NSW Government submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade

Inquiry into *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020*

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Introduction

The New South Wales Government (NSW) acknowledges the importance of achieving a consistent and coherent approach to Australia's foreign relations and foreign policy and supports the broad intent of the Australian Government's *Australia's Foreign Relations (State and Territory Arrangements) Bill* ('the Bill').

At the same time, NSW recognises that in a globalised world, economic prosperity and security is underpinned by numerous, carefully considered State arrangements with international partners. As the Explanatory Memorandum notes, most of these arrangements deliver significant benefits for Australia. They create commercial opportunities or enhance the States' proper execution of their responsibilities (e.g. in health and education) while presenting minimal or no foreign policy risk.

It is in Australia's national interest that such arrangements continue with minimal constraints. States are best placed to identify and enter arrangements that serve their economic and policy goals and to build investment pipelines that drive the national economy. Now more than ever, such arrangements are needed to secure Australia's economic future, create jobs and promote economic recovery from COVID-19.

In seeking to regulate legitimate foreign policy interests, it is important that the Bill strikes the right balance between risk and convenience. Foreign policy considerations must enhance the quality of decision-making without impairing States' agility or producing unintended economic consequences.

Recommendations

The current Bill is broad in scope, proposes significant administrative and procedural obligations on States and Territories and gives the Minister for Foreign Affairs wide, enduring powers over foreign arrangements. The Explanatory Memorandum states it is not intended to impede low risk, beneficial arrangements or regulate purely commercial undertakings.

NSW submits that, with a number of straightforward amendments, the Bill can give better effect to this intention. NSW make four recommendations:

1. Define "commercial basis" to ensure certain purely commercial arrangements are not captured;

2. Create more procedural certainty for low risk arrangements;

3. Clarify what arrangements will be exempt from the scope of the Bill; and

4. Clarify the operation of the Public Register.

Recommendation 1: define "commercial basis" to ensure certain purely commercial arrangements are not captured

Sections 7(g) and 8(k) of the Bill exclude "corporations that operate on a commercial basis" from the operation of the Bill. According to the Explanatory Memorandum, this definition is intended to ensure commercial corporations (whether wholly or partly government owned) and purely commercial head arrangements remain unregulated. NSW supports this intent, but submits it is unclear whether the definition achieves the objective.

As the Explanatory Memorandum acknowledges, foreign states structure their governments in a variety of different ways. Many foreign State-owned (or controlled) enterprises may not be strictly constituted as "corporations" or operate on a purely "commercial basis" as typically understood under Australian law. Yet the arrangements they enter into will be commercial in nature. Since foreign arrangements are classified on an entity basis, and neither "corporation" or "commercial basis" is defined, there is a risk that purely commercial arrangements will be captured and regulated in apparent contradiction to the Bill's intent.

In addition, an ambiguous definition will force States and Territories to seek clarification from the Commonwealth Government on whether certain commercial partners, negotiating purely commercial arrangements, are captured by the Act. This will not only introduce uncertainty and delay into commercial negotiations but also increase the administrative burden on both Commonwealth and State bureaucracies.

NSW recommends the Australian Government consider amending the Bill to ensure that arrangements which genuinely operate for commercial purposes are excluded from the scope of the Bill, as intended.

Recommendation 2: create more procedural certainty for low risk arrangements

Agility and procedural certainty are critical to the successful negotiation and conclusion of international arrangements, especially where downstream investment or commercial outcomes are anticipated. For States to continue securing successful outcomes, it is important that the processes and timeframes for notification and approval align with realistic negotiating demands. Certainty is also required to ensure the efficient and effective allocation of States' resources to negotiations.

As currently drafted, some provisions of the Bill create uncertainty in process and status of arrangements:

- **Sections 21 and 28** provide that Ministerial approval to negotiate and enter into core arrangements is implied if the Minister does not respond within 30 days. In practice, many arrangements must be negotiated and concluded in much shorter timeframes. Thus, a blanket 30 day "waiting period" will effectively prevent States from securing certain opportunities – or force a difficult choice to proceed without relevant approvals. Where an arrangement presents low foreign policy risk but high economic or policy benefit, a shorter, more active approval process should be available.

- **Section 35(1)** gives the Minister the power to declare negotiations of a non-core arrangement invalid despite there being no requirement to seek approval to negotiate such arrangements. This part of the scheme may result in inefficient use of State resources as it increases the risk of "sunk costs" in negotiations that are later cancelled.

- **Section 40(2)** gives the Minister the power to make a declaration in respect of any foreign arrangement in operation, regardless of any earlier decisions. **Sections 41 and 42** also allow the Minister to declare invalid legally binding arrangements under Australian or foreign law. If passed, the status of a large number of commercially important and beneficial arrangements will be rendered uncertain.

  NSW recommends that the Australian Government consider the impact of these provisions on relationships with international partners and investors and work with States and Territories to ensure confidence is preserved.

Recommendation 3: clarify what arrangements will be exempt from the scope of the Bill

Sections 4 and 13(4) of the Bill provide that certain arrangements may be exempt from obligations under the Bill. Exempt arrangements will be prescribed by the Minister under Rules and may include thematic types of arrangements or arrangements entered into during a particular period.

NSW strongly supports exempting certain categories of arrangements from the scope of the Bill. Properly utilised, this mechanism will ensure States can maintain a flexible approach to negotiating and entering into low risk arrangements. This flexibility is particularly important during ministerial visits and trade missions where arrangements must be negotiated within a matter of days. For example, during a 2017 trade mission to Japan, an MOU on teacher and student exchange was renegotiated and renewed in five days. Similarly, a technology cooperation partnership was concluded and announced on a three day visit to India in 2018. Both arrangements have led to significant cooperation, learning and tangible benefits for NSW and our international partners.

To work optimally, it is important that categories of exempt arrangements properly align with commercial and practical needs. This means exemptions could also extend to specific entities similar to exemption arrangements under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

NSW recommends the Australian Government consult with States and Territories to ensure that exempt arrangements are meaningfully defined and there is a clear and certain process for seeking exemptions. NSW supports publication of the Rules to ensure clarity for all parties.

Recommendation 4: clarify the operation of the Public Register

Section 53(3) of the Bill provides that information must not be included on the Public Register where the Minister is satisfied that information is commercially sensitive or must otherwise be excluded.

NSW supports the appropriate protection of commercially sensitive and other confidential information. Maintaining commercial confidentiality of certain discussions preserves the integrity of negotiations between States and their international partners.

NSW welcomes further clarification of how aspects of the Public Register will operate. For instance, it is unclear to what extent details of exempt arrangements will be recorded on the Public Register. Similarly, the Bill should clarify whether exempt variations of arrangements must be recorded if the original arrangement has been disclosed.