# Submission to Legislative Review of the Australia's Foreign Relations (State and Territory Arrangements) Act 2020

2 August 2024

## ACKNOWLEDGEMENT OF COUNTRY

Monash University recognises that its Australian campuses are located on the unceded lands of the people of the Kulin Nations, and pays it respects to their Elders, past and present.

## INTRODUCTION

Monash University is unique in the Australian higher education sector for its international profile. Ten percent of its first intake of students in 1961 were international students from the Indo-Pacific region. For over 25 years Monash has pursued a multi-dimensional approach to internationalisation that includes international students enrolled at Australian campuses, investment in the establishment of campuses across the region, programs for Australian-enrolled students to study in the region, deep transnational education, and research partnerships.

Monash has made a key contribution to the nation's research excellence and its global impact. For example, Monash researchers and clinicians conduct a quarter of Australia's clinical trials, which measure the efficacy of new medicines and therapies. Our researchers lead global efforts to protect communities from mosquito-borne diseases via the World Mosquito Program and lead the nation's Centre of Excellence for the elimination of violence against women, which works in close partnership with partners across the Indo-Pacific. International agencies including the US National Institutes of Health and the Wellcome Trust invest more than $100m each year in research led from Australia by Monash University.

Monash makes a key contribution to equipping the nation to work with the Indo-Pacific through its education. This coming summer, more than 2,000 students based at Monash's Australian campuses will undertake studies in the Indo-Pacific region through the University's Global Immersion Guarantee, the nation's largest single student mobility program, with a further 4,000 students travelling internationally as part of their undergraduate or postgraduate degree.

Australia's national interest is supported through all the above work which advances the nation's scientific, educational, economic, and social progress, as well as our nation's influence globally.

## THE FOREIGN ARRANGEMENTS SCHEME

Monash has significant experience working within the requirements of the Foreign Arrangements Scheme ('the Scheme') since its introduction via the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Act). Since the introduction of the Scheme, Monash has submitted more than 3,000 notifications under the Act, requiring the assessment of over 26,000 pre-existing and prospective arrangements.

The Scheme was rushed into existence. Its design flaws have meant that the Scheme has inadvertently *contributed towards* the "*complex and challenging international environment*" to which the Review refers, rather than helping regulated entities *navigate* this environment.

Monash notes in particular:

- the breadth of the Act's scope, which imposes notification requirements across an unnecessarily wide range of arrangements;
- the ambiguity of the Act's language and definitions, which impose significant and avoidable 'burdens of interpretation' on regulated entities and the Government;
- the overlap and duplication with other legal and 'soft law' instruments such as the *Foreign Influence Transparency Scheme Act 2018* (FITS Act) and the University Foreign Interference Taskforce (UFIT) *Guidelines to Counter Foreign Interference in the Australian University Sector* (the Guidelines).

These features work in combination and compound to overburden notifiers (subnational governments and universities) and the Federal Department notified (DFAT). In Monash's view, much of this burden does little to support the object of the Act.

Monash recommends:

- the adoption of a risk-based approach to the scope of the Act;
- the adoption of clearer definitions within the Act;
- careful consideration of the Scheme's role relative to other 'resilience' instruments such as FITS to remove duplication and overlap; and
- better guidance for, and engagement with the university sector to support the Scheme's objectives.

Monash welcomes the opportunity to engage in further discussions with the Government and the independent reviewer to produce a Scheme that is more workable and effective.

## RESPONSE TO REVIEW QUESTIONS

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

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 arrangement between a State/Territory entity and a foreign entity: (a) does not, or is unlikely to, adversely affect Australia's foreign relations; and (b) is not, or is unlikely to be, inconsistent with Australia's foreign policy."* (s.5)

If the Act is to be successful in accomplishing its object, entities that have regulatory obligations under it must understand sufficiently the content of Australian foreign policy. Otherwise it is possible or even likely that they will seek to negotiate arrangements that are inconsistent with the nation's foreign policy, despite conforming to the specific obligations under the Act. Put another way, the notification regime established by the Act is only the means chosen by the Act to accomplish its object and compliance with that regime will not necessarily achieve the underlying object.

Consistent adherence to Australian foreign policy would be better supported by a requirement under the Act for the Minister to provide clear guidance on the substance of foreign policy to entities regulated by the Act. We acknowledge DFAT's work under the current Minister to introduce periodic sector briefings on foreign policy, and we support the continuation of such sessions and related outreach. However, if the definition of 'Australia's foreign policy' remains as currently framed in the Act, the provision of such guidance should not be left to the discretion of the Minister of the day.

According to its definition in the Act "Australia's foreign policy" need not be 'written or publicly available', or 'formulated, decided upon, or approved by any particular member or body of the Commonwealth'. This definition leaves the Minister of the day with wide and unchecked discretion including the discretion to not inform regulated entities of what that policy is.

We address the matter of guidance further in responses below. However, it is obvious that without a requirement on the Commonwealth to advise entities regulated by the Act of its foreign policy in the detail necessary to support decision making, consistent adherence to that policy cannot be ensured, even if regulated entities engage with the requirements of the Act diligently. Of course it is not possible to describe Australia's foreign policy exhaustively, but a statutory requirement to provide guidance to regulated entities is necessary to accomplish the object of the Act.

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

### *2.1 Reduce the scope of notifications required to eliminate 'low risk' arrangements (this answer also responds in part to Questions 4 and 5).*

The Scheme requires too many notifications about matters which appear extremely unlikely to be inconsistent with this object. For example:

- there is a significant number of arrangements with entities such as the public healthcare system of other Commonwealth nations. At 8 July 2024, there were 57 arrangements on the Public Register involving UK NHS entities, and 80 arrangements involving NZ Health/Te Whatu Ora,
- There were also over 360 arrangements involving the US National Institutes of Health (NIH). NIH funded projects can be viewed on an online public database.

The Scheme's Public Register reveals many similar examples - data access arrangements with *Statistics Netherlands*, grant agreements with the Dutch and Swedish Research Councils, research with both New Zealand's Transport and Landcare Research Agencies and many other arrangements which appear extremely low risk while creating a significant and arguably pointless burden of paperwork for all regulated entities as well as for the Commonwealth.

Requiring a focus on low risk matters inevitably consumes resources both of the Commonwealth and of State and Territory entities at the cost of those applied to matters of potential higher risk. The UFIT Guidelines encourage universities to "identify their own highest risks to help prioritise resourcing, and apply mitigations that are appropriate to their specific risks". As we illustrate further below, the Act draws due diligence resources towards the compliance requirements of the Act and from matters of greater risk.

### *2.2 Simplify definitions of matters 'in scope' and make the Commonwealth's interpretations easily available*

Definitions in the Act impose an unnecessarily high 'burden of interpretation' upon regulated entities and DFAT to determine what foreign entities fall inside or outside the scope of the Act. Monash understands that there is inconsistency across the sector in what arrangements are notified because of differing interpretations of the Act's scope. Monash's experience suggests that DFAT also might have difficulty determining the boundaries of the Act.

We note as examples the following two specific challenges:

1. ***Application of the Act to foreign corporations.***

Corporations that "operate on a commercial basis" are excluded from the Scheme. However, as the guidance note on this matter suggests, there is often considerable detail to be researched and contemplated in order to form a judgement on whether in fact the foreign entity falls within the scope of the Act. The result is often, nonetheless, a matter of judgement around which two assessors might legitimately arrive at different conclusions.

To illustrate the challenge and complexity, we note an example from Singapore, where there is a group of public healthcare institutions that operate under *the Ministry of Health Holdings Pte Ltd*, a private, commercial entity established and wholly owned by Singapore's Ministry of Health. The Chairman of MOH Holdings Pte Ltd is the Permanent Secretary of the Ministry of Health. We understand DFAT has deemed the parent entity MOH Holdings Pte Ltd as out of scope of the Act, however many of its wholly owned subsidiaries such as Woodlands Health Pte Ltd, Khoo Teck Puat Hospital have been deemed *in scope* and are listed on the Scheme's Public Register.

The above example indicates how the design flaws of the Act (in this case overly elaborate definitions) compound to produce an unnecessary burden on regulated entities. The foreign entities indicated above are arguably very low risk. Once that realisation is reached, the work necessary to determine whether the entity is notifiable under the Act appears to not serve the object of the Act.

## 2. *Universities that lack institutional autonomy*

Under the Act, Universities are required to notify the Minister of arrangements with foreign universities that do not 'have institutional autonomy' from their government. In some cases the answer to this question is obvious, in many other cases there is much to take into account in forming such a judgement. The best evidence for this may be that the Commonwealth's own guidance on this single definition spans seven pages.

**Options to reduce the 'burden of interpretation' imposed by the Act**

There are ready options to ease these 'burdens of interpretation' and the consequent inconsistencies in what is notified to the Government:

- Having received well over 10,000 notifications under the Act by Monash's estimation[1], the Commonwealth could both ease the burden of these interpretations and promote consistency across the sector by publishing an easily searchable or A-Z list of foreign entities declared both in and out of scope under the Act to date (noting many 'in scope' arrangements often appear on the public register after a delay in our experience).
- For foreign universities, we believe that basing these on their country of location would simplify notifications. This would require a different approach to the 'country agnostic' framing of the Act, noting that the Commonwealth has other legislation - such as the Defence Trade Controls Act - which is not country agnostic.

### *2.3 Clarity of responsibilities where multiple institutions are involved*

Often multiple Australian universities can be involved in the same research project (i.e. multi-institutional agreements, research collaboration agreements, consortium agreements etc). In these instances, to avoid doubt and potential duplication, it should be made clear in the Act that it is the leading and administering institution's responsibility to undertake the relevant AFRA assessment and notifications. Similarly, where multiple Australian universities are involved in the same arrangement but not in a leading capacity, the Act should also clearly specify responsibilities for notifications. This would limit duplication of work for both universities and DFAT.

### *2.4 Consolidated guidance on interpretation*

In addition to the legislation itself, there are currently:

- a consequential amendment
- an explanatory statement
- 8 x factsheets
- 3 x guidance notes, and
- 2 x lists of FAQs.

This suggests the Act has required significant clarifications since its commencement. These resources, albeit helpful in providing much-needed clarifications, are difficult to navigate. For example, that credit transfer arrangements are considered minor administrative matters and out of scope of the Act is indicated in "Additional Frequently Asked Questions - June 2021", which is not intuitive. All matters relating to the Act should be captured in one document where possible.

### *2.5 Remove the requirement for two notifications for non-core arrangements*

The requirement for two notifications for each arrangement has significant resource implications for universities. The administrative burden it creates for universities appears disproportionate to the risk sought to be mitigated. Should this requirement be deemed necessary to support the object of the Act, it should be

[1] Noting the 2023 Annual Report of the Scheme indicates a total of 8,636 foreign arrangements were published on the Public Register as of 31 December 2023.

applied only to specific arrangements (according to country or type of arrangement) that the Government considers to be high risk.

We note for the purpose of this Review that further engagement with and guidance provided to the sector will reduce the risk of arrangements being presented to the Minister where any intervention becomes necessary between a first and second notification.

Further, in practice, we note that certain arrangements are simply not able to be notified twice given their nature (e.g. a letter of invitation supplied to support a visa application).

### *2.6 Consider linkages between the Scheme, FITS, and the UFIT Guidelines to remove scope for unintended duplication and consequences.*

The review of the FITS Act has noted the combined regulatory burden of various measures including the Act, the FITS Act and the UFIT Guidelines. These measures emerged with limited reference to each other or reconciliation of the various overlapping policy objectives of the Commonwealth. Should all continue to exist, the role of the Act should be clear and considered alongside these other measures. For example, it should not be necessary to make any notification under the FITS Act if a notification has already been made under the Foreign Relations Act. Further, as we note at point 2.1 above, requirements for compliance with the Act should not draw resources away from alignment with the UFIT Guidelines, if mitigating foreign interference risk is an underlying policy objective of the Act.

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

A key goal of the Act should be to not impede such cooperation or impose avoidable burdens upon it. As indicated in this submission, currently the Act imposes costs upon a much wider range of collaboration than Monash considers is justified by the stated object of the Act.

Beyond the Act, there are opportunities for the Commonwealth to better support international cooperation in the national interest. Ensuring policy integrity between immigration, education, foreign and innovation policies is - while challenging - necessary. Monash notes and refers to its recent submissions to the reviews of the *ESOS (Quality and Integrity) Bill 2024* and the *Draft international education & skills strategic framework.*

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

Yes. We have addressed this matter in part under question 2 and note the first step to improve calibration is to **remove lower risk arrangements from the scope of the Act**. Removing requirements to notify arrangements with any entity in Commonwealth nations, for example, appears an obvious step.

**Sector engagement on matters involving complex assessments of fields of research or technologies:** Monash considers that the Review should consider whether the Government might access and benefit from university experts in navigating the complex global technology landscape that often sits behind more complex arrangements. It would be regrettable if Australia's research performance - which has long relied on international collaboration as a path to excellence and impact - declined because our researchers exclude themselves from collaborations where a finely tuned assessment would reveal that Australia has more to gain than lose from a particular arrangement.

**Improve guidance and feedback:** Given changing foreign policy settings, and the framing of 'Australia's foreign policy' in the Act (see Q.1)**,** the availability of DFAT staff to provide foreign policy guidance is critical. The level of guidance has improved since the introduction of the Act. Scope for improvement remains. In particular, it would be desirable for DFAT to provide guidance on how additional information sought by the Department is likely to be used in the decision-making process and how it might cause a university to alter its own decision-making in the future.

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

Monash urges that the scope of the Act be narrowed as indicated at Q2 and Q4 above.

Additional to points already made, Monash suggests that the Review consider the exclusion/modification of the notification requirements as follows:

- Explicitly exclude grants awarded by or involving Australian Government agencies (see the further comment on this at Q.6 below).
- Exclude delegation visit invitations - these are typically issued for the purpose of visa applications and the Government has the means to address any risks via visa decisions.
- Tenders, bids and requests for quotations - these should be categorised in the same way as grant applications and should only be notifiable upon successful award.
- Procurement - It appears that the procurement of goods and services can in rare and unusual circumstances fall within the scope of the Act. The overwhelming majority of these arrangements are with commercial entities and therefore not notifiable. However, they still must be reviewed by a regulated entity. Taking a risk-based approach and removing any requirement for notification of procurement arrangements would reduce the burden of the legislation, given the high volume of these types of arrangements.
- Any other class of arrangements for which the Government has not determined any significant concern over the duration of the operation of the Act.
- Subsidiary arrangements of foreign arrangements as defined under the Act - these arrangements are highly unlikely to be inconsistent with Australia's foreign policy if the 'head' arrangement itself is not of concern.

## 6. 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?

Please refer to previous answers (particularly Q2).

The Act requires Australian universities to notify the Minister of arrangements involving a notifiable foreign entity, even if a Commonwealth agency is a party to the arrangement e.g. DFAT; Australian Research Council; National Health and Medical Research Council. It is reasonable that the Commonwealth should already know about such arrangements to which its agencies are a party, and that consequently, **any requirement on universities to notify the Minister of such arrangements involving agencies of the Commonwealth should be explicitly removed.**

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

Monash welcomes DFAT's outreach initiatives, which have improved over time. The Public Register is a useful tool to check arrangements that have been assessed to be in scope by DFAT. However, it is extremely difficult to report on and/or analyse. Transparency would be improved by enhancements to the Public Register so that those searching it can generate meaningful reports by relevant variables such as country, or arrangement type.

Equally it would be useful to enhance the online notification portal so that reports can be generated from it and exported. While the functionality to filter out of scope arrangements has been a beneficial one, the lack of exportable reports from the system has been frustrating and resulted in manual cross-checking, which is an inefficient use of limited resources. Another useful enhancement would be to add a status indicator to show whether an arrangement has been the subject of a decision and published on the Public Register.

Finally, to repeat a point made above, publishing a list of entities deemed out of scope to date would immediately relieve regulated entities from making each of these assessments case-by-case.