***AUSTRALIA’S fOREIGN RELATIONS (sTATE AND tERRITORY ARRANGEMENTS) RULES 2020***

**Explanatory Statement**

***AUSTRALIA’S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) RULES 2020***

**EXPLANATORY STATEMENT**

**Issued by the authority of the Minister for Foreign Affairs**

The *Australia’s Foreign Relations (State and Territory Arrangements) Act 2020* (the Act) allows the Minister to assess whether arrangements between State/Territory entities and foreign entities are consistent with Australia’s foreign policy and do not adversely affect Australia’s foreign relations.

Section 54 of the Act allows the Minister to make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, rules may be made pursuant to the provisions of the Act listed in Attachment A.

The *Australia’s Foreign Relations (State and Territory Arrangements) Rules 2020* (the Rules) will prescribe the following matters for the purposes of the Act:

* exempt arrangements;
* additional information to be included in the Public Register; and
* information State/Territory entities must include in a notice to the Minister.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*.  The overall assessment is that the Rules are compatible with human rights. A copy of the Statement is at Attachment B.

Details of the Rules are set out in Attachment C.

The Office of Best Practice Regulation (OBPR) has been consulted in relation to the Rules.  No Regulation Impact Statement is required.

Consultation occurred via publication of a draft version of *Australia’s Foreign Relations (State and Territory Arrangements) Rules 2020* on the Department of Foreign Affairs and Trade website and a range of consultations with State/Territory entities, including universities.

The Act specifies no conditions that need to be satisfied before the power to make the Rules may be exercised.

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003.*

The Rules commence immediately after they are registered.

**ATTACHMENT A**

**AUTHORISING PROVISIONS**

Section 54 of the Act allows the Minister to make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions of the Act apply:

* section 4, which defines ***exempt arrangement*** to include an arrangement of a kind that is prescribed by the rules;
* subsection 53(2), which requires that, for certain foreign arrangements and subsidiary arrangements, the Public Register must include the title and parties to the arrangement, whether the Minister made any decisions in relation to the arrangement, and any information prescribed by the rules;
* subclause 2(5) of Schedule 1 to the Act, which requires State/Territory entities to include any information prescribed by the rules in a notice to the Minister of a pre-existing core foreign arrangement; and
* subclause 3(3) of Schedule 1 to the Act, which requires State/Territory entities to include any information prescribed by the rules in a notice to the Minister of a pre-existing non-core foreign arrangement.

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Australia’s Foreign Relations (State and Territory Arrangements) Rules 2020**

This disallowable legislative instrument, the *Australia’s Foreign Relations (State and Territory Arrangements) Rules 2020* (the Legislative Instrument), is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

Part 1 of the Legislative Instrument deals with preliminary matters. Section 1 titles the Legislative Instrument the *Australia’s Foreign Relations (State and Territory Arrangements) Rules 2020.* Section 2 provides that the Legislative Instrument will commence immediately after it is registered. Section 3 provides that the Legislative Instrument is made under the *Australia’s Foreign Relations (State and Territory Arrangements) Act 2020* (the Act). Section 4 deals with definitions, namely that ***Act*** means the *Australia’s Foreign Relations (State and Territory Arrangements) Act 2020.*

Part 2 of the Legislative Instrument deals with exempt arrangements. Section 5 specifies the kinds of arrangements that are exempt from certain provisions of the Act.

Part 3 of the Legislative Instrument deals with information that must be included on the Public Register. Section 6 specifies the information about each foreign arrangement and subsidiary arrangement that must be included on the Public Register.

Part 4 deals with transitional requirements relating to pre-existing foreign arrangements. Section 7 specifies the information that must be included in a notice about a pre-existing foreign arrangement.

**Human rights implications**

The Legislative Instrument engages the following rights and freedoms:

 a. the prohibition on arbitrary or unlawful interference with privacy.

It is well accepted that States owe international human rights law obligations to natural persons, as opposed to non-natural persons such as bodies corporate or bodies politic.

The Legislative Instrument primarily supports the Act’s regulation of the negotiation of, entry into, and continuation of, arrangements between government entities, being State/Territory entities and foreign entities, and is unlikely to affect the human rights of individuals. Accordingly, the Legislative Instrument only engages the above right to the limited extent that the Legislative Instrument may affect individuals, such as individuals who have entered into subsidiary arrangements (such as commercial contracts) under the auspices of foreign arrangements that are covered by the scheme.

***The prohibition on arbitrary or unlawful interference with privacy***

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) establishes a prohibition on arbitrary or unlawful interference with privacy. The UN Human Rights Committee has not defined ‘privacy’. It should be understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy.

This Legislative Instrument implements measures contained in the Act that engage the prohibition on arbitrary or unlawful interference with privacy, namely, the provisions that require the disclosure of personal information.

Section 6 of this Legislative Instrument prescribes certain information that must be made available to the public on the Public Register, for the purposes of section 53 of the Act. Section 6 specifies that the additional information to be included on the Public Register is the date that the Minister made a decision in relation to the arrangement and the date the arrangement was entered. The inclusion of these dates on the Public Register would not be considered personal information.

Section 7 of this Legislative Instrument prescribes information that must be included in a notice from a State/Territory entity to the Minister of a pre-existing foreign arrangement, for the purposes of clauses 2 and 3 of Schedule 1 of the Act. Section 7 of this Legislative Instrument does not directly require the provision of personal information. It is unlikely that such notices would contain, as a matter of course, personal information, as personal information is not relevant to the decisions of the Minister under the Act. However, it is possible that such notices could contain a very limited subset of personal information in certain circumstances, such as the names of negotiators.

To the extent that sections 6 and 7 of this Legislative Instrument engage the right to privacy, any limitations on that right is permissible as it is in pursuit of a legitimate objective, is rationally connected to the objective, and is a proportionate way of achieving that objective.

a. *Prescribed by law*: The prescribed information to be notified and published on the Public Register is clearly set out in this Legislative Instrument. This Legislative Instrument is a form of delegated legislation and is therefore subject to Parliament’s consideration and disallowance procedures. The prescribed information is sufficiently precise and clear to ensure that individuals are aware that there are specific requirements for State/Territory entities to provide information to the Minister and that specific information will be published on the Public Register.

b. *Legitimate Objective*: Requiring information to be provided to the Minister is essential to the functioning and enforcement of the scheme established by the Act. The Minister is required to assess whether proposed arrangements would adversely affect Australia’s foreign relations or are inconsistent with Australia’s foreign policy. In order to do so, the Minister requires information about the nature of the arrangement and the parties to it. Requiring the publication of certain information related to arrangements subject to, or affected by, the Act online through the Public Register allows for transparency of decisions under the Act, and also ensures that all parties to an arrangement, and the public generally, have access to information regarding the status of a particular arrangement. This includes prospective parties who may be seeking to enter into subsidiary arrangements. Given the potential ramifications for persons entering into subsidiary arrangements if the status of the ‘head’ foreign arrangement has been affected by the Act, it is necessary to publish and make public sufficient detail on the Register, which may include information contained in notices provided by State/Territory entities to the extent prescribed by this Legislative Instrument.

c. *Rationally connected*: Requiring the provision of information via notices under the Act in order for the Minister to make decisions, and requiring the publication of certain information on the Public Register, are purposes that are rationally connected to the objective of protecting Australia’s foreign relations and providing for transparency of the Minister’s decisions under the Act. The Minister needs relevant information upon which to base his or her decisions under the Act, and it is in the public interest to make those decisions publicly available. This will ensure potential parties to prospective subsidiary arrangements are aware of the status of the relevant pre-existing foreign arrangement and will ensure the public has access to information about the status of an arrangement regulated by the Act. The information prescribed by this Legislative Instrument is that information required to fulfil the objectives of the Act.

d. *Proportionate*: Subsection 53(3) of the Act provides safeguards to ensure that certain information must not be included on the Public Register, and therefore is not made publicly available. This includes information that is commercially sensitive, subject to Cabinet confidentiality or legal professional privilege, protected by public interest immunity or affects national security.

**Conclusion**

The Legislative Instrument is compatible with human rights because, to the extent that it may limit privacy rights, those limitations are reasonable, necessary and proportionate.

**Australia’s Foreign Relations (State and Territory Arrangements) Rules 2020**

**Senator the Hon. Marise Payne, Minister for Foreign Affairs**

**ATTACHMENT C**

**DETAILS OF THE *AUSTRALIA’S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) RULES 2020***

**Part 1 – Preliminary**

**Section 1 – Name**

1. This section provides that the title of the instrument is the *Australia’s Foreign Relations (State and Territory) Arrangements Rules 2020*.

**Section 2 – Commencement**

1. This section provides for when the Rules commence.
2. Subsection 2(1) provides that each provision of the Rules specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.  Any other statement in column 2 has effect according to its terms.
3. The table provides that the whole of the instrument commences immediately after it is registered.
4. A note clarifies that this table relates only to the provisions of this instrument as originally made.  It will not be amended to deal with any later amendments of this instrument.
5. Subsection 2(2) provides that any information in column 3 of the table is not part of the Rules.  Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

**Section 3 – Authority**

1. This section provides that the Rules are made under the *Australia’s Foreign Relations (State and Territory Arrangements) Act 2020* (the Act).
2. Section 54 of the Act allows the Minister to make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

**Section 4 – Definitions**

1. This section defines key terms for the purposes of the Rules.
2. ***Act*** is defined as the *Australia’s Foreign Relations (State and Territory Arrangements) Act 2020.*

**Part 2 – Exempt arrangements**

**Section 5 – Exempt arrangements**

1. This section provides that certain arrangements are exempt from the notification and approval provisions of the Act. The exemption of these arrangements does not prevent the Minister from making a declaration in relation to such arrangements under Part 4 of the Act.
2. Subsection 5(1) of the Rules prescribes arrangements for the purposes of the definition of ***exempt arrangements*** in section 4 of the Act.
3. Paragraph 5(1)(a) exempts core foreign arrangements which solely deal with the sharing of information or resources for the management of an emergency in Australia which has been declared (however described), where those arrangements are negotiated or entered while the declaration is in force. This exemption recognises that such arrangements are often time-critical, in the public interest and less likely to pose a risk from a foreign policy or foreign relations perspective. It is therefore appropriate that States and Territories are able to negotiate and enter into such arrangements unimpeded by the Act in response to emergencies such as natural disasters and pandemics.
4. Paragraph 5(1)(b) 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, and it would be unnecessarily administratively burdensome for State/Territory entities to be required to notify and, where applicable, seek approval of such arrangements.
5. Subsection 5(2) of the Rules provides that a variation arrangement is an exempt arrangement for the purposes of subsection 13(4) of the Act if:
	1. the arrangement is a foreign arrangement; and
	2. the State/Territory entity that is party to the arrangement has given the Minister notice under the Act that the State/Territory has entered the arrangement; and
	3. the variation is a minor variation that does not alter the substance of the arrangement (for example, the variation alters the number of students involved in an exchange under the arrangement from 6 to 5).
6. As highlighted by the note at the end of this subsection, such arrangements would otherwise be subject to the notification and approval provisions of the Act by virtue of section 13(1) of the Act, which provides that a variation of an arrangement is subject to the Act in the same way that an arrangement is.
7. The exemption in this subsection recognises that minor variations are less likely to pose a risk from a foreign policy or foreign relations perspective where the Minister has already been notified of the main arrangement. It would be unnecessarily administratively burdensome for State/Territory entities to be required to notify and, where applicable, seek approval of minor variations in these circumstances.

**Part 3 – The Public Register**

**Section 6 – Information that must be included on the Public Register**

1. This section prescribes information to be included on the Public Register for the purposes of paragraph 53(2)(d) of the Act.
2. Paragraphs 6(a) and (b) require that the date of each decision made by the Minister in relation to an arrangement, and the date the arrangement was entered into, must be included on the Public Register. This is in addition to the title of the arrangement, the parties to the arrangement and whether the Minister made any decisions in relation to the arrangement, which must be included on the Public Register under subsection 53(2) of the Act.
3. The inclusion of the dates of decisions made by the Minister and entering of arrangements will provide greater transparency to State/Territory entities by allowing them to identify the nature of the Minister’s decisions at a particular point in time.

**Part 4 – Application, saving and transitional provisions**

***Division 1 – Transitional requirements relating to pre-existing foreign arrangements***

**Section 7 – Information to be included in notice of pre-existing foreign arrangement**

1. This section prescribes the information State/Territory entities must include in a notice to the Minister for the purposes of paragraphs 2(5)(c) and 3(3)(e) of Schedule 1 to the Act in relation to pre-existing core foreign arrangements and pre-existing non-core foreign arrangements respectively.
2. For these arrangements, the following information must be included in the notice:
3. the name of the arrangement;
4. the parties to the arrangement;
5. a brief statement summarising the subject matter and effect of the arrangement;
6. the date the arrangement was entered, the duration of the arrangement and any other relevant timeframes in relation to the arrangement;
7. whether the arrangement is legally binding under an Australian law, legally binding under a foreign law or not legally binding; and
8. a brief statement summarising the details of any information that the State/Territory entity requests the Minister not to include on the Public Register under paragraph 53(3)(a) of the Act and the reasons for the request.
9. Paragraph 7(g) provides that the information required by paragraphs 7(e) and 7(f) must also be included in relation to each subsidiary arrangement to an arrangement.
10. The information prescribed by this section will allow the Minister to determine whether a decision or declaration should be made, and what information will be included on the Public Register.