



AUSTRALIA'S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) ACT 2020 GUIDANCE – GOVERNMENT CORPORATIONSⁱ

Australia's Foreign Relations (State and Territory Arrangements) Act 2020 (the Act) fosters a systematic and consistent approach to foreign engagement across all levels of Australian government. It creates a scheme to ensure that arrangements between State or Territory governments and foreign government entities do not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy.

This Guidance Note should be read together with 'Fact Sheet 1–Overview'.

When does the Scheme apply to corporations?

The Foreign Arrangements Scheme (the Scheme) creates obligations for State/Territory entities that propose to enter, or enter, an arrangement with a foreign entity.

The Scheme is not intended to regulate arrangements with **purely commercial corporations**, including where the corporation is wholly or partly state-owned.

To reflect this intention, corporations that **operate on a commercial basis** are excluded from the definition of 'State/Territory entity' and 'foreign entity'. This means that commercial corporations are not included within the Scheme, except where they are party to a **subsidiary arrangement** entered into under the auspices of a head arrangement between a State/Territory entity and a foreign entity.

However, corporations that **do not operate on a commercial basis** are within the scope of the Scheme where they fall within the definition of 'State/Territory entity' or 'foreign entity' (for example, because the corporation is an **agency** of a State/Territory or foreign government). Whether a State/Territory or foreign corporation is captured by the Scheme will need to be determined on a **case-by-case** basis.

What factors are relevant to determining whether a corporation is in scope?

A government-controlled or owned corporation is likely to be within scope of the Scheme where its operations predominantly involve goods, services or activities that are provided or conducted:

- **gratuitously** or not with a view to generating revenue or profit;
- not generally pursuant to a **commercial contract or agreement**;
- with the support of funding from **consolidated revenue**; and/or
- with the purpose of fulfilling **statutory functions** or to pursue objectives which are not of a commercial character but are, instead, **predominantly political or governmental**.

These factors should be considered **holistically**. None of the factors will, on its own, be determinative. Further, these factors are not exhaustive. Each corporate entity will need to be **assessed on a case-by-case basis**, having regard to its individual circumstances.

State/Territory entities are **best placed** to make an assessment of whether a State/Territory entity or foreign entity is within scope, as they have awareness of the nature of their own operations and the operations of their foreign partners.

How should these factors be used to distinguish a commercial corporation?

Key factors to consider include the financing of an entity, whether the entity's operations occur gratuitously and whether the entity's operations are political or governmental in character.

- Where a corporation conducts its operations gratuitously, it is more likely that the corporation's operations are not commercial. However, there is a difference between operating gratuitously and operating commercially but without making a profit. A corporation that fails to make a profit, but does not operate gratuitously, may not be within the Scheme.
- Where a corporation's operations are not generally undertaken pursuant to a commercial contract or agreement, it is more likely that the corporation's operations are not commercial. Where a corporation may be capable of entering a commercial contract, or may do so on an ad hoc basis, this is not sufficient to demonstrate that it operates on a commercial basis.
- Where a corporation is financed by a State/Territory or foreign government, it is more likely that the corporation's operations are not commercial. The ordinary meaning of 'commercial' is that there is an exchange of goods, commodities or services, generally in return for monetary or other reward.
- Where a corporation's operations appear to be intended to promote, or to contribute to, public debate concerning a current or proposed law or government policy, or another issue of general concern to the community, it is more likely that the corporation's operations are not commercial. This is particularly the case where the corporation's duties, powers and objects are stipulated by law or otherwise relate to matters of policy. For example, where a corporation's purpose is to enforce a law or pursue government policy, the corporation is likely to be in scope.

In contrast where the functions and activities performed by a corporation are ones that can be, and are, performed by **private entities engaged in a business**, this will tend to indicate that the corporation is **not within scope**.

How will entities comply with obligations under the Scheme?

State and Territory entities must notify the Minister of foreign arrangements within scope of the Scheme through the online portal: www.foreignarrangements.gov.au.

Corporations that are considered to be agencies of a State/Territory entity or foreign government are **core entities** for the purposes of the Act.

Where both the foreign entity and the State/Territory entity are core entities, the arrangement must be notified as a **core arrangement**. If either entity is a **non-core** entity, the arrangement is a **non-core arrangement**.

Pre-existing arrangements must be notified by:

- **10 March 2021** if core foreign arrangements, and
- **10 June 2021** if non-core foreign arrangements.

Commencing **10 March 2021**, the Minister must be notified of a proposal to negotiate or enter a core foreign arrangement. The Minister must also be notified of a proposal to enter a non-core foreign arrangement. For both core and non-core arrangements, the Minister must also be notified on entering the arrangement.

Where can I get further information?

Contact the Department of Foreign Affairs and Trade at foreignarrangements@dfat.gov.au

ⁱ * This guidance sets out some of the requirements of the Australia's Foreign Relations (State and Territory Arrangements) Act 2020. It is not intended to be comprehensive and should not be relied on as a definitive interpretation of the Act. It is also not intended as legal advice. Readers should rely on the substantive provisions of the Act as enacted by Parliament, and any applicable rules, in assessing their obligations and seek independent legal advice.