



AUSTRALIA'S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) ACT 2020 GUIDANCE ON INSTITUTIONAL AUTONOMY¹

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 Fact Sheet should be read with 'Fact Sheet 1 – Overview' and 'Fact Sheet 4 – Australian Public Universities'

Purpose

This Fact Sheet is designed to assist State and Territory entities (especially Australian public universities) in their consideration of **whether a foreign university does not have institutional autonomy** under the Act.

When are arrangements with foreign universities covered?

The Foreign Arrangements Scheme applies to State and Territory entities (including Australian public universities) when they enter arrangements with:

- a foreign university that does not have institutional autonomy, or
- a foreign tertiary education institution that is a part of a foreign government (for example, a government military academy).

Further information on the range of arrangements covered by the Scheme is in **Fact Sheet 1**.

When does a foreign university not have institutional autonomy?

A foreign university does not have institutional autonomy if **a foreign government is in a position to exercise substantial control over the university**.

Under the Act,² a foreign government will be considered to be in a position to exercise substantial control over a university if, and **only if, one or more of the following indicators 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 the political party that forms the foreign government;

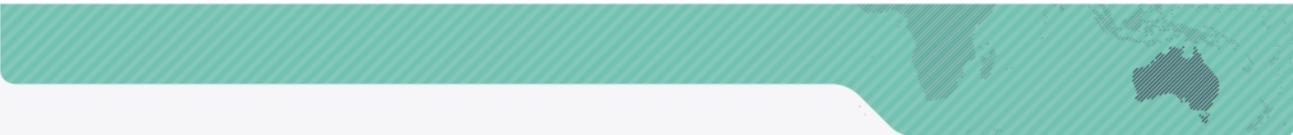
or

- (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;

or

¹ This FACT SHEET 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.

² Subsections 8(2)-(4).

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- (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 (b) above, in their teaching, research, discussions, publications or public commentary.

The circumstances described in (a), (b) and (c) above must be **required by a law or the university's governing documents** for the foreign university to be considered to not have institutional autonomy.

The three indicators are set out in the legislation to make the process of considering whether a foreign university has institutional autonomy as simple as possible. Similarly, the need for the indicators to be required by a law or the university's governing documents ensures that State and Territory entities do not need to consider whether the foreign university has institutional autonomy in practice.

The vast majority of foreign universities will not meet any of these indicators. Universities with similar levels of institutional autonomy to Australian universities do not meet these indicators. Universities with institutional autonomy separate from government, with freedom in relation to their internal governance, curriculum, research, teaching and discussion, and ability to publish those things, are not within scope of the Scheme. Accordingly, arrangements with these universities do not need to be notified.

What laws and governing documents do I consider?

To determine if something is 'required by a law', entities may consider legislation establishing a university, applicable education laws, or references to education in a country's constitution.

To determine if something is required by a university's governing documents, entities may consider the constitution, rules, or other official documents by which the university is constituted, or according to which the university operates. This includes university constitutions, charters, rules or official policy documents.

For the majority of foreign universities, these documents are available on the internet or may be provided by the foreign university to an entity before entering an arrangement as part of usual due diligence processes. When engaging foreign universities, it is expected that State and Territory entities conduct due diligence to assess whether a foreign university is within the scope of the Scheme. This may include conducting open source research and/or requesting copies of relevant laws or governing documents. This is consistent with existing due diligence processes outlined in the *Guidelines to Counter Foreign Interference in the Australian University Sector* and the ASIO Due Diligence Integrity Tool.

If an examination of the relevant laws and governing documents applicable to a foreign university determines that no indicator is met, that foreign university has institutional autonomy. On the other hand, if an examination of the relevant laws and governing documents determines that one or more indicator is met, that foreign university does not have institutional autonomy and all arrangements with that university must be notified.

How do I assess whether a foreign university does not have institutional autonomy?

Take the following steps:

Step 1: Identify and source applicable laws and governing documents of the foreign university.

Step 2: Check whether the laws and governing documents meet any of the requirements set out in the three indicators. The **Matrix to Assess Institutional Autonomy** below provides guidance, example questions, and advice on sources to consider.

Step 3: If a State or Territory entity has checked the laws and governing documents of the foreign university, and is not certain whether the foreign university has or does not have institutional autonomy under the Act, please contact the Department of Foreign Affairs and Trade.

Matrix to Assess Institutional Autonomy

Assessment area	Guidance	Examples of questions to consider	Examples of possible sources
Membership of the foreign university's governing body	<p>This indicator will be met if a <u>majority of</u> governing body members are <u>required to be</u> a member, supporter, unit, or part of the political party that forms the foreign government, however that requirement is described.</p> <p>This indicator will not be met if a majority of governing body members are <u>incidentally</u> members or supporters of the political party.</p> <p>A university's 'governing body' is the body with the highest level of authority over the university's internal governance, with leadership over the university and responsibility for strategic oversight and guidance. The definition is broad to cover the different types of governing bodies. For example, a governing body may be a university council, committee, primary committee, senate, or board of trustees, depending on the university.</p>	<ul style="list-style-type: none"> • What is the university's highest governing body? • What are the laws and governing documents establishing the governing body? • How many members does the governing body have? • How is the university's governing body appointed? • Are most of the university's governing body members also members of the same political party? • To be appointed to or part of the university's governing body, is there a requirement in the laws or governing documents for members to have a particular political affiliation, support or be a member of a particular political party? • If so, does this requirement apply to all, or at least a majority, of the members? 	<ul style="list-style-type: none"> • Legislation establishing the university • University constitution or charter • Other university document(s) setting out the requirements or procedures for appointing members to the governing body.
Education or research requirements	<p>This indicator will be met if there is a positive obligation for education and/or research at the university to adhere to, follow, uphold or be in service of political principles or political doctrine of the foreign government (or the political party that forms the foreign government).</p> <p>This indicator will not be met if education or research at the university is required to be politically neutral.</p>	<ul style="list-style-type: none"> • What are the laws and governing documents regulating research and education requirements? • What is set out in the laws or governing documents about (i) decisions on academic content, or (ii) who should be involved in decisions on academic content? • Are there laws or governing documents constraining the university's academic freedom and independence to choose its curriculum, courses and research content? • Is there censorship of particular academic content under laws or governing documents? • Do the laws or governing documents place positive obligations on the foreign university to serve, uphold, follow or adhere to particular political doctrine (or, conversely, is the university required to be politically neutral)? If so, does this impact education and/or research at the university? 	<ul style="list-style-type: none"> • National higher education laws • National education laws, if applicable to universities • Legislation establishing the university • University constitution or charter • University rules or regulations.

Matrix to Assess Institutional Autonomy

Assessment area	Guidance	Examples of questions to consider	Examples of possible sources
Academic staff requirements	<p>This indicator will be met if there is a positive obligation on the university's academic staff to adhere to, follow, uphold or be in service of political principles or political doctrine of a foreign government (or the political party that forms the foreign government).</p> <p>This indicator will not be met if academic staff are required to be politically neutral.</p>	<ul style="list-style-type: none"> • What are the laws and governing documents regulating employees? • What is set out in the laws or governing documents about (i) decisions on academic staff, or (ii) who should be involved in employing and appointing academic staff? • Is there censorship of academic staff in laws or governing documents? • To be employed at the university, do the laws or governing documents place positive obligations on the academic staff to serve, uphold, follow or adhere to particular political views (or, conversely, are employees required to be politically neutral)? • Would an Australian academic need to change their course content or public statements if they were teaching at that foreign university, due to a requirement in the laws or governing documents of the university? 	<ul style="list-style-type: none"> • National higher education laws. • National education laws, if applicable to universities. • Legislation establishing the university. • University constitution or charter. • University rules or regulations.

Case studies

Case Study A: Political party membership of the foreign university's governing body

Assessment: An Australian public university needs to assess whether its foreign partner, Foreign University A, has institutional autonomy for the purposes of the Foreign Arrangements Scheme.

The Australian public university locates the university constitution on Foreign University A's website.

The constitution sets out that the governing structure of Foreign University A is a university council and 6 sub-councils (for example, the research sub-council). The university council is the highest level of authority in Foreign University A, with strategic oversight and leadership responsibilities across the university.

The constitution states that the country's national government appoints all members of the university council, who must also be members of the political party that forms the country's national government.

Conclusion: Foreign University A's governing document requires that a majority of members of Foreign University A's governing body must be members of the political party that forms the foreign government, pursuant to paragraph 8(3)(a) of the Act. This means that the foreign government is in a position to substantially control Foreign University A, under subsection 9(2) of the Act, and Foreign University A does not have institutional autonomy.

Case Study B: National laws require all higher education to adhere to political doctrine

Assessment: An Australian State government department wants to negotiate a new arrangement and assesses whether the other party, Foreign University B, has institutional autonomy.



The State government department examines open source information available online and notices media reports that education in the country in which Foreign University B is located must support the political doctrine of that country's government. The State government department undertakes due diligence in relation to Foreign University B to identify whether the media reports are substantiated in applicable laws or governing documents.

The State government department requests a copy of applicable laws from Foreign University B. The State government department is provided with copies of the national higher education laws, national education laws and laws establishing Foreign University B.

On review, the State government realises that the national laws that establish and manage ongoing requirements for all higher education providers legislate that all higher education taught in the country must conform with and adhere to the foreign government's political doctrine.

Conclusion: Education provided at Foreign University B is required by law to adhere to the political doctrine and political principles of the foreign government, pursuant to paragraph 8(3)(b) of the Act. This means that the foreign government is in a position to substantially control Foreign University B under subsection 8(2) of the Act, and Foreign University B does not have institutional autonomy.

Case Study C: Foreign university's academic freedom protected by law

Assessment: An Australian public university has pre-existing agreements with Foreign University C. The Australian public university locates the charter and statute establishing Foreign University C online. The charter references a 30-member Senate that governs Foreign University C, which is a 'governing body' for the purposes of paragraph 9(3)(a) of the Act. Members of the Senate are all appointed by Foreign University C, in accordance with the charter, and nothing requires the members to have a particular political affiliation.

Academic freedom of Foreign University C is protected by law. There are references throughout the statute establishing Foreign University C to academic freedom of education and research and freedom of expression for staff and students. The Australian public university checks the national higher education laws applying to Foreign University C, which also stipulate academic freedom within higher education institutions in the country, without any requirement for education, research or staff to adhere to particular political views.

Conclusion: None of the indicators in subsection 8(3) of the Act are satisfied and therefore a foreign government is not in a position to substantially control Foreign University C under subsection 8(2) of the Act. Foreign University C has institutional autonomy and is not a ‘foreign entity’ under the Act.

Case study D: All academic staff must adhere to political doctrine

Assessment: An Australian public university has long-established agreements with Foreign University D and wants to know whether notification is required under the scheme.



The Australian public university consulted with its academic staff to determine whether they would need to amend their education materials, courses or research if they were to teach at Foreign University D. Staff from their School of Politics and International Relations indicated that their course content would need to change, to account for censorship and to support the foreign government’s political ideology. The Australian public university also found media reports that staff at Foreign University D have been removed for publicly dissenting against the political doctrine of the foreign government in that country.

The Australian public university, as part of its due diligence consistent with the *Guidelines to Counter Foreign Interference in the Australian University Sector*, had already located official policy documents according to which Foreign University C operates. These are ‘governing documents’ of Foreign University D, as defined under subsection 9(4) of the Act. The policy documents revealed that academic staff working at Foreign University D must support and teach the political agenda of the political party that forms the foreign government of that country.

Conclusion: Foreign University D’s academic staff are required, by the university’s governing documents, to adhere to political principles and doctrine of the political party that forms the foreign government, in their teaching, research, discussions, publications and public commentary, pursuant to paragraph 9(3)(c) of the Act. This means that the foreign government is in a position to substantially control Foreign University D, under subsection 9(2) of the Act, and Foreign University D does not have institutional autonomy.

Case Study E: Foreign tertiary education institution that is part of a foreign government

Assessment: An Australian State government agency is considering making an agreement with Foreign Academy E—a tertiary education institute overseas—and is deciding whether the agreement must be notified to the Minister.

The State government agency undertakes due diligence to establish who its foreign partner is before entering into a written agreement, including looking into Foreign Academy E’s relationships with foreign governments and political parties. Foreign Academy E’s public information appears on a foreign government’s military website and reveals that Foreign Academy E is an agency of the foreign government’s national Department of Defence.

Conclusion: Foreign Academy E is an agency (however described) of the national government of a foreign country, pursuant to paragraph 8(1)(c) of the Act. This means that Foreign Academy E is a ‘foreign entity’ under the Act.



Case Study F: Institutional autonomy enshrined in laws

Assessment: An Australian public university has pre-existing arrangements with Foreign University F. The Australian public university saw media reports alleging censorship of certain political courses within Foreign University F, indicating deeper due diligence is required to understand potential foreign government control over Foreign University F.

The Australian public university locates publicly available national higher education laws, the charter and official regulations applicable to Foreign University F. Reading through these documents, it is apparent that there are no political party membership requirements of Foreign University F's governing body, nor are there obligations for education, research or academic staff to comply with particular political doctrine. To be sure of its assessment, the Australian public university requests relevant laws and governing documents from Foreign University F. These documents do not include requirements of political adherence. The Australian public university cannot identify further publicly available information and there are no further documents disclosed by Foreign University F.

Conclusion: None of the circumstances described in the indicators in subsection 8(3) of the Act are required by laws or governing documents applicable to the university. As a consequence, a foreign government is not in a position to substantially control Foreign University F, under subsection 8(2) of the Act. Foreign University F has institutional autonomy and is not a 'foreign entity' under the Act.

What are some hints and tips?

Some of the hints and tips below may help in making a quick assessment of institutional autonomy.

1. The majority of foreign universities will not satisfy any of the indicators and, therefore, will have institutional autonomy under the Act.
2. State and Territory entities need only check the laws and governing documents applicable to a foreign university to determine if one indicator is met to assess if a foreign university does not have institutional autonomy for the purposes of the Scheme. The laws and governing documents are the only sources to check to determine whether an indicator is satisfied.
3. The Public Register is an important resource identifying foreign universities that are within the scope of the Scheme. Where there is an arrangement on the Public Register involving one State or Territory entity and one foreign university, that foreign university is a 'foreign entity' under section 8 of the Act. All State and Territory entities should notify the Minister of their arrangements with that foreign university.
4. While entities need to undertake their own due diligence, there are some circumstances where the extent of a foreign university's institutional autonomy may be unclear. If—having checked a foreign university's laws and governing documents—an entity is not certain whether a foreign university has institutional autonomy under the Act, contact the Department of Foreign Affairs and Trade.

Where can I get further information?

More information is available at www.foreignarrangements.gov.au. If a State or Territory entity has conducted due diligence to assess a foreign university and has remaining questions, please contact the Department of Foreign Affairs and Trade at foreignarrangements@dfat.gov.au.