Foreign Influence Transparency Scheme Amendment Bill 2019

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House: House of Representatives
Portfolio: Attorney-General
Commencement: The day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.
All hyperlinks in this Bills Digest are correct as at March 2019.

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Purpose of the Bill
The purpose of the Foreign Influence Transparency Scheme Amendment Bill 2019 (the Bill) is to amend the Foreign Influence Transparency Scheme Act 2018 (the FITS Act) to:

- replace the definition of ‘communications activity’ to ensure that producers of relevant information or material will be liable to register under the Scheme
- require that the information or material includes a disclosure about the role of a foreign principal in its production
- clarify the factors to be considered in determining the purpose of an activity and
- make technical amendments to offences for failing to apply for or renew registration under the Scheme.

Background
The Foreign Influence Transparency (FIT) Scheme commenced on 10 December 2018.¹ The purpose of the Scheme is to ‘provide the public and government decision-makers with visibility of the nature, level and extent of foreign influence on Australia’s government and political process’.² Persons (whether individuals or organisations) are required to register under the FIT Scheme if they have certain arrangements with, or undertake activities on behalf of, foreign principals (defined to include foreign: governments, political organisations, government-related entities and government-related individuals).³ Types of registrable activities include:

- parliamentary lobbying on behalf of a foreign government
- parliamentary lobbying on behalf of other kinds of foreign principals for the purpose of political or governmental influence
- general political lobbying for the purpose of political or governmental influence
- communications activities for the purpose of political or government influence
- disbursement activities for the purpose of political or governmental influence
- employment or activities of former Cabinet ministers
- employment or activities of recent designated position holders in the 15 year period immediately following their public role.⁴

Registrants must disclose information about the nature of their relationship with the foreign principal and the activities they are undertaking (or have an arrangement to undertake) on behalf of the foreign principal.⁵

The FITS Act was part of a legislative package introduced to address concerns about foreign influence and foreign interference in Australia, along with the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 and the Electoral Legislation

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1. Foreign Influence Transparency Scheme Act 2018 (FITS Act), section 2, table item 1, column 3.
3. FITS Act, Part 2 (Registration under the scheme) and section 13A (definition of registrable arrangement).
4. AGD, ‘Foreign Influence Transparency Scheme’, op. cit. See also: FITS Act, Division 3 of Part 2 (Registrable activities) and Division 2 of Part 1 (Definitions, including of on behalf of and political or governmental influence).
5. FITS Act, Part 3 (Responsibilities of registrants under the scheme).
Amendment (Electoral Funding and Disclosure Reform) Act 2018. The proposed laws were controversial, and the Bills for all three Acts were amended substantially in response to reports of the Parliamentary Joint Committee on Intelligence and Security and the Joint Standing Committee on Electoral Matters before being passed.\(^6\)

Amendments were made to the FITS Act late in 2018 to expand the scope of information to be included on the publicly available register and to reduce the grace period for registration by persons with registrable arrangements in place when the Act commenced.\(^7\)

The Government has emphasised the need for the Bill to be passed quickly to ensure transparency about foreign influence in light of the upcoming federal election, due by the 18 May 2019.\(^8\)

Committee consideration
At the time of publication of this Bills Digest, the Bill had not been referred to any parliamentary committee, and neither the Senate Standing Committee for the Scrutiny of Bills nor the Parliamentary Joint Committee on Human Rights had reported on the Bill.\(^9\)

Policy position of non-government parties/independents
The Australian Labor Party supports the Bill.\(^10\)

At the time of publication of this Digest, there was no public indication of the policy position of other non-government parties and independents on the Bill.

Position of major interest groups
At the time of publication of this Digest, there was no indication of reactions by major interest groups.

Financial implications
The Explanatory Memorandum states that the Bill will have no financial impact.\(^11\)

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\(^12\)

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\(^{9}\) The Bill was introduced after the final meetings of the Senate Standing Committee of the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights before the pre-Budget recess.

\(^{10}\) M Dreyfus (Shadow Attorney-General), *Transcript of interview with Fran Kelly: ABC RN Breakfast*, media release, 21 February 2019.

\(^{11}\) The Statement of Compatibility with Human Rights can be found at page 4 of the Explanatory Memorandum to the Bill.
Key issues and provisions

Section 4 of the FITS Act sets out a simplified outline of the Act. **Item 1 of Schedule 1** will amend section 4 to clarify that the responsibilities under the FIT Scheme applying to a registrant also apply to persons who are liable to be registered. The amended outline will note that the extended disclosures obligations regime applies to persons who undertake registrable communication activities, whether or not the person is a registrant. These changes to the outline reflect the amendments outlined under ‘Definition of communications activity’ and ‘Reporting obligations’ below.

**Definition of communications activity**

Various proposed definitions of *communications activity* for the purposes of the FIT Scheme attracted controversy. The existing definition in section 13 of the *FITS Act* is the result of previous Government amendments to the definition of *communications activity* originally proposed in the Foreign Influence Transparency Scheme Bill 2018.

**Current definition and exclusions**

Section 13 of the *FITS Act* defines what is meant by *communications activity* for the purposes of the FIT Scheme. Currently, it means communicating or distributing information or material to the public or a section of the public. However, subsection 13(3) excludes from the definition of *communications activity* activities undertaken by a ‘disseminator’ where the activity:

- is undertaken in the ordinary course of the disseminator’s business and
- is communicating or distributing, to the public or a section of the public, information or material
  - produced entirely by a person other than the disseminator or
  - produced by the disseminator only to the extent that the disseminator alters the information or material, without affecting substance, to ensure compliance with the law or to fit time or space constraints and
- the identity of:
  - if the producer produced the information or material on behalf of another person—that other person or
  - otherwise—the producer of the information or material

is either apparent in the communicating or distributing or is disclosed in accordance with rules prescribed for the purposes of the definition of *communications activity*.

As noted in the Explanatory Memorandum:

> As currently drafted, subsection 13(1) only applies to a person that communicates or distributes information or material to the public or a section of the public - it does not apply to a person that produces information or material for a foreign principal if that material is given to another party to distribute. As a result, there is currently no requirement for a producer to register or to comply with the other obligations under the FITS Act relating to disclosures in communications activity. In addition, there is no requirement to register on a person who disseminates information or material that is produced entirely by another person and in circumstances where the identity of the producer of the information is evident. In those circumstances, there may [sic] be any evidence as to the involvement of a foreign

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The Bill will extend the operation of the FIT Scheme to ensure this is no longer the case.

Proposed changes

Item 2 of Schedule 1 will repeal and replace subsection 13(1). The new definition of communications activity will continue to apply the FIT Scheme to a person communicating or distributing information or material to the public or a section of the public. However, the effect of proposed paragraph 13(1)(b) is to extend the Scheme to also include persons producing information or materials for a foreign principal, for the purpose of that material being communicated or distributed to the public or a section of the public by someone else.15

This extended definition means that producers of information and materials will be liable to register and to provide disclosures about the role of the foreign principal in their production of the information or material.16

An example of the intent of this amendment is to capture a person who produces an advertisement on behalf of a foreign government for the purpose of influencing voters at the upcoming election, where that advertisement is then distributed by another organisation.17

Retrospective operation of amendments

Item 28 provides that the amendments to section 13 of the FITS Act apply in relation to an arrangement for a person to undertake an activity, whether the arrangement existed before or after the amendments commence. That is, those amendments will apply retrospectively to existing arrangements to undertake activities captured by the revised definition of communications activity.

Reporting obligations

Part 3 of the FITS Act outlines the reporting and other obligations of persons once they are registered under the FIT Scheme.

Current reporting and related obligations

Briefly, the existing reporting and related obligations under the FITS Act include:

• promptly reporting any material changes affecting the registration
• promptly reporting any disbursement activity undertaken on behalf of the foreign principal
• during the voting period for a federal election or designated vote—reviewing the currency of information provided by the registrant and promptly reporting about certain registrable activities undertaken during the voting period
• making various disclosures when undertaking communications activity on behalf of the foreign principal
• renewing registration annually for so long as the person remains liable to register under the scheme and

15. ‘Produce’ is not defined in the FITS Act, but the Explanatory Memorandum to the Bill states that ‘produce’ in paragraph 13(1)(b) will be taken to have the same meaning as it does in subsection 13(3).
16. Details of the disclosure requirements for different types of communications activities are prescribed by the Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018.
• keeping proper records.\textsuperscript{18}

**Disbursement activity under the FITS Act and reporting obligations under the Commonwealth Electoral Act 1918**

The *FITS Act* defines *disbursement activity* as disbursing money or things of value, where neither the person nor a recipient of the disbursement is required to disclose it under Division 4, 5 or 5A of Part XX of the *Commonwealth Electoral Act 1918* (CEA).\textsuperscript{19}

That is, the definition excludes disbursements that are required to be disclosed under another law, namely the *CEA*. Part XX of the *CEA* deals with election funding and financial disclosure. Division 4 requires the disclosure of donations to candidates or political parties. Division 5 requires the disclosure of electoral expenditure. Division 5A requires political parties, associated entities and those who spend more than the disclosure amount on political expenditure in a financial year to provide annual returns.\textsuperscript{20}

Registered political parties, political campaigners and associated entities provide returns each financial year to the Electoral Commission setting out details relating to amounts received, paid or incurred by the parties, campaigners or entities during the year. Third parties also provide annual returns setting out details relating to electoral expenditure incurred by the third parties during the year.

The returns are published by the Electoral Commissioner, on the Transparency Register, under section 320 of the *CEA*.\textsuperscript{21}

**Proposed changes to reporting and related obligations**

Section 33 of the *FITS Act* provides a simplified outline of Part 3. Items 6 and 7 of Schedule 1 will amend the outline to highlight the expanded responsibilities under the Scheme to provide disclosures when undertaking communications activities on behalf of a foreign principal, whether or not the person is a registrant.

**Item 8** of Schedule 1, by omitting ‘other than in a voting period’ in the heading of section 35, consolidates the reporting of *disbursement activities* under the one section rather than sections 35 and 37 as previously had been the case. In addition, **item 9** will extend the reporting obligations for reportable activities so that they apply not only to existing registrants but also to persons from the time that they become liable to register (regardless of whether they ultimately register or not).

**Items 10 and 11** are consequential amendments related to extending reporting to a person who is liable to register under the Scheme.

**Item 12** will insert proposed subsection 35(2) to clarify timeframes for reporting disbursements that reach the electoral disclosure threshold (currently $13,800) or a multiple of that threshold. Within a voting period it will be within seven days, and outside a voting period, within 14 days.\textsuperscript{22}

**Items 14–18** will amend section 37, which concerns reporting of registrable activities during voting periods, to clarify that it does not include disbursement activities, and to align the reporting

\begin{itemize}
\item FITS Act, sections 33–40.
\item FITS Act, section 10.
\item *Commonwealth Electoral Act 1918*, Part XX, Divisions 4, 5 and 5A.
\item Voting period is defined in section 10 of the *FITS Act*. The threshold is set under subsection 287(1) of the *Commonwealth Electoral Act 1918*.
\end{itemize}
timeframes so that the section will apply to a person from the time they become liable to be registered (regardless of whether they ultimately register or not). As noted above, the effect of item 8 is that the reporting of disbursement activities at all times is consolidated under section 35, making (for example) existing subsection 37(3) (repealed by item 18) obsolete.

Items 19–21 will make consequential amendments to section 38 to extend the disclosure requirements to a person undertaking the communications activity regardless of whether they are registered under the Scheme. This means, for example, that a person who undertakes relevant activities who is liable to be registered (but is not) who fails to make the appropriate disclosures will commit an offence.

**Determining the purpose of an activity**

Parliamentary lobbying on behalf of a foreign principal other than a foreign government, general political lobbying, communications activities and disbursement activities are registrable under the FIT Scheme only if undertaken for the purpose of political or governmental influence. The purpose of an activity is also relevant to other provisions in the *FITS Act*, including the definition of lobby and the revised definition of communications activity proposed in the Bill.

Section 14 of the *FITS Act* sets out the matters to be taken into consideration in determining the purpose of an activity. The first of these is the intention or belief of the person undertaking the activity. Items 3 and 4 of Schedule 1 will amend paragraph 14(a) to clarify that in relation to belief, it is the person’s belief (if any) about the intention of the foreign principal on whose behalf an activity is undertaken that is to be considered (as opposed to the person’s belief about the purpose of the activity itself). The Explanatory Memorandum states:

> This would mean, for example, that even though a foreign principal does not explicitly state its intention that a particular activity is for the purposes of influencing a political or governmental process or decision, it is relevant that the person undertaking the activity believes that to be the foreign principal’s intention.

The intention of the person undertaking the activity will remain a factor to be considered in determining the purpose of an activity, as it is currently.

**Offences**

Section 57 of the *FITS Act* sets out offences for failing to apply for or renew registration. Currently, one of the elements of the offences in subsections 57(3), (3A) and (4) is that the person was reckless as to whether he or she omitted to apply for or renew registration under the Fit Scheme.

The Explanatory Memorandum notes that the concept of reckless omission is not defined or used in the *Criminal Code Act 1995* (which sets out general principles of criminal responsibility, including the elements of offences, under Commonwealth laws), meaning that the current

23. For an overview and examples of registrable activities, see: AGD, Foreign Influence Transparency Scheme, [Registrable activities](#), Factsheet 5, February 2019.

24. See the proposed note to subsection 38(1) inserted by item 21 of Schedule 1 of the Bill.

25. *FITS Act*, section 21. General political lobbying, communications activity, disbursement activity and political or governmental influence are each defined in Division 2 of Part 1 of the *FITS Act*. Section 12 provides that an activity is undertaken for the purpose of political or governmental influence if ‘the sole or primary purpose, or a substantial purpose’ of the activity is influencing one or more of the processes and proceedings listed (including, for example, a process in relation to a federal election or a federal government decision) or influencing the public or a section of the public in relation to any of those processes or proceedings.

26. *FITS Act*, section 10; item 2 of Schedule 1 (proposed subsection 13(1)).

27. [Explanatory Memorandum](#), p. 9.
wording of these offences could cause difficulties in any prosecution.\textsuperscript{28} \textbf{Items 23–27 of Schedule 1} will remove references to reckless omissions in the offences in subsections 57(3), (3A) and (4), and make consequential changes to clarify the intended operation of those offences, to remove those difficulties.

\textsuperscript{28} Ibid., pp. 13–14.