

# **FOREIGN INFLUENCE TRANSPARENCY SCHEME AMENDMENT RULES 2023**

## **EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

### **AUTHORITY**

The *Foreign Influence Transparency Scheme Amendment Rules 2023* (the Rules) are made under section 71 of the *Foreign Influence Transparency Scheme Act 2018* (the Act), for the purposes of section 53 of the Act. The Act establishes the Foreign Influence Transparency Scheme (the Scheme). The objective of the Scheme is to provide transparency to the public and decision-makers about the nature, level and extent of foreign influence on Australia's governmental and political processes.

Section 71 of the Act provides that the Minister may, by legislative instrument, make rules prescribing matters that are required or permitted by the Act to be prescribed by the rules, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 53 of the Act provides an authorisation for the Secretary to disclose scheme information for a range of specified purposes and to a person specified for that purpose. Item 4 of subsection 53(1) provides that the Secretary may communicate scheme information to a person prescribed by the rules for a purpose prescribed by those rules.

### **PURPOSE AND OPERATION OF THE RULES**

The Rules would prescribe matters for the purposes of section 53 of the Act, to allow the Secretary of the Attorney-General's Department to communicate scheme information to the Minister responsible for the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Foreign Relations Act) and their department, for the purposes of administering that Act.

The Attorney-General's Department administers the Scheme, which requires individuals and entities to register certain activities on a public register hosted by the department if they undertake those activities on behalf of a foreign principal. The Secretary of the Attorney-General's Department has powers to obtain information and documents if the Secretary reasonably suspects that a person might be liable to register under the Scheme and has not registered (section 45), or reasonably believes that a person (whether or not a registrant) has information or a document that is relevant to the operation of the Scheme (section 46). Section 50 of the Act provides that scheme information is information obtained by the Secretary, an APS employee of the department who has functions in relation to the Scheme, or any other person who performs functions in relation to the Scheme under an agreement with the Commonwealth, and which was obtained in the course of performing functions or exercising powers under the Scheme.

The Department of Foreign Affairs and Trade (DFAT) administers the Foreign Relations Act, which establishes the Foreign Arrangements Scheme. The purpose of the Foreign Arrangements Scheme is to ensure a consistent approach to foreign policy across all levels of Australian government. Under the Foreign Arrangements Scheme, State and Territory governments, local governments and Australian public universities were required to notify the Minister for Foreign Affairs of pre-existing arrangements that were in operation on commencement of the Foreign Arrangements Scheme. Pre-existing core foreign arrangements (between State and Territory governments and foreign national governments) were required to be notified by 10 March 2021 and pre-existing non-core foreign arrangements (State and Territory sub-national, local government and university arrangements) were required to be notified by 10 June 2021. As of 10 March 2021, State and Territory governments, local governments and Australian public universities have also been required to notify the Minister of prospective foreign arrangements and, for core arrangements, seek the Minister's approval. The

Minister may cancel, vary or prevent an arrangement from proceeding where the arrangement is inconsistent with Australia's foreign policy or adversely affects Australia's foreign relations.

The Foreign Arrangements Scheme is part of a range of Government measures to protect Australia's national interests. The Foreign Arrangements Scheme operates alongside, and is complementary to, the Foreign Influence Transparency Scheme. Given the nature of the Foreign Arrangements Scheme and the arrangements that are within its remit, a small number of entities may be within the scope of both schemes. For instance, an entity may be involved in an arrangement required to be notified to the Minister, whilst also being a foreign principal for the purposes of the Scheme.

The Rules would authorise the Secretary of the Attorney-General's Department, or their delegate, to communicate scheme information to the Foreign Minister and DFAT for the purpose of administering the Foreign Relations Act. Given the potential for entities to be within the scope of both schemes, the ability for the Attorney-General's Department to share information obtained under the Scheme with the Minister for Foreign Affairs and DFAT for the purposes of administering the Foreign Arrangements Scheme would improve the interoperability of the schemes. A decision under one Act may be relevant to the administration of the other. For example, a decision by the Foreign Minister to cancel or vary an arrangement with an entity under the Foreign Arrangements Scheme may alter the way the Act applies to the relevant entity. The Rules would ensure that the Attorney-General's Department can provide the Minister for Foreign Affairs and DFAT with visibility of matters arising under the Act that may be relevant to the administration of the Foreign Relations Act, which supports the efficient and appropriate administration of both schemes.

## **CONSULTATION**

The Attorney-General considered the general obligation to consult imposed by section 17 of the *Legislation Act 2003*. The Attorney-General was satisfied that consultation was appropriate and reasonably practicable to be undertaken. Before the Rules were made, the Attorney-General's Department consulted DFAT, the Office of Impact Analysis (OIA) (formerly the Office of Best Practice Regulation), and the Office of the Australian Information Commissioner. The Attorney-General also consulted the Information Commissioner in accordance with subsection 53(2) of the Act. The feedback received was considered and where appropriate, incorporated into the finalised Rules.

## **REGULATORY IMPACT**

The OIA considers that the Rules are unlikely to have a regulatory impact and advised that an Impact Analysis was not required. The OIA reference for this consultation is: 44767.

## **PRIVACY IMPACT ASSESSMENT**

The Attorney-General's Department instructed the Australian Government Solicitor (AGS) to complete a Privacy Impact Assessment of the Rules. AGS assessed the Rules to be a low to medium privacy risk project. While there is a potential for any disclosure of information to DFAT to have an impact on the privacy of an individual, any impact is unlikely to be significant. Further, it is expected that information will be shared infrequently as only a small number of entities may be within scope of both schemes, and very little of the scheme information would likely be personal information as the Foreign Relations Act primarily concerns entities who are not individuals.

## **NOTES ON SECTIONS**

An explanation of the provisions of the Rules is provided in [Attachment A](#).

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

A statement of compatibility with human rights, prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, is provided in [Attachment B](#).

## NOTES ON SECTIONS

### **PART 1 - Preliminary**

#### **Section 1 – Name of Regulations**

This section would provide that the name of this instrument is the *Foreign Influence Transparency Scheme Amendment Rules 2023*.

#### **Section 2 – Commencement**

This section would provide for the instrument to commence on the day after the instrument is registered.

#### **Section 3 – Authority**

This section would provide that the instrument is made under the *Foreign Influence Transparency Scheme Act 2018*.

#### **Section 4 – Schedules**

This section would provide that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

### **SCHEDULE 1 – Amendments**

This section would amend the *Foreign Influence Transparency Scheme Rules 2018* to insert a new Part 4 (Communicating and dealing with scheme information). The new Part would prescribe an additional category of purposes and persons for which the Secretary is authorised to communicate scheme information. New section 8 would provide that administering the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* is a prescribed purpose for which the Secretary of the Attorney-General's Department may communicate scheme information. The section would provide that either the Minister who has responsibility for administering that Act or the Department administered by that Minister, is a person to whom that information may be communicated for that purpose.

## **STATEMENT OF COMPABILITY WITH HUMAN RIGHTS**

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

### **Foreign Influence Transparency Scheme Amendment Rules 2023**

The *Foreign Influence Transparency Scheme Amendment Rules 2023* (the Rules) are 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*.

#### **Authority**

Section 71 of the *Foreign Influence Transparency Scheme Act 2018* (the Act) provides that the Minister may, by legislative instrument, make rules prescribing matters that are required or permitted by the Act to be prescribed by the rules, or that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 53 of the Act provides an authorisation for the Secretary to disclose scheme information for a range of specified purposes and to a person specified for that purpose. Item 4 of subsection 53(1) provides that the Secretary may communicate scheme information to a person prescribed by the rules for a purpose prescribed by the rules.

#### **Purpose and operation of the Rules**

The Rules prescribe matters for the purposes of section 53 of the Act, to allow the Secretary of the Attorney-General's Department to communicate scheme information to the Minister responsible for the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Foreign Relations Act) and their department, for the purposes of administering the Foreign Relations Act.

The Attorney-General's Department administers the Act which established the Foreign Influence Transparency Scheme (the Scheme). The objective of the Scheme is to provide transparency to the public and decision-makers about the nature, level and extent of foreign influence on Australia's governmental and political processes. It which requires individuals and entities to register certain activities under the Scheme if they undertake those activities on behalf of a foreign principal. The Secretary of the Attorney-General's Department has powers to obtain information and documents if the Secretary reasonably suspects that a person might be liable to register under the Scheme and has not registered (section 45), or reasonably believes that a person (whether or not a registrant) has information or a document that is relevant to the operation of the Scheme (section 46). Section 50 of the Act provides that information obtained in the course of performing functions or exercising powers under the scheme is scheme information.

The Department of Foreign Affairs and Trade (DFAT) administers the Foreign Relations Act, which establishes the Foreign Arrangements Scheme. The purpose of the Foreign Arrangements Scheme is to ensure a consistent approach to foreign policy across all levels of Australian government. It requires State and Territory entities to notify the Minister for Foreign Affairs of pre-existing and prospective arrangements with foreign entities. The Minister may cancel, vary or prevent an arrangement from proceeding if it is inconsistent with Australia's foreign policy or adversely affects Australia's foreign relations.

The Foreign Arrangements Scheme is part of a range of Government measures to protect Australia's national interests. The Foreign Arrangements Scheme operates alongside, and is complementary to, the Foreign Influence Transparency Scheme. Given the nature of the Foreign Arrangements Scheme and the arrangements that are within its remit, a small number of entities may be within the scope of both schemes. For instance, an entity may be involved in an arrangement required to be notified to the Minister, whilst also being a foreign principal for the purposes of the Scheme.

The Rules would authorise the Secretary of the Attorney-General's Department, or their delegate, to communicate scheme information to the Minister for Foreign Affairs and DFAT for the purpose of administering the Foreign Relations Act. Given the potential for entities to be within the scope of both schemes, the ability for the Attorney-General's Department to share information obtained under the Scheme with the Minister for Foreign Affairs and DFAT for the purposes of administering the Foreign Arrangements Scheme would improve the interoperability of the schemes. A decision under one Act may be relevant to the administration of the other. For example, a decision by the Minister for Foreign Affairs to cancel or vary an arrangement with an entity under the Foreign Arrangements Scheme may alter the way the Act applies to the relevant entity. The Rules would also ensure that the Attorney-General's Department can provide the Minister for Foreign Affairs and DFAT with visibility of matters arising under the Act that may be relevant to the administration of the Foreign Relations Act, which supports the efficient and appropriate administration of both schemes.

### **Human rights implications**

The Rules engage the right to privacy as contained in article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

#### *Legitimate objective of the Rules*

Under international human rights law, any limitation on rights and freedoms must be reasonable, necessary and proportionate for the pursuit of a legitimate objective. For an objective to be legitimate, it must address a pressing or substantial concern, and not simply seek an outcome regarded as desirable or convenient.

It is essential that all arms of government are able to perform their functions. This ensures the proper functioning of Australia's representative democracy and its decision-making processes. The Rules would allow the Secretary of the Attorney-General's Department to disclose scheme information to DFAT for the purposes of administering the Foreign Relations Act. The Rules therefore promote the legitimate objective of the Foreign Relations Act, which is to enable the Minister for Foreign Affairs to protect Australia's foreign relations by ensuring that arrangements between State or Territory entities and foreign entities are not inconsistent with Australia's foreign policy or adversely affect Australia's foreign relations.

#### *Right to privacy (article 17)*

Article 17(1) of the ICCPR provides that no one should be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation. Furthermore, article 17(2) provides that everyone has the right to the protection of the law against such interference. The right may be limited when the limitation is lawful, not arbitrary, and reasonable, necessary and proportionate to achieve a legitimate objective.

The Rules engage the right to privacy to the extent that the Secretary's disclosure of scheme information to DFAT may involve disclosures of personal information within the meaning of section 6 of the *Privacy Act 1988* (Cth) (Privacy Act). This could include disclosures of sensitive information relating to a person's political opinions or membership of a political association, also within the meaning of section 6 of the Privacy Act, where the department has obtained such information in the course of administering the Scheme, which requires persons who undertake certain activities on behalf of foreign principals for the purpose of influencing federal political or governmental processes to register.

The likelihood of disclosing personal information under the Rules will be limited because the Foreign Relations Act concerns arrangements between entities not individuals. As such, information that would be likely to be disclosed under the Rules would typically relate to entities rather than individuals, and therefore little information disclosed under the Rules is likely to contain personal or sensitive information. However, where information disclosed under the Rules does contain such

information, the limitation on the right to privacy is nonetheless reasonable, necessary and proportionate as set out below.

The limitation on the right to privacy is a necessary means of achieving the legitimate objective of ensuring the interoperability of the two schemes where an entity may be subject to both schemes and a decision under one Act may be relevant to the administration of the other. The Rules are rationally connected to this objective as they ensure the Attorney-General's Department can provide the Minister for Foreign Affairs and DFAT with visibility of matters arising under the Act that may be relevant to the administration of the Foreign Relations Act, which supports the efficient and appropriate administration of both schemes.

The Rules are proportionate to achieving the legitimate objective and there are several limitations and safeguards in place which ensure that any engagement of the right to privacy is consistent with article 17 of the ICCPR. The authority to disclose scheme information under the Rules is limited. Subsection 53(1) authorises the Secretary to disclose scheme information for a purpose prescribed by rules, and the Secretary has delegated this power under section 67 of the Act to relevant Senior Executive Service level employees. This ensures that authority to disclose scheme information is limited to officials with appropriate seniority within the Attorney-General's Department.

The additional purpose and persons prescribed in the Rules are sufficiently narrow. The Secretary of the Attorney-General's Department is only authorised to disclose information under the Rules where it is for the specified purpose, and would not be able to collect information specifically for the purposes of DFAT administering the Foreign Relations Act. The Attorney-General's Department will create a record of each instance of proposed disclosure under the Rules, including the basis upon which the department is reasonably satisfied the disclosure is relevant to the administration of the Foreign Relations Act.

The Attorney-General's Department currently provides an information collection notice to registrants under the Scheme to inform them of how the department uses and may potentially disclose their personal information to fulfil obligations under the Act. The department will update the information collection notice to ensure it contains notification of potential sharing of personal information with DFAT for the purpose of the administration of the Foreign Relations Act.

The Attorney-General's Department will develop procedures to ensure information shared is accurate and securely transferred, consistent with the Privacy Act and the Australian Government Protective Security Policy Framework (PSPF). Once shared, scheme information must also be stored in accordance with the Privacy Act and PSPF, and may be used or disclosed for the purposes for which it was obtained in accordance with section 54 of the Act (i.e. to administer the Foreign Relations Act). The department will also inform individuals who seek correction of their personal information that they may request the department notify other entities to which the information may have been disclosed about the correction of their personal information.

To the extent that the Rules allow for the disclosure of certain information and the subsequent limitation on the right to privacy, this limitation is reasonable, necessary and proportionate to support another Commonwealth agency to carry out its functions.

## **Conclusion**

The Rules are compatible with human rights because to the extent that they limit the right to privacy, those limitations are reasonable, necessary and proportionate in order to achieve a legitimate objective. The Rules allow the Secretary to share scheme information to assist the Minister for Foreign Affairs or DFAT to perform functions under the Foreign Arrangement Scheme, which supports the efficient and appropriate administration of both schemes and ensures their interoperability where an entity may be subject to both schemes.