Macquarie University Feedback

Australia's Foreign Relations Act 2020

Macquarie University thanks the Department of Foreign Affairs and Trade (DFAT) for the opportunity to provide feedback on the Australia's Foreign Relations Act 2020 (the Act). Macquarie University thanks DFAT for their long-standing engagement with the university sector and with Macquarie University on the implementation of the Act. The Foreign Arrangement Branch displays professionalism, a depth of knowledge, and a willingness to learn through their engagement and support of the university sector's international collaboration activities.

Macquarie's use of the Act's key terms in this document references the definitions of those terms in the Act.

Has the Foreign Relations Act been effective in delivering against its objectives, to ensure consistent adherence to Australia's foreign policy through foreign engagement?

Macquarie University notes that the object of the Act is to ensure that the Commonwealth is able to protect and manage Australia's foreign relations by ensuring that ***any*** (emphasis added) arrangement between a State/Territory entity and a foreign entity is not, or is unlikely to be, inconsistent with or adversely affect Australia's foreign relations or foreign policy.

When the Act was first proposed and enacted, there was considerable debate regarding whether the definitions of the Act's key terms, and the object of the Act itself, were appropriate for a democracy in the contemporary world. In recent years the Commonwealth Government has placed a significant focus on ensuring academic autonomy and freedom of speech within the Australian university sector. Macquarie recommends that the Department consider whether the construction and implementation of the object of the Act, as it relates to the university sector, enables academic autonomy and freedom of speech. During the transitional period of the legislation in 2021 Macquarie witnessed a noticeable chilling effect whereby planned collaborations did not go ahead.

Similarly, Macquarie recommends the Department consider the role of non-government organisations in the creation and maintenance of Australian foreign policy. A healthy democracy should be characterised by a multiplicity of views, including on foreign policy and that country's foreign relations. Consideration should be given to whether the Act's object is in line with the western democratic tradition, or whether the Act's object should be amended to better reflect the role of autonomy and freedom of speech in the construction and maintenance of a healthy public sphere.

Macquarie notes that, as evidenced in the Public Register, only an insignificant percentage of arrangements that have been notified have been subject to a Ministerial intervention. None of these have involved Australian universities.

Macquarie's view is that the Act's object, as it relates to ***any*** arrangement, is not suitable to Australia's democracy. Macquarie recommends the limitation of the Act such that it be only concerned with counter-signed arrangements executed by authorised members of state or territory entities with foreign entities.

How could the operation of the Foreign Relations Act be improved? Are there amendments to the Foreign Relations Act that would enhance its operation?

As noted above, Macquarie University recommends an amendment to the object of the Act limiting the scope by removing the word 'any' and the introduction of the word 'enable':

> (1) The object of this Act is to ensure that the Commonwealth is able to enable, protect and manage Australia's foreign relations by ensuring that ~~any~~ arrangements between a State/Territory entity and a foreign entity:

The definition of arrangement in the Act is sufficiently broad that it is not possible for any university in Australia to be satisfied it is in compliance. Macquarie therefore questions the appropriateness of the definition of arrangement including the wording: 'any written understanding or undertaking'. As academics have autonomy in their research, they are able to collaborate on behalf of their university and may enter into understandings regarding those collaborations via electronic correspondence or electronic message platforms. It is ambiguous whether such non-legally binding understandings constitute personal arrangements or institutional arrangements. It is singularly unusual in a democracy for a law to require a country's academics to submit their email correspondence to the Department of Foreign Affairs and Trade for review by the Minister of Foreign Affairs.

In practice no Australian university has been able to implement a process that satisfactorily complies with this legislative requirement. Indeed, even the Department of Foreign Affairs and Trade appears to have established a principle that these types of arrangements are not within the scope of the Act.[1] Macquarie recommends the definition of arrangement be amended such that it explicitly removes 'written understandings or undertakings' from the scope of the Act. Macquarie's recommendation is that the Act should only relate to countersigned arrangements executed by authorised members of state or territory entities with foreign entities.

Similarly, the Act is unsuitable as it relates to tender applications to foreign governments undertaken by state or territory entities. Without a pre-approval mechanism in the Act, state and territory entities (including Australian universities) currently take on significant liabilities when entering into tender submissions to foreign entities that Australian corporations do not experience. An Australian corporation does not have the uninsurable liability of the Foreign Minister being able to cease its legally-binding arrangement. Yet, Australian universities have had to operate with this liability since the Act came into effect. Macquarie recommends that the Act be amended to create regulatory equity between Australian corporations and state and territory entities. Macquarie recommends that the class of arrangements to which the Act applies should be limited to those unique activities of state and territory entities.

Macquarie University recommends the removal of subsidiary arrangements from the Act and the amendment of the definition of a foreign arrangement. The implementation of subsidiary arrangements within the university context has created confusion, administrative complexity, and unnecessarily high levels of work. Macquarie recommends that the definition of a foreign arrangement should be amended to include arrangements that reference or give effect to previously notified foreign arrangements, thereby removing the need for the Act to include subsidiary arrangements.

[1] Based on Macquarie University analysis of DFAT's assessments of arrangements submitted to-date and official advice received in relation to those arrangements.

Macquarie has experienced administrative issues in submitting arrangements that relate to this confusing aspect of the Act. For example, if a foreign arrangement is related to another foreign arrangement it needs to be linked to that arrangement in the Foreign Arrangement Portal, but if it is a subsidiary arrangement then that arrangement is linked to its parent arrangement differently. Macquarie staff have had to explain to new staff in the Foreign Arrangement Branch how this linking system works and what the differences are between a linked arrangement and a subsidiary arrangement. Macquarie suggests that this aspect of the legislation creates unnecessary confusion and complexity. Macquarie recommends that the subsidiary arrangement section of the Act be removed and incorporated into a single definition for a 'foreign arrangement'.

Finally, Macquarie recommends that the notification requirements of the Act be amended so that there is a general exemption for the notification of arrangements with foreign entities in countries on the Foreign Countries List (FCL). The FCL legislative instrument is used to enact exemptions to the provisions of the Defence Trade Controls Act. It is therefore appropriate to extend the legislative exemptions driven by the FCL to the Foreign Arrangements Scheme. A portion of Macquarie's administration of the Foreign Arrangements Scheme is devoted to arrangements with health care entities in Europe or government entities in the US. These arrangements should be exempt from notification as they are unlikely to be counter to the national interest and or misaligned with Australian foreign policy. Foreign arrangements should only be required to be notified under the Act if they are with non-exempt countries that are not listed on the FCL.

Are there opportunities for the Foreign Relations Act to better support international cooperation in the national interest?

Macquarie recommends that the Act would benefit from the introduction of exemptions that relate to nation-to-nation science and research diplomacy framework agreements. This would enable the Commonwealth Government to negotiate a framework agreement on academic collaboration with a foreign government with a defined discipline scope. The university sector could then execute arrangements within that scope that were exempt to the requirements of the Act.

This type of structure would further enable the University Foreign Interference Taskforce Guidelines on Countering Foreign Interference. It would facilitate universities to advise and guide academics toward collaboration with foreign countries in particular discipline areas, or with particular sub-national entities party to a framework agreement.

Macquarie's view is that the introduction of science and technology nation-to-nation framework agreements would signal to the Australian academic community the areas of engagement that the Commonwealth Government would like to see accelerated. Since 2019, much of the policy of the Commonwealth Government in this area has been directed towards ensuring the university sector undertakes higher degrees of due diligence and risk management. Macquarie recommends that the Commonwealth develop science diplomacy frameworks that better enable and accelerate international research collaboration in disciplines of strategic national interest with key foreign partners from which significant benefit sharing is expected to occur. Participating in Horizon Europe is one clear step that could be taken by the Australian government that would benefit the Australian research enterprise.

Could the Foreign Relations Act be better calibrated to address foreign policy risks and changing foreign policy settings?

Macquarie's view is that by linking the Act to the FCL, the Act would be better calibrated to a contextually adjacent Commonwealth mechanism for reviewing a foreign country's alignment with Australia's national interest. Introducing an FCL exemption would go a long way to reducing

unnecessary administration associated with the Act and ensuring compliance was focused on those arrangements that are more likely to pose a higher-than-normal risk.

Should the scope of the Foreign Relations Act be changed to apply to a broader or narrower range of international cooperation?

Macquarie is of the view that the Act should be amended to narrow the range of international cooperation currently in scope. Macquarie's view is that the current scope is overly broad and that this makes satisfactory levels of compliance impossible to achieve for the regulated community.

Macquarie notes the following issues as they relate to the Act:

- Compliance challenges: it is impossible to fully comply with the Act due to the current definition of 'arrangement';
- Selective or inconsistent enforcement: due to limited resources within DFAT, the legislation is likely to be characterised by selective enforcement, over time this can lead to unfairness and undermine the rule of law;
- Administratively burdensome: overly broad laws create administration burdens for the regulator and the regulated community, leading to inefficiencies in the use of public funds;
- Prioritisation issues: with insufficient resources, DFAT needs to prioritise some category of arrangements over others, this can lead to blind spots forming and emerging issue areas being missed;
- Unintended consequences: overly broad legislation creates unintended negative consequences due to generating regulatory uncertainty for individuals and organisations trying to operate within law;
- Potential for abuse: overly broad laws create the opportunity for future governments to selectively enforce the law and target specific individuals or groups unfairly.

Macquarie recommends the following general principles for DFAT to consider in remediating the overly broad nature of the Act:

- Narrow the scope of the legislation so that it can be realistically enforced, Macquarie has made a number of suggestions to this end;
- Develop clear guidelines and priorities for the regulated community, this could be done through the Foreign Arrangements Portal or another mechanism so that there is greater transparency on DFAT's prioritisation of foreign arrangement review and a greater understanding of where DFAT sees risk within the existing body of foreign arrangements;
- Explore alternative regulatory approaches, including self-regulation – the UFIT Guidelines may be a more appropriate structure for managing some of the risks that the Act has become associated with;
- Consider a phased implementation to test and refine alternative, narrower, regulatory approaches.

Does the Foreign Relations Act strike the right balance between achieving its objectives and the administrative requirements it places on states, territories, local governments, and universities?

The Act does not strike the right balance between its objectives and the associated administrative requirements. It is therefore an inefficient use of public funds, both within DFAT and within state

and territory entities. Macquarie's recommendations within this document describe how greater balance and a more efficient use of public money can be brought into the functions of the Act.

In support of these recommendations, we have included a series of short case studies in the Appendix to this submission. These provide some examples where the additional administrative burden imposed by the legislation does not appear to be balanced by an uplift in national benefit.

Are there additional ways that the Foreign Relations Act can improve transparency and awareness of international engagement, including through the Public Register?

Macquarie recommends that the functioning of the Public Register be amended such that arrangements are only published after the executed version has been notified and reviewed. During the transitional phase Macquarie notified a draft arrangement that it then triaged for internal risk review. The arrangement was not executed. Macquarie had to provide DFAT with justification on why the draft arrangement should not be published on the Public Register – creating unnecessary administrative burden for Macquarie and DFAT.

If executed arrangements were the only items published on the Public Register, this would provide universities and DFAT time to engage with each other on any risks associated with a draft arrangement. This would allow universities to choose not to execute arrangements if they identified new risks during discussions with DFAT. Confidentiality in this circumstance would provide a trusted space within which DFAT and the university sector could exchange information relevant to whether any given arrangement should be executed and whether it was in the national interest to pursue the opportunity.

Macquarie has had incredibly positive engagement with the Foreign Arrangements Branch when seeking advice on draft arrangements. Macquarie sees this as a positive outcome of the Act – it has drawn the university sector and DFAT closer together and provided DFAT with a more accurate view of the level of Track 2 diplomacy that the university sector undertakes for Australia.

Are there opportunities to better support compliance with the Foreign Arrangements Scheme, including through publicly available information and outreach initiatives?

Macquarie University's experience of DFAT's outreach activities in support of the Foreign Arrangement Scheme has been very positive. Both the local state engagements and the regular University Forum have provided important convening mechanisms, and ensured the sharing of information as the global environment has changed. The University Forum has been a notable improvement to Commonwealth outreach activities as it has convened the Australian community of university foreign relations practitioners in Canberra on a regular basis. This has facilitated cross-sectoral information sharing, productive engagement with other Commonwealth departments and agencies, and an overall improvement in awareness across the university sector of the constraints and opportunities as they exist within the Commonwealth for enabling international academic collaboration.

It has, however, also reinforced to the university sector that the Commonwealth has a limited understanding of how the university sector operates. Macquarie's observation is that the Commonwealth does not understand how academic autonomy and freedom of speech is operationalised within the university context. Similarly, the university sector has a limited understanding of how inter-departmental collaboration works in Canberra.

There is a burgeoning web of interconnected compliance frameworks for national security and defence as it relates to academic activities in the university sector. The university sector has limited

resources and must necessarily prioritise its approach to compliance so that it is efficient and focused on areas where the risk is highest. The increasing complexity of Commonwealth regulation means that university activity is increasingly directed to engaging with the Commonwealth, rather than undertaking meaningful activity that would lower an institutional risk profile. If the regulatory environment continues to dynamically change over coming years without any new funding being provided to the university sector by the Commonwealth to support risk management activities, then the following impacts are likely to occur:

- Practitioners within Government and the University sector will move on, leading to a loss of knowledge, an increase in transactional engagement, and a decrease in trust between the two sectors;
- Universities will be forced to focus compliance efforts on the legislation with the greatest criminal penalties, this may not necessarily be where their activities could be most meaningfully directed;
- International collaboration that is in Australia's national interest will not go ahead and a brain drain will commence with long-term impacts for Australia.

Macquarie understands that DFAT cannot be prescriptive in its policy guidance and public pronouncements. However, due to the autonomy with which academics operate in Australia, public signalling is required that explicitly outlines the 'rules of engagement' for international academic collaboration. Regulatory uncertainty is beginning to have a real effect on academic collaboration in the national interest. At the last two University Forums there was a notable and easily identifiable divergence between different Commonwealth departments regarding advice about international engagement.

Macquarie recommends that the Australian Government should formulate a whole-of-government policy framework in support of enabling and protecting the university sector's international collaboration. The updated Research Security policy of the Government of Canada is an example of a national policy that provides explicit and unambiguous signalling to the Canadian university sector on the government-endorsed rules of engagement.

Concluding remarks

Macquarie thanks DFAT for the professionalism, integrity and cooperative spirit with which it has engaged with the university sector. The Foreign Arrangements Branch has done incredible work in implementing a very broad piece of legislation. True to DFAT's excellence, tact, negotiation and dogged pursuance of Australia's national interest; the Act has been implemented in a way that has not caused any of Australia's foreign relations to deteriorate. Macquarie acknowledges the extraordinary work this has taken from DFAT to achieve. Our deepest congratulations go to DFAT for turning the Act into a mechanism of positive engagement that has further bolstered Australia's international engagement with the world.

Macquarie hopes that this legislative review is an opportunity to focus the Act on what DFAT (and Australian universities) does well, and to narrow its scope so that it effectively achieves its object of not just ***protecting*** Australia's foreign relations, but also of ***enabling*** Australia's foreign relations. An enabling object in the legislation would be more appropriate for a pluralistic democracy that seeks to set a standard of excellence for other international actors in the region and the world.

SUMMARY OF MACQUARIE UNIVERSITY'S RECOMMENDATIONS

Macquarie recommends:

1. Consideration of whether the construction and implementation of the object of the Act, as it relates to the university sector, enables academic autonomy and freedom of speech.

2. Consideration of the role of non-government organisations in the creation and maintenance of Australian foreign policy.

3. Limiting the scope of the Act such that it be only concerned with counter-signed arrangements executed by authorised members of state or territory entities with foreign entities.
    a. Supported by amending the object of the Act by removing the word 'any' and the introduction of the word 'enable'.

4. Amending the Act to create regulatory equity between Australian corporations and state and territory entities.

5. Removing subsidiary arrangements from the scope of the Act and the amendment of the definition of a foreign arrangement to include arrangements that reference or give effect to previously notified foreign arrangements,

6. Amending the notification requirements of the Act so that there is a general exemption for the notification of arrangements with foreign entities in countries on the Foreign Countries List.

7. Introducing into the Act exemptions that relate to nation-to-nation science and research diplomacy framework agreements.

8. Development, by the Commonwealth, of integrated science diplomacy frameworks that better enable and accelerate international research collaboration in disciplines of strategic national interest with key foreign partners from which significant benefit sharing is expected to occur.

9. Remediating the overly broad nature of the Act via:
    a. Narrowing the scope of the legislation;
    b. Developing clear guidelines and priorities for the regulated community;
    c. Exploring alternative regulatory approaches, including self-regulation;
    d. Considering a phased implementation to test and refine alternative, narrower, regulatory approaches.

10. Amending the function of the Public Register such that arrangements are only published after the executed version has been notified and reviewed.

11. Formulation of a whole-of-government policy framework in support of the university sector's international collaboration.