Outline of Australia's Foreign Relations (State and Territory Arrangements) Bill

The Bill establishes a novel and complex regulatory regime, which is summarised in broad terms by this outline. If passed in its present form, the Bill will have a significant impact on the State and Territory entities that fall within its scope. These entities will need to understand their obligations under the Bill and the consequences of not meeting those obligations.

Legislative History to Date

The Australia's Foreign Relations (State and Territory Arrangements) Bill ('the Bill') was introduced into the House of Representatives on 3 September 2020. The Bill has been referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for report by 5 November 2020.

Purpose of the Bill

s 5(1) of the Bill states:

> The object of this Act is to ensure that the Commonwealth is able to protect and manage Australia's foreign relations by ensuring that any arrangement between a State/Territory entity and a foreign entity:
>
> (a) does not, or is unlikely to, adversely affect Australia's foreign relations; and
>
> (b) is not, or is unlikely to be, inconsistent with Australia's foreign policy.

The first point to note is the use of the terms 'Australia's foreign relations' and 'Australia's foreign policy'. s 5(2) non-exhaustively defines 'Australia's foreign policy' as a policy that the Minister for Foreign Affairs is satisfied is the Commonwealth's policy on 'Australia's foreign relations' or 'things outside Australia', whether or not the policy is 'written and publicly available' or has been 'formulated, decided upon, or approved by any particular member or

body of the Commonwealth'. The Explanatory Memorandum ('ExMemo') observes that this last point:

> recognises that foreign policy is dynamic, and ensures that the definition of Australia's foreign policy will be sufficiently flexible to cover a policy regardless of whether it was the product of, or approved by, the Cabinet, any other ministerial decision-making body, the Prime Minister or any other Minister, the Department of Foreign Affairs and Trade, or any other department of State.[1]

The ExMemo makes clear that 'foreign policy' for the purposes of the Bill is not the preserve of the Minister for Foreign Affairs or the Department of Foreign Affairs. Instead, 'foreign policy' includes any policy which is developed by any Commonwealth Minister or department, as long as it relates to 'Australia's foreign relations' or 'things outside Australia'.

The Bill does not define the term 'foreign relations'. The ExMemo does refer to the external affairs power under the Constitution, stating that it:

> supports legislation with respect to matters or things outside the geographical limits of Australia, as well as legislation with respect to matters concerning Australia's relations with other nations.[2]

This statement points to the term 'foreign relations' being intended to cover 'matters concerning Australia's relations with other nations'.

Key Definitions

The term 'foreign arrangement' is defined in s 6 as an arrangement between a 'State/Territory entity' and a 'foreign entity'. The term 'arrangement' is defined in s 9(1) as:

> any written arrangement, agreement, contract, understanding or undertaking:
>
> (a) whether or not it is legally binding; and
>
> (b) whether or not it is made in Australia; and
>
> (c) whether it is entered before, on or after the commencement day.

State and Territory Entity

[1] Explanatory Memorandum, para. 187.
[2] Explanatory Memorandum, para. 185.

The term ‘State/Territory entity’ is addressed in s 7, which contains a list of entities that fall under the term, including local government bodies and public universities. Corporations operating on a ‘commercial basis’ are excluded from the definition.

Foreign Entity

The term ‘foreign entity’ is defined in s 8, which contains a list of entities covered by the term, including national and regional governments and universities. Again, corporations operating on a ‘commercial basis’ are excluded from the definition. Of note is the fact that ‘foreign entity’ is not expressly defined to include international organisations. The position in relation to these organisations may be addressed in the rules, as the definition of ‘foreign entity’ provides that it includes ‘an entity that is external to Australia and is *prescribed by the rules* to be a foreign entity’ (emphasis added). The definition of a ‘core foreign entity’ under s 10 also permits an entity ‘that is external to Australia’ to be ‘*prescribed by the rules* to be a core foreign entity’ (emphasis added). This mechanism could be applied to international organisations.

Core Foreign Arrangement

The term ‘core foreign arrangement’ is defined in s 10 as an arrangement between a ‘core State/Territory entity’ and a ‘core foreign entity’ which, in turn, are both defined as a government or department/agency of government. The term ‘core foreign arrangement’ does not draw its meaning from the importance of an arrangement’s subject matter, but the parties to it.

Legislative Scheme

The ExMemo states the Bill establishes a ‘two tier system’ of approval for foreign arrangements as follows:

a) for core foreign arrangements, under Part 2, the Minister’s approval is required in order for the core State/Territory entity to commence negotiations, or enter the arrangement; and

b) for non-core foreign arrangements under Part 3, the State/Territory entity must notify the Minister before entering the arrangement, and the Minister has discretion to make a declaration that the State/Territory must not negotiate or enter the arrangement.[3]

Part 2 – core foreign arrangements

The ExMemo summarises the operation of Part 2 in the following terms:

> After receiving notice from the relevant State/Territory entity, the Minister must make a decision within 30 days. The Minister must give approval if he or she is satisfied that the arrangement would not adversely affect Australia's foreign relations and would not be inconsistent with Australia's foreign policy. If the Minister is not satisfied of these factors, he or she must refuse to provide approval … If the Minister does not make a decision within the 30 day period, the Minister is taken to have approved the proposed negotiation or arrangement.[4]
>
> If a core State/Territory entity enters a core foreign arrangement in contravention of the prohibition in Part 2, … the arrangement is invalid and unenforceable, not in operation or required to be terminated … as relevant. The Minister may also enforce the prohibitions … by seeking an injunction from the High Court or Federal Court.[5]

Part 3 – non-core foreign arrangements

Part 3 regulates non-core foreign arrangements. These are arrangements between core State/Territory entities and non-core foreign entities, non-core State/Territory entities and core foreign entities and non-core State/Territory entities and none-core foreign entities.

Unlike the position with core foreign arrangements, a State/Territory entity is not required to notify the Minister of the proposed negotiation of a non-core foreign arrangement. The ExMemo states that:

> This ensures that State/Territory entities may negotiate foreign arrangements freely, until or unless the Minister is of the view that the negotiation adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.[6]

[3] Explanatory Memorandum, para. 14.
[4] Explanatory Memorandum, para. 17.
[5] Explanatory Memorandum, para. 18.
[6] Explanatory Memorandum, para. 648.

If the Minister takes the view that the negotiation adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy, he or she may make a written declaration that the State/Territory entity must not start, or continue, to negotiate the arrangement.

Although not required to give notice that it is negotiating a non-core foreign arrangement, a State/Territory entity must give a notice to the Minister if it proposes to *enter* a non-core arrangement with a foreign entity. The Minister may make a declaration prohibiting a State/Territory entity from entering the non-core arrangement. Unlike the regime governing core foreign arrangements, which imposes a time limit on the Minister to make decisions on approvals, the Bill does not to impose a time limit in relation to declarations. Instead, s 37 requires the Minister, 'as soon as practicable after making the declaration', to give written notice of the declaration to the State/Territory.

What about pre-existing arrangements?

Part 4 permits the Minister to make declarations in relation to foreign arrangements that are in operation. The arrangements may pre-date the commencement of the legislation (addressed below under Schedule 1) or have been entered into after commencement and allowed to proceed under the frameworks established by Parts 2 or 3. The Minister may make declarations that such arrangements are invalid and unenforceable, not in operation or required to be varied or terminated, as relevant. Such declarations may be made where the Minister is satisfied that the relevant arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

Part 4 also permits the Minister to make declarations in relation to subsidiary arrangements made under foreign arrangements. The Minister may make declarations that such subsidiary arrangements are invalid and unenforceable, not in operation or required to be varied or terminated, as relevant, if the Minister is satisfied that the relevant arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

Schedule 1 of the Bill provides for transitional requirements relating to the notification of foreign arrangements entered into prior to the commencement of the legislation. Under this Schedule, State/Territory entities are required to notify the Minister of such arrangements. If the foreign arrangement is a core foreign arrangement, then the State/Territory entity must

notify the Minister before the end of three months following commencement of the legislation. If the foreign arrangement is a non-core arrangement, then the State/Territory entity must notify the Minister about the arrangement before the end of six months following commencement of the legislation. If a State/Territory entity fails to notify the Minister of core foreign arrangements in accordance with the Schedule, the relevant arrangement will be automatically deemed to be invalid and unenforceable, not in operation or required to be terminated.

When making declarations under Part 3 and Part 4, the Minister must take into account matters set out in s 51, including the extent of the performance of the arrangement, the financial consequences for the State/Territory, whether the declaration would impede the acquisition of goods or services by the State/Territory, and any other matter the Minister considers relevant. The obligation on the Minister to take these factors into account is qualified by the requirement for the State/Territory to give information on the factors to the Minister. It appears that in the absence of such information the Minister is not required to consider the factors.

It is worth noting that there is not an equivalent requirement for the Minister to take these factors into account when making decisions under Part 2, which deals with core foreign arrangements.

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PUBLISHED 01 OCTOBER 2020.