



## AUSTRALIA'S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) ACT 2020

### FREQUENTLY ASKED QUESTIONS – AUSTRALIAN PUBLIC UNIVERSITIES <sup>i</sup>

#### Questions regarding the scope of the Foreign Arrangements Scheme

##### What is considered a 'university' located in a foreign country under the Scheme?

The Scheme applies the ordinary meaning of 'university', which is generally understood to be an institution of higher learning which provides facilities for teaching and research and is authorised to grant recognised higher education academic qualifications at the undergraduate and/or postgraduate level. Such tertiary institutions do not need to be titled 'university' to be in scope and may be referred to by other terms, such as college, institute, academy or conservatory.

##### When are foreign education institutions that are not universities captured by the Scheme?

Foreign education institutions that are not universities may be in scope if they satisfy one of the definitions of 'foreign entity' in section 8 of the Act. The exception to this is paragraph 8(1)(i), which only applies to foreign universities.

A foreign education institution would satisfy the definition of 'foreign entity' if it is:

- a Department or agency of a foreign government, under paragraph 8(1)(c)
- a Department or agency of a foreign sub-national government, under paragraph 8(1)(g), or
- an authority of a foreign government entity established for a public purpose, under paragraph 8(1)(h).

For example, a foreign military academy that is in fact a Department or agency of a foreign national government is considered a 'foreign entity' under paragraph 8(1)(c). This will be a question of fact depending on the foreign entity that enters the arrangement.

##### What are some examples of university business which would not be considered exempt as minor administrative or logistical arrangements?

*Note: Refer to 'Fact sheet 5 – Exemptions'*

The Scheme exempts foreign arrangements solely dealing with minor administrative or logistical matters. This captures, for example, arrangements dealing with flights, accommodation, submitting paperwork or visa applications or the timing of conferences. This recognises that such arrangements are less likely to pose a risk from a foreign policy or foreign relations perspective. The following examples would not be considered exempt as minor administrative or logistical arrangements:

- collaboration by two universities on research output
- organising cultural activities
- establishing student exchange and mobility programs
- establishing scholarship programs
- collaboration on a workshop, presentation or conference session

## How does a university determine if an arrangement is a 'subsidiary arrangement'?

Section 12 of the Act steps through the definition of a subsidiary arrangement. Key factors to consider are:

- if the arrangement meets the definition of 'foreign arrangement' under subsection 6(2) of the Act, it is not considered a subsidiary arrangement
- an arrangement that pre-dates a head foreign arrangement cannot be a subsidiary arrangement
- to be a subsidiary arrangement, the arrangement has to be entered into under the auspices of the head foreign arrangement. This means it has to be entered into at the same time, or after, the head foreign arrangement is entered AND it has to fit within one of two categories:
  - the subsidiary arrangement has to be entered into for the purposes of implementing the head foreign arrangement (whether or not it refers to the head foreign arrangement or is contemplated by the head foreign arrangement), or
  - the head foreign arrangement must contemplate (eg encourage, foster or promote) the arrangement and the arrangement must have been entered into as a consequence of the head foreign arrangement.

## How does the exclusion of 'corporations that operate on a commercial basis' apply to universities and education institutions? Will a commercial and wholly-owned subsidiary of a university be excluded?

*Note: Refer to 'Guidance Note – Corporations'*

Australian public universities are in scope of the Scheme. The question of whether a subsidiary of a university is in scope involves a case-by-case assessment, having regard to the establishment, structure, control and oversight of the subsidiary, and whether the subsidiary is excluded as a commercial corporation. Universities may wish to seek legal advice about whether their specific controlled entities have obligations under the Act.

Corporations that operate on a commercial basis are excluded from the Scheme. Determining whether a university subsidiary entity is in fact a commercial corporation involves a case-by-case, holistic assessment having regard to relevant factors, as outlined in '*Guidance Note – Corporations*'.

This means that commercial corporations are not included within the Scheme, except where they are party to a subsidiary arrangement entered under the auspices of a head arrangement between a State/Territory entity and a foreign entity. An example in the university context is:

- An Australian public university enters into a "Memorandum of understanding (MoU) on Research Cooperation" with Foreign University A, which does not have institutional autonomy. This MoU is a 'non-core foreign arrangement' under the Act.
- A commercial corporation then concludes a contract to deliver training on research to Foreign University A, which is entered for the purpose of implementing the MoU on Research Cooperation. As the commercial corporation is not a 'State/Territory entity' under the Act, the contract is not a 'foreign arrangement'. However, the contract is a 'subsidiary arrangement' under section 12 of the Act, as it was entered under the auspices of a head foreign arrangement (i.e. the MoU).

## When are commercial agreements of Australian public universities in scope of the Scheme?

Commercial agreements between a 'State/Territory entity' under section 7 and a 'foreign entity' under section 8 of the Act are in scope of the Scheme. The definition of 'arrangement' includes written contracts. This is intended to cover all arrangements entered into by State and Territory governments, local governments and Australian public universities with foreign governments and certain foreign universities. However, it is important to note that arrangements (including commercial agreements) with commercial corporations are not in scope of the Scheme.

## **Does the Scheme cover academics acting in an individual capacity? For example, academics receiving direct funding from foreign universities and foreign governments.**

The Scheme only applies to Australian public universities when they enter arrangements with foreign governments or certain foreign universities, not individuals acting in their own right. Whether an arrangement is entered by the university or an individual is a question of fact.

Arrangements that relate to funding for academics could be covered in certain circumstances. For example, where an academic enters a foreign arrangement while acting on behalf of their Australian public university. Where an academic enters an arrangement in their individual capacity under the auspices of a head foreign arrangement, that arrangement may also be considered a 'subsidiary arrangement' under the Scheme.

## **Does the scope of the term 'arrangement' encompass arrangements developed informally or via private tools (such as SMS, WhatsApp, or personal email)?**

*Note: Refer to 'Fact Sheet 5 – Exemptions'*

The term 'arrangement' is defined broadly under section 9 of the Act. It encompasses anything **in writing** that is an arrangement, agreement, contract, understanding or undertaking, whether or not it is legally binding, and whether or not it is made in Australia.

Where an arrangement is created using informal technology but is in writing and otherwise falls within the scope of the Act, it would need to be notified to the Foreign Minister. However, it is important to note that these messages or informal items would need to both meet the definition of an 'arrangement' and be in writing, to be within the scope of the Act. There are also exemptions in the Rules that exclude minor administrative and logistical matters.

State/Territory entities may wish to seek legal advice if uncertain about specific circumstances.

## **Will the Department of Foreign Affairs and Trade provide a more specific list of university arrangements that are in and out of scope?**

The Scheme is designed to be flexible and responsive to global shifts and changes in Australia's foreign policy. Consequently, how the Scheme applies to any particular arrangement involves a case-by-case assessment.

## **Questions regarding institutional autonomy**

*Note: Refer to 'Guidance – Institutional autonomy'*

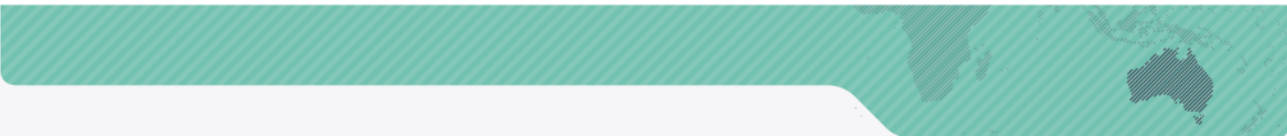
### **How are religious universities or foreign universities owned or controlled by royal families considered under the Scheme?**

Whether religious universities, or universities owned or controlled by royal families, do not have institutional autonomy depends on the circumstances of each foreign university. This will need to be assessed on a case-by-case basis.

The institutional autonomy test refers to the degree of control exercised over a foreign university by a foreign government or the political party that forms the foreign government. It does not refer to the degree of control by a religious leadership or body.

To meet the requirements in the Act for a foreign university to not have institutional autonomy, it is necessary to demonstrate:

- that the religious or royal leadership to which the university is answerable forms part of the foreign government, AND
- that the foreign government (through the religious or royal leadership) is in a position to exercise substantial control over the university's governing body, education, research and/or academic staff, in accordance with the requirements in subsection 8(3) of the Act.



The indicators under paragraphs 8(3)(b) and (c) of the Act include a requirement for education, research and/or academic staff to adhere to, or be in service of, political principles or political doctrines of a foreign government or political party that forms the foreign government. In the context of religious universities, a requirement to adhere to religious principles or religious doctrines is not in itself sufficient to meet these indicators.

The foreign government, or political party that forms the foreign government, would need to be capable of guiding or altering the religious principles or religious doctrines, in order to consider them to be ‘political principles or political doctrines of the foreign government or political party that forms the foreign government’. Consideration must be given to the full requirements in subsection 8(3) before determining whether a foreign university does not have institutional autonomy.

## Questions regarding notifying the Foreign Minister of an arrangement

### **When should an Australian public university notify of a prospective arrangement and what documentation needs to be provided with the notification?**

*Note: Refer to ‘Fact sheet 7 – Grant applications’*

Under the Act, Australian public universities must notify the Foreign Minister of a proposal to enter a prospective foreign arrangement. There is no specific timeframe for this proposal, other than that notification is required prior to entry into the arrangement. However, the notification must include a copy of the draft arrangement proposed to be signed with the foreign entity.

Australian public universities must also notify the Foreign Minister once they have entered into a prospective foreign arrangement, and include with their notification a copy of the arrangement as entered. The Act and the Rules set out detail about the information required to be provided with each notification. This information is also specified in the notification form in the portal.

There is no obligation on Australian public universities to notify the Foreign Minister prior to negotiating prospective foreign arrangements.

### **Do universities need to notify the Foreign Minister of a multi-party arrangement, which includes another State/Territory entity?**

A multi-party foreign arrangement must be notified if the parties include at least one ‘State/Territory entity’ under section 7 and one ‘foreign entity’ under section 8 of the Act.

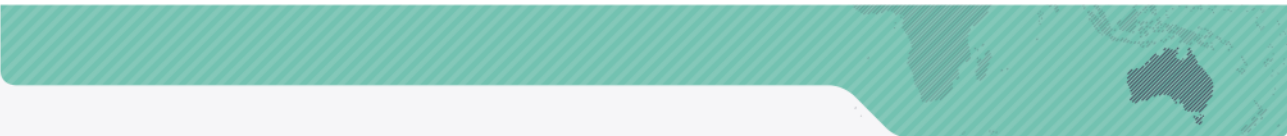
There are different obligations for Australian public universities depending on whether the arrangement is a ‘core foreign arrangement’ or ‘non-core foreign arrangement’ under the Act.

Where Australian public universities are parties to a multi-party core arrangement (i.e. involving a State or Territory government entity and a foreign national-level entity), there is no requirement for the ‘non-core’ Australian public university to notify the Minister of the arrangement. This obligation rests with the ‘core entity’, namely the State or Territory government entity.

In contrast, where Australian public universities are parties to a multi-party ‘non-core’ arrangement, there is a requirement for all State/Territory entities, including Australian public universities, to notify the Foreign Minister.

For multi-party arrangements, the Taskforce will accept a notification from one party as a notification from the parties, but State/Territory should coordinate to ensure at least one party makes a notification. DFAT will direct subsequent engagement on that specific arrangement through the notifying party.

There is no prohibition on all parties notifying the arrangement.



It is important to consider the circumstances in which it may not be sufficient for only one party to notify an arrangement.

- For example, where one party has information about a multi-party arrangement that they wish or need to provide separately, they should make a separate notification. This may include information relevant to any decision the Minister may make; for example, specific information to address the factors listed under subsection 51(2).
- If one party has subsidiary arrangements which would not be notified by other parties, that party would need to make a separate notification to notify those subsidiary arrangements.

**Does the Foreign Minister need to be notified of a multi-party arrangement involving some foreign universities that do not have institutional autonomy and some that have institutional autonomy?**

Yes. For example, an arrangement involving two Australian public universities, a foreign university that is not in scope of the Scheme and a foreign university that does not have institutional autonomy, must be notified by the two Australian public universities.

## Questions regarding the Public Register

**An Australian public university notified the Foreign Minister of an arrangement with a foreign university, but it is not on the Public Register. Does that mean the foreign university is not in scope of the Scheme?**

There is no set legislative timeframe for publication of notified arrangements to the Public Register.

If an Australian public university notifies the Foreign Minister of an arrangement that is deemed not to be in scope, DFAT will advise the university accordingly.

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<sup>i</sup> These frequently asked questions set out information about compliance with the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020*. They are not intended to be comprehensive and should not be relied on as a definitive interpretation of the Act. They are 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.