14 March 2018

Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Secretary,

The Joint Media Organisations – whose logos appear above – appreciate the opportunity to make an additional supplementary submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *Foreign Influence Transparency Scheme Bill 2017* (the Bill).

We state at the outset that the significant concerns we have expressed about the FITS Bill – in our previous submissions (number 19 and 19.1) and in evidence given to the PJCIS[1] – have intensified.

We note that the Attorney-General's Department (AGD) has made supplementary submissions to the PJCIS. These submissions do not address concerns raised by media organisations to the PJCIS.

Rather they highlight the unintended consequences of a law that criminalises legitimate and overt influence in an attempt to criminalise – and stop – illegitimate and covert influence.

We hope that this submission and the recommendations contained herein are taken in the way that they are offered – to achieve legislation that is fit-for-purpose and minimises the chilling effect on public interest reporting.

However it remains our firm view that the issues with this Bill are so serious and so difficult to properly address through amendment, that the most appropriate course of action at this stage is for the Bill to be withdrawn to allow for a fundamental reconsideration of what is intended to be achieved and complete redrafting to address the many concerns that have been raised by a range of affected stakeholders.

[1] Particularly p21 – 31, Proof Committee Hansard, 16 February 2018

OVERARCHING CONCERN AND RECOMMENDATION

As we have articulated previously, the Bill impacts:

i. **Media companies that operate in Australia – regardless of their foreign principal status** - in relation to our day to day activities including commercial, editorial and entertainment;
ii. **Any company (media or otherwise) with a foreign principal that operates in Australia;**
iii. **Media companies with a foreign principal that operate in Australia**. These are:
   - Direct relationship with foreign principal – Network 10, The Guardian, News Corp Australia, Foxtel, Fox Sports and SkyNews; and
   - Indirect relationship with foreign principal – FreeTV and ASTRA.

It has become increasingly obvious that this Bill is deeply flawed – not just as it applies to media organisations – and is recognised to be so:

- The Bill is a complex labyrinth of provisions that has significant material consequences for 'foreign businesses' operating in Australia that legitimately engage with Government – both politicians and officials – to influence their operating environment;
- The introduction of an insiders (domestic businesses) and outsiders (foreign businesses) approach to business introduces a uneven playing field for legitimate business engagement with all parts of government;
- The continuous disclosure scheme is excessively burdensome;
- Criminal liability applies for non-compliance; and
- Exemptions do not match the scope of the offences.

Clearly this is a serious matter that requires careful consideration and further assessment.

RECOMMENDATION

This Bill requires significant review of its purpose/intent and operation. The scope of the Bill requires narrowing to ensure the Bill is fit-for-purpose and unintended consequences are addressed appropriately.

The Bill should only apply to foreign government influence – not foreign business influence.

If this is not possible, we recommend:
- An exemption for media organisations that appropriately addresses the activities undertaken in the ordinary course of business; and
- An appropriate exemption for businesses with foreign principals for undertaking activities in the normal course of employment in relation to issues that affect their business

ISSUES IN THE BILL THAT REQUIRE FURTHER CONSIDERATION AND AMENDMENT

It has become clear that the provisions that require amendment have extended beyond our commentary and recommendations in our original submission.

This has become evident through analysis of AGD submissions and discussions with AGD, particularly where we have illustrated issues and have been advised that the particular outcome is not intended – yet the illustrated issue is definitely caught by the drafting.

We offer the following analysis and recommendations regarding specific sections of the Bill. These could address our concerns at (i) to (iii) above.

We reiterate however that the complexity of the Bill does not make amendment an easy task, and we prefer the options recommended above – in that order.

- **Section 10 – Definitions**

We have concerns regarding the definitions of *'arrangement'*, *'communications activity'*, and *'foreign principal'*.

- Definition of ***'arrangement'***

The Bill defines '***arrangement'*** as:

> *includes a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten.*

It remains the case that the definition of 'arrangement' is too broad.

The mere existence of an arrangement does not mean the local entity is an agent of the foreign principal and shares a common purpose, although the activity may well be intended to influence.

RECOMMENDATION

- We do not offer an amendment here.
- We are of the view that an amendment may not be necessary if our following recommended amendments were accepted.

- Definition of ***'foreign principal'***

The Bill defines ***'foreign principal'*** as:

(a) a foreign government;
(b) a foreign public enterprise;
(c) a foreign political organisation;
(d) a foreign business;
(e) an individual who is neither an Australian citizen not a permanent resident of Australia.

RECOMMENDATION

Subsections (d) and (e) should be narrowed to only those foreign businesses or individuals who are *'operating on behalf of foreign governments for the purpose of influencing the Australian government.'*

This change will ensure that an Australian company engaged in genuine business activities with a foreign CEO or parent company would not automatically be caught by the Bill purely by virtue of its corporate structure.

- Definition of ***'communications activity'***

We address this issue in the context of section 13 below.

- **Section 12 – Activity for the purpose of political or governmental influence**

  This section of the Bill describes legitimate business activities that are undertaken by both domestic and foreign entities, and even domestic entities with foreigner leaders.

  We address this issue in the context of section 14 below.

- **Section 13 – Communications activity**

  As we have expressed previously, the carve-out for media companies at section 13 misunderstands the business of all media organisations.

  As we have expressed previously, including in stand-alone representations to the PJCIS by those represented by this submission, the exemption at section 13 should extend to all methods of communications, including online and digital platforms, of media companies.

  We are also of the view that both sub-sections should make it clear that the exemption applies in circumstances where the broadcast or publication occurs pursuant to an arrangement with a foreign principal. This is of particular importance regarding the publication or broadcast of syndicated content. Foxtel's submission to the PJCIS particularly addressed this matter. Note however this is equally applicable to publishing as broadcast.

  This change would ensure that:
  - Broadcasters and publishers are exempt in relation to content in any medium (e.g. a copy of a TV broadcast which is made available online); and
  - It is clear that there is no need for media companies to register for the publication or broadcast of syndicated content. It is important to ensure that commercial contracts and content supply agreements are not caught.

> **RECOMMENDATION**
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> - The exemption in sub-section 13(3) and (4) should extend to all methods of communication of information or materials by broadcasters, including online or digital platforms; and
>
> - Both sub-sections should also make clear that the exception applies in circumstances where the broadcast or publication occurs pursuant to an arrangement with a foreign principal.

- **Section 14 – Purpose of activity**

  Section 14 in the Bill says:

  > Section 14 – **Purpose of activity**
  > The purpose of an activity may be determined by having regard to any one or more of the following:
  > (a) the intention or belief of the person undertaking the activity;
  > (b) the intention of any foreign principal on whose behalf the activity is undertaken;
  > (c) all of the circumstances in which the activity is undertaken.
  > Note: The purpose of an activity is relevant for the purposes of certain registrable activities (see sections 12 and 21) and for the purposes of the exemptions in Division 4 of Part 2.

  The effect of section 14 is that the intention of the foreign principal alone will be sufficient to establish that the purpose of an activity is political or governmental influence.

As we have discussed with the Committee and AGD, this threshold is exceptionally low and puts all employees of media companies and the media company itself – regardless of its foreign principal status – at risk under the scheme across all aspects of a media company's business.

To address this significant issue we recommend that the concept of a 'commonality of purpose' between the person and foreign principal should be introduced into section 14.

This would ensure that a person does not become liable to register under the Scheme where the person is not aware of the foreign principal's intention that the purpose of the activity is political or governmental influence.

This is very important for media companies under this Bill. This commonality of purpose is vital across all aspects of media company's businesses. Following are some examples that are in no way exhaustive:

- Where a media company is involved in the production, publication or broadcast of an advertisement under the direction of a foreign principal or an agent of a foreign principal, but does not have any view as to the subjective effect of the ad;
- Syndicated content where the publication or broadcast of such may be edited to 'fit' (in the sense of fitting on a page, or editing for the purpose of fitting with a broadcast schedule or clipping/editing content of a foreign government news provider (such as Russia Today, Al Jazeera or the BBC) for use in news story that could be broadcast or appear on a digital site);
- Where a media company publishes or broadcasts 'entertainment' content – for example National Geographic – that is about a subject that is topical within the Australian government landscape – say the Great Barrier Reef – and the program also discusses climate change;
- Where a publisher or broadcaster runs an opinion piece by a foreign principal;
- Where a comment from a foreign principal is published or broadcast in the normal course of the business of a media company.

These issues are more acute (under the current Bill) for media companies with a foreign principal.

This is an extremely important amendment to the Bill to ensure the issues at (i) to (iii) are dealt with fully and appropriately across the full range of the business of media companies.

RECOMMENDATION

The Bill should be amended such that the present section should become section 14(1) and should be subject to section 14(2) which should read:

> *(2) A person undertakes an activity for the purpose of political or governmental influence only if the person shares a common intention with the foreign principal on whose behalf the activity is undertaken.*

We also see value in the **Explanatory Memorandum** specifying the purpose of the section. For example: Is it to be used by a person (such as a media company) in assessing its obligations, or by the Government in assessing compliance, or both?

– **Section 21 – Registrable activities: activities in Australia for the purpose of political or government influence**

Section 21 says:

(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.

Item	Activity	Foreign principal
1	Parliamentary lobbying: (a) in Australia; and (b) for the purpose of political or governmental influence	(a) a foreign public enterprise; or (b) a foreign political organisation; or (c) a foreign business; or (d) an individual
2	General political lobbying: (a) in Australia; and (b) for the purpose of political or governmental influence	any kind of foreign principal
3	Communications activity: (a) in Australia; and (b) for the purpose of political or governmental influence	any kind of foreign principal

The Bill effectively requires registration with the Scheme for matters that are already the subject of compliance requirements under existing Commonwealth legislation.

This increases the regulatory burden where it is unnecessary.

RECOMMENDATION

We believe that Section 21 should be amended to exclude any form of lobbying or communication contemplated in items 1-3 that is already regulated by, and in compliance with, the Commonwealth and state Electoral Acts and Schedule 2 of the *Broadcasting Services Act 1992* (Cth).

(This amendment could alternatively be introduced into Division 4 (either the existing media exemption, as broadened (see below)) or as a stand-alone exemption).

This change would ensure that material produced or published by a media company containing political matter (including election material) which arguably falls within the definition of 'lobby' would not be registrable for the purpose of the FIT Scheme if the material otherwise complies with Commonwealth legislation.

– **Section 28 – Exemption: news media**

This is a serious concern for all media companies – regardless of foreign principal status – and we have expressed serious concerns regarding the deficiencies of the drafting previously.

This exemption must apply to the day-to-day commercial and editorial operations of a media company, in the ordinary course of business.

This is particularly important because we know that exemptions are narrowly and literally interpreted. Given the breadth of the Bill, this exemption needs to match the liability created by the by it.

RECOMMENDATION

To ensure the exemption covers all aspects of the day-to-day business of a media organisation, we recommend that subsection (1)(b) be amended so that it reads:

(b) the activity is carried out in connection or association with the ordinary business dealings of a person in the course of providing media services to the public in Australia, including:

(i) by the provision of news, current affairs, editorial, entertainment and educational content; and
(ii) *lobbying in relation to issues affecting their Australian media business.*

This change would ensure that the publication and broadcast of content by the media in the ordinary course of business does not create registration requirements.

It also ensures that media industry lobbying is not registrable and therefore avoids the imposition of different obligations on different Australian media companies by virtue only of their ownership structure.

– **Section 29 – Exemption: commercial or business pursuits**

Section 29(2) applies to a person employed by or operating under name of foreign principal. It says:

(2) A person is exempt in relation to an activity the person undertakes on behalf of a foreign principal if:

(a) the foreign principal is:
(i) a foreign public enterprise; or
(ii) a foreign business; and

(b) the activity is a commercial or business pursuit:

(i) undertaken by an individual in his or her capacity as an employee of the foreign principal; or
(ii) undertaken by the person under the name of the foreign principal.

As outlined at the beginning of this submission, the requirement to comply with the Scheme is a significant issue for all businesses with a foreign principal.

This goes to the heart of the Scheme being unwieldy and not fit-for-purpose. It criminalises legitimate and overt influence in an attempt to criminalise – and stop – illegitimate and covert influence.

The issues are therefore even more acute for media companies with a foreign principal – being Network 10, The Guardian, News Corp Australia, Foxtel, Fox Sports, SkyNews; and industry associations such as FreeTV and ASTRA (indirectly).

Why more acute?

- Each of those companies has people that undertake jobs that on a daily basis require them to engage with the government for the purpose of influencing. Those are the people you see representing the joint media organisations at hearings and the like; and
- Each of those companies have people that undertake jobs that on a daily basis require them to engage with the government for the purpose of creating content for the media companies – including journalists and other editorial members of staff.

This is why it is essential that the news media exemption and the commercial and business pursuit exemptions are fit-for-purpose.

Currently there is a chasm between the Bill and the intention expressed by the AGD in supplementary submissions regarding this provision. As opposed to what the AGD expresses, the exemption at section 29(2) is inadequate for those people who lobby and influence the government in the ordinary course of their jobs in media organisations with a foreign principal.

For the exemption to apply sub-sections (b)(i) and (ii) would need to hold. These provisions are about how an organisation is structured and the name of the organisation.

The exemption – as it is currently drafted, does not apply to anyone performing policy, regulatory and government affairs functions at Network 10, News Corp Australia, The Guardian, Foxtel, Fox Sports and SkyNews; nor the entire staff at FreeTV and ASTRA who are indirectly captured by the Bill (as there is one member of the organisation with a foreign principal).

We strongly suspect that a range of companies across the breadth of the economy – all contributors to Australia's economy – will also be captured and not exempt.

Therefore it is vital that this is amended.

RECOMMENDATION

The criteria in sub-section (2)(b) should be expanded to capture employees of any Australian company owned or controlled by a foreign principal, but not operating under the name of that foreign principal. For example, section (2)(b)(ii) should be amended so that it reads:

> *'(ii) undertaken by the person under the name of, or expressly in association with, the foreign principal.'*

The term "commercial or business pursuit" should be clarified preferably by way of definition in the following (or similar) words:

> *"Commercial or business pursuit" includes lobbying in the ordinary course of the person's business or employment."*
>
> This change would:
>
> - clarify that any activity undertaken by a person in the normal course of his or her employment, including any lobbying in relation to issues that affect its business, would fall within this exemption; and
> - ensure that employees of media companies with foreign ownership, but which do not operate in the name of their foreign principal, will be covered by this exemption.

As the Committee is aware, the Bill itself, and the unintended consequences are numerous at each and every element and in combination, makes this very complex. However, it is the case that each and every element needs addressing.

We welcome further engagement with the Committee regarding these serious matters.