

# THE FOREIGN INFLUENCE TRANSPARENCY SCHEME HAS COMMENCED: ARE YOU REQUIRED TO REGISTER?

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Legal Briefings - By **Jacqui Wootton and Jodi Kerley**

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Australia's "Transparency Register" under the *Foreign Influence Transparency Scheme* is now live, with the time to register arrangements in existence at the date of the Scheme's commencement expiring on 10 March 2019. We look at the Scheme, which was designed to provide transparency over foreign influence in Australia, and the obligations under the Scheme.

## KEY TAKEAWAYS FOR BUSINESSES

- The Foreign Influence Transparency Scheme imposes registration and other obligations on persons who undertake or agree to undertake certain activities on behalf of "foreign principals".
- The definition of "foreign principal" is broad. Companies that have an element of foreign government ownership (whether immediate or ultimate) need to consider whether they are required to register under the Scheme. Other potential triggers include:

- where a “foreign principal” engages former high-ranking government officials or politicians, including as consultants or as members of boards or management ; and
- where certain registrable activities are carried out on behalf of another company that is related to a foreign government or foreign political organisation.
- For those carrying out activities covered by the Scheme, it will be important to determine what procedures and control mechanisms should be put in place to facilitate compliance with the Scheme on an ongoing basis.

## OVERVIEW OF THE NEW SCHEME

The *Foreign Influence Transparency Scheme Act 2018* (Cth) (**Scheme**) commenced on 10 December 2018.

The Scheme aims to increase transparency over foreign influence over Australia’s political and government processes and the views of the Australian public on political or government matters.

To that end, the Scheme imposes registration and other obligations on persons who undertake or agree to undertake certain, mostly political, activities on behalf of “foreign principals”.

Activities covered by the Scheme include:

- parliamentary lobbying in Australia;
- general political lobbying in Australia;
- communications activity in Australia;
- disbursement activities in Australia;
- any activity by a former Cabinet Minister; and
- any activity by a “recent designated position holder”.

In some instances, the purpose of the activity is also relevant.

There are a number of exemptions available, including for industry representative bodies and registered charities. Limited exemptions exist for commercial or business pursuits in specific circumstances.

## WHO IS A “FOREIGN PRINCIPAL”?

The concept of “foreign principal” under the Scheme includes not only foreign governments and foreign political organisations but also persons, termed “foreign government related entities” (**FGRE**) and “foreign government related individuals”, who have certain prescribed relationships with foreign governments or foreign political organisations.

For example, a company will be a FGRE (and therefore a “foreign principal”) if:

a. a foreign government or foreign political organisation:

1. holds more than 15% of the issued shares of the company;
2. holds more than 15% of the voting power in the company;
3. can appoint at least 20% of the company’s board of directors; or

b. ~~4. can exercise total or substantial control over the company; or~~  
the directors of the company are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign government or foreign political organisation.

Significantly, the foreign ownership percentage caught by the concept of FGRE is less than the percentage specified for a “foreign person” under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (at least 20%) and “foreign public enterprise” under the foreign bribery offences in Australia’s Criminal Code (more than 50%).

The “more than 15%” ownership threshold was apparently chosen by the Government to reflect that the definition of FGRE captures companies *related* to foreign governments and foreign political organisations, rather than simply companies *controlled* by those foreign bodies.

In practice, this concept of relatedness means that it will not always be obvious whether a person is a “foreign principal”, particularly a FGRE. This may be problematic as the obligation to register rests on the person carrying out the activities, not on the potential “foreign principal”, who is in a better position to determine whether it is a FGRE.

## **UNDERTAKING ACTIVITIES “ON BEHALF OF” A “FOREIGN PRINCIPAL”**

A person undertakes an activity on behalf of a “foreign principal” if:

- a. the person undertakes the activity either under an arrangement with or in the service, on the order, at the request or under the direction of the “foreign principal”; and
- b. both the person and the “foreign principal” knew or expected the person would or might undertake activities that are registrable under the Scheme.

Being a subsidiary of a “foreign principal” does not mean, on its own, that the subsidiary carries out activities on behalf of the “foreign principal”. However, companies that are either directly or ultimately owned by a “foreign principal” may still be required to register if the “foreign principal” orders, requests or directs the subsidiary to carry out registrable activities.

## **OBLIGATIONS UNDER THE SCHEME**

If required to register, a person must provide certain information to the Attorney-General’s Department, including the nature of the person’s relationship with the “foreign principal” and the type of registrable activity undertaken on behalf of the “foreign principal”.

Some of the information provided to the Department will be available on the public “transparency register”.

Registrants are then subject to a number of ongoing reporting and record-keeping requirements and, if communicating or disclosing information to the public on behalf of the “foreign principal”, must disclose this fact in accordance with the requirements of the Scheme. There are also heightened reporting requirements during voting periods.

It is a criminal offence to:

- a. fail to register under the Scheme;
- b. fail to fulfil obligations under the Scheme;
- c. provide false or misleading information to the Department; and
- d. destroy records with the intent of avoiding or defeating the object of the Scheme.

If required to register, there are deadlines by which to do so under the Scheme.

For new arrangements with or new activities undertaken for “foreign principals”, businesses have 14 days from entering the arrangement or undertaking the activity to register under the Scheme.

## **IMPLICATIONS FOR BUSINESSES**

Businesses and other people who undertake activities on behalf of “foreign principals” should be investigating whether any of those activities could be caught by the Scheme. This is particularly important for companies who have an element of foreign government ownership (whether immediate or ultimate) and companies who provide services to foreign entities in Australia.

While a company is not considered to undertake activities on behalf of a “foreign principal” merely because the company is a subsidiary of a “foreign principal”, difficult questions as to the application of the Scheme may still arise in the context of operating within a corporate group where objectives are shared amongst members of the group.

Businesses that fall within the definition of a FGRE will need to consider the Scheme with respect to any current or future engagements of former high ranking government officials or politicians, including those who act as consultants or as members of the board or management committees.

Further and as indicated above, it may not always be clear whether a person is a “foreign principal”, particularly a FGRE. Accordingly, before carrying out any registrable activity on behalf of another company, it will be important to make reasonable enquiries as to whether there is a relationship between that company and a foreign government or foreign political organisation.

Those businesses that expect to be caught by the Scheme should put systems and controls in place to facilitate compliance with the Scheme.





## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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