

***AUSTRALIA'S FOREIGN RELATIONS  
(STATE AND TERRITORY ARRANGEMENTS) AMENDMENT (PROSPECTIVE  
ARRANGEMENTS AND OTHER MEASURES) RULES 2021***

**EXPLANATORY STATEMENT**

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**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) Amendment (Prospective Arrangements and Other Measures) Rules 2020* (the Rules) will prescribe the following matters for the purposes of the Act:

- exempt arrangements;
- information that State/Territory entities must include in notices of prospective foreign arrangements to the Minister; and
- time for giving notices to the Minister about pre-existing core foreign arrangements.

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.

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.

Consultation was undertaken with affected stakeholders during the implementation of the Act, which has directly informed the drafting of this instrument.

## **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 as an arrangement of a kind that is prescribed by the rules;
- section 16(2)(c) which requires State/Territory entities to include any information prescribed by the rules in a notice given to the Minister under subsection 16(1) of the Act about a proposal to negotiate a core foreign arrangement;
- section 23(2)(e) which requires State/Territory entities to include any information prescribed by the rules in a notice given to the Minister under subsection 23(1) of the Act about a proposal to enter a core foreign arrangement;
- section 23(2)(f) which requires a notice given to the Minister under subsection 23(1) of the Act about a proposal to enter a core foreign arrangement to be accompanied by any documents prescribed by the rules;
- section 29(2)(c) which requires State/Territory entities to include any information prescribed by the rules in a notice given to the Minister under subsection 29(1) of the Act about entering a core foreign arrangement;
- section 29(2)(d) which requires a notice given to the Minister under subsection 29(1) of the Act about entering a core foreign arrangement to be accompanied by any documents prescribed by the rules;
- section 34(2)(d) which requires State/Territory entities to include any information prescribed by the rules in a notice given to the Minister under subsection 34(1) of the Act about a proposal to enter a non-core foreign arrangement;
- section 34(2)(e) which requires a notice given to the Minister under subsection 34(1) of the Act about a proposal to enter a non-core foreign arrangement to be accompanied by any documents prescribed by the rules;
- section 38(2)(c) which requires State/Territory entities to include any information prescribed by the rules in a notice given to the Minister under subsection 38(1) of the Act about entering a non-core foreign arrangement;
- section 28(2)(d) which requires a notice given to the Minister under subsection 29(1) of the Act about entering a non-core foreign arrangement to be accompanied by any documents prescribed by the rules;

- subclause 2(5)(c) 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)(e) 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) Amendment (Prospective Arrangements and Other Measures) Rules 2021**

This disallowable legislative instrument, the *Australia's Foreign Relations (State and Territory Arrangements) Amendment (Prospective Arrangements and Other Measures) Rules 2021* (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) Amendment (Prospective Arrangements and Other Measures) Rules 2021*. 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).

Clause 1A specifies that foreign arrangements dealing with child protection are exempt arrangements.

Part 2A specifies the information that must be included in a notice when negotiating core foreign arrangements, before entering core foreign arrangements and when entering core foreign arrangements.

Part 2B specifies the information that must be included in a notice about proposals to enter and when entering non-core foreign arrangements. Additionally, Part 2B specifies an amendment to paragraph 7(a) to omit 'name' and substitute 'title'.

#### **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 possible disclosure of personal information.

Parts 2A and 2B of this Legislative Instrument prescribe information that must be included in a notice from a State/Territory entity to the Minister when negotiating, and before and about entering core arrangements; and before and about entering non-core arrangements. Parts 2A and 2B of this Legislative Instrument do 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 Parts 2A and 2B of this Legislative Instrument engage the right to privacy, any limitation 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 relevant pre-existing foreign arrangements 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) Amendment (Prospective Arrangements and Other Measures) Rules 2021**

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

## **ATTACHMENT C**

### **DETAILS OF THE *AUSTRALIA'S FOREIGN RELATIONS (STATE AND TERRITORY ARRANGEMENTS) AMENDMENT (PROSPECTIVE ARRANGEMENTS AND OTHER MEASURES) RULES 2021***

#### **Section 1**

Section 1 provides that the name of the Rules is *Australia's Foreign Relations (State and Territory Arrangements) Amendment (Prospective Arrangements and Other Measures) Rules 2021* (the Amendment Rules).

#### **Section 2**

Section 2 provides that the Amendment Rules commence immediately after it is registered.

#### **Section 3**

Section 3 states that the authority for making the Amendment Rules is taken from the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Act).

#### **Section 4**

Section 4 is a provision that gives effect to the amendments to the *Australia's Foreign Relations (State and Territory Arrangements) Rules 2020* (the Rules) as described in the Schedule.

#### **Schedule 1 – Amendments**

##### **Clause 1 – At the end of subsection 5(1)**

1. Subsection 5(1) of the Rules exempts certain types of arrangements. Exempt arrangements are defined in section 4 of the Act as arrangements of a kind that are prescribed by the rules to be an exempt arrangement.
2. Clause 1 prescribes foreign arrangements solely dealing with child protection as exempt arrangements.
3. The exemption relates to child protection arrangements that are entered into by State and Territory child protection and welfare agencies with comparable foreign government entities. Arrangements of this nature are entered into on short notice, are one-off, time-critical and time-limited collaborations regarding children, where any delay could present a risk to individual children or families. Exempting child protection arrangements is consistent with the intention of the Scheme, as these types of arrangements are less likely to pose a risk from a foreign relations or foreign policy perspective.

##### **Clause 2 – After Part 2**

This clause inserts a Part 2A, detailed as follows:

##### **Part 2A – Negotiating and entering core foreign arrangements**



## **Section 5C – Information to be included in notices to the Minister about negotiations**

4. Section 5C prescribes the information that core State/Territory entities must include in a notice to the Minister for the purposes of subsection 16(2) of the Act in relation to proposing to negotiate a core foreign arrangement with a core foreign entity.
5. For these arrangements, the following information must be included in the notice:
  - a. the title of the arrangement proposed to be negotiated;
  - b. the parties to the arrangement proposed to be negotiated;
  - c. a brief statement summarising the subject matter and effect of the arrangement proposed to be negotiated; and
  - d. whether the arrangement proposed to be negotiated will be legally binding under an Australian law, legally binding under a foreign law or not legally binding.
  - e. for each proposed subsidiary arrangement, of the arrangement proposed to be negotiated, that is known to the State/Territory entity at the time the notice is given to the Minister—the information in paragraphs (a) to (d) in relation to the proposed subsidiary arrangement.
6. The information prescribed by this section will assist the Minister to determine whether an approval, refusal or revocation of approval decision should be made.

## **Section 5D – Information to be included in notices to the Minister before entering core foreign arrangements**

7. Section 5D prescribes the information core State/Territory entities must include in a notice to the Minister for the purposes of subsection 23(2) of the Act in relation to a proposal to enter a core foreign arrangement with a core foreign entity.
8. For these arrangements, subsection 5D(1) provides that the following information must be included in the notice:
  - a. the title of the proposed arrangement;
  - b. the parties to the proposed arrangement;
  - c. a brief statement summarising the subject matter and effect of the proposed arrangement;
  - d. whether the proposed arrangement will be legally binding under an Australian law, legally binding under a foreign law or not legally binding
  - e. 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; and
  - f. for each subsidiary arrangement or proposed subsidiary arrangement, of the arrangement, that is known to the State/Territory entity at the time the notice is given to the Minister—the information in paragraphs (a) to (e) in relation to the subsidiary arrangement or proposed subsidiary arrangement.
9. Under subsection 5D(2), if the State/Territory entity has a copy of a proposed subsidiary arrangement, the notice must be accompanied by a copy of that arrangement.
10. The information prescribed by this section will assist the Minister to determine whether an approval, refusal or revocation of approval decision should be made, and what information should be excluded from the Public Register.

## **Section 5E – Information to be included in notices to the Minister about entering core foreign arrangements and documents to accompany notices**

11. Section 5E prescribes the information core State/Territory entities must include in a notice to the Minister for the purposes of s 29(2) of the Act in relation to entering an arrangement with a core foreign entity.
12. For these arrangements, subsection 5E(1) provides that the following information must be included in the notice:
  - a. the title of the arrangement;
  - b. the parties to the arrangement;
  - c. a brief statement summarising the subject matter and effect of the arrangement;
  - d. the day the arrangement was entered and the duration of the arrangement;
  - e. whether the arrangement is legally binding under an Australian law, legally binding under a foreign law or not legally binding; and
  - f. 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.
  - g. for each subsidiary arrangement, or proposed subsidiary arrangement, of the arrangement, that is known to the State/Territory entity at the time the notice is given to the Minister—the information in paragraphs (a) to (f) in relation to the subsidiary arrangement or proposed subsidiary arrangement.
13. Under subsection 5E(2), if the State/Territory entity has a copy of a subsidiary arrangement or a proposed subsidiary arrangement, the notice must be accompanied by a copy of that arrangement.
14. The information prescribed by this section will assist the Minister to determine whether a declaration should be made, and what information should be included on the Public Register.

## **Part 2B – Entering non-core foreign arrangements**

### **Section 5F – Information to be included in notices to the Minister about proposals to enter non-core foreign arrangements and documents to accompany notices**

15. Section 5F prescribes the information State/Territory entities must include in a notice to the Minister for the purposes of subsection 34(2) of the Act in relation to a proposal to enter a non-core foreign arrangement.
16. For these arrangements, subsection 5F(1) provides that the following information must be included in the notice:
  - a. the title of the proposed arrangement;
  - b. the parties to the proposed arrangement;
  - c. a brief statement summarising the subject matter and effect of the proposed arrangement;
  - d. whether the proposed arrangement will be legally binding under an Australian law, legally binding under a foreign law or not legally binding; and

- e. 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.
  - f. for each proposed subsidiary arrangement, of the proposed arrangement, that is known to the State/Territory entity at the time the notice is given to the Minister—the information in paragraphs (a) to (e) in relation to the proposed subsidiary arrangement.
17. Under subsection 5F(2), if the State/Territory entity has a copy of a proposed subsidiary arrangement, the notice must be accompanied by a copy of that arrangement.
18. The information prescribed by this section will assist the Minister to determine whether a declaration should be made, and what information should be excluded from the Public Register.

**Section 5G – Information required to notify the Minister about entering non-core foreign arrangements and documents to accompany notices**

19. Section 5G prescribes the information State/Territory entities must include in a notice to the Minister for the purposes of subsection 38(2) of the Act about entering a non-core foreign arrangement.
20. For these arrangements, subsection 5G(1) provides that the following information must be included in the notice:
- a. the title of the arrangement;
  - b. the parties to the arrangement;
  - c. a brief statement summarising the subject matter and effect of the arrangement;
  - d. the day the arrangement was entered and the duration of the arrangement;
  - e. whether the arrangement is legally binding under an Australian law, legally binding under a foreign law or not legally binding; and
  - f. 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.
  - g. for each subsidiary arrangement or proposed subsidiary arrangement, of the arrangement, that is known to the State/Territory entity at the time the notice is given to the Minister—the information in paragraphs (a) to (f) in relation to the subsidiary arrangement or proposed subsidiary arrangement.
21. Under subsection 5G(2), if the State/Territory entity has a copy of a subsidiary arrangement or a proposed subsidiary arrangement, the notice must be accompanied by a copy of that arrangement.
22. The information prescribed by this section will assist the Minister to determine whether a declaration should be made, and what information should be excluded from the Public Register.

**Clause 3 – Paragraph 7(a)**

23. Paragraph 7(a) of the Rules requires the ‘name of the arrangement’ to be included in a notice about a pre-existing foreign arrangement given to the Foreign Minister under subclause 2(3) or 3(2) of Schedule 1 to the Act.

24. Clause 3 omits the word ‘name’ and substitutes the word ‘title’ to amend the wording in paragraph 7(a) of the Rules to align with the wording in the Act.

**Clause 4 – Paragraph 7(d)**

25. Paragraph 7(d) of the Rules requires ‘the date the arrangement was entered and the duration of the arrangement’ to be included in a notice about a pre-existing foreign arrangement given to the Foreign Minister under subclause 2(3) or 3(2) of Schedule 1 to the Act.
26. Clause 4 omits the word ‘date’ and substitutes the word ‘day’ to amend the wording in the Rules to align with the wording in the Act.