Opening Statement

Law Council
OF AUSTRALIA

18 June 2018

Opening Statement to the Parliamentary Joint Committee on Intelligence and Security (Foreign Influence Transparency Scheme Bill 2017)

Arthur Moses, President-elect, Law Council of Australia

1. I would like to thank the Committee for the opportunity to provide evidence to its inquiry in relation to proposed Australian Government amendments to the Foreign Influence Transparency Scheme Bill 2017.

2. The Law Council largely welcomes the proposed government amendments to the Bill. They significantly focus the Bill's operation on its stated aim of making the exercise of foreign influence of Australia's political and government matters more transparent through a registration system. In our view, the narrowing of the Bill's application goes a considerable way of improving the proportionality of the regime and, the Constitutional validity, of the legislation because it ensures that the Bill is appropriate and adapted to serve the legitimate end of the legislation.

3. The improvements of the proposed government amendments are set out in our supplementary submissions to the Committee of 15 June 2018, however the four main issues which we have noted are:

    - limitations of who would be considered to be a 'foreign principal';

    - secondly, narrowing the instances where a person will be taken to be acting under the influence of a foreign principal by removing the term 'control' and removing the concept of 'funding or supervision' and 'collaboration' with a foreign principal;

    - narrowing the definition of 'activity for the purpose of political or governmental influence' to where there is a 'sole or primary purpose, or a substantial purpose' or influencing political matters; and

    - broadening the exemptions.

4. The Law Council is very grateful for these amendments, which the government has proposed, which go a long way to dealing with our concerns. But there are a number of matters that we have put forward in our submission on the 15th of June, that we would ask the government to consider in relation to the proposed Bill:

    - As you would have noted, one of those matters relates to the definition of 'activity for the purpose of political or governmental influence' (proposed section 12). The definition as you would have noted, as it presently stands, is rather broad in terms of the substantial purpose test and what we've suggested is that it be amended to narrow it to activity to what is said to be the 'sole or primary, or **dominant** purpose' and this is the advice which has been received from the Law Council's Not-for-Profit and Charities Committee that in the context of charities law there may some difficulty to the lack of precision as to what amounts to 'a substantial purpose' in relation to influencing political matters.

    - The other matter which we have raised is that a further change be made for the exemption for legal advice or representation to make it consistent with the Federal Lobbying Code of Conduct, namely that the words 'or relates primarily to' should be replaced by 'or is incidental to' to ensure that the test in the exemption is consistent with the language at clause 3.5(f) of the Federal Lobbying Code of Conduct. It can be fairly said in relation to this issue, that it is not intended that these amendments are inconsistent with the Code of Conduct, but these

amendments should align with the Federal Lobbying Code of Conduct to ensure that there is no inconsistency.

- The other issue relates to the proposed definition of 'foreign government related entity' draws in companies where only 15% is owned by a foreign government, government related entity, political organisation or a foreign government related individual and also on other bases which may be difficult to apply. Again, as we've looked at the legislations it doesn't appear to align with other relevant Commonwealth legislation such as the *Corporations Act 2001* (Cth), the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the *Financial Sector (Shareholdings) Act 1998* (Cth), each of which specifies 20% as the level at which control is assumed. The policy objectives of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the Bill are similar in that they seek to 'regulate' foreign activities in Australia. The Law Council suggests that it should be set at 20%, in order to ensure that it aligns with other relevant legislation. This prevents a 'shifting sands' approach to concepts of foreign control across different legislative schemes that deal with the regulation of foreign activities. This minimises confusion as to the applicable law.

- The other issue, is the need for the proposed transparency notice scheme should be considered by the Committee in light of the proposed extensive powers of the Secretary of the Attorney-General's Department under proposed section 45 to investigate whether a person is liable to register in relation to a foreign principal. If it is to proceed, further amendments to the Bill should be made to align the transparency notice provisions to general administrative law principles as set out in our submission.

- The Law Council also maintains its view, that consideration should be given to the availability of civil penalties to enforce compliance with the scheme rather than criminal penalties. However, if criminal penalties are to be employed, absolute liability should not be a basis for the proposed offences and appropriate defences should be considered.

- The other matter that I wanted to highlight is, given the abrogation of the privilege of self-incrimination, and this is used in a multitude of federal legislation, we want the Committee to consider a derivative use immunity should also apply in addition to a use immunity.

- And finally, where the Secretary has exercised the power under proposed section 46 to compulsorily obtain information, the privilege against self-incrimination being abrogated (proposed section 47), the Secretary is free to use that information for purposes other than the issue of a transparency notice and maintenance of the register. The Law Council recommends that the views of the Australian Privacy Commissioner be obtained on this proposal and a review of the table in proposed section 53.

5. In short, members of the committee, the Law Council thanks the government for the constructive amendments which have been made to the Bill, which in large measure address our concerns.

6. However, concerns remain just in relation to three broad areas:

    - Firstly, the need for this legislation to align with other federal legislation, so that there is not a 'shifting sands' approach to the very same subject matter;

    - The second issue relates to legal professional privilege. It is well understood and accepted that the privilege against self-incrimination can be abrogated when it comes to certain legislation. If that is to occur, not only should direct use be prohibited in criminal proceedings, but derivative use should also be prohibited. If that were not to occur, there is a real risk that the safeguards for a fair trial may be called into question. In turn, this could call into question any convictions which may be secured under the legislation;

    - The third issue, relates to the issue of whether offences should be characterised as absolute liability offences rather than strict liability offences. Absolute liability offences do not require the prosecution to establish intention on the part of the wrongdoer.

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