



Australian Major Performing Arts Group
Supplementary submission to the
Parliamentary Joint Committee on Intelligence and Security Inquiry

Foreign Influence Transparency Scheme Bill 2017
Government proposed amendments

June 2018

Dear Committee,

Further to our initial submission, AMPAG has considered the government's proposed amendments to the Foreign Influence Transparency Scheme Bill 2017 (the Bill) and the extent to which they address our concerns.

In Summary

While AMPAG appreciates this opportunity to provide a supplementary submission and the government proposed amendments do narrow the reach of the legislation, which is to be commended. We do not believe that it is the intention of the government to capture in this legislation an Australian arts company applying for funding for an international project and the associated decision making that an Australian government funding body would undertake. However, an examination of the proposed amendments shows that the potential remains for regular, legitimate arts and cultural activities involving foreign elements to be captured by this legislation, even though they carry no risk of or intent to engage in clandestine political influence.

We are concerned that many foreign arts organisations that Australian arts organisations might look to collaborate with would fall under the definition of a '*government related entity*' due to their governance structures. Where grant or investment funding for these types of collaborations is sought from government or other federal government bodies (Department of Foreign Affairs and Trade, Department for the Arts, Australia Council for the Arts etc), such activity would potentially be captured under proposed Division 1 Part 2 Sections 11 and 12 – even though the activity would not be understood by anybody as an attempt to influence in the way the legislation is trying to address.

We therefore recommend the draft Bill to be further amended to clarify that it does not cover this kind of activity, which is often encouraged by government for its cultural significance.

While the legislation extends exemptions to business and industry organisations, news media and aid organisations, the charitable and not-for-profit arts organisations are not exempt. We believe it is possible to craft an exclusion for Australian registered charities engaged in their approved charitable activities. More specifically AMPAG recommends an exemption for not-for-profit arts organisation.

Impact of key proposed amendments for arts organisations

Division 1 Part 2 Section 10 –Definitions

The government's proposed amendments to the Bill narrow the definition of *foreign principal* by removing clause (b) *a foreign public enterprise* and (e) *an individual who is neither an Australian citizen nor a permanent Australian resident*. These deletions on their own would address our concerns; however, the amendment also inserts a new term — *foreign government related entity* — that may inadvertently capture foreign arts organisations and cultural institutions.

The new term proposed is defined as follows:

foreign government related entity means a person, other than an individual, who is related to a foreign principal that is a foreign government or a foreign political organisation in one or more of the following ways:

- (a) if the person is a company—one or more of the following applies:
- (i) the foreign principal holds more than 15% of the issued share capital of the company;
 - (ii) the foreign principal holds more than 15% of the voting power in the company;
 - (iii) the foreign principal is in a position to appoint at least 20% of the company's board of directors;
 - (iv) the directors (however described) of the company are under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal;
 - (v) the foreign principal is in a position to exercise, in any other way, total or substantial control over the company;
- (b) if the person is not a company—either of the following applies:
- (i) the members of the executive committee (however described) of the person are under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal;
 - (ii) the foreign principal is in a position to exercise, in any other way, total or substantial control over the person.

AMPAG is concerned that foreign arts organisations may be captured by (a) (iii) and (iv) and or (b) (i) under these proposed amendments.

In Australia, several of our state major performing arts organisations are statutory bodies with the boards appointed by government, e.g. State Theatre Company of South Australia and the Adelaide Symphony Orchestra. Similarly, many major cultural institutions' boards are appointed by government. This is also the case for some arts and cultural organisations abroad. They would thereby qualify under (a) (iii) as a **foreign government related entity**.

Arts organisations across many countries receive government funding to exist (e.g. performing arts venues or galleries) and to create creative work. Those who receive grants have obligations to use that money in accordance with the government-generated funding agreement. This may then be seen to fall under (a) (iv) and (b) (i) of the definition **foreign government related entity**.

If foreign arts organisations are captured by this definition, they will then continue to be captured by the definition of **foreign principal**, and our issue will not have been addressed.

Division 1 Part 2 Section 11 –Undertaking activity on behalf of a foreign principal

In this section the Bill has been amended as follows:

Undertaking activity on behalf of a foreign principal

- (1) A person undertakes an activity **on behalf of** a foreign principal if the person undertakes the activity:
- (a) under an arrangement with the foreign principal; or
 - (b) in the service of the foreign principal; or
 - (c) on the order or at the request of the foreign principal; or
 - (d) under the control or direction of the foreign principal; or
 - ~~(e) with funding or supervision by the foreign principal; or~~
 - ~~(f) in collaboration with the foreign principal.~~

Assuming for this exercise that the foreign arts organisation or venue is deemed a *foreign government related entity* and therefore a *foreign principal*, an Australian arts organisation entering into an 'arrangement', as listed in(1)(a) above, may then be deemed to be **undertaking an activity on behalf of the foreign principal**.

Arrangement in the legislation is defined as 'includes a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten.'

Division 1 Part 2 Section 12 –Activity for the purpose of political or governmental influence

It is not uncommon for Australian government decisions to be made in support of arts collaborations and presentations involving foreign partners.

Section 12 determines what **activity** is for the purpose of **political or governmental influence**:

Clause 12 (1) A person undertakes an activity for the purpose of **political or governmental influence** if the sole or primary purpose, or a substantial purpose, of the activity is to influence one or more of the following:

- (a) a process in relation to a federal election or a designated vote;
- (b) a process in relation to a federal government decision;
- (c) proceedings of a House of the Parliament;
- (d) a process in relation to a registered political party;
- (e) a process in relation to a member of the Parliament who is not a member of a registered political party;
- (f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party.

Clause 12 (3):

For the purposes of paragraph (1)(b), decisions made by any of the following are examples of federal government decisions:

- (a) the Executive Council;

- (b) the Cabinet or a committee of the Cabinet;
- (c) a Minister or Ministers;
- (d) a Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) or a subsidiary of a Commonwealth entity (within the meaning of that Act);
- (e) a Commonwealth company (within the meaning of the *Public Governance, Performance and Accountability Act 2013*);
- (f) an individual in the course of performing his or her functions in relation to a person or body mentioned in an above paragraph.

(4) For the purposes of paragraph (1)(b) and subsection (3), a reference to a decision includes a decision of any kind in relation to any matter, including administrative, legislative and policy matters:

- (a) whether or not the decision is final; and
- (b) whether or not the decision is a formal decision.

The amended wording for section 12 (1) introduces the term 'sole or primary purpose, or a substantial purpose'. This narrows the type of activities that are captured under this legislation. However, the interpretation of what is captured by section 12.1 (b) needs further exploration.

Section 12 (3) outlines decisions that are considered to be federal government decisions. 12 (3) (d-f) applied in an arts context captures decisions made by the Department of the Arts or any other federal government departments, the Australia Council for the Arts and their employees.

It is not clear what is understood by the whole 'activity'. If the action is seeking interactions with government for the sole purpose of seeking funding, is that seen as the sole or dominant purpose of that activity, or is the wider view taken in considering the arts organisation's main objective and focus of activity, which is to stage an arts collaboration? If the latter, arts activities will not require registration under Part 2 Division 3 Section 21.

Part 2 Division 3 Section 21– Registrable activities: activities in Australia for the purpose of political or governmental influence

Section 21 states:

(1) An activity that a person undertakes on behalf of a foreign principal is registrable in relation to the foreign principal if:		
(a) the activity is covered by an item in the table; and		
(b) the foreign principal is the kind of foreign principal specified for the activity in the table; and		
(c) the person is not exempt under Division 4 in relation to the activity.		
Activities in Australia for the purpose of political or governmental influence		
Item	Activity	Foreign principal
1	Parliamentary lobbying: (a) in Australia; and (b) <i>for the purpose of political or governmental influence</i>	(a) <u>a foreign public enterprise; or</u> (b) a foreign political organisation; or (c) a foreign business; or (d) an individual
2	<u>General political lobbying:</u>	<u>any kind of foreign principal</u>

Activities in Australia for the purpose of political or governmental influence		
Item	Activity	Foreign principal
	(a) in Australia; and (b) <u>for the purpose of political or governmental influence</u>	
3	Communications activity: (a) in Australia; and (b) for the purpose of political or governmental influence	any kind of foreign principal
4	Donor activity: (a) in Australia; and (b) for the purpose of political or governmental influence	(a) a foreign government; or (b) a foreign public enterprise; or (c) a foreign political organisation

(2) A single activity undertaken by a person may be covered by more than one item of the table in subsection (1). If it is, the scheme applies in relation to the activity as covered by each such item.

Item 1 and 2 may require Australian arts organisations in an *arrangement* with a foreign arts organisation deemed a *foreign principal* to register their activities, depending on how activities are defined.

Division 4 –Exemptions

The government's proposed amendments have not extended an exemption to arts activities.

Conclusion:

- Narrowing the undertaking of an activity on behalf of the foreign principal to *sole or primary purpose* is sensible; however, there is still the question of what constitutes the whole activity.
- We are concerned that many foreign arts organisations that Australian arts organisations might look to collaborate with would fall under the definition of a 'government related entity' due to their governance structures.
- Where funding for these types of collaborations is sought from government, the activity would potentially be captured under proposed Division 1 Part 2 Sections 11 and 12 — despite the fact that the activity would not be understood by anybody as an attempt to influence in the way the legislation is trying to address.
- If this activity does fall under Part 2 Division 3 Section 21, Australian Arts organisations will be required to maintain up-to-date entries on the register. This would generate an unproductive administrative burden on the organisation.
- We therefore recommend the draft Bill be further amended to clarify that it does not cover this kind of activity, which is often encouraged by government for its cultural significance.
- To avoid doubt, AMPAG continues to recommend that an additional exclusion for the arts be added to Division 4.