

WESTERN AUSTRALIAN GOVERNMENT SUBMISSION – INDEPENDENT REVIEW OF AUSTRALIA'S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) ACT 2020

Please find the following submission from the Western Australian Government responding to the terms of reference for the independent review of *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Act).

(a) whether it is necessary or desirable to do anything to improve the operation of the Act

Generally, the Western Australian Government has found the overall operation of the Act and processes reasonably understandable. The Department of Foreign Affairs and Trade (DFAT) staff responsible for the scheme are approachable and able to assist with matters of clarification or policy advice. Notwithstanding, a number of actions could be considered to improve its operation.

In particular, if the focus of the Act is on core arrangements that involve matters of high-risk, then clarification on what constitutes this, and associated processes involved are important to improve transparency and decision making. It is recommended that this should include:

- Increased awareness/notification of entities considered high-risk, for example through a shared register of advice. This could include guidance on whether entities are considered core, non-core, or out of scope for the purposes of the Act.
- Opportunities for quicker processes relating to low-risk proposals, including seeking extensions for existing arrangements or renewing these without going through the full Foreign Relations Act (FRA) process. For example, to renew a low-risk core arrangement, a party could notify the intent to negotiate without the requirement to wait for an approval to commence discussions. Alternatively, a 'grandfather' clause whereby if a foreign entity has been previously approved, this might be adopted, negating the need to resubmit when extending or renewing an arrangement.
- An increase in matters considered exempt, including where the Commonwealth is a party, New Zealand is a party, cultural arrangements (e.g. museums), police and emergency services arrangements, high-frequency arrangements (e.g. international education), and low-risk arrangements.
- Increased clarity and improved timeliness for advice regarding what is in scope/out of scope noting the potential for differences in interpretation. Western Australian Government agencies have noted that timeframes for relatively straightforward queries can be lengthy, particularly where matters are determined to be out of scope.

Consideration of TAFE Colleges under the Act

Despite being a State Government entity in Western Australia and given the frequency of international education agreements, TAFE colleges should be treated the same as universities (i.e. as a non-core state/territory entity). It is highlighted that TAFE colleges

are continually negotiating with offshore clients on partnerships and opportunities for delivery or partnerships arising from a range of activities, including Ministerial missions, in-market contacts and sister-state relationships.

Given the scope of these discussions, it is not practical to inform FRA of all possible opportunities until due diligence, in-depth discussion and negotiation have been undertaken, with the timeframes outlined in the Act having a negative impact on offshore business activities and commercial outcomes.. As an example, scholarship program opportunities have been lost in Western Australia due to FRA approval requirements to sign agreements or memoranda of understanding, which negatively impact TAFE colleges and partners, but not universities.

Requirement to notify FRA of intent to negotiate

More broadly, the issue of when FRA needs to be advised regarding a potential collaboration or partnership can be problematic. The timeframe of 30 days is counterproductive for any agency that is in discussion with a prospective partner, often stalling a discussion in its nascent stages. Clarification around what constitutes negotiation and when it is considered to have commenced, with flexibility to support these types of opportunities, is considered important.

It is also highlighted that discussions with international clients in relation to potential foreign arrangements need to be undertaken early to inform the client of the necessary requirements for approvals and inform them when these will need to be addressed. It is unrealistic to gain approval prior to negotiating with a client as this will delay discussions and create a loss in client confidence trying to build the relationship.

Similarly, timelines for Ministerial missions are also difficult to meet when considering core arrangements, which requires two separate 30 day approvals, or even non-core arrangements, which are urgent but low risk. It is suggested that a better methodology would be to remove the need to seek approval to commence negotiations and rather seek approval to sign an arrangement, as transparency is the more important thing.

Foreign Arrangements Scheme Online Portal

From an administrative perspective, it is noted that the Foreign Arrangements Scheme Online Portal is difficult to navigate, lacks search functionality, and is prone to errors when submitting arrangements (such as duplication of information fields). Consideration should be given as to whether improvements can be made to the portal to help ensure information is easily received and submitted. Additionally, consistent with the advice above, consideration should also be given to whether a repository of past decisions on the status of foreign entities might be available through this forum.

Implementation of the matters identified above is considered by the Western Australian Government to be important in improving the operation of the Act by simplifying processes and ensuring a focus on core and higher risk proposals. Consistent with the intent of the review and legislative framework, this would reduce the administrative burden on stakeholders while supporting international engagement, and economic outcomes.

(b) the effectiveness of the Act in meeting its objectives

It is noted that the object of the Act is to ensure that the Commonwealth Government 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.

The Western Australian Government supports these objectives. However, as the Act and scheme are mechanisms for implementing Australia's foreign policy agenda, it is also important that information is available for states and territories to understand this context prior to potentially engaging with foreign entities to support the achievement of these objectives.

For example, there is some inconsistency around how DFAT determines core and non-core foreign entities or where institutional autonomy applies. Similarly, it is also unclear how Human Rights should be considered when negotiating international arrangements at a state level. This includes advice on undertaking due diligence, or where countries and entities are identified for non-engagement through sanctions or geopolitical considerations, noting that these may change over time.

Understanding, and awareness of these matters is important as changes in foreign policy settings may determine whether entities are classified as core or non-core over time, and/or there are changes in level of risk. This influences the nature of arrangements, and the level of approval and negotiation required, and the associated administrative burden. Significantly, changes may impact on the renewal of existing agreements and/or programs, which have been in place for a number of years with potential flow on economic impacts.

The review of the Act provides an opportunity for DFAT to consider opportunities to improve information sharing on foreign policy matters, and to introduce formal processes, which enable this to occur. This should include recognising that it is important for states and territories to have mechanisms available to engage with DFAT to seek clarity on foreign policy through regular statements or briefings. It is suggested that this should build upon DFAT's existing outreach program but with a greater focus on foreign policy and issues of national security, including communication on any potential revisitation of past determinations of core and non-core entities.

In this context, DFAT's willingness to provide ad hoc briefings as required on specific foreign relations matters, or prospective arrangements is acknowledged. However, it is noted that in some instances, these briefings can take time to coordinate and can be restricted by Commonwealth Government security clearance requirements.

This may mean subject experts and those most familiar with the technical elements of an arrangement are unable to participate in these briefings, and there is a potential for important details to be missed. Further consideration of options to address this to ensure both state and Commonwealth requirements can be understood, and any conditions/mitigations can be met, should be an important part of the review process.

It is also suggested that the review presents an opportunity for DFAT to improve communication, and transparency of formal decisions, including those where no action is taken. This would enable states and territories to understand how many arrangements have been refused by the Minister, and how these may have been influenced by foreign policy matters. Importantly, this would assist states and territories to be more aware of matters, which they need to consider and ensure that expectations are aligned.

Implementation of the above matters is considered important by the Western Australian Government as it would support the legislative framework by ensuring that this is appropriately calibrated to foreign policy risks and changing foreign policy settings. As the above demonstrates, this is significant in improving transparency and state and Commonwealth Government engagement and informing decision making processes at a State Government level regarding potential foreign arrangements, and how best these may be approached.

In addition to these foreign policy initiatives, the Western Australian Government recommends that increased clarification and/or provision of additional information, including case studies and/or worked examples relating to the following matters, should be made available by the Commonwealth Government to assist in meeting the objectives of the Act. This includes:

- What constitutes an arrangement?
- What exemptions are available and what constitutes a logistical matter?
- When is a state deemed to have commenced negotiations?
- Requests to withhold information from the public register, when this applies, and the options available to do this.
- How do multiparty arrangements work in the context of the scheme including expectations on states to notify on behalf of other Australian entities.
- Increased understanding and clear advice around subsidiary arrangements for situations such as commercial arrangements signed by Western Australian businesses when invited as part of an overseas mission.
- Increased understanding around non-core arrangements that are not sub-national e.g. associations.

It is recommended that further information regarding these matters could be made available by updating the existing series of factsheets produced by DFAT and published on the Foreign Arrangements Scheme website. Availability of this information would support achievement of a legislative framework, which is clear to interpret and apply, and does not impose greater administrative burden on stakeholders and government than is necessary to achieve its objectives.

(c) whether the Act should be amended to implement the recommendations of the review

The Western Australian Government would support in-principle amendments to the Act to implement the recommendations of the review, subject to finalisation of the review recommendations.

(d) whether a further review of the Act should be undertaken, and, if so, when.

As good legislative practice and recognising the potential for change in the foreign policy landscape and settings, it is suggested that a further review of the Act is undertaken within a five-year timeframe.