

PJCIS Inquiry into the Foreign Influence Transparency Scheme Bill 2017

Questions on Notice and Questions in Writing for the Attorney-General's Department

Response to Selected Submissions and Oral Evidence

QUESTIONS ON NOTICE PUBLIC HEARING - 31 JANUARY 2018

Question (page 35, Proof Transcript)

Senator FAWCETT: Moving onto para 50 of your submission, on news and press services, we had evidence from Foxtel yesterday expressing concern about their commercial arrangement with state-owned providers of content—Al Jazeera and BBC would be two examples. My reading of the bill would say that if that's a purely commercial arrangement where they are broadcasting that material—particularly where it has BBC or Al Jazeera flagged at the start—they would be exempt from any requirement to register because it's commercial and clearly identified. Is that understanding I have correct? It seems to be at odds with their concern.

Ms Inverarity: I apologise; I have not yet had the chance to consider Foxtel's submission.

Senator FAWCETT: Could you take that on notice and come back to us?

Ms Inverarity: I will have to take that on notice.

Answer

The scheme will not require registration by broadcasters, carriage service providers and publishers for communications activity where their only role is to broadcast the information, provide the carriage service by which the information is transmitted or to publish the information. The person who produces the content on behalf of the foreign principal, which is then passed to the media organisation via a content supply contract, may have to register depending on the identity of the foreign principal, the purpose of the activity and whether the activity is in Australia. In relation to content/channels on the Foxtel platform outlined at page 2 of Foxtel's submission, including the BBC and Al Jazeera, the department's view is that there is no obligation on Foxtel to register under the Scheme as, by merely broadcasting the channels, it falls outside the definition of communications activity in section 13 of the FITS Bill.

Foxtel's submission to the Committee is considered in further detail below.

Question (page 36, Proof Transcript)

Senator FAWCETT: Could you take this on notice to come back to the committee. Looking at the fact there has been well over \$100 million spent by the Saudi government in Australia supporting schools, mosques and charities to further the Wahhabi stream of Islam, and given the actions of foreign governments and foreign security agencies raising very distinct concerns about that, what action should we take for it under this legislation?

Ms Inverarity: There is a question there as to whether the Foreign Influence Transparency Scheme is the action that should be taken. If there are concerns for security services in other areas then of course there are other options for pursuing that. We are happy to take it on notice.

Answer

The Scheme seeks to provide transparency for the Australian Government and the Australian public about the nature, level and extent of foreign influence in Australia, so that they can accurately assess the interests being bought to bear in respect of particular political and governmental decisions or processes. An entity will be liable to register under the Scheme if it undertakes registrable activities on behalf of a foreign principal and no exemptions apply. Beyond these specific circumstances, the Scheme does not regulate or prevent an entity engaged in advocacy or funding in respect of a particular cause.

Whether a entity promoting Wahhabism would be required to register under the Scheme would depend upon the identity of the foreign principal, the nature of the activities undertaken, and the purpose for which the activities were undertaken.

The religious exemption in section 27 establishes an exemption for activities undertaken on behalf of a foreign government where the activity is undertaken solely, or solely for the purposes of, acting in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion of the foreign government. This exemption seeks to explicitly avoid the activities of a church that is linked to a foreign government from being registrable under the Scheme. It does not apply to religions that are not linked to a foreign government. The intention of the exemption is to ensure that, in situations where the head of a church may also be the head of a state, activities undertaken in accordance with the doctrines and tenets of the religion are not registrable, even if they are for the purpose of political or governmental influence.

Question (page 47, Proof Transcript)

CHAIR: On the discussion around universities, I thought it was curious that absent from any of the examples was reference to collaborative efforts like the Confucian institutes and how they would be affected by the law if it was passed. I just note that. Can I have you take this on notice, given the time. News media expressed concern about broadcasting—Foxtel specifically—if they were to carry content from the BBC, Al Jazeera and any number of other state owned media platforms. Would they be required to onerously register under the FITS? Can you speak to that very briefly and perhaps provide a more detailed answer in written form?

Ms Inverarity: Very quickly, the definition of communications activity at clause 13 of the bill does seek to exempt broadcasters, carriage service providers and publishers from being obliged to register under the scheme if all they're doing is carrying the material, broadcasting, transmitting or publishing it. So, from the perspective of communications activity, we believe that's outside of scope, but, as I said, I haven't had a chance to consider their submission in detail. So we're happy to look at it further on notice.

Answer

Confucian Institutes

A person or entity will be liable to register under the Scheme if they undertake registrable activities on behalf of a foreign principal and no exemptions apply.

Whether a particular Confucian Institute would be required to register would depend upon the identity of the foreign principal, the nature of the activities undertaken and the purpose for which the activities were undertaken.

Questions in Writing for the Attorney-General's Department – Response to Selected Submissions and Oral Evidence

The Scheme is limited to lobbying activities, communications activities and donor activities undertaken on behalf of a foreign principal for the purpose of political or governmental influence. Simply receiving funding from a foreign donor will not, in and of itself, be sufficient to trigger a requirement for registration.

For example, if a Confucian institute received funding from a foreign government, and the foreign government provided those funds contingent upon the institute engaging in lobbying for a matter which would benefit that foreign government, then registration is likely to be required.

On the other hand, if funding was provided by a foreign government for general operating expenses of the institute, this is unlikely to meet the registration requirements as it is not likely to be for the purpose of political or governmental influence.

News Media

The scheme will not require registration by broadcasters, carriage service providers and publishers for communications activity where their only role is to broadcast the information, provide the carriage service by which the information is transmitted or to publish the information (subsections 13(3) and (4)). The person who produces the content on behalf of the foreign principal, which is then passed to the media organisation via a content supply contract, may have to register depending on the identity of the foreign principal, the purpose of the activity and whether the activity is in Australia. In relation to content/channels on the Foxtel platform outlined at page 2 of Foxtel's submission, including the BBC, Al Jazeera and other state-owned media platforms, there is no obligation on Foxtel to register under the Scheme as, by merely broadcasting the channels, it falls outside the definition of communications activity in section 13 of the FITS Bill.

Foxtel's submission to the Committee is considered in further detail below.

QUESTIONS IN WRITING

Could the Department please respond to concerns and recommendations raised in the following submissions and oral evidence:

Inquiry into the Foreign Influence Transparency Scheme Bill 2017

- Law Council of Australia
- Universities Australia and The Group of Eight
- Australian Catholic Bishops Conference
- Joint Media Organisations, Foxtel and Commercial Radio Australia
- Office of the Australian Information Commissioner
- Oral evidence given by Mr David Crosbie, CEO of the Community Council for Australia; and
- Australian Professional Government Relations Association.

Submission 4 – Law Council of Australia (LCA)

The proposed measures should be reconsidered with the view to strengthening disclosure obligations on the recipients of foreign influence.

The Foreign Influence Transparency Scheme (the Scheme) seeks to provide transparency of the nature and extent of foreign influence in Australian political and governmental processes. Foreign influence can be hidden from, and not disclosed to, the targets of such influence. Placing an obligation of the target of the influence would be unlikely to be workable, as that person may be unaware that a foreign principal is seeking to influence a decision or process via an intermediary. The proposal to strengthen disclosure obligations on the recipients of foreign influence would place an obligation on a person who has little or no opportunity of accessing this information, making it impossible for them to comply with such a regime.

Definition of acting ‘on behalf of’ a foreign principal (proposed section 11) should be amended to:

- **cover only activities that are undertaken as an agent, representative or employee of a foreign principal, or in any other capacity at the order, request, or under the direction or control, of a foreign principal; or cover only activities directly or indirectly supervised, directed, controlled, financed, or subsidised in whole or in major part by a foreign principal**
- **cover only circumstances where the person and foreign principal have actual knowledge of the order, request, direction, finance etc. of the foreign principal, and the person carries out the activity with that knowledge.**

The Department does not support limiting the application of the registration requirement to where both parties have actual knowledge of the involvement of the foreign principal. For example, a person may be acting on behalf of a foreign principal in Australia in accordance with conversations that person has had with the foreign principal regarding their interest in a particular decision or outcome being reached by the Australian government, but there is no specific order, request or

direction to lobby the relevant decision-maker or money has not been provided to the person to undertake those activities.

Limiting the Scheme in the manner suggested by the Law Council of Australia would ultimately undermine its transparency objective. In addition, the department believes the US Foreign Agents Registration Act (FARA) applies more broadly than suggested in the LCA's submission. In addition to the circumstances outlined above, the US FARA also requires registration where a person agrees, consents, assumes or purports to act as, or who is or holds himself out to be, whether or not pursuant to a contractual relationship, an agent of a foreign principal.¹

The submission argues that an exemption should be provided for members of professions (such as doctors, lawyers or accountants, and other service providers) who make occasional representations to Government on behalf of others in a way that is incidental to the provision by them of their professional or other services (similar to paragraph 3.5f of the Lobbying Code of Conduct).

It is important that any additional exemptions in the FITS Bill be carefully crafted so as not to undermine the Scheme's transparency objective.

The department accepts that requiring registration of persons who make only occasional representations to Government on behalf of others in a manner than is incidental to their professional or other services may impose an unnecessary regulatory burden. However, it is important that any exemption is not crafted so broadly as to allow people to avoid registration obligations under the Scheme where they undertake registrable activities on behalf of a foreign principal.

The exemption for legal advice or representation (proposed section 25) should be expanded to cover actions that are incidental to the provision of legal advice or representation.

The intention of the exemption is to cover all legal advice. The department's view is that the exemption should remain limited to legal representation in relation to judicial, criminal or civil law enforcement inquiries, investigations or proceedings.

It is important that any additional or expanded exemptions in the FITS Bill be carefully crafted so as not to undermine the Scheme's transparency objective. The department's view is that 'legal advice' would encapsulate services incidental to the provision of legal advice, as the term is to be construed broadly and includes include professional legal advice provided by a legal practitioner whether in oral or written form. It may not be appropriate to extend the exemption relating to legal representation to incidental services, as this may defeat the transparency objective of the Scheme.

Charitable entities registered with the Australian Charities and Not-for-Profits Commission should be exempt from the registration scheme.

It is important that any additional exemptions in the FITS Bill be carefully crafted so as not to undermine the Scheme's transparency objective.

¹ 22 U.S.C. § 611.

Registration with the ACNC and registration under the Scheme seek to achieve different purposes. The ACNC maintains a register of charitable entities for the purpose of maintaining, protecting and enhancing public trust and confidence in the charities sector through increased accountability and transparency.² In contrast, registration under the Scheme seeks to provide decision-makers and the Australian public with an understanding of the level and extent to which foreign actors are seeking to influence Australian political and governmental processes, often in ways that are legitimate and lawful.

The Scheme will only apply to charities to the extent that they engage in activities on behalf of a foreign principal for the purpose of political or governmental influence. If the Committee were minded to consider a specific exemption for charities, the definition of 'charitable purpose' in section 12 of the *Charities Act 2013* may provide a basis on which such an exemption could be crafted. The exemption could be for a person who undertakes an activity on behalf of a foreign principal if the sole purpose for which the activity is undertaken is a charitable purpose as defined in the *Charities Act 2013*.

Consideration should be given to the availability of civil penalties to enforce compliance with the scheme.

The department does not consider it necessary to include civil penalty provisions in the Bill at this time. Criminal offences are considered the most appropriate way to deter non-compliance with the registration requirements under the Scheme, and provide a meaningful enforcement mechanism should a person who is liable to register not be registered under the Scheme. According to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, criminal offences may be included in legislation where warranted due to the degree of malfeasance or the nature of the wrongdoing involved. An example of such conduct is dishonest or fraudulent conduct.

The appropriate mechanisms for enforcement of the Scheme will be considered as part of the review required by section 70. A review, which must take place within five years of the Scheme commencing, may consider how the criminal offences in Part 5 of the FITS Bill have operated in practice and whether it is necessary to supplement those offences with civil penalties.

The Explanatory Memorandum to the Bill should clarify the intersection between the proposed foreign interference offences in the Bill and those in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

The offences in the FITS Bill do not address foreign interference. Criminal offences for foreign interference are proposed in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Offences Bill). The offences in Part 5 of the FITS Bill are designed to deter non-compliance with the registration requirements under the Scheme, and provide a meaningful enforcement mechanism should a person who is liable to register not be registered under the Scheme.

² http://www.acnc.gov.au/ACNC/About_ACNC/ACNC_role/ACNC/Edu/ACNC_role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe

The conduct which the proposed foreign interference offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill and the proposed offences in the FITS Bill seek to address is different. Foreign interference is harmful conduct undertaken by foreign principals using covert or deceptive means to damage or destabilise the government or political processes of a country, either to harm that country's national interests or to create an advantage for the foreign country. This type of conduct would be criminalised by the EFI Offences Bill.

In contrast, foreign influence refers to activities conducted on behalf of a foreign principal, to pursue their own interests within Australia, often in a legitimate and lawful way. The offences in the FITS Bill apply where a person is undertaking registrable activities on behalf of a foreign principal and fails to register or comply with their registration obligations under the Scheme. The penalties are tiered, with the most serious penalties applying where a person engages in registrable activities without registering under the Scheme, despite knowing of their obligation to do so.

A finding of guilt for an offence under the Scheme would not constitute a finding of guilt for offences under the Criminal Code. The offences in the FITS Bill are not options for alternative verdicts for the foreign interference offences as the elements of the offences are sufficiently different. Section 4C of the Crimes Act would prevent a person being prosecuted for both a FITS offence and a foreign interference offence.

Submission 9 – Universities Australia Submission 11 – Group of Eight

Universities Australia recommends that the Government not proceed with the Bill until it has undertaken a thorough consultation process with stakeholders, particularly the higher education sector.

The Go8 recommends that the Committee recommend that the Government delay the introduction of this legislation to allow the proper and essential consultation processes to occur.

The timing for introduction of the Bill and decisions regarding consultation are matters for Government.

Universities Australia strongly recommends that the Parliament provide a specific exemption for activities that are predominantly academic or scholastic in nature. At a minimum, such a definition should include teaching and research activities, including the communication of research findings by any means.

The Go8 recommends that the Committee recommend the inclusion of 'genuine academic activities' among the exemptions, to ensure that the teaching, learning, research, collaboration, innovation, scholarship and social responsibility initiatives that underlie the effective operations of Australia's democracy are not inadvertently harmed.

The recommendations from Universities Australia and Go8 draw upon the exemption in the US FARA for 'persons engaging in bona fide religious, scholastic, academic, artistic or scientific pursuits or of the fine arts.'³

The department is of the view that a similarly broad exemption is not appropriate in the Australian context. The Scheme is narrower than the US FARA which captures a person or entity acting on behalf of a foreign principal in the US who engages in political activities; acts as a public relations counsel, publicity agent, information service employee or political consultant; solicits, collects, disburses or dispenses contributions, loans, money or other things of value; or makes representations to US government agencies or officials.⁴

In contrast, the Scheme applies only to a person who has a registrable arrangement with, or undertakes registrable activities on behalf of, a foreign principal. Registrable activities are limited to political lobbying, general parliamentary lobbying, communications activity or donor activity, as defined in the FITS Bill. The more targeted registrable activities means that Australia's scheme does not require as broad an exemption as is provided under the FARA.

Registration by academics and scholars, if undertaking registrable activities on behalf of a foreign principal for the purpose of political or governmental influence, would provide useful information to decision-makers and the public about the influences behind the positions being advanced by the academics or scholars in relation to a particular decision or process.

Universities Australia recommends that proposed section 11 be amended to remove references to 'collaboration'.

The inclusion of 'in collaboration with' in the definition of 'on behalf of' a foreign principal in section 11 is designed to cover circumstances where the person and the foreign principal are working together, but it can not necessarily be determined that the foreign principal is directing, controlling, supervising or funding the activities of the person.

The Scheme is not expected to stifle normal academic collaborative activities. The Scheme may have a role in regulating activities if they are undertaken in collaboration with a foreign individual or public enterprise and are a registrable activity – that is, parliamentary lobbying, general lobbying, communications activity or donor activity in Australia for the purpose of political or governmental influence. In these circumstances, the activities would continue to be permissible – the only requirement under the Scheme is to register and fulfil registrant obligations once registered.

³ 22 U.S.C. § 613.

⁴ 22 U.S.C. § 611(c).

Universities Australia recommends that expanded exemptions for legitimate business dealings and development be included in the Bill. This should include the normal conduct of business dealings of both commercial enterprises and the already heavily regulated, legitimate core business of non-profit organisations such as universities.

Universities Australia acknowledges in its submission at page 6-7 that 'the proposed scheme will not technically prevent' opportunities for 'joint research opportunities, investment in innovation precincts, possibilities for exchanges of knowledge and talent' to be realised, but rather that the scheme will create 'further regulatory barriers to having discussions with government officials [which] could easily stifle opportunities for innovation.'

It is not clear that such activities would fall within the definitions of parliamentary lobbying, general lobbying, communications activity or donor activity for the purpose of political or government influence. If the activities do not meet these criteria, registration is not required.

To the extent that the activities do meet these criteria, there is not a clear policy reason to exempt them from registration.

Universities Australia recommends that legitimate advocacy of behalf of international students and other vulnerable groups (such as temporary workers) be exempted from this scheme.

The department notes this issue. The intention of the Scheme is not to capture representations made in relation to an individual. It may be desirable for an exemption for individual representations to be included in the Bill.

If the Committee were minded to consider a specific exemption, this would need to be carefully crafted to ensure that it does not defeat the Scheme's transparency objectives.

Submission 12 – Australian Catholic Bishops Conference

Recommends strengthening exemption in section 27 to provide certainty to the members of the Catholic Church that they are not required to register under the Scheme.

The religious exemption in section 27 establishes an exemption for activities undertaken on behalf of a foreign government where the activity is undertaken solely, or solely for the purposes of, acting in good faith in accordance with the doctrines, tenets, beliefs or teachings of a particular religion of the foreign government. This exemption seeks to explicitly avoid the activities of a church that is linked to a foreign government from being registrable under the Scheme. It does not apply to religions that are not linked to a foreign government.

The intention of the exemption is to ensure that, in situations where the head of a church may also be the head of a state, activities undertaken in accordance with the doctrines and tenets of the religion are not registrable, even if they are for the purpose of political or governmental influence.

The department notes that, in light of evidence from the Australian Catholic Bishops Conference (ACBC), the Catholic Church in Australia may not have a foreign principal, in which case registration is not required.

Recommends that the following entities and activities be specifically exempted from the Scheme:

- a) **charities, religious or other organisations or funds registered as a charity with the Australian Charities and Non-for-profits Commission**
- b) **a not-for-profit association, body or organisation constituted in Australia to represent the interests of its members acting for its purposes**
- c) **any other not-for-profit association, body or organisation constituted in Australia for charitable purposes acting for its purposes,**
- d) **the activity is, or is for the purposes of, acting in good faith for predominantly religious, philanthropic, educational, scientific or artistic purposes.**

It is important that any additional exemptions in the FITS Bill be appropriately limited so as not to undermine the Scheme's transparency objective.

Registration with the ACNC and registration under the Scheme seek to achieve different purposes. The ACNC maintains a register of charitable entities for the purpose of maintaining, protecting and enhancing public trust and confidence in the charities sector through increased accountability and transparency.⁵ In contrast, registration under the Scheme seeks to provide decision-makers and the Australian public with an understanding of the level and extent to which foreign actors are seeking to influence Australian political and governmental processes, often in ways that are legitimate and lawful.

The Scheme will only apply to charities to the extent that they engage in registrable activities on behalf of a foreign principal for the purpose of political or governmental influence. If the Committee were minded to consider a specific exemption for charities, the definition of 'charitable purpose' in section 12 of the *Charities Act 2013* may provide a basis on which such an exemption could be crafted. The exemption would be for a person who undertakes an activity on behalf of a foreign principal if the sole purpose for which the activity is undertaken is a charitable purpose as defined in the *Charities Act 2013*.

Recommend amending the definition of 'on behalf of' in section 11 to remove innocent and coincidental action, consistent with the US *Foreign Agents Registration Act*.

The ACBC submission posits that this would require removing 'in collaboration with a foreign principal' and amending the reference to 'funding or supervision by the foreign principal' to include 'funding or supervision in whole or major part by the foreign principal' in section 11(1). The ACBC also contends that subsection 11(3) should be removed as it significantly broadens the scope of what it means to be acting on behalf of a foreign principal.

⁵ http://www.acnc.gov.au/ACNC/About_ACNC/ACNC_role/ACNC/Edu/ACNC_role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe

The department disagrees that subsection 11(3) broadens the scope of what it means to be acting 'on behalf of' a foreign principal. Subsection 11(3) requires both the person and the foreign principal to know or expect that the person would or might undertake the activity, and that the person would or might do so in circumstances falling within the scope of sections 20, 21, 22 or 23 of the Bill. This ensures that a person does not need to register simply because their views align with those of a foreign principal, in a situation where the foreign principal has no ability to know that the person will or might engage in registrable activities.

For registration requirements to apply under the Scheme the person or entity must not only be acting on behalf of a foreign principal as defined in the Scheme. They must also engage in registrable activities, which are relatively narrow in scope, for the purpose of political or governmental influence.

The department's view is that the definition needs to be sufficiently broad so as to achieve the transparency objective of the Scheme.

Recommend exemption for public communications that are transparent and do not raise foreign influence concerns by included in the Scheme, to ensure the Bill does not unreasonably burden the implied freedom of political communication.

Including such an exemption would defeat the transparency objective of the Scheme. Even if the involvement of the foreign principal is fully disclosed, it should still be registrable. Otherwise, the register to be established under the Scheme will not have the desired effect of being a central, searchable repository of information about the level, extent and nature of foreign influence in Australian political and governmental processes.

The department is confident that the Scheme does not infringe or unnecessarily burden the implied freedom of political communication. The registration and transparency requirements in the Scheme do not prevent any person from engaging in political communication in Australia. Rather the Scheme merely requires the ultimate source of such communications to be available through registration under the Scheme. The Scheme's objective – to inform the Australian Government and the public about the ultimate source and interests behind political communications being made to them – is appropriate and adapted to serve a legitimate end of enhancing transparency of foreign influence in Australian political and governmental processes.

Submission 19 – Joint Media Organisations

Submission 21 – Commercial Radio Australia

Submission 27 – Foxtel

Joint Media Organisations, Commercial Radio Australia and Foxtel recommend the legislation only apply to foreign governments and businesses and/or individuals operating on behalf of foreign governments. It is appropriate to narrowly target the Scheme, given that the amount of costs to register and other administrative burdens is unknown. This will ensure a level playing field for foreign and domestic principals acting in the Australian business environment

The department considers that excluding businesses and individuals who are not operating on behalf of a foreign government would undermine the Scheme's transparency objective. Doing so would make it easy for foreign governments who wish to influence a political or governmental process in Australia to funnel that activity through a foreign business or individual, thereby making the activities fall outside the scope of the Scheme.

In developing the Scheme, the department considered the US FARA which considers a foreign principal to be a person outside the US, and a partnership, association, corporation, organisation or any other combination of persons organised under the laws of or having its principal place of business in a foreign country, in addition to the government of a foreign country and a foreign political party.⁶

The department is of the view that the existing exemptions in the Scheme that apply where the foreign principal is a foreign business or individual guard against onerous regulatory burdens for persons or entities acting on behalf of such actors. The Scheme will impose a small regulatory burden, and has been designed to minimise the burden on registrants to the extent compatible with its transparency objectives. A small fee will apply to the reporting requirement, anticipated to be less than that charged for registration under the US FARA (which is US\$305 for the initial filing and for each mandatory six monthly-supplemental statement).

Joint Media Organisations, Commercial Radio Australia and Foxtel recommend that media organisations be specifically exempted from the requirement to register under the Scheme.

The department does not support a complete exemption for media organisations under the Scheme.

Registration under the Scheme allows the person or public to have the ability to assess the interests which are being represented by the person undertaking the communications activity.

The Bill captures any person who undertakes communications activity on behalf of a foreign principal for the purpose of influencing an Australian government or political process, and the person is not exempt. The policy intention is to capture both digital and traditional media platforms, including social media, where a person can undertake registrable activities for the purpose of political or governmental influence.

⁶ 22 U.S.C. § 611(b).

It is essential that there is transparency where communications activities are undertaken on behalf of a foreign principal for the purpose of political or governmental influence. This is especially important for communications activity targeting the public. Such activities can be very powerful in affecting the views and opinions of persons involved in Australia's political and governmental processes, as well as influencing a person's vote in a federal election or designated vote.

The Scheme will not require registration by broadcasters, carriage service providers and publishers for communications activity where their only role is to broadcast the information, provide the carriage service by which the information is transmitted or to publish the information (subsections 13(3) and (4)). The person/entity who produces the content on behalf of the foreign principal, which is then passed to the media organisation via a content supply contract, may have to register depending on the identity of the foreign principal, the purpose of the activity and whether the activity is in Australia. For example, in relation to content/channels on the Foxtel platform outlined at page 2 of Foxtel's submission, there is no obligation on Foxtel to register under the Scheme as, by merely broadcasting the channels, it falls outside the definition of communications activity in section 13 of the FITS Bill.

As noted in Foxtel's submission, the department acknowledges the language in paragraph 210 of the Explanatory Memorandum is insufficiently clear and will seek to clarify this in a supplementary Explanatory Memorandum. Paragraph 210 seeks to confirm that, if the broadcaster or carriage service provider has a single supply contract with a foreign principal which extends to two types of activities – communications activity on behalf of the foreign principal for the purpose of political or governmental influence (i.e. produce native content) and retransmission of other information on behalf of the foreign principal (i.e. broadcast content/channels on their platform), the existence of the latter undertaking to retransmit does not absolve the broadcaster or carriage service provider of their obligation to register by virtue of the undertaking to produce native content.

Joint Media Organisations considers the exemption for news media in section 28 of the FITS Bill is too narrow and does not provide adequate exemptions for the daily activities of media companies

The exemption in section 28 applies to activities undertaken on behalf of a foreign business or individual if the activity is solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media. This means that privately owned media and press services are not required to register for following the direction of a foreign business or a foreign individual. The exemption in section 28 recognises that requiring registration by news services acting on behalf of a foreign business or individual would be unlikely to add to the Scheme's transparency objective. For example, absent the exemption in section 28, a local newspaper would be required to register if its parent company (a foreign business) directed that the local paper's editorial on the day of an election should urge voters to support a particular party. Requiring such entities to register would unjustifiably expand the scope of the scheme.

The department considers that the example provided on page 6 of the Joint Media Organisation's submission relating to the Sunday Telegraph would likely fall within the exemption at section 28 as

‘current affairs’ or ‘editorial content’. Further information on these terms is provided at paragraph 365 of the Explanatory Memorandum, extracted below.

Similarly, the terms ‘reporting news’, ‘presenting current affairs’, ‘expressing editorial content’ and ‘news media’ are not defined. These terms are intended to take their ordinary meanings.

- The terms ‘reporting news’ and ‘presenting current affairs’ could include the presentation of information about current events through print, online, television or radio mediums. This term is intended to refer to news that is investigated, selected and presented by media professionals including journalists, editors and producers and is intended to apply to traditional news sources such as print and online newspapers, television news and radio. The terms ‘reporting news’ and ‘presenting current affairs’ are not intended to capture the presentation of information about current events by members of the general public, such as through social media.
- The term ‘expressing editorial content’ is intended to include attitudes and opinions expressed in news media including print, online, television and radio media. This term is intended to refer to editorial content that is selected and presented by media professionals including journalists, editors and producers and is intended to apply to traditional news sources such as print and online newspapers, television news and radio.
- The term ‘news media’ is intended to include all sources and modes of presentation of news and information, including television, newspapers, magazines, online newspapers and other online platforms.

Joint Media Organisations consider that the exemption for commercial and business pursuits in section 29 is too narrow and does not provide an adequate exemption for the daily activities of media companies. Business relationships should not be codified, including arrangements between media organisations and foreign principals.

The exemption at subsection 29(2) applies where the foreign principal is a foreign public enterprise or foreign business, the activity is a commercial or business pursuit and the activity is undertaken by an individual in his or her capacity as an employee of the foreign principal, or under the name of the foreign principal. This exemption is intended to ensure that Australian branches of foreign-owned global corporations are not captured under the Scheme if the Australian subsidiary is operating under the same or similar trading name as the foreign principal – these activities are considered to be sufficiently transparent. Paragraph 388 of the Explanatory Memorandum to the Bill clarifies that this exemption extends to slight variations between the name of the Australian subsidiary company and the foreign parent company if it is clear that the Australian company and the foreign company are linked. The application of the exemption where the names are substantially similar, rather than identical, could be more directly stated in the principal Act.

However, where the link between the person and the foreign interest is hidden or undisclosed (i.e. using different names or some other mechanism to obfuscate the foreign interest), the person would not be able to rely on this exemption, even if undertaking a commercial or business pursuit. The department does not agree the exemption should be broadened.

Submission 17 – Office of the Australian Information Commissioner

Suggest a Privacy Impact Assessment be undertaken on the registration scheme established under the Foreign Influence Bill, to identify the impact that the scheme might have on the privacy of individuals, and to set out recommendations for managing, minimising or eliminating that impact.

The department will prepare a privacy impact assessment prior to commencement of the Scheme, having regard to the guidance provided by the Office of the Australian Information Commissioner.

Consider setting out further detail in FITS Bill on the obligation to consider privacy requirements in collection, use and disclosure of personal information under the Scheme and the development of rules, as well as consultation requirements (including with the Information Commissioner) in the development of rules.

The department anticipates consulting with the Information Commissioner and relevant stakeholders in the development of rules under the Scheme. Consultation with the Office of the Information Commissioner will occur in the implementation of the scheme and would not ordinarily be prescribed by legislation in this context.

Oral evidence provided by Mr David Crosbie, CEO of the Community Council for Australia

There should be a specific exemption from registration for charitable entities that are registered with the Australian Charities and Not-for-profits Commission (ACNC)

It is important that any additional exemptions in the FITS Bill be appropriately limited so as not to undermine the Scheme's transparency objective.

Registration with the ACNC and registration under the Scheme seek to achieve different purposes. The ACNC maintains a register of charitable entities for the purpose of maintaining, protecting and enhancing public trust and confidence in the charities sector through increased accountability and transparency.⁷ In contrast, registration under the Scheme seeks to provide decision-makers and the Australian public with an understanding of the level and extent to which foreign actors are seeking to influence Australian political and governmental processes, often in ways that are legitimate and lawful.

The Scheme will only apply to charities to the extent that they engage in activities on behalf of a foreign principal for the purpose of political or governmental influence. If the Committee were minded to consider a specific exemption for charities, the definition of 'charitable purpose' in section 12 of the *Charities Act 2013* may provide a basis on which such an exemption could be crafted. The exemption would be for a person who undertakes an activity on behalf of a foreign principal if the sole purpose for which the activity is undertaken is a charitable purpose as defined in the *Charities Act 2013*.

⁷ [http://www.acnc.gov.au/ACNC/About ACNC/ACNC role/ACNC/Edu/ACNC role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe](http://www.acnc.gov.au/ACNC/About%20ACNC/ACNC%20role/ACNC/Edu/ACNC%20role.aspx?hkey=88635892-3c89-421b-896d-d01add82f4fe)

The FITS Bill would require registration of any charity that receives any kind of support or donation from outside of Australia.

The FITS Bill will require registration of a person or entity who is engaged in registrable activities in Australia on behalf of a foreign principal for the purpose of political or governmental influence where no exemptions apply. Receipt of money by a charity from a foreign principal, in and of itself, will not be sufficient to trigger a requirement to register under the Scheme.

For example, if a charity receives money from a foreign person, and does not engage in parliamentary lobbying, general political lobbying, communications activity or donor activity as per the requirements in sections 20 and 21 of the Bill, they will not be required to register under the Scheme.

The department notes the evidence provided by Mr Crosbie that ‘every charity I know of not only provides charitable services but also advocates to try to reduce the need for them to provide those services.’ In these circumstances, a charity that engages in registrable activities in Australia *on behalf of a foreign principal* for the purpose of political or governmental influence would be required to register under the Scheme. In relation to Mr Crosbie’s comment, the department anticipates that, although all charities engage in advocacy, it is likely that not all do so on behalf of a foreign principal. Groups and entities who advocate on their own behalf, or on behalf of a domestic principal, would not need to register under the Scheme.

Exemption for humanitarian aid or assistance is not clearly defined, and does not cover the vast majority of charities in Australia that receive international philanthropy and support.

The humanitarian aid or assistance exemption in section 24 concerns activities undertaken on behalf of a foreign principal if the activity is, or relates solely to, humanitarian aid or humanitarian assistance. As set out in the explanatory memorandum to the Bill at paragraph 324, the terms ‘humanitarian aid’ and ‘humanitarian assistance’ are intended to include material and logistical assistance provided during man-made and natural disasters and crises and during times of conflict or civil unrest.

Commercial activities are carved out, why aren’t charities?

The department does not agree that all commercial activities are ‘carved out’ of the Scheme.

The Scheme includes limited exemptions for commercial activities for commercial or business pursuits in the context of commercial negotiations section 29(1) and for persons employed by or operating under the name of a foreign principal in section 29(2).

Subsection 29(1) of the Bill establishes an exemption for activities undertaken on behalf of a foreign business or foreign individual where the activity is solely, or solely for the purposes of bona fide business or commercial interests in relation to preparing to negotiating, negotiating or concluding a contract for the provision of goods or services. The exemption does not apply where the business or commercial pursuits relate to national security, defence or public infrastructure or where a person is acting on behalf of a foreign principal which is not a foreign business or individual.

Section 29(2) of the Bill establishes an exemption that applies where the foreign principal is a foreign public enterprise or foreign business, the activity is a commercial or business pursuit, and the activity is undertaken by an individual in his or her capacity as an employee of the foreign principal, or the activity is undertaken by a person under the name of the foreign principal. Requiring such persons to register would be unlikely to add to the Scheme's transparency objective, as it will be apparent (from the person's name or role) that they are connected to a foreign principal.

It is inconsistent that international company seeking to influence Australian Government alcohol policy would not be required to register, but Foundation for Alcohol Research and Education, if it receives money from the Bill & Melinda Gates Foundation for alcohol research, would have to register.

The department does not agree that the Scheme would treat charities and businesses differently in this regard.

Commercial activities are only exempt under subsection 29(1) of the Bill if the activity is solely, or solely for the purposes of bona fide business or commercial interests in relation to preparing to negotiating, negotiating or concluding a contract for the provision of goods or services. A person who lobbies the Australian Government on behalf of a foreign business in relation to policy decisions would not have the benefit of this exemption.

The Scheme is limited to lobbying activities, communications activities and donor activities undertaken on behalf of a foreign principal in Australia for the purpose of political or governmental influence. Simply receiving funding from a foreign donor for research will not, in and of itself, be sufficient to trigger a requirement for registration.

Requiring charitable entities that are registered with ACNC to also register under this Scheme would impose significant new administrative costs on those organisations.

The transparency scheme will impose a small regulatory burden, through the requirement to complete an initial registration and an annual renewal. A small fee will apply to the reporting requirement, anticipated to be less than that charged for registration under the FARA (US\$305 for the initial filing and for each mandatory six-monthly supplemental statement). There will also be additional reporting on registrable activities during voting periods, given that these are periods of heightened political activity and awareness.

The scheme has been designed, to the extent compatible with its transparency objective, to minimise the burden on registrants. Registrants will be required to keep records relating to registrable activities and arrangements, any benefits provided by a foreign principal and any registrable communications activity.

The nature of records to be kept will depend on the individual circumstances. The requirement for records to be kept is crucial to ensure that possible investigations or prosecutions will not be undermined as relevant records have been lost or destroyed. It is also important that the requirement to keep records extends beyond a period of registration, as activities undertaken on

behalf of a foreign principal within the last five years may continue to have implications for decision-making and public policy in Australia.

Submission 13 – Australian Professional Government Relations Counsel

The Scheme duplicates the transparency requirements in Commonwealth Lobbying Code of Conduct and associated registers which have high levels of compliance, are ‘a balanced and reasonable set of measures to provide public confidence’ and satisfy the transparency requirements for government relations consultants proposed in the Scheme.

The Scheme and the various Lobbying Registers are complementary in that they both seek to ensure contact between lobbyists and the Australian Government is conducted transparently, honestly and with integrity. However, they differ in scope, compliance and enforcement mechanisms.

The Scheme will regulate persons undertaking registrable activities on behalf of a foreign principal, whereas lobbying registers require registration of entities engaged in lobbying activity on behalf of any third party, whether domestic or foreign.

The Scheme also contains powers to compel production of documents and enforcement mechanisms to deter non-compliance. In contrast, the Lobbying Code of Conduct and Register are not compulsory or binding regulatory mechanisms. They do not have a legislative basis and are not supported by enforcement measures.

The Scheme will have a detrimental impact on competitive neutrality for foreign companies operating in the Australian commercial market, and may result in the publication of commercially sensitive information. Recommend Scheme information only be disclosed to government, rather than being made publicly available and commercial-in-confidence information obtained under the Scheme not be published or released.

The purpose of the Scheme is to provide information to the public and decision-makers about the level and extent of foreign influence in Australian political and government decisions. Limiting the availability of information collected under the Scheme would undermine the Scheme's transparency objective, as the broader public would be unable to assess the interests being brought to bear in respect of political decisions they make i.e. a vote in a federal election or Referendum.

Section 43(2) allows the Secretary to decide not to make particular information available to the public if it is commercially sensitive. A registrant who considers that information is commercially sensitive can specify this when giving the information. Commercially sensitive information would include details of commercial contracts, where disclosure of that detail would cause detriment to the parties or expose sensitive information relating to a company's operations, expenditure or employees.

Recommend Scheme be limited to activities relating to security, defence and foreign policy – collecting information beyond these categories would be of no public interest or utility.

The department does not agree that only activities related to security, defence and foreign policy have 'public interest and utility'. The goal of the Scheme is to detail the level, extent and nature of foreign influence in Australia's political and governmental processes, including elections and other public votes. It is of high public interest, and essential to Australia's democracy, to know when and how foreign principals, through intermediaries, are trying to influence such processes.

The department considers the Scheme should not be limited in the way suggested.

Recommend amendments to provide that it should be sufficient to make reasonable inquiries on question of whether a company is controlled by a foreign government.

The intention of the Scheme is not to penalise people who could not reasonably have known that they were engaged by a foreign principal. A registrant will not always be able to know whether a company is controlled by a foreign government, and therefore falls within paragraph (b) of the definition of 'foreign principal' in the Bill. The offences in section 57 of the Bill relating to failure to apply for or maintain registration only apply where the person knew that he or she was required to apply for registration or renew their registration in relation to a foreign principal. That is, the person must have been aware that he or she was required to apply for registration or renew their registration.

The department notes that, even if a person cannot determine whether a company is 'controlled' by a foreign government, the Scheme will still apply if an entity is constituted under the laws of a foreign country or has its principal place of business outside of Australia, consistent with the definition of 'foreign business' in section 10 of the Bill.

Recommend amendments to allow a registered party to delay registering a client name in a circumstance where this might result in speculation about a pending transaction involving the client which has not been disclosed under the Corporations Act, as per clause 5.2 of the Commonwealth Lobbying Code of Conduct.

This information could be denoted by a registrant as commercially sensitive. The Secretary may decide not to make commercially sensitive information publicly available under subsection 43(2).

Exclude foreign pension fund from definition of foreign public enterprise and explicitly include in definition of foreign business.

The definition of 'controlled' aligns with the criteria listed in the Criminal Code to determine when an entity is a 'foreign public enterprise' (see section 70.1).

A foreign pension fund may be considered either a foreign public enterprise or a foreign business for the purposes of the Scheme. The department will assist potential registrants to determine their registration requirements once the Scheme is established.

APGRA recommends clarifying that the section 29 exemption for contract negotiations is to be broadly construed and covers explanatory and other meetings with a Minister or public official.

The section 29(1) exemption for commercial negotiations does cover related meetings. This is further explained in paragraph 375 of the Explanatory Memorandum to the Bill, which notes:

The terms 'negotiate, negotiating or concluding' is intended to include all activities undertaken in relation to a contract for the provision of goods and services. For example, the term would include preliminary meetings in the lead-up to negotiating a contract, activities undertaken during the negotiation period and activities undertaken to conclude the contract which may relate to a final evaluation of good and services provided or the final exchange of funds under the contract.

Section 21 relating to communications activity on behalf of any kind of foreign principal constrains legitimate expression of views on public policy or regulatory issues by foreign companies and individuals.

The purpose of the Scheme is to ensure communications activities undertaken by an intermediary for a foreign principal are transparent. Where an intermediary is used, the Scheme provides important information to the public or decision-maker about the involvement of a foreign principal in the communications activity.

The registration and transparency requirements in the Scheme do not prevent any person from engaging in political communication in Australia. Rather the Scheme merely requires the ultimate source of such communications to be stated or available. The Scheme's objective – to inform the Australian Government and the public about the ultimate source and interests behind political communications being made to them – is appropriate and adapted to serve a legitimate end of enhancing transparency of foreign influence in Australian political and governmental processes.

Foreign companies and individuals who engage in communications activities under their own names will not be subject to the application of the Scheme.

Recommends a single, annual date for renewal of registration, or biannual updates, to reduce compliance burden and the risk of inadvertent error.

The department is of the view that setting single, annual dates for renewal for all registrants would be unworkable from an administrative perspective. The department estimates that there could be 500 registrants in the first year of the Scheme's operation – if a single date was set for renewal, this would impact the department's ability to ensure decisions about registration are made, and scheme information is made publicly available, in a timely fashion.

The extra requirements imposed on registrants for election campaigns are unnecessary.

As noted in the Explanatory Memorandum, election campaigns are a time of heightened political activity, when there is a particular need for foreign influence on political and government processes to be transparent so that members of the Australian community can make informed decisions about their vote. They are points in time where many Australians are more engaged with the political process and are critical to the health of Australian democracy.

The additional reporting requirements for election periods are considered necessary to provide information to the public and decision-makers about the level, extent and nature of foreign influence when exercising their vote.

The Scheme contains burdensome record keeping requirements - a charge should not be imposed for registrants because of this.

The existence of adequate records is essential to the effective administration of the Scheme and will allow for appropriate investigations into potential non-compliance with the Scheme. To achieve the transparency objectives of the Scheme, certain information relating to a person's registration must be collected. The matters in relation to which records must be kept are exhaustively listed in section 40, and include:

- any registrable activities 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 a 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.

Fees will be charged for initial registration and annual renewal of registration, not in relation to keeping records. The Scheme will impose a small regulatory burden, and has been designed to minimise the burden on registrants to the extent compatible with its transparency objectives. A small fee will apply to the reporting requirement, anticipated to be less than that charged for registration under the US FARA (which is US\$305 for the initial filing and for each mandatory six monthly-supplemental statement).

Recommend that only activities undertaken on behalf of a foreign principal should be registered, not an arrangement to undertake activities which is burdensome and of no obvious value.

Arrangements include contracts and other written agreements – it would not be prudent to exclude these from the Scheme. Under the United States FARA, arrangements are covered, even if no activities are ever undertaken under the arrangement - the Scheme has been developed consistent with this approach.⁸

The Scheme's strict liability offences and extreme criminal penalties are neither appropriate nor proportionate for inclusion – instead, civil penalties would be adequate.

The department does not consider it necessary to include civil penalties provisions in the Bill at this time. Criminal offences are considered to be the most appropriate way to deter non-compliance with the registration requirements under the Scheme, and provide a meaningful enforcement mechanism should a person who is liable to register not be registered under the Scheme. According to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,

⁸ 22 U.S.C. § 611(c)(2).

criminal offences may be included in legislation where warranted due to the degree of malfeasance or the nature of the wrongdoing involved. An example of such conduct is dishonest or fraudulent conduct.

The department notes that for strict liability offences, the defence of mistake of fact is set out in section 9.2 of the Criminal Code. The defence provides that a person is not criminally responsible for an offence that includes a physical element to which strict liability applies if:

- at or before the time of the conduct constituting the physical element, the person considered whether or not a fact existed, and is under a mistaken but reasonable belief about those facts, and
- had those facts existed, the conduct would not have constituted an offence.

The appropriate mechanisms for enforcement of the Scheme will be considered as part of the review required by section 70. A review, which must take place within five years of the Scheme commencing, may consider how the criminal offences in Part 5 of the FITS Bill have operated in practice and whether it is necessary to supplement those offences with civil penalties.

General questions

- 1. In his second reading speech, the Prime Minister outlined a 'four-pillar' Counter Foreign Interference Strategy. The four pillars are: sunlight, enforcement, deterrence and capability. Could you provide some further detail about the Counter Foreign Interference Strategy?**

The Prime Minister's second reading speech on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 on 7 December 2017 identified four 'pillars' that will underpin a whole-of-government countering foreign interference strategy. The first three of these pillars are the ways Government will address foreign interference, and the fourth enables them to be undertaken. As noted by the Prime Minister, these pillars are interlocking components and critical to successfully protecting Australia's sovereignty and democracy:

- 1) *Sunlight*: shedding light on coercive, corrupt or covert behaviour by foreign governments that is incompatible with Australia's sovereignty and values, and improving transparency around foreign influence in Australia.
- 2) *Enforcement*: identifying attempts at interference in Australia by foreign entities and disrupting them by applying the relevant laws to those involved.
- 3) *Deterrence*: utilising sunlight and enforcement activities to discourage foreign entities from seeking to attempt to interfere in Australia's sovereignty and values.
- 4) *Capability*: building and maintaining capability within Government to deliver these first three pillars.

2. Given the potential difficulties with presenting evidence for the proposed new offences for foreign interference and espionage, is it intended that the Transparency Scheme becomes a more readily available series of offences?

The offences in the Bill and the proposed espionage and foreign interference offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill are designed to complement each other rather than overlap and provide a suite of investigative options for agencies.

3. Could a breach of the Foreign Influence Transparency Scheme, some of which involve strict liability, be used as establishing an intent element to proposed offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill?

It is not clear to the department how the commission of an offence under the Bill could be used to establish an intent element for one of the proposed offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill.

4. Could Scheme information be used to establish intent for proposed offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill?

Section 53 allows the Secretary to communicate scheme information to a law enforcement body for an enforcement related activity within the meaning of the *Privacy Act 1988*.

It is not possible to comment on how such information might be used by a law enforcement body in the performance of its functions, as this will depend on the nature of the particular investigation or matter.

5. Could the Secretary's powers to request future information be used in overcoming evidentiary challenges to the proposed offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill?

No. The Secretary's powers to request information are limited to situations where:

- the Secretary reasonably suspects that a person might be liable to register under the Scheme (subsection 45(1)), or
- the Secretary reasonably believes that a person has information or a document that is relevant to the operation of the Scheme (subsection 46(1)).

6. Is public transparency of foreign influence the primary objective of the Bill? If so, why are in-house public affairs and government relations counsel exempt from the Scheme?

The Scheme seeks to provide transparency for the Australian Government and the Australian public about the nature, level and extent of foreign influence in Australia.

The activities of in-house public affairs and government relations counsel are considered to be sufficiently transparent as they are conducted in the name of the foreign principal. This is reflected in the exemption at section 29(2), which provides that a person is exempt if they are undertaking registrable activities on behalf of a foreign public enterprise or foreign business, the activity is a

commercial or business pursuit and the activity is undertaken by an individual in his or her capacity as an employee of the foreign principal, or under the name of the foreign principal.

To require in-house public affairs and government relations counsel to register would impose an unnecessary burden with little or no transparency gain.

7. The exemptions contained in Division 4 of the Bill apply only to registrable activities. However, a person may still be liable to register under the Scheme should they enter an arrangement with a foreign principal to undertake activities (s 18). Are the exemptions in Division 4 intended to also apply to arrangements with foreign principals? If not, why not?

The department does not agree that this is correct. The exemptions apply regardless of whether a person has a registrable arrangement with a foreign principal or undertakes registrable activities on behalf of a foreign principal.

Consistent with section 18, a person is liable to register if the person enters a registrable arrangement with a foreign principal. A registrable arrangement is defined in section 10 to mean an arrangement between a person and a foreign principal for the person to undertake an activity that, if undertaken by the person, would be registrable in relation to the foreign principal.

Therefore, an arrangement to undertake registrable activities enlivens the requirement to register for activities listed in sections 20, 21, 22 and 23 and the exemptions in Division 4.

Scope of the term 'on behalf of'

8. There has been some concern expressed in submissions and media coverage of the Bill that the Scheme would require persons to register where there are no explicit instructions for certain influencing objectives being set by a foreign principal. Could you clarify whether a person or entity would be required to register under the Scheme in the following scenario? And if not, what section of the Bill would support that advice?

***Scenario* - Would a person be liable to register where they are a member of an international professional association and undertook lobbying activities in accordance with that association's objectives?**

Whether a person would be required to register in this scenario depends upon whether the activity was undertaken 'on behalf of' the international professional association as well as the nature of the relationship between the person and the international professional association i.e. whether an employment relationship exists between the person and the association.

Under section 11, a person undertakes activities on behalf of a foreign principal if the person undertakes the activities

- under an arrangement with a foreign principal (which could include a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten and whether or not consideration is payable)

- in the service of the foreign principal
- on the order or at the request of the foreign principal
- under the control or direction of the foreign principal
- with the funding or supervision by the foreign principal, or
- in collaboration with the foreign principal.

It is possible that the person may be undertaking the activities 'in the service of' the international professional association given the alignment between the activities and the association's objectives. Paragraph 176 of the Explanatory Memorandum, extracted below, provides further information on the term 'in the service of':

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. There will still need to be a connection between the actions of the person and the foreign principal. It will not be sufficient for the person to unilaterally decide that they are undertaking particular activities 'in the service of' a foreign principal. The foreign principal must be, in some way, seeking or overseeing the activities.

For the activities to be registrable, the international professional association must have an awareness of, and some role in facilitating, the activities undertaken by the person. Where a 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, the person would not be considered to be undertaking an activity 'on behalf of' a foreign principal (subsection 11(3)).

An exemption at section 29(2) applies where the foreign principal is a foreign public enterprise or foreign business, the activity is a commercial or business pursuit and the activity is undertaken by an individual in his or her capacity as an employee of the foreign principal, or under the name of the foreign principal. Depending on the nature of the relationship between the person and the international professional association, this exemption could apply, meaning that the person would not need to register under the Scheme.

Overlap with Lobbying Code of Conduct

9. Lobbying of MOPS Staff is described as an 'inherently political activity' in the Explanatory Memorandum for the Bill. The Ministerial Code of Conduct and Lobbying Register also place obligations on MOPS Staff following their employment. Is there a reason that MOPS Staff were excluded from the registration obligations that apply to former Ministers, MPs and senior officials?

The public interest in knowing that a former MOPS Staff member is acting on behalf of a foreign principal is arguably less than in relation to the other categories with a significant public role. The department is of the view that MOPS Staff should not be included in the Scheme at this time, but

this could be considered as part of the review required by section 70 which must take place within five years of the Scheme commencing.

10. The Scheme will create registration obligations for conduct that is already regulated by the Lobbying Code of Conduct and Register. Is the Scheme intended to sit alongside the Lobbying Register, requiring a person to register under both for the same conduct? If so, could the Lobbying Code of Conduct or the new Scheme carve out activities or registrations that are captured by the other?

The Scheme and the Commonwealth Lobbying Code of Conduct and Register are complementary in that they both seek to ensure contact between lobbyists and the Australian Government is conducted transparently, honestly and with integrity. They do, however, contain differences in terms of scope, compliance and enforcement mechanisms.

While it is possible that persons undertaking lobbying activities on behalf of a foreign principal may register under both mechanisms, the Scheme will capture activities beyond lobbying. The Code of Conduct and Register only capture specific, defined lobbying activities that involve contact with Commonwealth Ministers and officials. The Scheme also contains significant powers to compel production of documents and strong enforcement mechanisms to deter non-compliance. In contrast, the Lobbying Code of Conduct and Register are not compulsory or binding regulatory mechanisms – they do not have a legislative basis and are not accompanied by enforcement measures such as civil penalties.

A specific carve out for activities and registrations under the Lobbying Code of Conduct would not be appropriate and would undermine the Scheme's transparency objective. The experience of the US in administering the *Foreign Agents Registration Act* (FARA), which contains an exemption for person engaged in lobbying activities and who have registered under the *Lobbying Disclosure Act 1995*⁹ was instructive in policy development of the Scheme. As the department's initial submission to the Committee's inquiry notes:

A key challenge for FARA in achieving its transparency objective is the exemption that provides that persons and entities registered under the US Lobbying Disclosure Act are not required to also register with FARA. The Lobbying Disclosure Act is broad in its application which has the unintended consequence of some foreign agents registering with the Lobbying Disclosure Act and avoiding registration with FARA. The OIG Audit also finds that the Lobbying Disclosure Act has fewer regulatory requirements and necessitates the disclosure of less information than is required under FARA. The OIG Audit finds that the Lobbyists Disclosure Act exemption is a key reason for the decline in FARA registrations in the 1990's. Recognising this challenge, the Scheme proposed in the FITS Bill does not include an exemption for lobbyists registered on a Commonwealth or state and territory lobbyists register. The Department has consulted closely with the Department of Prime Minister and

⁹ 22 U.S.C. § 613.

Cabinet who administer the Australian Government Lobbyists Register to minimise overlap between the different regulatory measures.¹⁰

The department notes that a recent Bill proposed by the House Judiciary Committee proposes repealing from the FARA the exemption for those registered under the Lobbying Disclosure Act.¹¹

In light of the difficulties experienced in the administration of the FARA by virtue of the exemption for lobbyists, the department did not include similar exemption in the Scheme.

News media and communications activities

11. The Bill exempts the reporting of news, current affairs and the expression of editorial content in news media by private-owned media entities. Why does the exemption not apply to State-owned media?

The section 28 exemption does not apply if a news service is acting on behalf of a foreign government, foreign public enterprise or foreign political organisation - there is a public interest in knowing when news and press services are influencing Australian political or governmental processes on behalf of a foreign government.

The exemption in section 28 recognises that requiring registration by news services acting on behalf of a foreign business or individual would be unlikely to add to the Scheme's transparency objective. For example, absent the exemption in section 28, a local newspaper would be required to register if its parent company (a foreign business) directed that the local paper's editorial on the day of an election should urge voters to support a particular party. Requiring such entities to register would unjustifiably expand the scope of the scheme.

12. Why are former Cabinet Ministers, former Ministers, former MPs and former senior Commonwealth officials not included in the private news media exemption?

It is appropriate that former Cabinet Ministers, former Ministers, former MPs and senior Commonwealth officials are not able to take advantage of the exemption at section 28. Such persons are distinguished from other individuals or entities because of the influence they have by virtue of their previous roles. There is merit in the Australian public and government decision-makers knowing when, and in what circumstances, individuals who fall within these categories are acting on behalf of a foreign business or a foreign individual, even when solely for the purposes of reporting news, presenting current affairs or expressing editorial content in news media.

¹⁰ Review of the Foreign Influence Transparency Scheme Bill, Submission 5 – Attorney-General's Department, p.6, quoting the Department of Justice Office of the Inspector General, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*, September 2016.

¹¹ <https://www.congress.gov/bill/115th-congress/house-bill/4170/text>

13. What role, if any, do broadcasters, carriage service providers and publishers have in determining whether content complies with the requirements of the Bill before distributing?

This question raises two possible scenarios: when the broadcaster, carriage service provider or publisher produces content, and when the broadcaster, carriage service provider or publisher transmits content produced by another person or entity.

When the broadcaster, carriage service provider or publisher produces content

The broadcaster, carriage service provider or publisher may undertake a communication activity as they are communicating or distributing the information or material. The activity will be registrable if undertaken on behalf of a foreign principal in Australia for the purpose of political or governmental influence. Under section 14, the purpose of the activity may be defined by having regard to one or more of the following:

- the intention or belief of the person undertaking the activity,
- the intention or belief of the person on whose behalf the activity is undertaken, and
- all of the circumstances in which an activity is undertaken.

Any or all of these factors may be considered in determining the purpose of an activity. Therefore, even when a broadcaster, carriage service provider or publisher produces the material in accordance with a commercial arrangement (so that the purpose of the activity, according to their belief, is a financial benefit) but the purpose of the foreign principal in paying for the information or materials to be produced is for the purpose of political or governmental influence, the activity may still be registrable under the Scheme.

The onus is on the registrant to determine whether the activity is being undertaken for the purpose of political or governmental influence. In administering the scheme, the department will assist registrants to determine whether their activity is registrable.

If the broadcaster, carriage service provider or publisher is undertaking a registrable activity in communicating or distributing the information or materials, he or she must make a disclosure about the foreign principal in accordance with Rules made in accordance with section 38 of the FITS Bill.

The rules may prescribe:

- instances of communications activity (such as advertisements, magazine features)
- when and how disclosure are to be made in relation to instances of communications activity
- the content, form and manner of disclosures, and
- circumstances in which a person is exempt from making a disclosure.

When the broadcaster, carriage service provider or publisher transmits content produced by another person or entity

Broadcasters, carriage service providers and publishers are specifically carved out of the definition of 'communications activity' in section 13, where their only role is to broadcast the information, provide the carriage service by which the information is transmitted or to publish the information.

14. Could news outlets, broadcasters and publishers be captured by the term 'activity for the purpose of political or governmental influence? If yes, in what circumstances, and will they need to register?

Yes, news outlets, broadcasters and publishers could be covered by the Scheme if they undertake registrable activities on behalf of a foreign principal for the purpose of political or governmental influence in Australia and an exemption in Division 4 does not apply.

For example, a news outlet, broadcaster or publisher may be required to register if it lobbies a politician on behalf of a foreign principal about media ownership laws in Australia, and an exemption in Division 4 does not apply.

15. How is online content hosted outside of Australia, or originally disseminated outside of Australia, captured by the Bill? Is it intended that such conduct will require registration? If yes, how will a determination be made that the online content is for the purpose of political or governmental influence in Australia?

Under section 21, parliamentary lobbying, general political lobbying, communications activity and donor activity must be undertaken in Australia to be registrable.

16. Social Media Platforms

- **Could the Department clarify whether the application of the Bill to social media platforms?**
- **Under what circumstances could a social media platform be required to register under the Scheme?**
- **For example, would Facebook's algorithms which target certain areas of the community with certain news coverage, be sufficient to fall within the definition of the 'on behalf of' a foreign principal?**

The Scheme applies regardless of the medium used to activities undertaken on behalf of a foreign principal, in Australia, for the purpose of political or government influence.

Like traditional media platforms, a social media platform may be required to register under the Scheme if they undertake a registrable activity on behalf of a foreign principal. For example communications activity will be registrable if it is undertaken on behalf of a foreign principal in Australia for the purpose of political or governmental influence. 'Communications activity' is defined in section 13 to mean communication or distribution of information or material – this is intended to cover all circumstances in which information or materials are disseminated, published, disbursed, shared or made available in any way.

The department's view is that it is unlikely that algorithms would fall within the definition of 'communications activity' in section 13.

Application to business and commerce

- 17. Are the activities of all employees and all subsidiary companies considered to be undertaken 'on behalf of' the foreign company (ie. the foreign principal) for the purposes of the Scheme?**
- **If no, when would a subsidiary be considered to not be doing something on behalf of the foreign parent company?**

Depending on the particular circumstances of the relationship between the employee and foreign principal, and the subsidiary company and the foreign principal, activities of an employee or subsidiary company could fall within the definition of 'on behalf of' in section 11. A person undertakes activities on behalf of a foreign principal if the person undertakes the activities:

- under an arrangement with a foreign principal (which could include a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten and whether or not consideration is payable)
- in the service of the foreign principal
- on the order or at the request of the foreign principal
- under the control or direction of the foreign principal
- with the funding or supervision by the foreign principal, or
- in collaboration with the foreign principal.

The Scheme contains a specific exemption at section 29(2) for entities who undertake activities on behalf of a foreign public enterprise or foreign company, where the activity is a commercial or business pursuit and the activity is undertaken by an individual in his or her capacity as an employee of the foreign principal, or under the name of the foreign principal. This exemption is intended to ensure that Australian branches of foreign-owned global corporations are not captured under the Scheme if the Australian subsidiary is operating under the same or similar trading name as the foreign principal – these activities are considered to be sufficiently transparent. Paragraph 388 of the Explanatory Memorandum to the Bill clarifies that this exemption extends to slight variations between the name of the Australian subsidiary company and the foreign parent company if it is clear that the Australian company and the foreign company are linked. The Committee may wish to consider whether the extension to substantially similar, rather than identical, names could be more directly stated in the principal Act.

- 18. The Bill does not provide an exception to the exemption for former Ministers, MPs and senior officials undertaking commercial or business pursuits on behalf of a foreign principal. Could the Department clarify this is the intent?**

Yes. The exemption at subsection 29(1) will apply to recent Cabinet ministers, recent Ministers and members of parliament and recent holders of senior Commonwealth positions.

19. Will the Bill require registration of in-house lobbyists, or will they be able to rely on the exemption for being 'employed by or operating under the same name' as the foreign principal?

- **If no, why are third-party lobbyists treated differently (despite the fact that the influence is still 'foreign')?**

If lobbying activities are undertaken by an employee of a foreign company, the person will not be required to register under the Scheme. This is explicitly exempted from the application of the Scheme by virtue of section 29(2), as the activities of an Australian employee of a foreign company undertaken in the course of his or her employment are considered to be sufficiently transparent.

20. Could a not-for-profit organisation rely on the business exemption? For example, CARE Australia is affiliated with and operates under the same name as CARE International.

- a. **Could CARE Australia rely on this exemption on the basis that they operate under the same name as CARE International?**
- b. **Could an individual employee of CARE Australia, or CARE International, rely on the exemption on the basis they undertake business pursuits in their capacity as an employee?**
- c. **If no, why is this exemption limited to business activities in the 'traditional' or 'commercial' operations of a business?**

A not-for-profit organisation could rely on the exemption at section 29(2) for persons who undertake activities on behalf of a foreign public enterprise or foreign company, if the activity is a commercial or business pursuit and the activity is undertaken by the person in his or her capacity as an employee of the foreign principal, or under the name of the foreign principal.

The activities of an Australian affiliate undertaken in the name of the foreign company are considered to be sufficiently transparent. It is intended that slight variations between the name of the Australian person undertaking the activities, and the foreign principal be permitted if it is abundantly clear that the person and the foreign principal relate to the same foreign public enterprise or foreign business.

An individual employee of CARE Australia, or CARE International would not have to register by virtue of the exemption in section 29(2), on the basis they are undertaking business pursuits in their capacity as an employee.

The reference to commercial or business pursuits is intended to take its ordinary meaning and to include activities relating to trade, commerce, buying, selling, dealing and marketing.

21. Could you please confirm whether activities that are incidental to the provision of legal advice or representation (eg. providing commercial advice) would be covered by the legal advice exemption?

The department's policy intention was for the exemption at section 25 to cover all legal advice. The department's views is that the exemption should remain limited to legal representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings.

It is important that any additional or expanded exemptions in the FITS Bill be carefully crafted so as not to undermine the Scheme's transparency objective. The department's view is that 'legal advice' would encapsulate services incidental to the provision of legal advice, as the term is to be construed broadly and includes include professional legal advice provided by a legal practitioner whether in oral or written form. It would not be appropriate to extend the exemption relating to legal representation to incidental services, as this may defeat the transparency objective of the Scheme.

Humanitarian exemption

22. Could you clarify whether an Australian charity would be required to register under the Scheme (and not otherwise qualify for an exemption), where its lobbying activities fall within the broader objectives of their international affiliated organisation(s)?

a. If an Australian non-government organisation undertook lobbying activities that were in accordance with policies of an international parent organisation, but were not directed to by the parent organisation to undertake that specific activity, would the domestic organisation be required to register?

Whether a person would be required to register in this scenario depends upon whether the activity was undertaken 'on behalf of' the international affiliated organisation as well as the nature of the relationship between the charity and the international affiliated organisation i.e. whether an employment relationship exists between the person and the association.

Under section 11, a person undertakes activities on behalf of a foreign principal if the person undertakes the activities

- under an arrangement with a foreign principal (which could include a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten and whether or not consideration is payable)
- in the service of the foreign principal
- on the order or at the request of the foreign principal
- under the control or direction of the foreign principal
- with the funding or supervision by the foreign principal, or
- in collaboration with the foreign principal.

It is possible that the person may be undertaking the activities 'in the service of' the international affiliated organisation given the alignment between the activities and the organisation's objectives. Paragraph 176 of the Explanatory Memorandum, extracted below, provides further information on the term 'in the service of':

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. There will still need to be a connection between the actions of the person and the foreign principal. It will not be sufficient for the person to unilaterally decide that they are undertaking particular activities 'in the service of' a foreign principal. The foreign principal must be, in some way, seeking or overseeing the activities.

For the activities to be registrable, the international affiliated organisation must have an awareness of, and some role in facilitating, the activities undertaken by the charity. Where a 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, the person would not be considered to be undertaking an activity 'on behalf of' a foreign principal (subsection 11(3)).

An exemption at section 29(2) applies where the foreign principal is a foreign public enterprise or foreign business, the activity is a commercial or business pursuit and the activity is undertaken by an individual in his or her capacity as an employee of the foreign principal, or under the name of the foreign principal. Depending on the nature of the relationship between the charity and the international affiliated organisation, this exemption could apply, meaning that the charity would not need to register under the Scheme.

Religious exemption

23. What role would the Department have in determining that a religious institution and a foreign government are so closely affiliated that transparency via the scheme is not required?

The onus is on the person undertaking the activities to determine whether they are liable to register under the Scheme. Where a person claims they are exempt from the requirement to register by virtue of section 27, the department would likely rely on information from the person, open source material and possibly information provided by other government departments and agencies to assess whether a religious institution and a foreign government are so closely affiliated that the religious exemption in section 27 applies.

Diplomatic exemption

24. In relation to the exemption for UN and associated persons, why are only activities which could be considered as being on behalf of a foreign government while performing duties for the UN exempted?

- a. Why does the exemption not extend to circumstances where an NGO or other organisation contributes funding to the UN, where the activities could be said to be 'on behalf of' the NGO?**

The exemption was limited to foreign governments because of the risk that UN officials and associated persons may need to register because they are engaged in activities funded by a foreign government. The risk of such activities being funded by other types of foreign principals (eg foreign public enterprises, foreign businesses or foreign individuals) is less.

25. Why is the exemption limited to the United Nations? Did the Department consider extending the exemption to other international organisations to which Australia is a member?

The exemption for UN and associated persons in subsection 26(2) seeks to recognise that in their official capacity, UN officials neither represent nor advance the interests of particular foreign principals but are instead concerned with the international community.

To the extent that other international organisations represent the interests of the international community, it may be appropriate to exempt these officials from the registration requirements under the Scheme. However, it is important that any additional exemptions in the FITS Bill be appropriately limited so as not to undermine the Scheme's transparency objective.

Application to universities and academics

26. Would an invitation from a foreign academic institution to present a paper, deliver a lecture, or take part in a conference attract registration requirements?

- a. If no, what else would be required to attract registration?**

This scenario would not appear to attract registration requirements, provided the person is not a recent Cabinet Minister, Minister, member of Parliament or holder of a senior Commonwealth position.

A person who does not fall within the above categories is liable to register when they undertake a registrable activity on behalf of a foreign principal, in Australia, for the purpose of political or governmental influence and no exemptions apply. An invitation to present a paper, deliver a lecture or attend a conference from a foreign academic institution would not fall within the categories of registrable activities under the Scheme.

If the person is a recent Cabinet Minister, Minister, member of Parliament or holder of a senior Commonwealth position, he or she may be required to register under the Scheme.

- Under section 22, a recent Cabinet Minister may be required to register if, within three years of ceasing that role, he or she undertakes activities on behalf of, or is employed by, a foreign principal (excluding a foreign government).
- Under section 23, a former Minister and member of Parliament, within three years of ceasing that role, or a senior Commonwealth official, within 18 months of ceasing that role, may be required to register if he or she undertakes activities on behalf of, or is employed by, a foreign principal (excluding a foreign government) where in the course of that employment or activities the person contributes skills, knowledge, experience or contacts gained through their former public role.

In relation to question 26(a), the following scenario may attract registration requirements under the Scheme for any person:

An academic is invited to present a paper, deliver a lecture or take part in a conference by a foreign academic institution on climate change. At the conference the academic is approached by a senior member of the foreign academic institution. The senior member offers the academic financial payment if, on his return to Australia, the academic writes a series of articles urging a change in Australian Government policy on climate change. The academic agrees, and publishes the series of articles on his blog.

In this scenario, the academic has undertaken communications activity in Australia on behalf of a foreign principal for the purpose of political or governmental influence. This would be a registrable activity within section 21 of the Scheme.

27. Would a foreign academic institution covering travel and accommodation costs attract registration requirements?

a. If no, what else would be required to attract registration?

This scenario would not appear to attract registration requirements, provided the person is not a recent Cabinet Minister, Minister, member of Parliament or holder of a senior Commonwealth position.

A person who does not fall within the above categories is liable to register when they undertake a registrable activity on behalf of a foreign principal in Australia for the purpose of political and governmental influence, and no exemptions apply. A foreign academic institution covering travel and accommodation costs for an academic to attend a conference would not fall within the categories of registrable activities under the Scheme.

If the person whose travel and accommodation costs are paid for by the foreign academic institution is a recent Cabinet Minister, Minister, member of Parliament or holder of a senior Commonwealth position, he or she may be required to register under the Scheme.

- Under section 22, a recent Cabinet Minister may be required to register if, within three years of ceasing that role, he or she undertakes activities on behalf of, or is employed by, a foreign principal (excluding a foreign government).

- Under section 23, a former Minister and member of Parliament, within three years of ceasing that role, or a senior Commonwealth official, within 18 months of ceasing that role, may be required to register if he or she undertakes activities on behalf of, or is employed by, a foreign principal (excluding a foreign government) where in the course of that employment or activities the person contributes skills, knowledge, experience or contacts gained through their former public role.

In relation to question 27(a), the following scenario may attract registration requirements under the Scheme for any person:

An academic attends a conference hosted by a foreign academic institution on climate change. The foreign academic institution covers the travel and accommodation costs of the academic. At the conference the academic is approached by a senior member of the foreign academic institution. The senior member urges the academic to meet with Australian government Parliamentarians on his return to Australia to push for a change in Australian Government policy on climate change, in line with the key findings of the conference. The academic agrees, and meets with the Minister for the Environment on his return to Australia.

In this scenario, the academic has undertaken parliamentary lobbying in Australia on behalf of a foreign principal for the purpose of political or governmental influence. This would be a registrable activity within section 21 of the Scheme.

28. The United States' *Foreign Agencies Registration Act* provides an exemption for 'persons whose activities are ... solely of a religious scholastic, academic, scientific or fine arts nature'. Why was this exemption not provided in the Australian scheme?

The department is of the view that a broad exemption as per the US *Foreign Agents Registration Act* (FARA) for 'persons engaging in bona fide religious, scholastic, academic, artistic or scientific pursuits or of the fine arts'¹² is not necessary in the Australian context. The Foreign Influence Transparency Scheme (the Scheme) is narrower than the US FARA which captures a person or entity acting on behalf of a foreign principal in the US who engages in political activities; acts as a public relations counsel, publicity agent, information service employee or political consultant; solicits, collects, disburses or dispenses contributions, loans, money or other things of value; or makes representations to US government agencies or officials.¹³

In contrast, the Scheme applies only to a person who has a registrable arrangement with or undertakes registrable activities on behalf of a foreign principal in Australia for the purpose of political or governmental influence. Registrable activities are limited to political lobbying, general parliamentary lobbying, communications activity or donor activity, as defined in the FITS Bill. The more targeted registrable activities means that Australia's scheme does not require as broad an exemption as is provided under the FARA.

¹² 22 U.S.C. § 613.

¹³ 22 U.S.C. § 611(c).

There is no reason to exempt registrable activities undertaken by academics or scholars if it is undertaken in Australia on behalf of a foreign principal for the purpose of political or governmental influence – there is nothing malicious about such activities. Rather, registration in these circumstances which provide useful information to decision-makers and the public about the influences behind the positions being advanced by the academics or scholars in relation to a particular decision or process.

29. Could you please confirm how the Bill is intended to apply to foreign funding of universities and other research institutions based in Australia?

The Scheme is limited to lobbying activities, communications activities and donor activities undertaken on behalf of a foreign principal in Australia for the purpose of political or governmental influence. Simply receiving funding from a foreign donor will not, in and of itself, be sufficient to trigger a requirement for registration.

For example, if a think tank received a donation on the condition that it be used to produce research to be used to lobby the government on a particular topic, then registration is likely to be required.

On the other hand, if funding was provided for general operating expenses or for scholarships to meet the cost of tuition, this is unlikely to meet the registration requirements as it is not likely to be for the purpose of political or governmental influence.

30. Could an entire university be required to register, or would only individual researchers who act on that funding be required to register?

The obligation to register is on the person or entity that has an arrangement with a foreign principal, or undertakes registrable activities on behalf of a foreign principal. It is not possible to provide a definitive answer about who would be required to register without a full understanding of all the relevant facts and circumstances. If a foreign principal provides funding to a specific researcher, group of researchers or functional unit on the condition that the person or entity undertake registrable activities for the purpose of political or governmental influence, absent additional information the registration obligation would likely apply to that person or entity. If individual researchers were employed by the entity which received funding from the foreign principal in the above circumstances, the researchers would not need to register individually – a single registration by the entity listing the individual researchers would be sufficient to satisfy the transparency objective of the Scheme.

Application of Scheme to personal matters

31. Could you clarify if the Scheme would require an individual to register where they sought meetings with an MP or an officer at Centrelink regarding the residency status of an unwell family member (who was not a citizen) and their eligibility for access to medical treatment?

The intention of the Scheme is not to capture representations made in relation to an individual. However, such activities are not explicitly excluded. The department notes that section 30 of the FITS Bill provides for exemptions to be made in circumstances prescribed by rules, and considers

inquiries and advocacy in relation to the welfare of individuals would be an appropriate case for an exemption by regulation

Operation of the Scheme

32. The Bill does not specify what information will be required by applicants upon registration, rather that this will be provided in rules and regulations. What information is the Department proposing would be required to be supplied?

To achieve the transparency objectives of the Scheme, certain information relating to a person's registration must be collected. The information that is collected is intended to capture the essential details relevant to a person's registration, to ensure that an accurate and comprehensive record is kept.

The information that a registrant is likely to be required to provide includes:

- the name of the person and general details (address, occupation, citizenship status and any prior government employment, including position and term of employment)
- the name of the foreign principal and general details (contact details, nationality, type of foreign principal and general description of business/activities)
- high level details of the nature of the relationship between the registrant and the foreign principal (e.g. whether there is a contract in place, an informal agreement or otherwise) and whether the person has received / is receiving financial benefits from the foreign principal, and
- issues of interest which the registrant intends to pursue on behalf of the foreign principal (i.e. environmental issues, defence contracts, a particular vote or policy).

33. In Canada, the Commissioner of Lobbying is required to undertake educational and outreach activities so that persons liable to register are made aware of their obligations. The Bill does not propose that the Secretary would be similarly obliged.

- a. Would the Department publish guidance on its website or operate an advice line so that potential registrants could be more aware of their obligations?**
- b. If so, when would this guidance be published? Would it be available prior to the date at which the Scheme was operational?**

Upon passage of the Bill, the department will develop guidance material and an education and outreach program. Guidance material will be available online. The Department also intends to provide support to persons who are unsure if they need to register under the Scheme.

The Bill provides that the Scheme will commence on a date to be proclaimed within twelve months of the Act receiving Royal Assent (section 2). This is to allow sufficient time to establish the administrative and other arrangements that will support the operation of the Scheme. It is intended

that guidance materials would be uploaded onto the department's website during this time. Education and outreach activities would also occur during this time.

34. The Bill establishes that an annual registration fee will be payable for each year that registrants are liable to register. The Bill does not set an amount. What amount is the Department considering for this charge?

- a. Will all registrants be required to pay the fee? Could some organisations, such as charities, be exempt from the fee?**

The Scheme will be partially cost-recovered, in accordance with the Australian Government Cost Recovery Guidelines.

A small fee will apply to the reporting requirement, anticipated to be less than that charged for registration under the US FARA (which is US\$305 for the initial filing and for each mandatory six monthly-supplemental statement).

All registrants will be liable to pay a fee for initial registration and renewal of registration under the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, but there is flexibility in relation to the amount of charges payable under the Scheme. Section 6 of the Charges Imposition Bill provides that the amount of charges payable in relation to the Scheme is to be prescribed in regulations. The regulations may prescribe an amount or method for working out an amount, different amounts or methods for different circumstances, or a nil amount for prescribed circumstances. Permitting the regulations to prescribe a nil amount in certain circumstances allows for flexibility in a situation where there are special circumstances, or where it is otherwise not appropriate to charge under the Scheme for a certain activity.

35. As the Bill proposed new regulation of business, has a Regulation Impact Statement been developed? If so, why was it not included in the Explanatory Memorandum?

The regulatory impacts of the Scheme were carefully considered by the Government when determining the scope of the Scheme.

36. The Government has allocated \$3.2 million to set up and operate the Scheme over 4 years. Stakeholders have indicated concern that this will be insufficient.

- a. How was this amount calculated, and what were the expected numbers of registrations under the Scheme?**
- b. If registrations are fewer or exceed what was anticipated, can resourcing accommodate this?**
- c. What will this funding allocation include? Does it include the development of online portals as well as staff?**
- d. What resources will be available to ensure timely publishing of information on the online register? Will additional resources be available to manage the additional reporting obligations during election periods?**

Establishment of the Scheme was included in the 2017-18 mid-year economic financial outlook. The establishment of the Scheme will cost \$3.2 million over four years from 2018-19, noting that the Scheme will be partially cost-recovered through registrant fees. This includes capital costs for a dedicated IT system to store and manage initial registration and registration renewal applications, reports and other information collected under the Scheme, as well as expenditure for staffing.

The department estimates that there could be 500 registrants in the first year of operation, and the Scheme was costed on this basis.

To achieve the transparency objective of the Scheme, it is essential that information be published in the online register in a timely manner. The Bill does not specify a timeframe for this to occur, but guidance will be provided for the administering unit within the department. The department is confident that, to the extent possible, the unit will be resourced to ensure timely publishing of information online, and will work flexibly to ensure that any additional resources are available in times of peak activity, including during election periods.

37. The Bill requires registrants to maintain extensive records for the duration of registration, and five years after that time. Does this record-keeping obligation extend to incidental or ancillary records that in any way relate to registrable activities or arrangements?

- a. If so, was the impact of this requirement on business, particularly the not-for-profit sector, contemplated?**
- b. Will guidance materials be developed on what records should be kept and how they should be kept?**

The existence of adequate records is essential to the effective administration of the Scheme and will allow for appropriate investigations into potential non-compliance with the Scheme. To achieve the transparency objectives of the Scheme, certain information relating to a person's registration must be collected. The matters in relation to which records must be kept are exhaustively listed in section 40, and include:

- any registrable activities 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 a 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.

The department will develop guidance materials to assist registrants identify the types of records they will need to keep for the purposes of the Scheme, prior to the Scheme's commencement. The regulatory impacts of the Scheme, including its effects on business, were carefully considered by the Government when determining the scope of the Scheme. The department's view is that the

requirements in section 40 strike an appropriate balance between the impact on business and the need for records to be kept to uphold the effective administration of the Scheme and support investigations into non-compliance.

38. The Bill requires a person or organisation to register for each foreign principal for whom they have an arrangement with or undertake registrable activities on behalf of. Would representative organisations and associations need to register multiple times in relation to the same activity because they do so on behalf of multiple foreign principals?

A person is required to register in respect of each foreign principal with whom they have a registrable arrangement or on whose behalf they undertake registrable activities. This is required under section 16(1) of the FITS Bill and an example of its application is included at paragraph 224 of the Explanatory Memorandum which provides:

... if a person undertakes registrable activities on behalf of foreign principal X on 1 January 2020, that person must apply for registration in relation to foreign principal X by 15 January 2020. However, if the same person also undertakes registrable activities on behalf of foreign principal Y on 10 January 2020, they must also complete a separate application for registration in relation to foreign principal Y by 25 January 2020.

If the representative organisation and association is undertaking registrable activities or have an arrangement with a number of foreign principals, they may be liable to register in respect of each separate foreign principal, regardless of whether the activity they are undertaking is the same.

Powers of the Secretary under the Scheme

39. The Bill requires the Secretary to make available certain information, but there is no requirement as to the time during which the information must be made available. Given there are strict time constraints on individuals and organisations to provide information to the Secretary, why is there no corresponding obligation to ensure the information is put on the public website promptly?

It is intended that information collected under the Scheme is placed on the public website as soon as practicable, taking into account the need for the Secretary to assess whether information should be excluded from publication as it is commercially sensitive, affects national security or is of a kind prescribed by the rules. Given the Scheme's transparency objective, it would defeat the purpose of the Scheme for there to be extended delay in providing visibility as to the level and extent of foreign influence in Australian political and governmental processes.

40. The Secretary will have the power to withhold information from the public register if satisfied it is commercially sensitive, affects national security, or is of a kind prescribed by the rules. What matters will the Secretary be required to consider before making a decision to publish or not publish content?

- a. Whilst the Explanatory Memorandum notes a registrant could mark something as being ‘commercially sensitive,’ would the Secretary be bound to not publish this information?**

The term commercially sensitive information is not defined in the Bill. The Secretary could consider whether, if particular information was revealed, it would cause detriment to the parties or expose sensitive information relating to a company's operations, expenditure or employees. If a document is marked ‘commercially sensitive’, but it is not clear to the Secretary that it falls within this category, he or she may seek further information from the registrant to satisfy himself or herself that the information is commercially sensitive.

In relation to national security, this term is not defined in the FITS Bill. The Secretary could consider matters relating to the protection of Australia and its people from threats and harm, including in relation to espionage, foreign interference, terrorism and political violence, as well as matters relating to the defence and protection of the integrity of Australia's borders and information relating to the activities of security, intelligence and law enforcement agencies. The Secretary may seek further information from security, intelligence and/or law enforcement agencies in deciding whether the information relates to national security.

- 41. The Secretary will have broad powers to share information with a wide range of agencies, authorities and departments; and for a number of purposes (including local government authorities). The Bill does not specify any matters that the Secretary must have regard to before sharing Scheme information. Will rules, regulations or guidance be developed to regulate the Secretary's decision?**

The department anticipates consulting with the Information Commissioner and other relevant stakeholders in the development of rules under the Scheme, including in relation to the sharing of Scheme information. The department will also prepare information materials for internal use in determining when to share Scheme information.

Oversight and review of the Scheme

- 42. Whilst the Auditor-General will be able to audit the Scheme, the Bill provides for no further oversight of the decisions of the Secretary. In the development of the Bill, did the Department consider any additional oversight mechanisms such as that existing in the United States?**

Decisions made by the Secretary under the Scheme will be subject to the usual operation of the *Administrative Decisions (Judicial Review) Act 1977*.

- 43. What matters would be included in the Minister's Annual Report to the Parliament?**

Section 69 provides that the annual report is to contain information on the operation of the Scheme. The matters to be addressed in the annual report will be prescribed by rules – this allows flexibility in determining what should be contained in the report once operational arrangements to support the administration of the scheme have been established.

While not prescriptive of what will be included in the annual report, it could include:

- the total numbers of persons registered, foreign principals and their country of origin and the nature of activities engaged in on behalf of foreign principals
- the total numbers of persons who ended their registration in the previous 12 months
- if applicable, any additional reporting in relation to a voting period within the previous 12 months
- the total number of times the Secretary exercised his powers to obtain information and documents under section 45 (Notice requiring information to satisfy Secretary whether a person is liable to register under the scheme) and section 46 (Notice requirement information relevant to the scheme), and
- any activities undertaken by the administering unit to educate on and encourage compliance with the registrant obligations under the Scheme (i.e. public awareness activities, production of educational materials).

Subsection 69(3) provides that the annual report must not include information that the Secretary is satisfied is commercially sensitive or affects national security.

44. The Bill and the Explanatory Memorandum does not provide for an independent review of the Scheme, only that a review must be undertaken. Is it the intention that an independent person would undertake the review?

The Bill is not prescriptive as to who should undertake the Review under section 70 – this will be a matter for Government to determine at the time it commissions the Review.

45. In a submission, Paul Jennings has suggested an annual report to Parliament on the state of counter-foreign interference efforts along with a Prime Ministerial Statement. Would the Department propose to include this broader context in the Annual Report on the Scheme to the Parliament? Or, would the Annual Report only contain administrative matters on the Scheme's operation?

Section 69 provides that the Annual Report is to contain information on the operation of the Scheme. While the matters to be addressed in the Annual Report will be prescribed by rules, it is intended that these be limited to administrative matters.

Discussion of the state of counter-foreign interference efforts in Australia would be beyond the scope of the Annual Report.

Offences

46. The penalty for providing false or misleading information (5 years imprisonment) is five times the penalty contained in the Criminal Code for providing false or misleading information. Why has the 5 year penalty been adopted in this Bill?

Consistent with Commonwealth criminal law policy, the maximum penalty for an offence should be set appropriately for the worst case scenario. The department considers the penalty of five years imprisonment to be appropriate given the serious implications of the provision of false or misleading information or documents under the Scheme, and the fact that the person is deliberately seeking to defeat the transparency objectives of the Scheme. It also seeks to ensure that persons who are issued notices to produce information provide accurate information, therefore ensuring the scheme holds information that accurately reflects the scale and scope of foreign influence activities in political and governmental processes. The penalty recognises the serious implications that unchecked and unknown forms and sources of foreign influence can have on Australia's democratic system of government.

The general defences in Chapter 2 of the Criminal Code are available for these offences, including the defence of mistake or ignorance of fact at section 9.1.

47. For all offences regarding failing to register or failing to renew registration, the prosecution must prove that a person knew that they were required to register (and therefore knew that an exemption did not apply). Is there a reason that no offences were included where a person was reckless as to whether they were required to register?

a. Is there a reason that no offences were included where a person was negligent as to whether they were required to register?

The obligation will be on the individual to determine whether they are liable to register under the scheme. Given this, the department does not consider it appropriate that a person could be liable to offences with penalties of up to seven years imprisonment unless they know of the existence of the requirement to register or renew registration.

The department does not consider it necessary to include offences with recklessness or negligence as the fault element, particularly given the Bill includes strict liability offences to deal with less serious conduct.

48. How are the penalties intended to apply to individuals that represent entities or organisations?

a. Are all directors of a corporation subject to criminal offences, or the whole board of management of an incorporated association?

b. The Bill provides that these matters will be resolved by Rules. Why is this not being addressed in the Principal Act?

The offences in Part 5 of the Bill will apply to bodies corporate in the same way as they apply to individuals. Part 5.2 of the Criminal Code sets out general principles of corporate criminal responsibility for Commonwealth criminal offences.

In relation to a body corporate, for offences punishable by imprisonment, a fine may be imposed.¹⁴ Where a body corporate is convicted of an offence, the court may impose a pecuniary penalty not exceeding an amount equal to five times the amount the maximum pecuniary penalty that could be imposed by a court on an individual convicted of the same offence.¹⁵

Question 48(b) is incorrect. The Bill does not provide for matters of corporate criminal responsibility to be dealt with by the rules. The Bill applies to legal persons (eg natural persons and bodies corporate) and section 64 clarifies certain matters in relation to partnerships.

Section 65 of the Bill provides that the Scheme applies to a person who is not a legal person, other than a partnership, as if the person was a legal person, and that changes in respect of that kind of person can be prescribed by rules made under section 71. This provision has been included to provide sufficient flexibility should a circumstances arise where a person is not a 'legal person' or a partnership, but should be subject to the operation of the scheme. It is possible that that kind of person would need special rules in order for the Scheme to apply. It would not be appropriate to specify this in the principal Act, given the level of specificity that may be involved. Any rules made under the Scheme would be legislative instruments under the *Legislative Instruments Act 2003* and would be subject to the normal disallowance processes.

49. The Law Council of Australia referred to difficulties faced by the US Department of Justice in enforcing the *Foreign Agents Registration Act*. The offences under the Bill will require the prosecution to prove a range of matters, which could be particularly challenging. Why have civil penalties not been included as an enforcement mechanism in the Bill?

The department does not consider it necessary to include civil penalties provisions in the Bill at this time. Criminal sanction is the most appropriate way to deter non-compliance with the registration requirements under the Scheme, and provide a meaningful enforcement mechanism should a person who is liable to register not be registered under the Scheme. According to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, criminal offences may be included in legislation where warranted due to the degree of malfeasance or the nature of the wrongdoing involved. An example of such conduct is dishonest or fraudulent conduct.

The appropriate mechanisms for enforcement of the Scheme can be further considered as part of the Review required by section 70. A review, which must take place within five years of the Scheme commencing, could consider how the criminal offences in Part 5 of the FITS Bill have operated in practice and whether it is necessary to supplement those offences with civil penalties.

In developing the Bill, the department considered the enforcement challenges faced by the Department of Justice in enforcing the *Foreign Agents Registration Act*. As noted in the department's initial submission to this inquiry:

¹⁴ Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

¹⁵ *Crimes Act 1914* s 4B(3).

One of the key challenges in enforcing FARA is that there is no power to compel information from registrations or other persons in connection with the operation of the statute. FARA disclosures are made voluntarily and there are few tools available to the US officials to enforce compliance. The evidentiary burden for criminal penalties is also high and makes criminal prosecutions difficult.¹⁶

The Scheme includes a suite of measures to encourage compliance, including powers to compel production of information and documents, and tiered offences which distinguish between intentional and reckless conduct for a range of offences including undertaking registrable activities while not being registered, failing to fulfil other responsibilities under the Scheme, and providing false or misleading information or destroying records in connection with the Scheme.

Additional Question from the Committee – received Monday 5 February 2018

Are there any impediments to establishing an independent commissioner, as has been established in Canada, to administer and enforce the Foreign Influence Transparency Scheme?

The department's view is that it is appropriate for the Secretary of the Attorney-General's Department to administer the Scheme. It is common for regulatory powers to be vested in a Secretary of a department. For example, the Secretary of the Department of Home Affairs has regulatory powers in relation to AusCheck which conducts background checking for Aviation and Maritime Security Identification Cards. Decisions made by the Secretary under the Scheme will be made in accordance with proper administrative decision making principles, including in relation to procedural fairness, and will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.

¹⁶ Review of the Foreign Influence Transparency Scheme Bill, Submission 5 – Attorney-General's Department, p.24.