



Australian Government

Australian Government response to the
Senate Foreign Affairs, Defence and Trade Legislation
Committee report:

Australia's Foreign Relations (State and Territory
Arrangements) Bill 2020 and Australia's Foreign
Relations (State and Territory Arrangements)
(Consequential Amendments) Bill 2020

November 2020

Introduction

The Australian Government welcomes the opportunity to respond to the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee) report on the Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 (the Bill) and the Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020.

The Bill is a critical tool through which the Commonwealth will exercise its responsibility for setting Australia's foreign policy and representing our nation internationally. States, Territories and other government entities, including local councils and public universities, make an important contribution to advancing Australia's foreign policy. However, in the absence of the Bill, the Commonwealth Government has little visibility over arrangements that those government entities enter into with foreign governments. The Government is committed to promoting consistency in all international arrangements and ensuring they protect and promote the national interest.

The majority of the Committee supported the passage of the Bill, subject to consideration of several recommendations. The Australian Labor Party members have issued a dissenting report, calling for a redrafting of the Bill in respect of several matters. The Australian Greens members have also issued a dissenting report, recommending that the Bill not pass in its current form.

The Government intends to pursue the passage of the Bill through the Parliament, but accepts the merit of many of the recommendations made by the Committee.

The Government thanks all members of the Committee for reviewing the Bill, including considering 107 written submissions and holding two days of hearings.

Committee Recommendations

Committee 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.

Response: Agreed.

The Government will move an amendment to the Bill to include the circumstances in which a foreign university is taken not to have 'institutional autonomy' for the purposes of the definition of 'foreign entity' in section 8.

The amendment will include new subsections 8(2)-(4) in the Bill as follows:

- (2) For the purposes of subparagraph (1)(i)(ii), a university does not have institutional autonomy if, and only if, a foreign government (whether or not the government of the country, or part of the country, in which the university is located) is in a position to exercise substantial control over the university.
- (3) For the purposes of subsection (2), a foreign government is in a position to exercise substantial control over a university if, and only if, one or more of the following paragraphs are satisfied:
 - (a) a majority of the members of the university's governing body are required, by a law or the university's governing documents, to be members or part of (however described) the political party that forms the foreign government;
 - (b) education provided or research conducted at the university is required, by a law or the university's governing documents, to adhere to, or be in service of, political principles or political doctrines of:
 - (i) the foreign government; or
 - (ii) the political party that forms the foreign government;
 - (c) the university's academic staff are required, by a law or the university's governing documents, to adhere to, or be in service of, political principles or political doctrines referred to in paragraph (b) in their teaching, research, discussions, publications or public commentary.
- (4) The ***governing documents*** of a university are the constitution, rules or other official documents by which the university is constituted or according to which the university operates.

Committee 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.

Response: Agreed in part.

The Department of Foreign Affairs and Trade (DFAT) will issue guidance to clarify the operation of the Bill in relation to corporations.

The Bill provides that corporations that operate on a commercial basis are excluded from the definitions of 'State/Territory entity' under paragraph 7(g) and 'foreign entity' under paragraph 8(1)(k). The Explanatory Memorandum details that the Bill is not intended to capture corporations, even if they are wholly or partly owned or controlled by an Australian State or Territory or by a foreign government. This is because the Bill is aimed at arrangements between State and Territory government entities and foreign government entities.

The Minister may make a declaration about an arrangement by, or with, a corporation that operates on a commercial basis where the arrangement is a subsidiary arrangement to a core or non-core foreign arrangement and:

- a declaration has been made in respect of the head foreign arrangement, or
- that head arrangement was entered in contravention of a decision by the Minister under the Bill, or
- that head arrangement is a pre-existing core arrangement that was not notified to the Minister.

Purely commercial arrangements by corporations fall outside the scope of the Bill. There are a number of existing schemes which ensure that Australia's national interests are protected in arrangements with foreign corporations, including under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the *Security of Critical Infrastructure Act 2018* (Cth).

The Government proposes to move an amendment to the Bill to require a statutory review of the legislation after three years of operation. As part of that review, the necessity or desirability of amending the scope of the legislation in relation to corporations may be considered.

Committee 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.

Response: Agreed.

The Minister for Foreign Affairs will make rules that exempt arrangements that solely deal with minor administrative or logistical matters (for example, flights, visa applications, accommodation, submitting paperwork, timing of conferences, or conference sessions). Where a State/Territory entity has notified the Minister that they have entered an arrangement, the rules will also exempt minor variations to that arrangement that do not alter the substance of the arrangement.

The draft rules will prescribe exempt arrangements, including:

- (1) For the purposes of the definition of *exempt arrangement* in section 4 of the Act, the following kinds of arrangements are exempt arrangements:
 - (a) core foreign arrangements which:
 - (i) solely deal with the sharing of information or resources for the management of an emergency in Australia which has been declared (however described) by the Commonwealth, a State or a Territory; and
 - (ii) are negotiated, proposed to be entered or entered, while that emergency is declared;
 - (b) foreign arrangements solely dealing with minor administrative or logistical matters (including, for example, flights, accommodation, submitting paperwork or visa applications or the timing of conferences or conference sessions).
- (2) For the purposes of subsection 13(4) of the Act, a variation of an arrangement is an exempt arrangement if:
 - (a) the arrangement is a foreign arrangement; and
 - (b) the State/Territory entity that is party to the arrangement has given the Minister notice under the Act that the State/Territory entity has entered the arrangement; and
 - (c) the variation is a minor variation that does not alter the substance of the arrangement (including, for example, a variation that alters the number of students involved in a student exchange under an arrangement from 6 to 5).

Note: Under subsection 13(1) of the Act, the Act applies in relation to a variation of an arrangement in the same way it applies in relation to an arrangement.

Committee Recommendation 4

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

Response: Agreed in principle.

The Government excluded hospitals from the Bill given their public health focus and because hospital arrangements were considered less likely to impact Australia's foreign relations or foreign policy.

The Government notes that where State and Territory government departments or agencies responsible for health enter into foreign arrangements involving hospitals, such arrangements are already within the scope of the scheme.

However, the Government will move an amendment to the Bill to require a statutory review of the legislation after three years of operation, as referred to above in response to Committee recommendation 2. As part of that review, the necessity or desirability of broadening the scope of the legislation to include hospitals may be considered.

Committee 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.

Response: Agreed.

The Government agrees to table draft rules during consideration of the Bills by the Parliament.

Since the Bill's introduction, DFAT has conducted consultations with more than 60 stakeholders, including representatives from State and Territory governments, local governments and Australian public universities. These consultations have included discussions about potential rules, including matters to be included in notices, on the public register, and in respect of potential exemptions.

DFAT will continue to work closely with stakeholders on matters relating to implementation, including to ensure the obligations set out in the Bill are able to be administered efficiently and effectively.

Committee Recommendation 6

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

Response: Agreed, subject to the above responses.

Labor Recommendations

Labor Recommendation 1

That the government redraft the Bill and re-present it to the Parliament at the earliest opportunity.

Response: Agreed in part

The Government will move amendments to the Bill to include the definition of institutional autonomy and to propose a three year statutory review as set out above in response to Committee recommendations 1 and 4.

Labor Recommendation 2

That the redrafted Bill:

- a) Establish an oversight mechanism.*
- b) Subject to appropriate arrangements to protect national security, requires the minister to provide reasons for decisions, and a process for review of a minister's decision.*
- c) Addresses the lack of clarity in the definition of 'arrangements' and 'institutional autonomy'.*
- d) Requires an annual report to the Parliament by the Minister, outlining engagement with entities covered by the Bill to articulate and explain Australia's foreign policy and how entities should engage with foreign entities in Australia's national interest.*
- e) Addresses the regulatory gap of private universities.*

Response: Agreed in part.

- a) Establish an oversight mechanism.*

The Government will move an amendment to the Bill to require a statutory review of the legislation after three years of operation. This will enable consideration of whether it is necessary or desirable to improve the legislation, and provide Parliament with a further opportunity to consider its operation and additional public scrutiny.

Decisions made under the Bill remain subject to judicial review by the Federal Court under section 39B of the *Judiciary Act 1903* (Cth), and by the High Court in its original jurisdiction. These avenues of judicial review will provide a robust mechanism to challenge the legality of decision-making, and will ensure that an entity may challenge a decision that affects them.

Further, the public register will promote public transparency on the operation of the scheme and provide scrutiny over decision-making.

b) Subject to appropriate arrangements to protect national security, requires the minister to provide reasons for decisions, and a process for review of a minister's decision.

It would not be appropriate for the reasons for a decision based on foreign relations and foreign policy to be shared. Providing reasons for a decision could itself adversely affect Australia's foreign relations, particularly where the decision would reveal sensitive aspects of Australia's foreign policy. This has the capacity to compromise Australia's bilateral relationships, and disadvantage Australia's position in international forums or negotiations. Providing reasons for a decision could, therefore, defeat the object of the Bill to protect and manage Australia's foreign relations.

The Government maintains the position that it is appropriate not to provide for merits review in this Bill. The Administrative Review Council has identified certain types of decisions— such as those affecting Australia's relations with other countries — as being generally unsuitable for merits review. This decision making power is appropriately vested in the Minister for Foreign Affairs. Given the impact such decisions have on Australia's relationship with other countries, Commonwealth-State relationships and national security, it is appropriate that decisions not be subject to merits review.

c) Addresses the lack of clarity in the definition of 'arrangements' and 'institutional autonomy'.

The Government will move an amendment to the Bill to include a definition of 'institutional autonomy', as set out above in response to Committee recommendation 1.

The Government considers that the definition of 'arrangements' in section 9 of the Bill is sufficiently clear. It is deliberately broad to capture the range of means by which arrangements are entered into, and to avoid the provisions of the Bill being easily circumvented by entities using less formal means to transact.

However, the Minister for Foreign Affairs will make rules that exempt arrangements that solely deal with minor administrative or logistical matters (for example, flights, visa applications, accommodation, submitting paperwork, timing of conferences, or conference sessions). Where a State/Territory entity has notified the Minister that they have entered an arrangement, the rules will also exempt minor variations to that arrangement that do not alter the substance of the arrangement.

Should the Minister for Foreign Affairs choose, the Minister will be able to further narrow the scope of the Bill by exempting arrangements under the rules. Once pre-existing arrangements are notified and the Minister has greater visibility of arrangements entered into by State/Territory entities, the Minister may reassess whether certain types of arrangements are less critical from a foreign policy perspective and consider exempting such arrangements. The scope of exemptions may also be considered in the proposed statutory review of the Act.

d) Requires an annual report to the Parliament by the Minister, outlining engagement with entities covered by the Bill to articulate and explain Australia's foreign policy and how entities should engage with foreign entities in Australia's national interest.

Government does not consider it necessary to provide an annual report to Parliament on engagement with entities subject to the provisions of the Bill.

DFAT, including via its network of seven State and Territory offices and more than 100 overseas missions, regularly briefs State, Territory and local governments and their overseas representatives on a range of matters, including updates relating to foreign and trade policy issues. That engagement happens formally and informally, can be planned or ad hoc, and in respect of specific proposals with potential foreign policy impacts or on general matters. An annual report recording such engagement would be unnecessary, and a diversion of valuable resources.

DFAT will work closely with States, Territories, local governments and Australian public universities to implement the legislation, including by engaging with them to ensure Australia's foreign policy objectives are well understood. Since the Bill's introduction, DFAT has conducted consultations with more than 60 stakeholders, including representatives from State and Territory governments, local governments and universities.

The Government also considers that the public register established under Part 5 of the Bill provides an appropriate record of engagement in respect of specific arrangements.

e) Addresses the regulatory gap of private universities.

The Bill is intended to address foreign engagement by State and Territory governments and government entities. Private universities are, therefore, appropriately outside the scope of the Bill.

The Bill is not intended to impede Australian public universities undertaking international research and partnerships with foreign counterparts, or reduce their competitiveness compared to private universities. Much of the usual and routine business of public universities will proceed as it has in the past; simply with a greater level of visibility afforded to the Minister for Foreign Affairs and the Australian public.

Labor Recommendation 3

That the government make clear how this regime will interact with the existing legislation and guidelines that work to safeguard Australia's sovereignty including FIRB processes, UFIT Guidelines and the FITS and provide confidence that the Bill does not present a sovereign risk that will undermine investment and cost Australian jobs.

Response: Agreed in principle.

DFAT will work with other responsible Commonwealth Government departments to ensure that public materials regarding the scheme established by the Bill are clear in relation to its intent, purpose and application; that any duplication or replication in the operation of the Bill and other existing schemes is minimised; and the extent of any interaction between those schemes is clear.

There are several schemes which serve an important function in ensuring that Australia's national interests are protected in dealings with overseas entities. However, each of these schemes serve a different purpose and have a different policy intent from the Bill. None of these regimes have the specific focus of this Bill – facilitating Commonwealth oversight of foreign arrangements entered into by States and Territories and their entities, to ensure that their arrangements with foreign governments are consistent with Australia's foreign policy and do not adversely affect our foreign relations.

Under the *Foreign Acquisitions and Takeovers Act 1975* (the FIRB regime), the Treasurer is responsible for reviewing foreign investments to ensure that they are not contrary to the national interest.

Through the University Foreign Interference Taskforce, government and universities have jointly developed Guidelines to counter foreign interference in the Australian university sector.

The Foreign Influence Transparency Scheme is designed to provide the public with visibility of the nature, level and extent of foreign influence on Australia's government and politics.

Labor Recommendation 4

That the Government engage in genuine consultation with Australian entities covered by the Bill on the design of the regime.

Response: Agreed.

The Government is engaging with Australian entities in relation to the Bill.

The Prime Minister, the Minister for Foreign Affairs, the Minister for Education and their offices have each engaged with stakeholders in respect of the Bill. In addition, since the Bill's introduction, DFAT has conducted consultations with more than 60 stakeholders, including representatives from State and Territory governments, local governments and universities. These consultations have included discussions about potential rules, including matters to be included in notices, on the public register, and in respect of potential exemptions. They have also addressed interpretation of provisions and key terms, and the means for implementing the scheme.

Government will continue to work closely with stakeholders on the implementation of the Bill, including to ensure its streamlined and effective administration.