# 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, 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 was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee, which reported on 5 November 2020. The Committee's Report and the Government's Response to it of 17 November 2020 are addressed below.

## *Purpose of the Bill*

The Commonwealth Government is responsible 'for managing Australia's external affairs and developing and implementing Australia's foreign policy'.[1] The Explanatory Memorandum accompanying the Bill ('ExMemo') identifies what amounts to a 'blind spot' for the Commonwealth Government in discharging this responsibility when it states that:

> [T]he Commonwealth currently has little awareness of engagement between State or Territory governments and foreign governments, and their associated entities. There is no existing mechanism or consistent practice to ensure that State or Territory governments notify the Commonwealth of arrangements with foreign governments or consult and seek advice on the

[1] Explanatory Memorandum [5].

impact of such arrangements on Australia's foreign relations and foreign policy.[2]

The Bill is intended to remedy this 'blind spot'. s 5(1) 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.

To this end, the Bill establishes a vetting regime to ensure that:

> State/Territory entities cannot negotiate, enter, vary, or continue to give effect to arrangements with foreign entities where the arrangement would adversely affect Australia's foreign relations or is inconsistent with Australia's foreign policy.[3]

***Key definitions***

*'Australia's foreign policy' and 'Australia's foreign relations'*

The Bill uses 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 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.[4]

There can be no objection in principle to seeking flexibility in the definition of 'foreign policy', but the pursuit of flexibility may be fairly criticised when it allows for a policy which is not 'publicly available'. How can State and Territory entities pursue arrangements with foreign entities that are consistent with Australia's foreign policy when that policy need not be in the public domain?

[2] Explanatory Memorandum
[3] Ibid [8].
[4] Ibid [187].

The ExMemo also 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 and Trade. 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.[5]

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

*'foreign arrangement'*

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 broadly 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/ Territory entity'*

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

[5] Explanatory Memorandum [185].

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. s 10(4)(b) also defines a 'core foreign entity' as 'an entity that is external to Australia and is prescribed by the rules to be a core foreign entity'. This would allow the Minister for Foreign Affairs to prescribe an international organisation to be a 'core foreign entity'. 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.[6]

*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

[6] Explanatory Memorandum [14].

> 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.[7] 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.[8]

*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.[9]

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 notice to the Minister if it proposes to *enter* a non-core arrangement with a foreign entity. The Minister may then 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 to give written notice of the declaration to the State/Territory 'as soon as practicable after making the declaration'.

[7] Explanatory Memorandum [17].
[8] Ibid [18].
[9] Ibid [648].

*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 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 impair the continued existence of the State or Territory as an independent entity and whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government. These last two matters reflect potential constitutional concerns, which Professor

George Williams AO elaborated upon in his appearance before the Committee. Professor Williams, who is one of Australia's leading constitutional scholars, observed that:

> [T]he High Court has held that a federal law will be invalid if it impairs the capacity of a state to function in accordance with the constitutional conception of the Commonwealth and the states as part of our federal structure. This implied immunity of the states has been used in several cases to overturn federal laws that undermine the ability of state executives, courts and parliaments to operate in accordance with their functions.[10]

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 there is no equivalent requirement for the Minister to take these factors into account when making decisions under Part 2, which deals with core foreign arrangements. If there are potential constitutional issues arising in relation to action under Parts 3 and 4, then the same issues must also arise in relation to action under Part 2.

*Public Register*

s 53 requires the Minister to keep certain information relating to foreign arrangements considered under the Act on a publicly available register, which must be available on the internet.

*Procedural fairness*

s 58 provides that the Minister is not required 'to observe any requirements of procedural fairness in exercising a power or performing a function' under the Act. In defence of this approach, the ExMemo states that:

> Australia's foreign relations and foreign policy evolve with time and in response to international events and circumstances, and are not always appropriate to be made public or shared with State/Territory entities, courts or the public at large.[11]

[10] Hansard, October 13, p. 1.
[11] Explanatory Memorandum [1178].

***Report of Senate Committee***

The Senate Foreign Affairs, Defence and Trade Legislation Committee delivered its Report on the Bill on 5 November. The Report is comprised of a majority report signed by the Chair of the Committee, Senator Abetz, a dissenting report by the Australian Labor Party, and another dissenting report by the Greens. The Committee received 91 public submissions and 15 confidential submissions. It held public hearings in Canberra on 12 and 13 October 2020. Submissions were received from State and Territory Governments, the Department of Foreign Affairs and Trade, a wide range of universities, individual academics, the Law Council of Australia, the Australian Local Government Association, and private individuals.

The State and Territory Governments which made submissions (NSW, Tasmania, ACT, and NT) highlighted the importance to the States and Territories of the agreements/arrangements covered by the regime established under the Bill. While supporting the 'broad intent'[12] of the Bill, they registered concerns with aspects of it. The NSW Government considered that elements of the Bill created uncertainty in the 'process and status of arrangements'.[13] The NSW Government also called for 'processes and timeframes for notification and approval [to] align with realistic negotiating demands'.[14] The NT Government made a similar point.[15] It also argued for compensation to be given to Australian entities affected by the Commonwealth declaring an agreement/arrangement to be invalid.[16] The Tasmanian Government expressed concern that the broad definition of 'foreign policy' would create uncertainty for the States and Territories.[17] It also warned that 'some of the Bill's provisions may impact the independence of states and territories'.[18]

The Committee received 'extensive evidence' from universities.[19] Much of it criticised the Bill. The Committee noted in its Report that:

> The overall position expressed by the university sector is that public universities should not be included in the legislation; or if they are to be included, amendments are required to limit the

[12] NSW Government submission, p. 3.
[13] Ibid, p. 4.
[14] Ibid.
[15] NT Government submission, p. 2.
[16] Ibid.
[17] Tasmanian Government submission.
[18] Ibid.
[19] Committee Report [2.85].

> impact on the sector.[20]

Universities argued the approval regime would limit their capacity to enter collaborative research arrangements with foreign universities.[21] They were concerned at the regulatory burden that would be imposed by the regime.[22]

On the issue of foreign universities, s 8(1)(i) defines a foreign university as a 'foreign entity' if it is located in a foreign country and does not have 'institutional autonomy'. The Bill does not offer a definition of this term, leaving this task to the rules. However, the ExMemo does give the following example of a case where a university would not have 'institutional autonomy':

> [A] lack of institutional autonomy may include a government or a political party exerting control or influence over the university management, leadership, curriculum, and/or research activities.[23]

Universities were concerned at the uncertainty created by leaving the definition of 'institutional autonomy' to the rules.[24]

As noted above, Professor George Williams AO raised concerns about the constitutional validity of elements of the Bill. In its Report, the Committee referred to evidence given by DFAT officers in relation to these concerns as follows:

> DFAT officers gave evidence that it had received legal advice from the Commonwealth Solicitor-General on the constitutionality of the bills, and stated that DFAT is 'confident in the constitutional basis for the legislation'. DFAT officials declined to elaborate further on the legal advice received or specifically answer the questions raised by other witnesses about constitutionality.[25]

The Report goes on to state:

> When specifically asked to provide further information on notice, the Attorney-General lodged a formal claim of public interest immunity with the committee, citing 'the long-standing practice of successive Australian Governments to not disclose privileged legal advice' as the basis of his claim to withhold the specifics of the legal advice provided by the Solicitor-

[20] Committee Report [2.85].
[21] Ibid.
[22] Ibid.
[23] Explanatory Memorandum [252].
[24] Committee Report [2.98].
[25] Ibid [2.27] footnotes omitted.

General from the committee.[26]

The Committee concluded it could not 'form a considered judgement on the constitutional questions raised in the evidence before it' and that it would be 'a matter for the Senate as a whole to weigh these issues during its deliberations on the bills'.[27]

*Recommendations*

The Report prepared by the Majority made the following recommendations:

**Recommendation 1**

The committee recommends that the definition of 'institutional autonomy' be included in the bill itself (e.g. in the definition of 'foreign entity' in section 8), rather than as a disallowable rule.

**Recommendation 2**

The committee recommends that the government consider including a definition of corporate autonomy in the bill to clarify the operation of the legislation in relation to corporations.

**Recommendation 3**

The committee recommends that the rules exempt minor administrative or purely logistical matters (e.g. flights, visas etc) and minor alterations of arrangements that do not alter their substance.

**Recommendation 4**

The committee recommends that the government consider broadening the scope of the legislation to include hospitals.

**Recommendation 5**

The committee recommends that DFAT consult with stakeholders on the proposed rules, and that the rules be released publicly before the consideration of the bills by the Parliament.

**Recommendation 6**

[26] Committee Report [2.28] footnote omitted.
[27] Ibid [2.160].

The committee recommends that, subject to consideration of the above recommendations, the bills be passed.

***Government Response***

As part of its Response, the Government undertook to address the term 'institutional autonomy' in the Bill and provided draft text to this end.[28] On the issue of corporations, the Government stated that DFAT would issue guidance to clarify the operation of the Bill in relation to corporations.[29] The Government also undertook to table draft rules during the consideration of the Bill by Parliament.[30]

In responding to a recommendation in the dissenting Labor Party report that an 'oversight mechanism' be established, the Government stated it would introduce an amendment to the Bill to provide for a statutory review of the legislation after three years of operation.[31]

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[28] Government Response, p. 3.
[29] Ibid p. 4.
[30] Ibid p. 6.
[31] Ibid p. 7.