



## AUSTRALIA'S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) ACT 2020 ADDITIONAL FREQUENTLY ASKED QUESTIONS<sup>i</sup>

### Which arrangements are required to be notified by 10 June 2021?

The Scheme requires all pre-existing non-core arrangements to be notified by 10 June 2021. All arrangements required to be notified by universities or local governments are 'non-core arrangements'. An arrangement is notifiable if it meets the following criteria:

- a. It is an arrangement as defined by the Act, including an agreement, contract, undertaking, or understanding.
- b. The arrangement is in **writing**.
- c. The arrangement was in operation on or after 10 December 2020. If the arrangement was in operation between **10 December 2020 and 9 March 2021**, it is a pre-existing arrangement, even if it subsequently expired or was terminated. If the arrangement took effect on or after 10 March 2021, it is a prospective arrangement and should be notified accordingly.
- d. The arrangement is between a State/Territory entity, and a foreign entity under section 8 of the Act, regardless of any other parties to the arrangement. The Scheme does not apply to arrangements entered into by State/Territory entity employees acting in their own right and not on behalf of their employer.
  - i. For example, whether an arrangement by a university employee binds or otherwise commits the university is primarily a question of fact, which will likely depend on factors such as:
    - the way a university is constituted;
    - governance arrangements in individual universities;
    - the position and authority of the individual concerned;
    - the extent to which a person holds relevant delegations and responsibilities;
    - and whether the university has endorsed or given effect to the arrangement.
  - ii. The Foreign Arrangements Taskforce is not aware of the specific arrangements each university applies and we are therefore unable to advise whether individual arrangements bind or commit those universities. This is something we would anticipate universities would consider in the context of their internal governance, separate from the requirements of the Scheme. We understand some universities have elected to use their policy on outside employment to guide judgements as to whether an arrangement is entered by the university or by an individual acting in their own right, for example.
  - iii. If a State/Territory entity notifies an arrangement, we will assume they have made a decision that the arrangement is one entered by or on behalf of that entity, and will treat it accordingly.

We recommend that State/Territory entities notify any arrangements they are uncertain about, and these will be screened for questions of scope in due course.

## What is a subsidiary arrangement and how do I notify a subsidiary arrangement on the Portal?

Arrangements subordinate to a head foreign arrangement must meet two criteria to be considered a subsidiary arrangement. They must be:

- a. Entered under the auspices of a head foreign arrangement
- b. They must not themselves be a foreign arrangement.
  - i. This depends on the **type of parties** to the arrangement – such an arrangement will still be a foreign arrangement in its own right if the parties include a State/Territory entity **and** a foreign entity.
  - ii. A subsidiary arrangement therefore does not require both a foreign and an Australian entity to be parties to the arrangement.

Subsidiary arrangements need to be notified separately to head foreign arrangements through the Online Portal. One of the questions asked of users submitting a notification on the Online Portal is whether the arrangement is a subsidiary arrangement. Answering this question will prompt the user to include the reference number for the head arrangement.

### *Note: Technical issue encountered by some users when entering subsidiary arrangements*

We are aware of a technical issue encountered by some users that prohibits entering subsidiary arrangements where they only include Australian parties or only include foreign parties. We are investigating endeavouring to rectify issue as soon as possible. In the interim, where a subsidiary arrangement cannot be notified separately (ie. It has only Australian or only foreign parties) please undertake the following process:

- a. When creating the notification of the head arrangement, you will be asked if there are any subsidiary arrangements in effect, and how many. Please include all subsidiary arrangements, including those that are unable to be notified, in this count.
- b. Before submitting the head arrangement, please attach a copy of the affected subsidiary arrangements and a statement setting out the following details for each:
  - i. Name of the subsidiary arrangement;
  - ii. Parties to the subsidiary arrangement;
  - iii. Date the subsidiary arrangement was entered into;
  - iv. Whether the subsidiary arrangement is legally binding under Australian law, legally binding under a foreign law, or not legally binding;
  - v. Details of any information about the subsidiary arrangement that you request the Minister not to include on the Public Register under paragraph 53(3)(a) of the Act and the reasons for the request.
- c. Please do not follow this process for subsidiary arrangements that can be notified in the usual way through the Online Portal.

If you have already submitted the notification associated with the head arrangement under which you are unable to notify of a subsidiary arrangement, please get in touch with [foreignarrangements@dfat.gov.au](mailto:foreignarrangements@dfat.gov.au).



## Should I notify of an arrangement where the text of the arrangement is unable to be located?

We encourage State/ Territory entities to make every effort to locate arrangements. Copies of arrangements (including unsigned copies) can be provided where they replicate or provide the substance of the original. Multiple documents may also, together, comprise an arrangement. Notifications of arrangements for which no written evidence is provided will not be considered sufficient notifications. If you cannot find a copy of an arrangement, but you are aware it was in writing and remains in operation, please contact us at [foreignarrangements@dfat.gov.au](mailto:foreignarrangements@dfat.gov.au).

## How do I request an exemption from publication of information about my arrangement on the Public Register?

Foreign Arrangements notified through the Online Portal will not automatically be uploaded onto the Public Register. The Scheme provides the option to seek exclusion of information from the Public Register. Requests will be considered by the Taskforce and put to the Foreign Minister for decision.

To request an exclusion, please do the following when submitting a notification through the Portal:

- a. Complete the details of the arrangement including the full title. Please do not redact titles when submitting notifications through the Online Portal.
- b. Include a copy of the arrangement. Notifications will not be sufficient if a copy of the arrangement is not included.
- c. When prompted, request exclusion of information from the Public Register and provide information supporting your request in the text boxes. This can include suggested redactions for the Register. You can also upload documents to support the request. **Please ensure you provide sufficient information to support the Foreign Minister's decision about the exemption request.**

## What are the timeframes for assessment of arrangements?

For prospective core arrangements, the Foreign Minister is required to make a decision on proposals to negotiate and proposals to enter within 30 days of receiving a notification.

For all other arrangements, including all pre-existing arrangements, prospective non-core arrangements, and notification of having entered into a prospective core arrangement, there is no requirement for the Minister to make a decision. State/Territory entities are required to notify these arrangements, but **there is no need to wait for a decision**. Arrangements may proceed unless entities are advised otherwise.

If a State/Territory entity is concerned about a particular arrangement and thinks it may raise foreign policy or foreign relations concerns, we encourage you to contact the Taskforce at [foreignarrangements@dfat.gov.au](mailto:foreignarrangements@dfat.gov.au) at your earliest opportunity.

## Does the 'minor administrative or logistical matters' exemption apply to my arrangement?

The exemption for foreign arrangements that solely deal with minor administrative matters is narrow, and only applies to foreign arrangements - **not subsidiary arrangements** (which would all need to be notified). This exemption is restricted to foreign arrangements that *do not* contain substantive commitments which may raise considerations under the foreign policy test. The exemption will not cover foreign arrangements which are substantive, and do not *solely* deal with minor administrative matters. For example, an arrangement is likely to be substantive where the terms address:

- a. development or substance of research;
- b. topics that research will cover;
- c. funding agreements, including where the funding and amount is discretionary or otherwise subject to negotiation;
- d. other substantive rights and obligations (e.g management of intellectual property, strategy and institutional cooperation).



Arrangements will need to be assessed by the notifying entity on a case-by-case basis to determine whether a particular arrangement is a foreign arrangement or is a subsidiary arrangement, and then to consider whether an exemption applies. Examples of common university arrangements could include:

- a. Credit transfer arrangements – These arrangements are likely to be subject to the minor administrative exemption where they only deal with recognition of study already conducted, and do not address more substantive matters.
- b. Joint PhD/research candidature or supervision arrangements - This kind of arrangement is unlikely to fall within the minor administrative exception, as such arrangements often contain substantive terms relating to the relationship between the two educational institutions providing the joint degree, the determination or supervision of study topics, and the management of intellectual property rights. In general, if the arrangement only details the individual concerned and their supervision arrangements, it may fall within the exemption. However, if there is detail about the nature of a specific project, or other rights and obligations including intellectual property, the arrangement is not likely to be exempted.
- c. Student fee sponsorship or guarantee arrangements - This kind of arrangement is likely to fall within the minor administrative exemption when the arrangement solely concerns the manner in which an individual student pays for their (separately organised) studies, where the nature of the fees is not discretionary or open to determination between the parties.

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<sup>i</sup> \* 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.