



**Submission to the
Senate Foreign Affairs, Defence and Trade
Legislation Committee**

**Inquiry into Australia's Foreign Relations
(State and Territory Arrangements) Bill 2020**

September 2020

Executive Summary

The University of Melbourne welcomes the opportunity to provide a submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee on *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020* (Bill). The University recognises the critical importance of securing Australia's national interest from foreign interference.

University global engagement advances Australia's interests

The University of Melbourne seeks to play its part in advancing Australia as an ambitious, forward-thinking country while increasing its reputation and influence globally. As a research-intensive and comprehensive University, the University of Melbourne is internationally connected, drawing on relationships built over many years that span the globe in the pursuit of the world's best collaborators.

The scope and scale of international engagement at the University is significant, with the University collaborating with global organisations such as the Bill and Melinda Gates Foundation, the Wellcome Trust, Atlantic Philanthropies and the World Health Organization in the investigation, dissemination and application of research which addresses some of the most pressing global problems.

These relationships have delivered in the order of approximately 2000 active arrangements across 57 countries, which provides Australia with world class research that is translated into new discoveries in medicine, public health, manufacturing, engineering, agriculture and others.

These relationships are carefully managed in the national interest and also to deliver sovereign capabilities that would otherwise be out of reach for Australia.

The scope of the Bill is too broad to achieve its objectives

While the University understands the need for vigilance and continual improvements to secure the national interest, the Bill, as currently drafted, is unlikely to be fully effective in achieving its objectives.

The ability for Australian universities to drive global engagement through building strong and lasting relationships with international parties will be severely compromised by the proposed legislation in its current form. In seeking to manage sovereign capability, the Bill may inadvertently create sovereign risk for Australia's global research and engagement, the very research that Australia will rely on to rebuild the post-COVID economy.

We estimate, for our University alone, there will be 400-450 new confirmed and 1200-1600 proposed arrangements per annum. In addition, some 2000+ existing arrangements will be required to be notified to DFAT within six months of the commencement of the Bill.

Existing written 'arrangements' with foreign entities that may fall in scope of the proposed legislation not only extend to teaching agreements and research projects, but include staff in receipt of Fellowships or Awards (e.g. Fulbright Scholarships) that run under the aegis of foreign governments, graduate researchers receiving stipends from foreign governments for work in Australian laboratories, memorandums of understanding, philanthropic gifts and donations, Study-Abroad Programs, joint PhD Programs, and vocational and professional placements.

While recognising that government agencies need support for the increasingly complex task of protecting Australia against foreign interference, the Bill's intent is unlikely to be delivered as it is currently drafted. The scope of the Bill is vast and will introduce extensive additional regulatory burden and administrative costs – both for universities and government. The extensive scope of possible agreements covered raises the very real risk that the Bill is likely to be ineffective in protecting national security – potentially risky agreements may become lost in the sheer volume of

information provided. The Bill, if progressed, should therefore apply only to legally binding written agreements and not to undefined proposals, negotiations or grant applications.

Ministerial powers are unilateral, not subject to merits review and can be retrospective

The scope of the Minister's capacity to unilaterally declare current and existing arrangements invalid will not provide international collaborators with confidence in the validity of arrangements entered into with Australian State/Territory entities. A high proportion of the Bill's regulatory regime has been left to be worked out through Rules, the content of which is unknown. The lack of a comparable approach in any prior legislation is of deep concern. There is a need for the Bill to provide for procedural fairness and adherence to the rule of law for Ministerial decisions.

The Bill duplicates existing foreign interference measures

The Bill lacks clarity on a number of significant issues and associated operational aspects and lacks coordination with existing legislation, processes and current programs of work. For example, the Bill does not recognise the extensive regulatory and compliance regime that currently exists to manage foreign interference such as the Defence Trade Controls Act (DTCA), the Foreign Interference Transparency Scheme Act (FITS) and the University Foreign Interference Taskforce (UFIT) Guidelines.

The Bill will have a chilling effect on global engagement

The consequent negative impact on legitimate collaborative international relationships and research is contrary to the public interest as it will deter international partners from pursuing agreements with Australian university partners. International co-authorship numbers are rising and at present, over 60% of Australia's research publications include a foreign co-author. This pattern of activity relies on foreign collaborators being funded by their entities/governments as the Australian government does not fund foreign entities through our research councils or bilateral programs. As international co-publications are more highly cited and impactful, this legislation poses the danger that Australia will rapidly fall behind other countries in research and innovation efforts. Further, the proposed Public Register should only include information on arrangements that are legally binding and for which a declaration has been made by the Minister, rather than information about every arrangement that is proposed and about which the Minister has been notified.

The Bill raises questions of constitutionality

There is a constitutional flaw in the Bill in its singling out of State entities for special burdens to which other entities are not exposed. This risk of invalidity is unlikely to be reduced by the requirement that the Minister take into account (when deciding to make a declaration) the matters listed in clause 51(2)(c) and (d) of the Bill.

Need for review and regulatory impact assessment

The University of Melbourne takes foreign interference seriously, while also acknowledging that the vast majority of international linkages are in Australia's national interest in research, teaching and learning and student mobility.

We are committed to working closely with Government to achieve outcomes that are both effective, workable and proportionate. This submission suggests amendments to the Bill that would better target its provisions. However, it would be preferable to remove universities from the Bill's remit and have the issues it seeks to address managed through the existing regimes established for this purpose. In addition, an independent, robust regulatory impact assessment should be conducted.

For further information, or to discuss this submission, please contact Ms Debra Tegoni, General Counsel and Executive Director Legal and Risk at debra.tegoni@unimelb.edu.au or on (03) 8344 3796.

Summary of recommendations

The University of Melbourne makes the following recommendations for amendments to the Bill:

1. Public universities should be excluded from the Bill.
2. Specific activity, and arrangements in pursuance of that activity, should be specifically excluded in the Bill (not in the Rules).
3. The Bill should be refined to only address gaps not covered by existing legislation and processes (e.g. DTCA, FITS Act, Autonomous Sanctions Act, UFIT Guidelines).
4. The Bill should apply only to legally binding written agreements and not to undefined proposals, negotiations or grant applications.
5. The Public Register should only include information on arrangements that are legally binding and for which a declaration has been made by the Minister, rather than information about every arrangement that is proposed and about which the Minister has been notified.
6. Remove the application of the Bill to university arrangements made prior to the Bill's commencement.
7. Provide certainty of ability to claim compensation where the Minister's decision has a financial impact on the University.
8. Provide procedural fairness and adherence to the rule of law for Ministerial decisions.
9. The Minister should be required to provide certainty to arrangements notified to have legal effect within a specified timeframe.
10. The sector should be given the opportunity to examine and provide feedback on the Rules, and Parliamentary oversight strengthened, before the Rules are finalised.

Discussion of the issues

The University of Melbourne recommends that universities be removed from the remit of the Bill for the reasons outlined below. However in the event that the Bill proceeds, a series of recommendations are outlined below that would improve the operation of the Bill's provisions.

1. Public universities should be excluded from the Bill

There is no policy position as to why public universities are subject to the proposed intensive regulation of the Bill. The Bill has been expressed as targeting State and Territory entities. There is no explanation of the specific problem being targeted and no policy explanation to justify the Bill's application to the proposed or actual arrangements of public universities, other than they may easily be captured by virtue of the fact that they depend on State/Territory legislation for their powers. In the context of other extensive current and emerging regulatory regimes, which are substantial, there is little justification for this overreach.

Further, there is no public policy argument presented that justifies why public universities will be subject to additional intensive and potentially overlapping regulation when private universities are not. This differential treatment of public and private universities will jeopardise the validity of the Act that results from the Bill. The practical result will be to inhibit the capacity of leading universities to pursue scholarship and research in a way that will significantly damage the public interest and will have immediate and long-term impacts for the sector.

There is a constitutional flaw in the Bill in its singling out of State entities for special burdens to which other entities are not exposed and we submit that the flaw is structural. Legislation that singles out entities (including universities) established by or under State law for differential treatment compared to entities (including public universities) that have no such connection to a State (including private universities) would be seen as imposing a special disability or burden on the exercise of powers and fulfilment of functions of the States (including public universities), which curtails their capacity to function (as governments).¹ This risk of invalidity is unlikely to be reduced by the requirement that the Minister take into account (when deciding to make a declaration) the matters listed in clause 51(2)(c) and (d) of the Bill.

If the Government is not prepared to exclude public universities, the following recommendations are made:

2. Specific activity, and arrangements in pursuance of that activity, should be specifically excluded in the Bill (not in the Rules)

The proposal to assess arrangements as to whether they *would be, or would be likely to be, inconsistent with Australia's foreign policy...* [s.35 (1)(c)(ii)] is a very vague standard that will be constantly changing and would assess arrangements against subjective criteria.

While the national interest foreign policy test to be applied by the Minister in decision making under the Bill is unknown, there are certain activities and arrangements undertaken by a university that should be excluded from the ambit of the Bill. The significant burden that would otherwise be imposed, without such exemptions, is not justified nor proportionate to risks that would otherwise be presented. This amendment would alleviate some of the substantial regulatory burden and overlap currently proposed by the Bill. It would reduce Government/DFAT resources that would be necessary to manage compliance with the provisions.

The activities and arrangements relating to those activities proposed for exemption in the Bill itself (the Rules lack sufficient certainty as they may be unilaterally changed by the Minister at any point) include:

¹ *Fortescue Metals Group Ltd v The Commonwealth* (2013) 250 CLR 548 at 137

- Arrangements dealing with teaching posts and related arrangements.² Course content is already subject to significant regulatory oversight;
- Arrangements that offer joint degrees with overseas institutions for students that combine overseas study as part of their degrees;
- Research grant applications, involving one or more foreign entities, whether to an Australian or overseas funding body;
- Research arrangements (the Explanatory Memorandum on pg. 103 suggests this might be done in the Rules, however this should be clarified and included in the Bill); and
- Cultural activities.

3. The Bill should be refined to only address gaps not covered by existing legislation and processes (e.g. DTCA, FITS Act, Autonomous Sanctions Act, UFIT Guidelines)

An extensive suite of national interest legislation and various compliance requirements currently exist. Universities must comply with the following when dealing with foreign entities:

- *Autonomous Sanctions Act 2011 (Cth)*
- *Autonomous Sanctions Regulations 2011 (Cth)*
- *Foreign Influence Transparency Act 2018 (Cth)*
- *Defence Trade Controls Act 2012 (Cth)*
- *Defence Trade Controls Regulation 2013 (Cth)*
- *Export Control Act 2020 (Cth)*
- *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018.*

The Government is also currently consulting on a plan to introduce an enhanced regulatory framework, building on existing requirements under the *Security of Critical Infrastructure Act 2018*.

Universities must also comply with the Australian Code for the Responsible Conduct of Research including the National Statement on Human Research Ethics and the new Australian Research Council conflict of interest policy which further supports transparency of international activity. The Bill will sit alongside and overlap with these existing legal regimes covering foreign interference, involving regulation across several different Departments, which creates a risk of different and/or conflicting standards of decision-making and outcomes.

More recently, the Guidelines to counter Foreign Interference in the Australian University sector (**UFIT**) were published and agreed with the sector, which cooperated fully and in good faith with their development. Universities are implementing compliance regimes with relevant controls in order to comply with UFIT Guidelines. Issues continue to be considered and dealt with through that process. The current Bill duplicates this framework and so creates regulatory complexity and increases the compliance burden. If the Bill raises new issues then these could be dealt with under the existing laws and the UFIT regime.

4. The Bill should apply only to legally binding written agreements and not to undefined proposals, negotiations or grant applications

The Bill creates a duplicate notification requirement which continues to add to compliance administration and regulatory burden. Universities will be required to notify the Minister of proposals or negotiations to enter into relevant arrangements, as well as when those arrangements actually become effective. It is unclear what comprises a proposal and a negotiation. This creates

² The term 'arrangement' is used to cover the whole group of contracts, agreements, memorandums etc currently stipulated in the Bill

confusion and uncertainty in application and will impact on normal interactions. It is anticipated that this uncertainty will significantly impede legitimate, positive and productive relationships being fostered due to concerns of traversing the unclear reach of the Bill.

Without amendment, multi-party research grant applications, involving one or more foreign entities, whether to an Australian or overseas funding body, would require notification at the submission stage even though many of them will not proceed to binding contract.

The University of Melbourne alone submits in the order of 1200-1600 grant applications to Australian and International funding agencies per annum. Narrowing the scope of this provision would reduce the reporting and assessment burden both on universities and government reviewers and focus on actual agreements. Accordingly, we propose that only committed grants be notifiable. The University alone has in the order of approximately 2000 active arrangements across 57 countries.

5. The Public Register should only include information on arrangements that are legally binding and for which a declaration has been made by the Minister, rather than information about every arrangement that is proposed and about which the Minister has been notified

There will be significant potential impact on the ability for universities to pursue commercial arrangements to translate important research and intellectual property if there can be no assurance of confidentiality in circumstances where the arrangement may need to be displayed in a register, especially before the arrangement is legally binding. A public register of all arrangements could also damage Australia's reputation as a dependable partner depending on how that information was subsequently used and reported. This could erode the competitive edge of the impacted research and diminish areas of Australian economic advantage.

6. Remove the application of the Bill to university arrangements made prior to the Bill's commencement

There is considerable uncertainty and burden created by application of the Bill to arrangements that were in place prior to the Bill's commencement. Some arrangements with foreign universities and relevant foreign entities may have been in place for many years. It has been suggested that the Bill's approach could be analogised to the legislation that gives effect to Foreign Investment Review Board approvals. However, we note that the relevant legislation (the *Foreign Acquisitions and Takeovers Act 1975*) does not apply to arrangements that existed prior to the legislation coming into effect. This is a significant and important difference between the two regimes. The extensive reach and retrospectivity proposed by the Bill, combined with uncertainty regarding the consequences for the parties of an arrangement that is declared invalid and unenforceable by the Minister under the Bill, does not justify such an approach.

7. Provide certainty of ability to claim compensation where the Minister's decision has a financial impact on the University

The Minister is provided with significant and unfettered power to declare an arrangement as invalid and unenforceable under Australian law. When foreign arrangements are involved, it is possible that the arrangement is governed by foreign law (for example, as the proper law of the relevant contract); and in that situation the foreign party may pursue the university for compensation. This may also encourage foreign parties to insist on the application of foreign law in arrangements after the Bill's commencement. The government's position must be clarified as this has significant potential impact on the sector.

8. Provide procedural fairness and adherence to the rule of law for Ministerial decisions

The combined effect of the Bill and a related bill explicitly excludes the requirement for the Minister to exercise procedural fairness or to allow review of the Minister's decision under the *Administrative Decisions (Judicial Review) Act 1977*. This removes the ability of a person affected by the Minister's decision to seek a statement of reasons for decision. There is no justification provided for such an exclusion, which removes any oversight to ensure the Minister's decision is lawful and so undermines the fundamental concept of rule of law. Further, no provision is made for review of the Minister's decisions by the Administrative Appeals Tribunal (a body that has demonstrated its capacity to review decisions with international and security implications). There is no justification for denying both effective judicial review and merits review in a legislative scheme that impinges so dramatically on commercial and research arrangements.

9. The Minister should be required to provide certainty to arrangements notified to have legal effect, within a specified timeframe

To allow for contractual certainty the Minister should make an assessment on the arrangement, and if no Ministerial declaration is made within a specified time period (30 days) then the arrangement should be permitted to proceed without further risks of invalidity. This would allow for parties to agree to a condition precedent to be presented to a contracting party which would preserve reputational and contract certainty. This would provide a more manageable and reasonable outcome. If this measure is not pursued, the potential for termination of arrangements with public universities will reduce the perceived reliability of these arrangements, reducing their value, and consequently, the translational research opportunities and revenue available to public universities.

10. The sector should be given the opportunity to examine and provide feedback on the Rules, and Parliamentary oversight strengthened, before the Rules are finalised.

The significant role to be played, in the legislative scheme, by Rules (referred to in the Bill on 59 occasions) points to a deeply concerning aspect of the scheme: the Parliament is being asked to enact legislation that will provide the Minister with the power to intrude on, and invalidate, contractual arrangements, but the precise circumstances in which that power will be available and exercised are left to be defined by subordinate legislation – the content of which is unknown at the present stage. That is a serious threat to the institution of representative democracy that is fundamental to Australia's Constitution.

There are many important terms and matters that are to be reserved for the Rules including potential exemptions or modifications. One important example is the meaning of 'institutional autonomy' as this will have considerable impact on the application of the Bill to Australian universities.

The Parliament should not pass the Bill in its current form with so much of its detail dependent on Rules that are currently not disclosed. The Parliament should require that the Rules are also presented to ensure parliamentary oversight and so that an informed decision can be made on the merits of the Bill.

Case Studies

International collaboration directly benefits our key industry sectors. For example, in the discipline of agricultural research almost two-thirds of Australian Agricultural and Biological research in the last three years was published with an international co-author. This work is translated directly into productivity on Australian farms, through initiatives such as the Healthy Soils Joint Research Centre (Case Study 1) which have been made possible through Government initiatives. As it stands, the Bill is at odds with Australia's National Science Statement which encourages and supports collaboration across disciplines, sectors and internationally.

University of Melbourne Case Study 1

Australia China Joint Research Centre, Healthy Soils for Sustainable Food Production and Environmental Quality

The Healthy Soils for Sustainable Food Production and Environmental Quality Joint Research Centre (JRC) is one of six Centres co-funded by both the Australian and Chinese governments as part of the Australia-China Science and Research Fund (ACSRF), administered by the Commonwealth Department of Industry, Science, Energy and Resources. It is focused on delivering tangible economic, environmental and social benefits for both countries and specifically responds to an expressed industry need for improved soil sustainability and related food security tools.

The University of Melbourne leads this Centre under the guidance of Professor Deli Chen who brings together expertise from across Australia including the CSIRO and the University of Western Australia, among others. In China, the Centre is supported by ten partners including the Chinese Agricultural University, Chinese Academy of Sciences, and Nanjing Agricultural University. The Centre delivers new solutions to challenges in sustainable agricultural management and trains early and mid-career-researchers in developing new technologies and management practices to improve farming productivity and sustainability for Australia and China.

Since its inception, this team of experienced scientists and scholars have strictly adhered to both internal University policies and processes relating to intellectual property, conflict of interest and data security and management. Robust governance and risk mitigation strategies have been developed by the Centre, with all Centre activities complying with existing legislative frameworks relating to Australian and International export controls, DFAT visa screening and specific responsibilities and obligations specified in the Commonwealth Government funding agreement.

The University has proactively supported and fully engaged with Government-led processes, which has included the development of the University Foreign Interference Taskforce Guidelines, an initiative that has been recognised internationally as world-leading. The University has worked extremely hard with the sector and the Government through this process to create a strong, cohesive, trusted process of engagement where the strength of the research sector can combine with the specialist knowledge and expertise of Government and the security agencies to protect critical national research assets.

The University has worked through the implementation of the suite of enhanced national security measures targeting foreign interference. This has included the establishment of a dedicated, cross-institutional Working Group to oversee compliance ensuring it has: an appropriate chain of authority and accountability for setting and reviewing university security policy; is instituting optimised rigorous risk assessment processes; and is progressing the development of communications and training programs on foreign interference for staff and students. A key focus for the University has been optimising due diligence processes to ensure appropriately rigorous review and assessment of all international partnerships.

University of Melbourne Case Study 2

Existing controls in place and the complexities introduced by the Bill

The University has adopted enhanced due diligence processes and oversight mechanisms reflecting implementation of the UFIT Guidelines. Any activity with a foreign entity that relates to the Defence Strategic Goods List is closely examined and assessed on the basis that it flags elevated risk for compliance and can have implications for the Australian national interest.

In appropriate cases, this scrutiny includes referral by the University to the Department of Defence for assessment of the proposed activity and partner in relation to the requirement for export permits. Based on information provided by the Department of Defence, our understanding is that its assessment includes analysis of the proposed collaborator and foreign policy considerations, including consultation with the Department of Foreign Affairs in relevant cases. The Department of Defence aims to provide advice within 15-35 business days, depending on the complexity of the case. It is unclear whether any separate assessment by DFAT under the Bill would add to these timeframes, and to what extent these assessments would be coordinated.

The existing regulatory process relating to exports provides a targeted mechanism to enable the Commonwealth to review research activity that occurs at the higher risk threshold, and enables both government and the University to appropriately focus attention on these higher risk cases. Adding an additional foreign relations requirement to research activity has the potential to (a) dilute attention across low or negligible risk activity; and (b) duplicate an existing mechanism of export regulation/foreign policy alignment assessment for activity that merits genuine scrutiny.

Leaving aside impacts on legitimate research endeavours, a number of compliance-related risks emerge from the potential over-regulation of research activity, including the dilution of government resources available to support Universities working in a compliant fashion. An emerging risk is the fragmentation of regulation and sources of government advice across a number of Commonwealth Departments. The greater the level of complexity in the landscape, the more challenging and resource-intensive it is for Universities to implement compliance in a robust and focussed way.