

Foreign Influence Transparency Scheme Bill 2017¹

Obligations and Consequences Flowchart for individuals and organisations (“you”)

	Communications activity	General political lobbying	Parliamentary lobbying	Donor activity
Are you involved in Australia in any of the following, or have you entered into an arrangement to undertake any of the following (whether or not you actually do these things– see s 18):	defined in section 13(1) as communicating or distributing “information or material” including (as per section 13(2)) “information or materials in any form, including oral, visual, graphic, written, electronic, digital and pictorial forms.” Private communications would appear to be caught as well as public communications	lobbying any one or more of the following: (a) a Commonwealth public official; (b) a Department, agency or authority of the Commonwealth; (c) a registered political party; (d) a candidate in a federal election – [in each case] other than lobbying that is Parliamentary lobbying	lobbying any one or more of the following persons:(a) a member of the Federal Parliament; (b) a person employed under section 13 or 20 of the <i>Members of Parliament (Staff) Act 1984</i>)	a person undertakes this if: (a) the person disburses money or things of value; and (b) 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 <i>Commonwealth Electoral Act 1918</i> Is the donor activity caught by the Cwlth Electoral Act? <ul style="list-style-type: none"> • If yes, that Act applies. • If no, this Act applies.
Is your involvement for the “purpose” of “political or governmental influence”?	See definitions below	See definitions below	Purpose is not relevant if lobbying is on behalf of foreign government (s 20) – otherwise see definitions below	See definitions below
	Section 14 states that: 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.			

¹ As introduced to the House of Representatives on 7 December 2017

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	<p>Section 12(1) states that ‘for the purpose of political or governmental influence’ includes where ‘any’ purpose of the registerable activity is to directly or indirectly influence any aspect of the processes and proceedings described, ‘including the outcome.’</p> <p>Subsection 12 (2) adds that “an activity is taken to be for the purpose of political or governmental influence” if “a purpose of the activity is to influence an aspect of a process or proceedings mentioned in that subsection by influencing the public, or a section of the public, in relation to the process or proceedings.”</p> <p>That is, any activity which may influence some or all of ‘the public’ (whether or not it is a public or private activity) may be caught by the Bill.</p>			
Does an exemption apply?	<p>section 13: publisher of a periodical, broadcaster of the relevant communication /carriage service provider</p> <p>Note: no exemption for journalists who are not themselves publishers or broadcasters, no exemption for writers on social media (only ‘publishers’), no exemption for opinion pieces that are not editorials (see also s 28 exemption below)</p>			<p>Section 21: activity is on behalf of:</p> <ul style="list-style-type: none"> • a foreign business, or • an individual who is neither an Australian citizen nor a permanent Australian resident <p><i>[Query why foreign businesses and individuals should be exempt, particularly where they have close ties with foreign governments? Does this not allow the making via such persons of donations which would otherwise be caught?]</i></p>
<ul style="list-style-type: none"> • Humanitarian aid or assistance (s 24): 	<p>A person is exempt in relation to an activity the person undertakes on behalf of a foreign principal if the activity is, or relates solely to, the provision of humanitarian aid or humanitarian assistance. <i>[Given that any conduct can convey multiple messages to different audiences, it is likely to be virtually impossible for anyone to prove that their conduct had a sole purpose]</i></p>			

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• Legal advice or representation (s 25)	A person is exempt in relation to an activity the person undertakes on behalf of a foreign principal if the activity is solely, or solely for the purposes of, the provision of legal advice or legal representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings <i>[same problem]</i>			
• Diplomatic, consular etc activities (s 26)	Exempts such activities on behalf of foreign governments subject to certain conditions.			
• Religious lobbying for theocracies (s 27)	if: (a) the foreign ‘principal’ is a foreign government; and (b) the activity is solely, or solely for the purposes of, acting in good faith in accordance with the doctrines, tenets, beliefs or teachings of the particular religion of the foreign government. <i>[It is not clear why this exemption should be granted as a matter of principle].</i>			
• Some news media (s 28)	for activities “solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media. ” <i>[No exemption for social media, no exemption for opinion pieces].</i>			
• Commercial or business contractual negotiations (s 29(1))	If: the foreign ‘principal’ is a foreign business or individual and the activity is solely, or solely for the purposes of, the pursuit of bona fide business or commercial interests in relation to preparing to negotiate, negotiating, or concluding, a contract for the provision of goods or services, and “in no way” relates to national security, defence, or public infrastructure (within the meaning of the Criminal Code).			
• Commercial or business pursuit for disclosed employer (s 29(2))	If: the foreign ‘principal’ is a foreign public enterprise or business and 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.			
<i>Comments</i>	<i>Note – no exemption for attending public demonstrations, signing public petitions, writing letters to a newspaper or online or other normal methods of political discourse aimed at changing government policy</i>			<i>Note – does not cover soliciting, collecting or dispensing contributions, loans, money, or other things of value for or in the interest of a foreign principal– compare</i>

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				<i>Foreign Agents Registrations Act 1938 United States Code at § 611(c)(1)(iii).</i>
Is there any foreign person (whether living in Australia or overseas) or entity who might know or expect that you would or might carry out the activity (whether or not you actually do)?	<p>A foreign 'principal' includes:</p> <ul style="list-style-type: none"> • Foreign government (includes government authorities and state or local government bodies) • Foreign public enterprise (a company or any other person (other than an individual) controlled by the government of a foreign country or of part of a foreign country) • Foreign political organisation (includes a foreign political party) • Foreign 'business' (means a person (other than an individual) that: (a) either: (i) is constituted or organised under a law of a foreign country or of part of a foreign country; or (ii) has its principal place of business in a foreign country; and (b) is not a foreign government, foreign public enterprise or foreign political organisation) • An individual who is neither an Australian citizen nor a permanent Australian resident (and whether in Australia or not) <i>[Note: over 49% of Australia's current population are either born overseas (first generation Australian) or have one or both parents born overseas (second generation Australian).² It is therefore clear that at least 49 % of Australians will have family and friends who live overseas and who are likely to fall within the definition of 'foreign principal.'</i>] 			
Is the activity or proposed activity 'on behalf of' the foreign person or entity? (includes collaboration, , understanding, knowledge and expectation)	<p>Section 11(1) states that a person undertakes an activity on behalf of a foreign 'principal' (retaining the principal/agency concept) not only in the normal agency situations but also if the first person undertakes an activity 'in collaboration' with the foreign principal:</p> <p><i>(1) A person undertakes an activity on behalf of a foreign principal if the person undertakes the activity:</i></p> <p><i>(a) under an arrangement with the foreign principal; or</i></p> <p><i>(b) in the service of the foreign principal; or</i></p> <p><i>(c) on the order or at the request of the foreign principal; or</i></p> <p><i>(d) under the control or direction of the foreign principal; or</i></p> <p><i>(e) with funding or supervision by the foreign principal; or</i></p> <p><i>(f) in collaboration with the foreign principal.</i></p>			

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Australian Bureau of Statistics Media Release 27 June 2017 at <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3>

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	<p>(2) For the purposes of subsection (1), it does not matter whether consideration is payable.</p> <p>Collaboration' is not defined either in the Bill or in the <i>Acts Interpretation Act 1901</i>. The Cambridge English Dictionary definition is: "the situation of two or more people working together to create or achieve the same thing". That is, 'on behalf of,' which normally has the concept of a directing principal and a directed agent, is in this Bill being used to include the situation of two autonomous principals who choose to work together, where the Australian principal is not necessarily being directed in any way by the foreign principal.</p> <p>Section 10 defines 'arrangement' (paragraph (a)) as including "a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten" and the explanatory memorandum states that "in the service of" (paragraph (b)) will be read broadly to include "helping or meeting the needs of."</p> <p>Section 11(3) expands the meaning of 'on behalf of' even further. It includes the situation where both you and the foreign 'principal' 'knew or expected that [you] would or might undertake the activity'</p>			
<p>Is there anyone in a specified class of foreign person (whether living in Australia or overseas) or entity who might know or expect that you would or might carry out the activity?</p>	<p>If 'yes', for any class of foreign person, the Act applies (s 21)</p>	<p>If 'yes', for any class of foreign person, the Act applies (s 21)</p>	<p>If a foreign government, the Act applies (s 20)</p> <p>If any other class of foreign person, the Act applies (s 21)</p>	<p>If 'yes', for</p> <p>(a) a foreign government; or</p> <p>(b) a foreign public enterprise;</p> <p>or</p> <p>(c) a foreign political organisation the Act applies (s 21).</p> <p>If for:</p> <ul style="list-style-type: none"> • a foreign business, or • an individual who is neither an Australian citizen nor a permanent Australian resident, <p>the Act does not apply (s 21)</p>

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Registration obligation (even if activity is never undertaken)	<p>If above apply and no exemption applies, you must register the 'arrangement' with the foreign person/each foreign person within 14 days (ss 16, 18). It seems likely that consideration paid or payable will need to be disclosed (s 34 (4)(d)).</p> <p>Fees apply – s 63.</p> <p>Penalty for failure:</p> <p>s 57(1)(2) – if intentional (either failure to register or giving termination notice too early) and activity occurs, imprisonment for 7 years, s57(3) if reckless and activity occurs, imprisonment for 5 years,</p> <p>s 57(4)(5) if intentional or reckless (either failure to register or giving termination notice too early) and no activity occurs, imprisonment for 12 months.</p>			
Reporting obligations – material changes	<p>Must register material changes to information which has been provided in relation to the registration within 14 days (s 34) including additional registrable activity, change in consideration payable.</p> <p>Failure is an offence under s 58(1) (60 penalty units ie currently \$12,600) and if the information is or becomes false or misleading is also a Criminal Code offence (s 137.1)</p>			
Reporting obligations – communications activity/ donations	<p>Section 38 – rules may prescribe obligation to notify of specified instances of communication activity.</p> <p>Failure is an offence under s 58(1) (60 penalty units ie currently \$12,600)</p>			<p>Section 35 – must within 14 days report once electoral donation threshold reached, and as to total value reached.</p> <p>Failure is an offence under s 58(1) (60 penalty units ie currently \$12,600) and if the information is or becomes false or misleading is also a Criminal Code offence (s 137.1)</p>

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Reporting obligations – update as at voting period commencement	<p>Must notify Secretary within 14 days of commencement of federal election or designated vote ‘voting period’ confirming registration information is up to date or updating information if necessary (s 36)</p> <p>Failure is an offence under s 58(1) and if the information is or becomes false or misleading is also a Criminal Code offence (s 137.1)</p> <p>Penalty: (60 penalty units ie currently \$12,600)</p>			
Reporting obligations – during voting period	<p>Section 37: must notify Secretary within 7 days of any activity ‘on behalf of’ the foreign ‘principal’ at any time in the voting period if the activity relates to the federal election/ designated vote and the activity is for the purpose of political or government influence.</p> <p>Failure is an offence under s 58(1) and if the information is or becomes false or misleading is also a Criminal Code offence (s 137.1)</p> <p>Penalty: (60 penalty units ie currently \$12,600)</p>		<p>Section 37: must notify Secretary within 7 days where, at any time in the voting period, and if the activity relates to the federal election/ designated vote, you are involved in:</p> <ul style="list-style-type: none"> any parliamentary lobbying on behalf of a foreign government, any parliamentary lobbying on behalf of another foreign ‘principal’ for the purpose of political activity or governmental influence <p>Failure is an offence under s 58(1) and if the information is or becomes false or misleading is also</p>	<p>Section 37(3): must notify Secretary within 7 days of any activity ‘on behalf of’ the foreign ‘principal’ at any time in the voting period if the activity relates to the federal election/ designated vote and the activity is for the purpose of political or government influence, and the total disbursements reach the threshold or multiple mentioned in section 35 in the voting period.</p> <p>Failure is an offence under s 58(1) and if the information is or becomes false or misleading is also a Criminal Code offence (s 137.1)</p> <p>Penalty: (60 penalty units ie currently \$12,600)</p>

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			a Criminal Code offence (s 137.1) Penalty: (60 penalty units ie currently \$12,600)	
Annual renewal of registration (s 39)	<p>Section 39: must be carried out by the end of the renewal period each year if the person has not given a notice that they are no longer liable to register</p> <p>Fees apply – s 63.</p> <p>Failure is an offence under s 57.</p> <p>s 57(1) if intentional and activity occurs, imprisonment for 7 years,</p> <p>s 57(3) if reckless and activity occurs, imprisonment for 5 years,</p> <p>s 57(4) if intentional or reckless and no activity occurs, imprisonment for 12 months.</p>			
Notice of end of liability to register (s 31)	<p>Notice of end of liability must be given under s 31. Penalties apply under s 57 if the notice is given too early ie when an arrangement with a foreign ‘principal’ still exists.</p> <p>s 57(2) if intentional (giving termination notice when registrable arrangement still exists) and activity occurs, imprisonment for 7 years,</p> <p>s 57(5) if intentional (giving termination notice when registrable arrangement still exists) whether or not activity occurs, imprisonment for 12 months.</p>			
Record keeping obligations (s 40)	<p>Must retain while registered and until 5 years after registration ends records of:</p> <ol style="list-style-type: none"> (1) registrable activities (2) benefits provided by foreign ‘principal’ 	<p>Must retain while registered and until 5 years after registration ends records of:</p> <ol style="list-style-type: none"> (1) registrable activities (2) benefits provided by foreign ‘principal’ (3) details of arrangement with foreign ‘principal’ (4) other information or material communicated or distributed in Australia ‘on behalf of’ the foreign ‘principal’ 		

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	<p>(3) details of arrangement with foreign 'principal'</p> <p>(4) information or material forming part of any communications activity that is registrable</p> <p>(5) other information or material communicated or distributed in Australia 'on behalf of' the foreign 'principal'</p> <p>Failure is an offence under Sections 58(3) (60 penalty units ie currently \$12,600) and 61 (imprisonment for 3 years for intentional damage to, destruction of, concealment of, etc scheme records)</p>	<p>Failure is an offence under Sections 58(3) (60 penalty units ie currently \$12,600) and 61 (imprisonment for 3 years for intentional damage to, destruction of, concealment of, etc scheme records)</p>		
Obligation to provide information (s 59)	<p>On receipt of notice under s 45 (information as to whether person is liable to register) or 46 (information relevant to the scheme) for more information, must comply by end of specified period.</p> <p>Penalty for failure to comply within time: Imprisonment for 6 months unless all reasonable steps taken and information is ultimately provided as soon as practicable.</p>			
Penalty for providing false or misleading information or documents (s 60)	<p>On receipt of notice under s 45 (information as to whether person is liable to register) or 46 (information relevant to the scheme) for more information, must not provide information or documents that are false or misleading (including misleading by omission) in a material particular (onus on defendant).</p> <p>Penalty for failure: Imprisonment for 5 years unless all reasonable steps taken and information is ultimately provided as soon as practicable.</p>			