial criminal penalties. The FITS Act recognises that, for foreign influence activities that are a legitimate and accepted part of international engagement, it is important to ensure their interaction with our democratic system is made visible.

The second reading speech introducing the package of legislative measures described the purpose of FITS as to:

> *give the Australian public and decision-makers proper visibility when foreign states or individuals may be seeking to influence Australia's political processes and public debates.*

The speech emphasised that:

> *Being registered under the scheme should not be seen as any kind of taint. And certainly not as a crime … To the contrary it is applying the basic principles of disclosure to allow the public and policymakers to assess any underlying agenda.*

The Scheme serves this purpose by providing greater transparency of activities aimed at exerting influence on Australian political and governmental decision-making where they are undertaken on behalf of foreign governments and political organisations or entities and individuals linked to them.

Spectrum of behaviours and responses			
	Example of behaviour	**Classification of that behaviour**	**Type of response required**
The Foreign Influence Transparency Scheme Act	A person gives a speech at an event in Australia on behalf of a foreign government and registers that activity as a 'communications activity' on the FITS register.	This is transparent behaviour that is already registered on the FITS register.	No response is required. The FITS register is working as it should.
	A person sets up a company in Australia for the purpose of promoting the interests of a foreign country. The person misunderstands or is not aware of their obligations to disclose their influence on behalf of a foreign principal.	This is influence behaviour that is not yet transparent.	An administrative response is required. The department will engage with the person, raise awareness, and has the potential to issue notices under the FITS Act.
	An Australian company is engaged by a foreign government to make representations to the relevant Australian Government minister about export regulations that are favourable to the foreign government's trade interests. The company is aware of its obligations to register but refuses to do so.	This is influence behaviour that may not voluntarily be made transparent.	An enforcement response is required, potentially involving an investigation. This behaviour may be an offence under the FITS Act.
Other	A person covertly influences a political process in Australia on behalf of a foreign government	This behaviour may constitute foreign interference.	A law enforcement response is required, potentially involving an investigation. This may be an offence under the Criminal Code.
	A person makes classified information available to a foreign government with the intention of prejudicing Australia's national security	This behaviour may constitute espionage.	A law enforcement response is required, potentially involving an investigation. This may be an offence under the Criminal Code.

The Lobbying Code of Conduct

The department also administers the Australian Government *Lobbying Code of Conduct* (the Code), which is another federal level transparency framework, intended to promote transparency in activities designed to influence government and political processes. The Code and the Scheme differ in scope and purpose and, as such, there are a number of key differences between the definitions and activities covered under each framework. As a result of this different coverage, depending on the nature of the activity being undertaken and the relationship with the client or foreign principal, a person or entity may be required to register their activities under one framework and not the other. However, corresponding obligations under the Scheme and the Code can arise and the department considers this overlap in its management of both schemes.

Overview of the FITS Act

The public register

The FITS Act requires people and organisations who undertake *registrable activities* (sections 13, 20 and 21) *on behalf of* a *foreign principal* for the *purpose of political or governmental influence*, to

register these details on the public register hosted by the department. These key terms are defined in the FITS Act.

Registrable activities

Whether an activity is registrable depends on a number of factors including the identity of the person undertaking the activity and the identity of the foreign principal. Broadly speaking, the types of activities that are registrable are:

- parliamentary lobbying
- general political lobbying
- communications activity, and
- disbursement activity (sections 20 and 21).

The Scheme imposes broader registration requirements on former Cabinet Ministers (section 22) and recent designated position holders (section 23) if they act on behalf of a foreign principal after leaving their public role. The Scheme also includes a range of exemptions (sections 24 to 30) for certain activities that commonly involve arrangements with foreign principals. For example, sitting members of Parliament and statutory office holders are exempt from the operation of the Scheme (section 25A).

A person undertakes an activity *on behalf of* a foreign principal in the following circumstances:

- under an arrangement with the foreign principal
- in the service of the foreign principal
- on the order or at the request of the foreign principal, or
- under the direction of the foreign principal (section 11(1)(a)).

A person is considered to undertake an activity on behalf of a foreign principal if both the person and the foreign principal knew or expected the person would or might undertake the activity (section 11(1)(b)).

Foreign principals

Foreign principals are:

- foreign governments
- foreign political organisations
- foreign government related entities, or
- foreign government related individuals (section 10).

Broadly speaking, the definitions for 'foreign government related entity' and 'foreign government related individual' capture persons over which a foreign government or political organisation exercises total or substantial control, either in practical or legal terms (section 10).

Political or government influence

An activity is considered to be *for the purpose of political or governmental influence* (section 12) if the sole, primary, or a substantial purpose of the activity is to influence a process relating to the federal political system (such as an election, the proceedings of Parliament, or a government decision). An

activity can also be for the purpose of political or government influence if it aims to influence the public (or a section of the public) in relation to these processes.

Reporting requirements for registrants

Scheme registrants are also required to report any material change in their circumstances within fourteen days (section 34), report disbursement activity which reaches the electoral donations threshold (section 35), and undertake specific communications disclosures (section 38). There are additional reporting requirements during voting periods[1]. When a voting period commences, registrants must review their registration and confirm it is correct or update their details as required (section 36). Registrants must also report any registrable activities undertaken during the voting periods (if relating to the relevant vote or election) within seven days (section 37).

Record keeping and information sharing

The Secretary must keep a register of information obtained under the Scheme (section 42). Certain Scheme information is made publicly available, including the names of registrants, former registrants, foreign principals and descriptions of the registrable activities being undertaken (section 43).

In limited circumstances, the Secretary can share information that has been obtained under the Scheme. The FITS Act sets out the purposes for which for the Secretary is authorised to communicate information gathered under the FITS Act (Scheme information) (section 53). This includes, for example, sharing information with an Australian police force for enforcement-related activities, or for a purpose prescribed by the Foreign Influence Transparency Scheme Rules 2018. There are appropriate limitations on how, when and with whom Scheme information can be used and shared.

Compliance and enforcement

Transparency and information gathering notices

The Secretary can issue three kinds of notices under the FITS Act – transparency notices under Division 3, Part 1 and information gathering notices under section 45 and 46. Since the FITS Act commenced on 10 December 2018, one information gathering notice has been issued under section 45, and 13 information gathering notices have been issued under section 46. One transparency notice has been issued under section 14B of the FITS Act and was subsequently revoked.

Transparency notices are public notices that declare a person to be a foreign government related individual or entity. Transparency notices are intended to provide the public with certainty that a person or entity is a foreign principal for the purposes of the FITS Act, and alert them that registration obligations may arise for activities conducted on their behalf. Transparency notices can also serve as a compliance tool. The Secretary may declare that the entity or individual is related to a foreign

[1] Voting period for a **federal election** means the period beginning on the day of the issue of the writ for the election under the *Commonwealth Electoral Act 1918* (s 10(a)(i)) and ending at the time determined in accordance with that Act to be the latest time on polling day at which an elector in Australia could enter a polling booth for the purpose of casting a vote in the election (s 10(a)(ii)).

government where they have sought to conceal the nature of their relationship with a foreign government or foreign political organisation.

A notice issued under section 45 of the FITS Act requires a person to produce documents to satisfy the Secretary as to whether they are required to register under the Scheme. The Secretary can issue section 45 notices where the Secretary reasonably suspects that a person might be liable to register. A notice issued under section 46 of the FITS Act requires a person to provide information relevant to the Scheme. The Secretary can issue section 46 notices where the Secretary reasonably believes that a person has information relevant to the operation of the scheme. These notices are procedural tools to assist the department with gathering information relevant to the application of the Scheme.

Criminal offences

It is a criminal offence for a person who is liable to register not to be registered under the Scheme, or to fail to renew their registration. Penalties range from 12 months to five years imprisonment depending upon their level of culpability (section 57). Criminal offences also apply for failing to fulfil responsibilities under the Scheme (section 58), such as the reporting and disclosure requirements. It is a criminal offence not to comply with a notice from the Secretary requiring information in relation to the Scheme (section 59).

Origin and context of the Scheme

Introduction and passage through Parliament

In understanding the FITS Act and the Scheme, it is important to note the Scheme's origin and how it evolved as it progressed through Parliament. The Scheme was originally based on the United States (US) *Foreign Agents Registration Act* (FARA), which takes a broad approach to the entities considered a foreign principal and the relationships which constitute acting on a foreign principal's behalf.

A number of key amendments were made to the FITS Bill by the Parliament prior to its passage, which included recommendations from the PJCIS, informed by stakeholder engagement during the Committee review process. These amendments include:

Definition of 'foreign principal'

The definition of 'foreign principal' was amended to narrow the application of the Scheme. Initially, the definition of 'foreign principal' included all foreign businesses (defined as businesses constituted overseas, or businesses with a foreign country being their principal place of business), foreign individuals (defined as individuals who are neither an Australian citizen nor permanent resident), and foreign public enterprises (defined as entities controlled by a foreign government).

These definitions were removed and replaced with the concepts of 'foreign government related entity' and 'foreign government related individual'. The tests for being a foreign government related entity or individual are more specific than the concepts they replaced. The tests capture only entities or persons over whom a foreign government or political organisation exercised total or substantial control, either in practical or legal terms.

Scope of registrable activities and exemptions

The scope of activities captured by the Scheme were narrowed. The FITS Act passed by Parliament did not require persons to register if they undertook activities 'with funding or supervision by the foreign principal' or 'in collaboration with the foreign principal'.

A number of additional registration exemptions were added, and the scope of existing exemptions was broadened. Exemptions were made available where an activity related 'primarily to' the reason for exemption, as opposed to being the sole purpose.

Transparency notices

The transparency notice provisions were added, allowing the Secretary of the department to issue a notice declaring that a particular entity or individual is a foreign principal. This recognised that it may be more difficult to ascertain which entities and individuals were within the new definition of 'foreign principal'.

The Scheme's implementation and achievements

Administration of the FITS Act and the Scheme

The department administers the FITS Act and the Scheme, including the public FITS register (register) that the FITS Act established. The register makes public the information provided by registrants about their activities and relationships with a foreign principal, so that members of the public and decision-makers can access this information.

The department also provides advice to the Secretary about the Secretary's decisions to issue notices to declare that an entity is a foreign government related entity, or to produce information or documents necessary to administer the Scheme (sections 14B, 45 and 46).

The department receives dedicated ongoing budget funding of approximately $2.2 million per year to administer the Scheme. Currently, 13 ASL are supported to administer the Scheme. Scheme officials undertake the following functions:

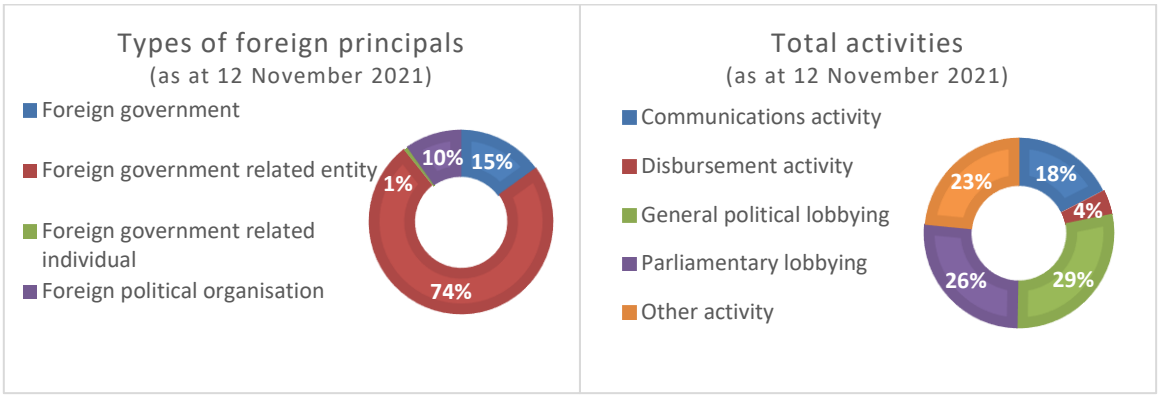
- day-to-day administration, such as providing advice to potential and actual registrants under the Scheme
- examine the registration obligations of individuals and entities that have not registered and may be liable to register
- establish and maintain an IT solution to manage registrations on the public register
- undertake stakeholder education and outreach activities
- work with other agencies and departments to share information
- provide advice to the Secretary about whether thresholds have been met to issue information gathering notices under the FITS Act where more information about arrangements and activities is required, and
- undertake comprehensive assessments of entities to provide advice to the Secretary in relation to the use of provisional transparency notices and transparency notices.

Registrations

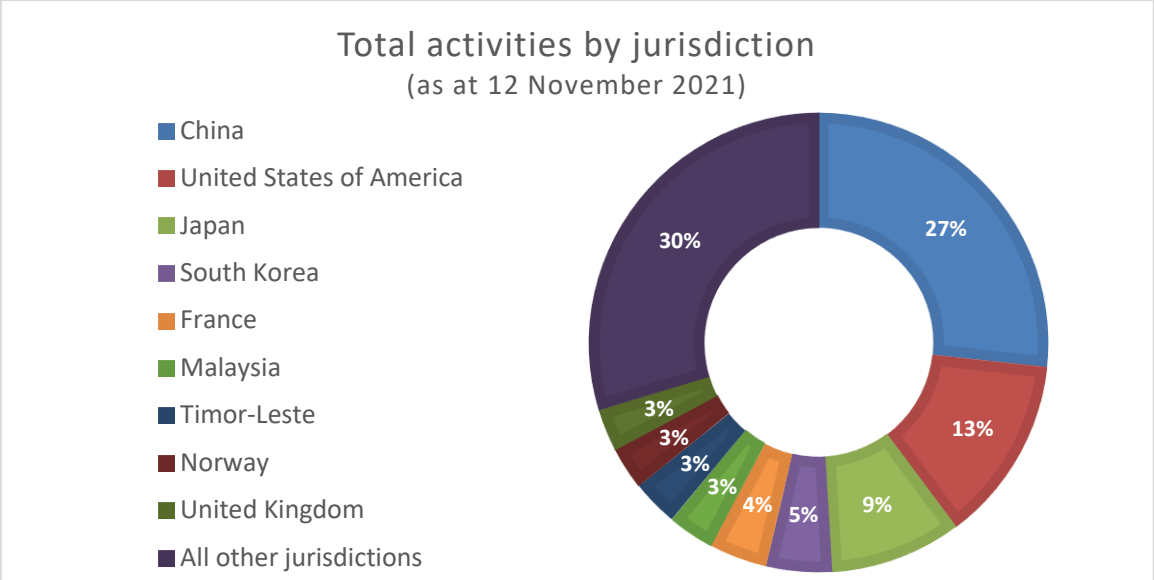
The Scheme provides greater visibility of foreign influence activities in relation to federal political and government processes. The public register is a central repository of information about foreign influence, which allows the public and decision-makers to readily access details of foreign influence activities and relationships.

Since the commencement of the Scheme, a total of 95 individuals and entities have registered, covering 358 activities on behalf of 171 different foreign principals from 40 jurisdictions (as at 12 November 2021). The number of registrations since the Scheme's introduction have remained constant each year with the department receiving:

- 38 registrations between December 2018 and June 2019, reflecting 144 activities undertaken on behalf of 70 different foreign principals, associated with 26 foreign jurisdictions,
- 54 registrations between July 2019 and June 2020 (including 26 registration renewals), reflecting 190 activities undertaken on behalf of 94 different foreign principals, associated with 32 foreign jurisdictions, and
- 59 registrations between July 2020 and June 2021 (including 34 registration renewals), reflecting 219 activities undertaken on behalf of 114 different foreign principals, associated with 34 foreign jurisdictions.



The highest numbers of registrable activities reported each year in Australia since the Scheme's introduction are associated with foreign principals connected to China, followed by Japan and the United States.



Responses to the Scheme

The Scheme has contributed to building greater awareness of foreign influence in Australia. This is indicated by media attention and public engagement with the Scheme, including through the FITS Transparency Helpline and email inbox. The department's web analytics report that between 19 November 2018 and 12 November 2021, the public register received 34,327 visitors and 113,619 page views.

The department has seen behavioural change following the introduction of the Scheme. Some organisations and individuals have chosen to tailor their activities and arrangements to the Scheme's obligations, in order to make transparent the extent of their relationship with a foreign principal. Others have chosen to cease engaging in certain activities that would otherwise be subject to registration. Some entities have integrated consideration of foreign influence risks into their institutional policies and practices, to ensure that instances of foreign influence are appropriately registered with the department.

Case study: The University of Queensland (UQ)

In response to the Scheme, UQ introduced a Foreign Influence Disclosure tool, an online process for determining whether registrable activities are being conducted at the University. The tool requires that academic staff and some senior professional staff review their collaborations with foreign universities, participation in research projects and clinical trials and their communication of research findings. Identified registrable activities are then registered on the FITS register, with the assistance of the University.

Outreach

The department has conducted extensive outreach activities through multiple channels to build public awareness and understanding of the Scheme. For example:

- The department advertised the Scheme in **17 major metropolitan and regional publications**, and **20 foreign language publications**, both when the Scheme came into effect in 2018 and again in March 2019 (following the end of the grace period for registrations).
- The department has sent over **1,700 letters** to increase public awareness of the Scheme. For example, following the Scheme's commencement the department wrote to all registered political parties, foreign embassies in Australia, and universities, along with a number of major companies, peak bodies, and community groups, to draw their attention to the Scheme.
- The department also undertook a similar mass-mail out, sending approximately **250 letters** to a range of advocacy groups, media organisations, political parties, and government departments in the lead-up to the 2019 federal election.

The department has engaged in specific efforts to inform former parliamentarians, senior parliamentary staff, and senior government officials of their obligations under the Scheme. For instance, following the May 2019 federal election, the department sent letters to each member and Senator leaving the Parliament to inform them of their obligations. The department has also worked with the Department of Finance to provide standard wording about the Scheme for inclusion in letters to departing parliamentarians and Ministerial Office staff.

The department regularly engages with potential registrants to discuss their obligations under the Scheme through the Transparency Helpline and email inbox. The department also conducts in-person public education and outreach sessions with community groups, businesses, industry representative bodies and government stakeholders. The department's ability to conduct in-person outreach activities has been disrupted due to the COVID-19 pandemic. However, the department has continued to conduct face-to-face activities where possible. This has included briefing the Australian National University National Security College on the operation of the Scheme and the Senate Standing Committee of Privileges regarding the application of the Scheme to *Members of Parliament (Staff) Act 1984* staff. The department will resume its in-person outreach as COVID-19 related restrictions ease.

The department is currently revising its public-facing factsheets about the Scheme and expects these will be published by early 2022. The department also expects to publish additional guidance material tailored to parliamentarians and Australian Government officials, similar to guidance material the department publishes under the *Lobbying Code of Conduct*. The department will work with relevant agencies to promote awareness of this guidance material and to explore other opportunities to promote awareness of the Scheme during 2022. The department will also consider whether there are appropriate opportunities to promote awareness of the Scheme prior to, and following, the 2022 federal election.

Compliance

The department has developed and published a Compliance Strategy (Attachment A) to provide greater clarity about the way in which compliance and enforcement activities are undertaken. The department expects that in most cases potential registrants will comply with the FITS Act voluntarily. In addition to its outreach activities, the department supports compliance with the FITS Act through advice on the departmental website and by responding to potential registrant's questions. In administering the Scheme, the department has engaged directly with a broad range of individuals, former office holders and entities about their potential registration obligations, many of whom have chosen to register as a result.

The Secretary may consider using notice powers under the FITS Act to gather documents and information, or to declare a person to be a foreign principal for the purposes of the FITS Act. To date, 15 information gathering notices have been issued under the Scheme and the Secretary has issued one provisional transparency notice (which was later revoked).

While many entities and individuals voluntarily engage with the Scheme, the department also receives information about cases of potential undisclosed foreign influence from a variety of sources. This includes referrals from relevant Australian Government agencies, members of the public and open source information, such as media coverage. The department assesses the appropriate approach to compliance on a case-by-case basis, with a preference for resolving matters through engagement with registrants or potential registrants. The department currently has a number of ongoing investigations into the status of entities under the FITS Act, including whether they are foreign government related entities or have registration obligations, and can provide the Committee with further details of these assessments in camera.

In the most serious cases of non-compliance, the department can refer the matter to the Australian Federal Police (AFP) for criminal investigation. The department considers all the circumstances involving the person and conduct in question before deciding on an appropriate course of action. A significant factor in this decision is the nature and extent of the conduct and the relative transparency value of the activity or arrangement in question. To date, no referrals have been made to the AFP.

Collaboration with relevant departments and agencies

The department has established close connections across government to facilitate the effective administration of the Scheme and ensure the Scheme is complementary to broader government efforts to build awareness of, and resilience to, foreign interference risks.

The department works closely with the NCFIC and the Counter Foreign Interference Taskforce (CFIT) and other departments with relevant regulatory and policy responsibilities. Additionally, the department works closely with the Electoral Integrity Assurance Taskforce, which promotes the integrity of Australia's electoral processes, and with the University Foreign Interference Taskforce, which aims to strengthen the university sector's resilience to foreign interference.

The department works regularly with law enforcement and the National Intelligence Community to understand the context of interference and influence in Australia and to identify areas for focus. This collaboration also informs the department's investigations into the character and behaviours of certain entities. This ensures that the appropriate response is taken when dealing with different behaviours. The department also receives, on occasion, referrals of potential foreign influence that are not disclosed on the register. There are instances where information gathered by law enforcement and security agencies assists in understanding behaviours, or the context in which certain behaviours occurs, which in turn will shape the decisions made and recommended under the FITS Act.

Careful consideration needs to be given to the appropriate protection of such information before using it to exercise powers under the Act. It is necessary and appropriate that the Secretary's decisions under the FITS Act are subject to review. This means that decisions must be supported by information

that could be made available to the tribunal or court, other parties and the public, noting that information protections may be available to limit or prevent disclosure.

The department works closely with the Department of Foreign Affairs and Trade (DFAT) to ensure that bilateral relationships are appropriately managed, for example, where there are potential sensitivities in issuing a notice to an entity related to a foreign jurisdiction. The department also works closely with DFAT where there may be cross over between the administration of the FITS Act and the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020*.

Geopolitical and domestic context

International comparisons

Internationally, the Australian Scheme is among the first of its kind. The only other similar scheme that regulates foreign influence is the US Foreign Agents Registration Act (FARA). FARA requires 'agents' of foreign principals who engage in political activities to publicly disclose their relationship with the foreign principal, as well as details of their activities. FARA seeks to promote transparency of foreign influence within the US, by allowing the US government and the public to understand how foreign influence impacts on American public opinion, policy and laws. A number of recent high profile prosecutions under FARA have brought it significant public attention, sparking renewed interest in FARA as a tool to protect the institutional integrity of government processes.[2]

The Australian Scheme was modelled on the core concepts of FARA, including the notion of a 'foreign principal' and the requirement to register activities undertaken on their behalf. However, the legal definitions, scope and practical application of the schemes are substantially different. For example, under FARA, the definition of 'foreign principal' includes not just foreign governments and foreign political parties, but also captures any person outside of the US, and entities organised under the laws of a foreign country or having its principal place of business in a foreign country (22 U.S.C. § 611(b)). As a number of the criteria for meeting the definition of foreign principal under FARA (for example, being domiciled outside of the US) are easier to ascertain than under the Australian Scheme, the entities that attract registration obligations may be clearer to both the administering department and the entities themselves.

The FITS Act takes a narrower approach, defining 'foreign principal', as a foreign government, a foreign government related entity, a foreign political organisation or a foreign government related individual. In order to satisfy the definition of foreign government related entity or individual, the FITS Act often requires that the department demonstrate to an evidentiary standard, that an individual is accustomed to or under an obligation (formal or informal) to act in accordance with directions or wishes of a foreign government, or that an entity is subject to the total or substantial control of a foreign government (section 10). In many cases, the criteria under the FITS Act defining foreign government related individuals and entities cannot be determined on the basis of available information.

[2] For a list of recent cases, see: The United States Department of Justice, *Recent FARA cases*, https://www.justice.gov/nsd-fara/recent-cases

Other jurisdictions are considering the establishment of their own registration schemes. The United Kingdom (UK) Home Office recently released a discussion paper – *Legislation to Counter State Threats (Hostile State Activity)* – seeking views on the proposal to introduce a Foreign Influence Registration (FIR) scheme. The paper specifically refers to Australia's Scheme as a potential model for the UK's own legislation. Like Australia's Scheme, the proposed UK FIR scheme would require certain entities and individuals to register activity that is being undertaken for, or on behalf of, a foreign state (including foreign state-related actors) and would be intended to bring transparency to these arrangements, rather than to prohibit or deter them.

According to the discussion paper, the FIR scheme would also serve as a direct tool to disrupt 'hostile activity' such as espionage, foreign interference and sensitive data theft, by imposing penalties for non-compliance with the FIR scheme. It proposes to build resilience to state threats and generally increase transparency of foreign influence to decision-makers and the public. The UK discussion paper focuses on countering and prosecuting hostile state activity as a primary objective of the FIR scheme. Canada is also exploring new ways to enhance their current measures to counter foreign interference, and examining whether lessons learnt from existing regimes (such as the Australian Scheme) can be applied in the Canadian context. The different approaches considered by jurisdictions, from the broad style of FARA to the UK's targeted focus on hostile state actors, illustrate the different ways foreign influence can be conceptualised and regulated.

Current context

Since 2018, there have been significant shifts in the geopolitical environment, in particular, more intensified and public strategic competition between the US and China. Liberal democracies are being confronted with rising levels of misinformation and disinformation, fuelled by rapid technological change. This means that transparency of foreign influence activities is more important than it has ever been. As foreign influence activities evolve, like-minded jurisdictions are grappling with the most effective ways to address foreign influence that poses a risk to democratic values or interests, but does not constitute criminal conduct.

Based on our experience administering the Scheme since 2018, the department has identified a number of areas in which the FITS Act could be reinforced or better adapted to the current context in which it operates. These are outlined in the following section.

Opportunities to improve the Scheme and enhance transparency

1. Affirm the purpose of the Scheme

The department considers that the original purpose of the Scheme — to support the integrity of our open democratic system by providing greater transparency of foreign influence in political and government processes — remains valid.

There is benefit in providing the public and government decision-makers with broad visibility of the nature, level and extent of foreign influence on Australia's government and political processes, irrespective of which country such influence emanates from.

This benefit was recognised by the High Court in *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18 (Kiefel CJ, Keane J and Gleeson J):

> *'the FITS Act must be understood as one supportive of the processes necessary to our democracy. The Act seeks to ensure that those making decisions in government, those making political judgments, those involved in the election of candidates to the Commonwealth Parliament and other interested persons are aware of the true actors and interests concerned when statements are made or information is provided on political matters. So understood, not only is that purpose legitimate, as consistent with the constitutionally prescribed system of representative government, it serves to protect it. Such a purpose may be a very important factor in the justification of a law.'*

There are merits in considering how the Act might better target entities, activities and jurisdictions that pose the greatest risk to transparency. There are particular challenges in applying the Act, as currently constructed, to foreign influence activities connected to countries with high degrees of government control and low levels of transparency.

One approach was considered in a recent Australian Strategic Policy Institute (ASPI) paper by Daniel Ward, which proposed that the Scheme be amended to abandon its country agnostic approach and instead apply differently to different countries. Under the model proposed in the ASPI paper, the FITS Act would be amended to:

> *adopt a 'tiered model', under which conduct originating in certain 'designated countries' would be subject to greater regulation than activity from other sources. The ministers responsible for the laws should be empowered to designate the source countries that warrant greater transparency. Designation would be based primarily upon an assessment of the foreign state's political system — in particular, the degree to which the foreign government controls ostensibly 'private' entities and deploys them to advance its national security goals.*[3]

The advantage of targeting the application of the FITS Act to particular countries, such as hostile or authoritarian states, is that it could enable regulatory requirements and enforcement efforts to be focused on areas of greatest risk and least transparency. The FITS Act could be tailored to apply broader obligations in circumstances where a foreign country's political system means entities or individuals in that country are generally subject to a substantial degree of control or direction by that country's government or the political party that forms the government. This would recognise that in

[3] *Australian Strategic Policy Institute, Losing our agnosticism: how to make Australia's foreign influence laws work*

such countries the means of control can often be opaque or difficult to verify at an individual entity level.

There are a number of issues to be considered in assessing the merits of moving away from a country agnostic to a country specific approach. Designating specific countries could mean that individuals, entities and activities registered in connection with those countries are viewed as high risk or malign, which may reinforce a reluctance to register. It may also result in the register providing a more uneven view of the nature, level and extent of foreign influence on Australia's government and political processes. Any amendments involving the designation of certain countries would also have to be considered in the context of Australia's foreign relations.

Applying the Scheme's registration requirements generally, irrespective of the country the influence stems from, has the advantage of providing broad visibility of the full nature and extent of foreign influence. The department considers it would be possible to address the challenges of applying the Scheme to entities, activities and jurisdictions that pose the greatest risk to transparency by making targeted improvements to the Act to ensure that the countries that pose a high risk are adequately captured without designating specific countries.

2. Ensure registrable activities can be effectively captured where the relationship to a foreign government is opaque

The definitions in the FITS Act that determine who is a 'foreign principal', and more specifically a 'foreign government related entity' or 'foreign government related individual', limit the extent to which the FITS Act achieves its purpose of providing visibility of the nature, level and extent of foreign influence.

The criteria requiring the Secretary to be satisfied to an evidentiary standard that, for example, an individual is accustomed to or under an obligation to act in accordance with directions or wishes of a foreign government, or that an entity is subject to the total or substantial control of a foreign government, have proven difficult to apply, both for the department and for potential registrants. This is particularly so where a foreign state's means of control over businesses, organisations and individuals are opaque and are not documented publicly or otherwise.

Further, foreign influence does not occur exclusively through foreign governments and political organisations and related entities. The interests of a foreign power may be advanced through a variety of organisations, commercial enterprises, and individual actors. Currently, there are a range of foreign entities that the definition of 'foreign principal', and therefore the Scheme, does not apply to, which may allow foreign influence to occur undisclosed through these avenues.

The complexity and limitations in the definition of 'foreign principal' create challenges not only in determining who has registration obligations but also in meeting the thresholds for issuing information gathering and transparency notices under the FITS Act. Some examples of challenges the department has faced are:

- In some jurisdictions, basic information such as company ownership (even for state owned enterprises) is not publicly available. Where this information is not made public in respect of

potential foreign principals located overseas, the department has no recourse to obtain it, as the Scheme's information gathering powers do not extend outside Australia.

- Companies may introduce trusts or holding companies, where the person or entity controlling these structures is unclear.
- Minutes of Board meetings and detailed governance documents (such as contracts establishing operational procedures) are rarely available through open source research, if at all. These documents are often the only way to conclusive determine whether a person meets certain elements of the foreign principal definitions. Although governance documents, where they exist, may be obtained via information gathering notices, issuing an information gathering notice often requires certain thresholds to be met and may not be effective in circumstances where entities and information are located overseas.

Opaque, informal and undocumented relationships combined with the complexity of the definition of foreign government related entity lead to circumstances where the FITS Act cannot be effectively applied. Although it may be understood that a foreign country's political system gives its government or ruling party the general means of control over entities and individuals, there is often insufficient information available to meet the specific tests in the definition of 'foreign principal' for a particular entity and to satisfy the thresholds required to issue an information gathering or transparency notice.

The department can provide the Committee with further confidential examples.

Example: A community group or organisation

A community group or organisation could have no formally documented connection to a foreign government but lobby a federal Member of Parliament to take action consistent with a foreign government's aims. Currently, if this organisation does not meet the definition of a foreign government related entity, it would not be required to register, despite how precisely its position matches that of the foreign government, substantial circumstantial evidence of a connection (such as regular meetings between the government and organisation), and evidence of personal connections with the foreign government (for instance, the Chair of the organisation and the Prime Minister of the foreign government are known to be close associates).

The FITS Act's focus on entities closely connected to a foreign government or political organisation risks means that there are instances where it is not capturing activities where the connection to a foreign government or political organisation is opaque or difficult to establish. Reducing or removing the requirement to demonstrate a strong connection to a foreign government would allow the scheme to more effectively capture ostensibly private entities which are nonetheless acting to progress the aims of a foreign country.

One option would be to adopt a definition of 'foreign principal' similar to that originally included in the FITS Bill and by FARA. Capturing foreign businesses, foreign public enterprises and foreign individuals more broadly would enable more effective enforcement of the Scheme where the connections and circumstances of the foreign principal are opaque or difficult to establish. These are

the very instances where there is the most transparency value in publicising the person and activity's connection to a foreign entity.

Extending the definition of 'foreign principal' would extend the regulatory burden of registration obligations to more entities and individuals. However, the burden associated with registration is modest and targeted exemptions could be included where appropriate.

Addressing limitations in the definition of 'foreign principal' would provide a more comprehensive picture of foreign influence. This would ensure that activities intended to influence Australia's political or governmental processes for the benefit of a foreign power are made transparent, regardless of the avenue used. A clearer and simpler definition of 'foreign principal' would also provide greater certainty for potential registrants.

3. Enhance enforcement options under the FITS Act

Additional tools for enforcing compliance with the FITS Act could be considered in the context of this review. The Scheme relies on entities and individuals to register where they are required to do so. Should a person knowingly or recklessly fail to register, referral for criminal investigation and prosecution is the only recourse for the department.

Some options to strengthen enforcement could include a power for the Secretary to name entities that the department considers have registration obligations but who refuse to register, or a power to issue infringement notices. This would provide a more graduated set of enforcement tools to encourage or compel compliance with the FITS Act.

4. Tailor the obligations on former Cabinet Ministers and recent designated position holders

Former Cabinet Ministers and recent designated position holders are subject to broader registration requirements (under section 22 and 23 respectively) than other persons and entities. These broader obligations are a lifetime requirement for former Cabinet Ministers and 15 years after leaving office for recent designated position holders.

The rationale for these broader obligations is that, by virtue of having held such a senior position within the Australian Government, these persons bring significant influence and knowledge to bear in any activities undertaken on behalf of a foreign principal. As a result, it was considered to be in the public interest to know when such persons are acting on behalf of a foreign principal irrespective of the nature of the activity they are undertaking.

The registration obligations for former Cabinet Ministers in particular have resulted in this cohort being required on occasion to register innocuous activities that provide little transparency benefit. For example, a former Cabinet Minister participating in interviews or even a cooking show with a state owned media organisation such as the BBC would be required to register even if no political or governmental influence was exercised and the foreign principal's involvement in the activity was apparent.

Refining and better targeting the obligations for this cohort would ensure that activity captured by the Scheme provides a clear transparency benefit for decision-makers and for the public.

One option would be to adjust the registration requirements for former Cabinet Ministers and recent designated positions holders in relation to communications activities, as these are the activities where issues have most commonly arisen. For example, there could be an exemption where the foreign principal's involvement in the communications activity is apparent and the activity is not for the purpose of political or governmental influence in Australia.

Another option could be to reduce the timeframe for which broader obligations apply after a person leaves office. The original version of the FITS Bill applied broader obligations for shorter periods of time — 3 years for former Cabinet Ministers, Ministers and members of Parliament and 18 months for recent senior Commonwealth officers.

5. Better target exemptions from the Scheme

The FITS Act provides that certain activities are required to be registered, except where a relevant exemption applies. Some exemptions are justified because the connection between the person and the foreign principal is already sufficiently transparent (such as of the exemption for diplomatic or consular activities, provided by section 26 of the FITS Act), or because the activities are within the established scope of the person's functions (such as the exemption for industry representative bodies, provided by section 29A).

However, certain exemptions do not have a clear justification, have unclear scope, or lead to inconsistent outcomes for similar relationships. For example, under section 29C of the FITS Act, entities registered as a charity under the *Australian Charities and Not-for-profits Commission Act 2012* are exempt from registration. Very similar entities that are unable to register as charities will still have to register under the FITS Act. For example a think tank undertaking registrable activities on behalf of a foreign principal may be exempt from registering owing to their status as a registered charity, while a similar entity without charitable status, is not exempt.

The cumulative effect of the exemptions substantially narrows the scope of the Scheme. Certain exemptions, such as the exemption for commercial or business pursuits (section 29), have the potential to apply broadly. This exemption applies where the activity is a commercial or business pursuit undertaken by a person in their 'capacity as a director, officer or employee of the foreign principal' or 'in or under the name of the foreign principal', where the foreign principal is a foreign government related entity. The exemption was included to minimise the regulatory burden on persons or businesses acting for a foreign government related entity who, for example, supply goods and services to government. However, it may exempt activities such as lobbying the Australian Government for particular regulatory outcomes that would benefit a foreign enterprise or foreign state.

Refining the exemptions to the FITS Act, so that their scope is clear and appropriate, would strengthen the Scheme's transparency value. It would clarify the Scheme's application, providing greater certainty for potential registrants, and would ensure that only those activities which are already suitably transparent are exempt from registration.

6. Enhance operational arrangements

The department has engaged with other departments and agencies to identify issues and prioritise its enforcement activity and has refined its approach to compliance drawing on experience administering the Scheme to date. There is also an opportunity to strengthen communications to build greater understanding of the Scheme's role. The department's view is that operational arrangements enhancements will deliver the greatest value if they are considered in conjunction with legislative reform.

Conclusion

The FITS Act is bringing greater transparency to foreign influence in Australia's political and governmental processes. Since the Scheme's introduction, there has been increasing international awareness of foreign influence, and other jurisdictions are looking to Australia as an example of how to address these emerging challenges. This review provides an opportunity to use the lessons learnt through the Scheme's administration to maximise the effectiveness of the FITS Act and to ensure that the Scheme can meet its transparency objectives and effectively engage with the current geopolitical context.

The department is happy to provide further information to the Committee to support its inquiry.