THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FOREIGN INFLUENCE TRANSPARENCY SCHEME AMENDMENT BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the Honourable Christian Porter MP)
FOREIGN INFLUENCE TRANSPARENCY SCHEME AMENDMENT BILL 2019

GENERAL OUTLINE

1. The Foreign Influence Transparency Scheme Amendment Bill 2019 will make amendments to the *Foreign Influence Transparency Scheme Act 2018* (the FITS Act) to clarify the operation of key provisions and improve the operation of the Foreign Influence Transparency Scheme (the scheme). These amendments will ensure that the Scheme is able to provide the maximum level of transparency, particularly during the upcoming voting period.

2. The Bill will make amendments to the definition of ‘communication activity’ under section 13 of the FITS Act to capture a person that produces information or material on behalf of a foreign principal for the purpose of the information or material being distributed to the public. The amendment will ensure that producers of relevant information or material will be required to register and will be subject to the same reporting and disclosure obligations as those entities that communicate or distribute equivalent information or material. This will ensure that there is appropriate transparency in relation to persons who produce such information or material on behalf of a foreign principal.

3. To complement this amendment, the Bill also makes minor technical amendments to section 14 of the FITS Act which will clarify how the purpose of an activity is determined. The amendment will ensure that a person’s belief about the intention of a foreign principal may be taken into account when determining the purpose of an activity. This might be relevant, for example, when determining whether an activity is undertaken for the purpose of political and governmental influence under section 12, or whether information or material is produced for the purpose of being communicated or distributed to a section of the public under section 13 as amended by this Bill.

4. The Bill will make amendments sections 35 and 37 of the FITS Act, which deal with reporting obligations under the scheme. The amendments will address gaps identified in the application of these reporting obligations, which currently only apply where a person is already registered. The amendments will align the Act’s registration and reporting timeframes to capture those persons that are liable to register, but who have not yet actually registered under the scheme. The amendments will also consolidate the reporting obligations relating to disbursement activities into a single section (section 35), so that all disbursement activities which are undertaken accumulate, regardless of whether they are undertaken during a voting period.

5. Similarly, the proposed amendments to section 38 of the FITS Act will extend the obligation to make disclosures in registrable communications activity to any person who undertakes a registrable communication activity on behalf of a foreign principal, not just to those who are already registered. The effect of this amendment is that anyone who undertakes a communications activity as defined by section 13 (whether or not they are already registered) will be required to include the relevant disclosures in the information or material. This will ensure that it is transparent to the people who receive the information or material on whose behalf that material is being communicated.

6. Finally, the Bill will make technical amendments to the offences in section 57 of the FITS Act to ensure that these offences work in the way that they were intended to. The
amendments make the omission to register or renew registration under the scheme a circumstance of the offence in order to attract the default element of recklessness, rather than to expressing it as a ‘reckless omission’, which is not a defined term in the Criminal Code.

FINANCIAL IMPACT

7. The Bill will have no financial impact on Government revenue.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Foreign Influence foreign influence transparency scheme amendment BILL 2019

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

2. The Foreign Influence Transparency Scheme Amendment Bill 2019 will make technical amendments to the Foreign Influence Transparency Scheme Act 2018 (the FITS Act) to address gaps that have been identified in the early operation of the Foreign Influence Transparency Scheme (the Scheme). These amendments will enable the Scheme to provide the level of transparency intended, particularly during the upcoming voting period.

3. The Bill will make amendments to the definition of ‘communication activity’ under section 13 of the FITS Act to capture a person that produces information or material on behalf of a foreign principal for the purpose of the information or material being distributed to the public. The amendment will ensure that producers of relevant information or material will be required to register and will be subject to the same reporting and disclosure obligations as those entities that communicate or distribute equivalent information or material. This will ensure that there is appropriate transparency in relation to persons who produce such information or material on behalf of a foreign principal.

4. To complement this amendment, the Bill also makes minor technical amendments to section 14 of the FITS Act which will clarify how the purpose of an activity is determined. The amendment will ensure that a person’s belief about the intention of a foreign principal may be taken into account when determining the purpose of an activity.

5. The Bill will make amendments sections 35 and 37 of the FITS Act, which deal with reporting obligations under the scheme. The amendments will address gaps identified in the application of these reporting obligations, which currently only apply where a person is already registered. The amendments will align the Act’s registration and reporting timeframes to capture those persons that are liable to register, but who have not yet actually registered under the scheme. The amendments will also consolidate the reporting obligations relating to disbursement activities into a single section (section 35), so that all disbursement activities which are undertaken accumulate, regardless of whether they are undertaken during a voting period.

6. Similarly, the proposed amendments to section 38 of the FITS Act will extend the obligation to make disclosures in registrable communications activity to any person who undertakes a registrable communication activity on behalf of a foreign principal, not just to those who are already registered. The effect of this amendment is that anyone who undertakes a communications activity as defined by section 13 (whether or not they are already registered) will be required to include the relevant disclosures in the information
or material. This will ensure that it is transparent to the people who receive the information or material on whose behalf that material is being communicated.

7. Finally, the Bill will make technical amendments to the offences in section 57 of the FITS Act to ensure that these offences work in the way that they were intended to. The amendments make the omission to register or renew registration under the scheme a circumstance of the offence in order to attract the default element of recklessness, rather than to expressing it as a ‘reckless omission’, which is not a defined term in the Criminal Code.

Human rights implications

8. The Bill will make amendments requiring people who undertake certain activities to register and provide information. This will engage the right to privacy.

9. The right to privacy protects against arbitrary and unlawful interferences with an individual's privacy, and recognises that individuals should have an area of autonomous development; a ‘private sphere’ free from government intervention and excessive unsolicited intervention by others. The right to privacy also includes respect for information privacy, including the right to control the dissemination of information about one's private life.

10. The right to privacy may be limited in the interests of national security, public order, to protect public health or the protection of the rights and freedoms of others. Limitations must be in order to achieve a legitimate objective, be rationally connected to that objective and be a reasonable, necessary and proportionate method to achieve the objective.

11. The Bill will limit the right to privacy because it will require information to be provided to the Department under the scheme cases that would currently not engage those obligations (and which are identified gaps in the scheme). This limitation is considered reasonable and necessary as the disclosure of the information concerned is required to achieve the transparency objectives of the FITS Act scheme.

12. The existing scheme does not limit the activities that individuals are able to conduct on behalf of a foreign principal – it merely requires a degree of transparency surrounding these activities and the role played by the foreign principal. The collection and retention of information relevant to the scheme is carefully regulated and there are a number of provisions in the FITS Act that limit disclosure of information collected under the scheme. Existing safeguards in the FITS Act relating to publishing information remain applicable, including the ability for individuals to request corrections to incorrect information and access to merits review under the Administrative Appeals Tribunal Act 1975.

Conclusion

13. The Bill is compatible with human rights because it encourages and promotes a political system that is transparent, and assists with ensuring that the forms and sources of foreign influence on Australian political and governmental processes are clearly visible. To the extent that it may limit human rights, those limitations are reasonable, necessary and
proportionate to achieve the legitimate objective of ensuring foreign influence activities in Australia are transparent and available to the Australian public.
NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

1. This clause provides for the short title of the Act to be the *Foreign Influence Transparency Scheme Amendment Act 2019*.

Clause 2 – Commencement

2. This clause provides that the provisions in the Bill will commence on the day after the Bill receives Royal Assent.

Clause 3 – Schedules

3. This clause provides that legislation that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule has effect according to its terms.

Schedule 1 – Amendments

Item 1 – Section 4

4. Item 1 will amend the section 4 of the Act, which sets out a simplified outline of the Act. Section 4 outlines the key obligations and features of the scheme, including that registrants have various responsibilities under the scheme which are aimed at ensuring that the Secretary has up to date information about a registrant’s activities, especially during voting periods for federal elections.

5. Item 1 amends the outline to draw attention to the amended disclosure obligations that will apply to persons that undertake registrable communications activity under the scheme. These obligations, which are set out at section 38 of the Act, will be amended by Item 20 of the Bill to apply to any person that undertakes these activities, regardless of whether or not the person is a registrant.

Item 2 – Subsection 13(1)

6. Item 2 repeals the definition of ‘communications activity’ in subsection 13(1) of the Act and replaces it with an updated definition.

7. 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 be any evidence as to the involvement of a foreign principal in the
production of the information or material and no enduring record (through a registration) of the activity being undertaken.

8. The amendment to subsection 13(1) will expand the current definition of communications activity so that it captures a person that produces information or material on behalf of a foreign principal for the purpose of the information or material being communicated or distributed to the public or a section of the public.

9. The amended subsection 13(1) provides that a person undertakes communications activity if:

- the person communicates or distributes information or material to a section of the public, or
- the person produces information or material for the purpose of the information or material being communicated or distributed to the public or a section of the public.

10. The effect of this amendment is to ensure that the producers of relevant information or material will be liable to register and subject to the same reporting and disclosure obligations as those entities that communicate or distribute that material. Additionally, it will address a current gap in the Act where material is disseminated by someone other than the person producing the information that could be exploited to subvert the transparency purpose of the scheme.

11. The term ‘produce’ is not defined in the Act. However it is intended that ‘produce’ for the purposes of paragraph 13(1)(b) will take the same meaning as it does in subsection 13(3).

**Items 3 – Paragraph 14(a)**

12. Item 3 and Item 4 amend subsection 14(a) to provide greater clarity as to how the purpose of an activity will be determined.

13. Currently, section 14(a) provides that the purpose of an activity is to be determined having regard to the intention or belief of the person undertaking the activity, as well as the intention of the foreign principal and any other circumstances in which the activity is undertaken.

14. These items will amend this subsection, to the effect that for the purpose of determining the purpose of an activity under the scheme, either of the following may be taken into consideration:

- the intention of the person undertaking the activity, or
- that person’s belief about the intention of any foreign principal on whose behalf the activity is being undertaken.

15. The requirements of paragraph 14(b), which take into consideration the intention of the foreign principal on whose behalf the activity is being undertaken, or any other relevant circumstances in which the activity is undertaken will continue to apply.
16. These amendments are intended to clarify that, rather than having regard to the belief of the person undertaking the activity about the purpose of the activity, regard may be had to that person’s belief about the foreign principal’s intention. This intention is relevant in determining, for example, whether an activity is undertaken for the purpose of political or governmental influence under section 12. 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. It is not relevant whether the person shared that belief. Similarly, under section 13(1) (as amended), in determining whether information or material is produced for the purpose of being communicated or distributed, it would be appropriate to consider the producer’s belief as to the intention of the foreign principal on whose behalf they are producing the information or material.

**Item 5 – Part 3 (heading)**

17. Item 5 makes a minor technical amendment to remove the words ‘of registrants’ from the heading of Part 3. This amendments reflects the amendments proposed by Items 6 to 18, which will update the reporting and disclosure obligations under sections 35, 37 and 38 so that they apply to a person undertaking registrable activities, even where they are not yet formally registered under the scheme.

**Item 6 – Section 33**

18. Item 6 will amend the simplified outline to Part 3 to omit paragraph (c) relating to making disclosures when undertaking communications activity on behalf of the foreign principal. This will be replaced by the paragraph to be added by item 7 below.

**Item 7 – At the end of section 33**

19. Item 7 will amend the simplified outline to clarify that a person who undertakes communications activity that is registrable in relation to a foreign principal must make a disclosure about the foreign principal. This clarifies that the disclosure obligation applies regardless of whether or not the person is a registrant under the scheme.

**Item 8 – Section 35 (heading)**

20. Item 8 will amend the heading of section 35 by omitting the words ‘other than in a voting period’. Section 35 will be amended by items 9 – 12 as outlined below so that obligations to report disbursement activity under the scheme are not limited to a voting period.

**Items 9, 10 and 11 – Paragraph 35(1)(a), (b) and (d)**

21. Items 9, 10 and 11 will amend section 35, which currently applies in relation to disbursement activity that occurs at any time other than a voting period.

22. As currently drafted, the Act deals with the reporting of disbursement activity over two sections - section 35 deals with the reporting of disbursement activities which undertaken are outside of a voting period and section 37 deals with the reporting of disbursement activity during a voting period.
23. The current section 35 provides that a registrant must report disbursement activity when the total value of the money or things of value being disbursed reaches the electoral donations threshold, or a multiple of that threshold. The electoral donations threshold is defined in section 10 of the Act to mean the disclosure threshold within the meaning of Part XX of the Commonwealth Electoral Act 1918. Under section 35, a registrant must report within 14 days of this threshold, or multiples of this threshold, being reached. However, the reporting obligations only attach to a person who is already registered under the scheme and do not apply in circumstances where a person has become liable to register under the scheme, but has not yet lodged an application to register.

24. For example, Person X enters an arrangement with a foreign principal on 1 March to undertake registrable disbursement activity on behalf of the foreign principal. Person X has become liable to register under the scheme, and under section 16 of the Act, must make an application for registration no later than 14 days after becoming liable to register. Person X lodges their registration on 10 March. However on 5, 6 and 7 March Person X makes a number of disbursements, each of which exceed the electoral donations threshold. Under section 35 as it is currently drafted, Person X would not have to report any disbursements until they are registered. As such, the disbursements on 5, 6 and 7 March would not need to be reported.

25. To address this gap, Items 9, 10 and 11 amend subsection 35(a) so that it operates to apply to a person who is not yet registered, and who undertakes a registrable disbursement activity that amounts to the electoral donations threshold or a multiple of the threshold.

26. Item 9 will repeal paragraph 35(1)(a). The effect of this amendment is that section 35 will not be limited to applying only to a person who is already registered under the scheme. Instead, the reporting obligations will apply to all disbursement activity, regardless of whether the person undertaking the activity is already registered.

27. Item 10 will amend paragraph 35(1)(b) to refer to ‘a’ person who undertakes disbursement activity on behalf of ‘a’ foreign principal. This is consequential to the amendment made by item 9 as the paragraph is no longer limited to a specific person who is already registered under the scheme.

28. Item 11 will amend paragraph 35(1)(d) to refer to the total value of money or things of value disbursed in the course of ‘disbursement activity undertaken by the person on behalf of a foreign principal’. The effect of this amendment is to ensure that all disbursement activity undertaken on behalf of a particular foreign principal is regarded as a continuing course of activity, so that the provision is not read down to apply to individual disbursement activities. This ensures that the legislative intent of requiring reporting of disbursements that reach the electoral donations thresholds or multiple of that threshold.

29. In the case of Person X, who is liable to register and who has undertaken registrable disbursement activity and met the threshold for reporting three times before making an application to be registered under the scheme would be required to report this activity upon lodging their application for registration.
**Item 12 – Subsection 35(2)**

30. Item 12 repeals existing subsection 35(2). As currently drafted, subsection 35(2) provides that a registrant must report when the electoral donations threshold, or a multiple of that threshold is reached. This must be done within 14 days.

31. Item 12 substitutes a new subsection 35(2) which provides that a person must report when the registrable disbursement activity reaches the electoral donations threshold, or a multiple of that threshold, as follows:

- on a day during a voting period – within 7 days, or
- outside a voting period – within 14 days, or
- if a person was not registered under the scheme on a day that the threshold or a multiple of that threshold was reached – on the day that the person applies for registration under the scheme in relation to that foreign principal.

32. A voting period is defined in section 10 of the Act.

33. The effect of these amendments is to provide consistency with other reporting obligations, and ensure that reports of disbursements meeting the disclosure threshold must be made within a reasonable period.

34. Item 12 also inserts a new subsection 35(2A) into the Act. Proposed subsection 35(2A) provides that if the person is not registered under the scheme on the day the threshold is reached, the notice may be given on the day the person applies for registration in relation to the foreign principal. This will enable the person to address their obligations to report disbursements at the same time as meeting their registration obligations.

**Item 13 – Subsection 35(4)**

35. Item 13 will repeal subsection 35(4) and is consequential to the amendments made by item 12 above, which deals with timeframes for reporting disbursements during a voting period.

**Items 14, 15, 16, 17 and 18 – Section 37**

36. Items 14 to 18 will amend section 37 to:

- remove the reporting obligations relating to disbursement activities, as these will be dealt with by the amendments to section 35, and
- align the reporting and registration timeframes, so that a person must report any registrable activity undertaken during the period between the time that they became liable to register, and the time that they become registered under the scheme.

37. As currently drafted, the reporting obligations contained in section 37 only apply to a person that is already registered under the scheme. Under section 16 of the Act, a person has 14 days to apply for registration from the day that they become liable to register – this means
that any relevant registrable activities undertaken between a person becoming liable to register and actually registering under the scheme will not attract reporting obligations.

38. To address this gap, Items 14 to 18 amend section 37 so that it operates to apply to a person who is not registered, but undertakes a registrable activity.

39. Item 14 will amend the heading to section 37 to provide that the section deals only with reporting registrable activity during voting periods (other than disbursement activity). This change is necessary as obligations relating to reporting disbursement activity will be consolidated into section 35.

40. Item 15 will repeal paragraph 37(1)(a). The effect of this amendment is that section 37 will not be limited to applying only to a person who is registered under the scheme. Instead, the reporting obligations will apply to any activities undertaken by a person who is liable to register, even if they are not yet registered.

41. Item 16 will amend paragraph 37(1)(b) so that it refers to ‘a’ person and ‘a’ foreign principal, rather than ‘the’ person registered – this has the effect of broadening the application of this provision and is consequential to the amendment in Item 15.

42. Item 17 will repeal current paragraph 37(1)(c) and replace it with a new paragraph that sets out the activities to which section 37 applies. It will clarify that section 37 is concerned with reporting registrable activities as set out in section 20 and 21 of the Act other than disbursement activity. Reporting requirements relating to disbursement activity will be consolidated in the amended section 35.

43. Item 18 substitutes new subsections 37(2) and (3), which provide the timeframes under which a person must report when a registrable activity is undertaken during a voting period. Reporting must occur within 7 days of the activity occurring, or, if the person was not registered under the scheme, the report must be made on the day that the person applies for registration under the scheme. This will enable a person to address their reporting obligations at the same time as meeting their registration obligations.

**Items 19, 20 and 21 – Subsection 38(1)**

44. Items 19 to 21 will amend subsection 38(1).

45. As currently drafted, subsection 38(1) provides that a person who is registered under the scheme in relation to a foreign principal must make a disclosure about the foreign principal if that person undertakes a registrable communications activity on their behalf. The effect of this provision is that a person only has to make a disclosure in relation to a registrable communications activity if they are already registered under the scheme.

46. For example, a person enters into an arrangement with Foreign Government X to undertake communications activity on 5 April. The activity is a series of advertisements designed to influence a current policy position of the government. The person is liable to register as of 5 April but has 14 days to lodge an application for registration. On 10 April, the person undertakes additional registrable communications activity. However, the current operation of section 38 means that they do not have to report this activity even once they register.
47. To address this gap and to ensure that the transparency purposes of the Act are fully realised, Items 19 to 21 will amend subsection 38 to expand its application.

48. Item 19 repeals paragraph 38(1)(a) which provides that the subsection applies to a person registered under the scheme. The effect of this amendment is that the disclosure obligations outlined in subsection 38(1) will apply regardless of whether a person is registered under the scheme or not.

49. Item 20 will amend paragraph 38(1)(b) so that it applies to ‘a’ person undertaking communications activity on behalf of ‘a’ foreign principal, rather than being limited to ‘the’ person registered under the scheme.

50. Item 21 will amend the note to subsection 38(1) by clarifying that it is an offence not to make the disclosure in relation to the communications activity, whether or not the person who undertakes the activity is registered under the scheme. The cross reference to the offence provision in subsection 58(2) has not changed.

Item 22 – Subsection 43(1A)

51. Item 22 makes a minor technical amendment to subsection 43(1A).

52. Section 43 deals with the Attorney-General’s Department’s Secretary’s obligation to make certain information available on the public register. This item will ensure that the obligation to publish information within 48 hours during a voting period applies to all relevant notices given to the Secretary during a voting period.

53. This is a consequential amendment to reflect the proposed amendments to the Act’s reporting obligations in sections 35, 37 and 38.

Items 23 and 24 – Paragraphs 57(3)(b) and (d)

54. Items 23 and 24 will amend the offence in subsection 57(3) that applies to reckless omission to apply or renew registration, where a person knows they are required to apply or renew. The amendments will address technical deficiencies with the current drafting to make the provisions more workable and ensure it operates as intended.

55. Item 23 will repeal paragraph 57(3)(b), which refers to the person being reckless as to whether they have omitted to apply or renew their registration. The concept of reckless omission is not defined or used in the Commonwealth Criminal Code, which may cause issues if this offence were to be prosecuted.

56. Item 24 will replace paragraph 57(3)(d) with a new paragraph which expresses the omission to register or renew registration as a circumstance, in order to attract the default element of recklessness.

57. The revised offence as amended will apply where a person knows they are required to register or renew their registration, the person undertakes a registrable activity, and the following circumstances exist at the time the activity is undertaken:

   - the person is not registered under the scheme in relation to the foreign principal, and
• the activity is registrable in relation to the foreign principal.

58. In order to prove the offence, a prosecutor would be required to make out that the person was aware of a substantial risk that those circumstances existed and, having regard to the circumstances, it was unjustifiable for the person to take that risk.

**Items 25 and 26 – Paragraphs 57(3A)(b) and (d)**

59. Items 25 and 26 will amend the offence in subsection 57(3A) that applies to reckless omission to apply for or renew registration, where a person is reckless as to whether they are required to do so. The amendments will address technical deficiencies with the current drafting to make the provisions more workable and ensure it operates as intended.

60. Item 25 will repeal paragraph 57(3A)(b), which refers to the person being reckless as to whether they have omitted to apply or renew their registration. The concept of reckless omission is not defined or used in the Commonwealth Criminal Code, which may cause issues if this offence were to be prosecuted.

61. Item 26 will replace paragraph 57(3A)(d) with a new paragraph that expresses the omission to register or renew registration as a circumstance, in order to attract the default element of recklessness.

62. The revised offence at paragraph 57(3A)(d) will apply where the person undertakes a registrable activity, and the following circumstances exist at the same time the activity is undertaken:

• the person is not registered under the scheme in relation to the foreign principal, and

• the activity is registrable in relation to the foreign principal.

63. In order to prove the offence, a prosecutor would be required to make out that the person was aware of a substantial risk that those circumstances existed and, having regard to the circumstances, it was unjustifiable for the person to take that risk.

**Item 27 – Paragraph 57(4)(b)**

64. Item 27 will amend the offence in subsection 57(4) that applies to intentional or reckless omission to apply or renew registration, knowing they are required to apply for or renew registration by the end of a period. The amendment will address technical deficiencies with the current drafting to make the provisions more workable and ensure it operates as intended.

65. Item 27 will amend paragraph 57(4)(b) so that the offence applies where:

• the person intentionally omits to apply for, or renew registration by the end of the period, or

• at the end of the period, the person is not registered under the scheme in relation to the foreign principal.
Item 28 – Application of amendments

66. Item 28 clarifies that the amendments to section 13 (communications activity) will apply to an arrangement for a person to undertake an activity whether the arrangement is in existence before or after the commencement of this Act.