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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Foreign Affairs, Senator the Honourable Marise Payne)

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

GENERAL OUTLINE

1. This Act establishes a legislative scheme for Commonwealth engagement with arrangements between State or Territory governments and foreign governments. The scheme will also cover entities that are associated with State or Territory governments (such as local councils and Australian public universities) and foreign governments (such as municipal or provincial governments).

2. This framework ensures that arrangements between State or Territory governments and foreign governments, and their associated entities, do not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy. This is intended to foster a systematic and consistent approach to foreign engagement across all levels of Australian government.

3. The Commonwealth welcomes engagement between State or Territory governments and foreign governments, which can deliver significant benefits including encouraging investment, building capacity in developing sectors and strengthening international cooperation.

4. However, while recognising these benefits, it is necessary for the Commonwealth to play a role to ensure that arrangements entered by State or Territory governments, and associated entities, are not negotiated, entered or continue in operation where they adversely affect Australia's foreign relations or are inconsistent with Australia's foreign policy.

5. The Commonwealth Government has responsibility for managing Australia's external affairs and developing and implementing Australia's foreign policy. However, the Commonwealth currently has little awareness of engagement between State or Territory governments and foreign governments, and their associated entities. There is no existing mechanism or consistent practice to ensure that State or Territory governments notify the Commonwealth of arrangements with foreign governments or consult and seek advice on the impact of such arrangements on Australia's foreign relations and foreign policy.

6. This Act fills this gap by establishing a legislative mechanism for the Minister, on behalf of the Commonwealth, to assess and manage the effect of these arrangements on Australia's foreign relations and foreign policy. This is designed to ensure a consistent and strategic approach to Australia's international engagement. It recognises the Commonwealth's responsibility for managing and protecting Australia's foreign relations, and that the Commonwealth Government, through the Minister, is best placed to assess the foreign relations and foreign policy impacts of arrangements with foreign governments.

7. The framework in this Act is country neutral and does not target any particular foreign state, but is concerned with protecting and managing Australia's foreign relations across all levels of Australian government.

8. The framework to be established by this Act ensures that State/Territory entities cannot negotiate, enter, vary, or continue to give effect to arrangements with foreign entities where the arrangement would adversely affect Australia's foreign relations or is inconsistent with Australia's foreign policy. Whether a particular arrangement adversely affects

Australia's foreign relations or is inconsistent with Australia's foreign policy is a matter for the Minister to consider on a case-by-case basis.

9. Certain provisions in this Act are broad in scope so as to cover all relevant State and Territory arrangements with foreign government parties. However, the Act also creates a framework for a narrower subset of these entities and corresponding arrangements, based on their greater impact on Australia's foreign relations.

10. Firstly, the Act applies to all arrangements between State/Territory entities and foreign entities, whether those arrangements are legally binding or not and regardless of when the arrangement was entered. This includes contracts, memoranda of understanding and other arrangements which represent a commitment between the two parties. The Act also covers variations to arrangements in the same manner as arrangements themselves, such as options to extend arrangements or variations to the terms of an existing arrangement.

11. Secondly, recognising the Commonwealth's responsibility for, and need to have oversight of all arrangements relevant to, foreign relations and foreign policy, this Act regulates arrangements made by the States and Territories, including the external Territories. This includes arrangements made by core State/Territory entities, which are defined as the States and Territories themselves, their governments and related departments and agencies. It also includes arrangements made by other State or Territory entities, such as local governments and Australian public universities.

12. This Act covers arrangements with all forms of foreign government, including national, state and local governments in foreign countries, however named. This includes arrangements with foreign countries, their national governments and related departments and agencies (defined in the Act as 'core foreign entities'). It also includes arrangements with other foreign entities, such as authorities, provinces, states, self-governing territories, regions, local councils, municipalities and their governments, agencies, and authorities, as well as foreign universities that do not have institutional autonomy, as distinct from the levels of institutional autonomy enjoyed by Australian public universities.

13. The obligations in this Act depend upon:

   a. whether an arrangement is prospective or already in operation, and

   b. the parties to the arrangement (different obligations apply to a core foreign arrangement—defined as an arrangement that is between a core State/Territory entity and a core foreign entity).

14. In relation to prospective foreign arrangements, this Act creates a two-tier system:

   a. for core foreign arrangements, under Part 2, the Minister's approval is required in order for the core State/Territory entity to commence negotiations, or enter the arrangement

   b. for non-core foreign arrangements under Part 3, the State/Territory entity must notify the Minister before entering the arrangement and the Minister has discretion to make a declaration that the State/Territory must not negotiate or enter the arrangement.

15. Part 2 applies to core foreign arrangements, that is arrangements between the following parties:

Core foreign arrangements	
Arrangements between a core State/Territory entity and core foreign entity	
<u>Core State/Territory entity</u> (paragraphs 7(a), (b) and (c)) • A State or Territory. • The Government of a State or Territory. • A Department or agency of either of the above (however described).	<u>Core foreign entity</u> (paragraphs 8(1)(a), (b) and (c) and paragraph 10(4)(b)) • A foreign country. • The national government of a foreign country. • A Department or agency (however described) of either of the above. • An entity external to Australia prescribed in the rules to be a core foreign entity.

16. Under Part 2, core State/Territory entities are prohibited from negotiating or entering an arrangement with a core foreign entity (a core foreign arrangement) if approval from the Minister is not in force.

17. Under Part 2, core State/Territory entities are required to notify the Minister about proposed arrangements with core foreign entities prior to negotiating and prior to entering the arrangement. After receiving notice from the relevant State/Territory entity, the Minister must make a decision within 30 days. The Minister must give approval if he or she is satisfied that the arrangement would not adversely affect Australia's foreign relations and would not be inconsistent with Australia's foreign policy. If the Minister is not satisfied of these factors, he or she must refuse to provide approval and the State/Territory entity will not be able to commence negotiations or enter into the arrangement. If the Minister does not make a decision within the 30 day period, the Minister is taken to have approved the proposed negotiation or arrangement.

18. If a core State/Territory entity enters a core foreign arrangement in contravention of the prohibition in Part 2, the Act provides that the arrangement is invalid and unenforceable, not in operation or required to be terminated by operation of this Act, as relevant. The Minister may also enforce the prohibitions in this Part by seeking an injunction from the High Court or Federal Court.

19. Part 3 applies to non-core foreign arrangements, that is arrangements between the following parties:

Non-core foreign arrangements	
Arrangements between a core State/Territory entity and non-core foreign entity	
<u>Core State/Territory entity</u> (paragraphs 7(a), (b) and (c)) • A State or Territory. • The Government of a State or Territory.	<u>Non-core foreign entity</u> (paragraphs 8(1)(d), (e), (f), (g), (h), (i), (j)) • A province, state, self-governing territory, region, local council,

<table>
<tr><th colspan="2">Non-core foreign arrangements</th></tr>
<tr><td>A Department or agency of either of the above (however described).</td><td>municipality or other political subdivision (by whatever name known) of a foreign country.
A local council, municipality or other political subdivision (by whatever name known) of the above.
The government of any of the above.
A Department or agency (however described) of any of the above.
An authority of certain entities established for a public purpose (except universities).
A foreign university that does not have institutional autonomy.
An entity external to Australia prescribed in the rules to be a foreign entity.</td></tr>
<tr><th colspan="2">Arrangements between a non-core State/Territory entity and core foreign entity</th></tr>
<tr><td><u>Non-core State/Territory entity</u>
(paragraphs 7(d), (e) and (f), section 55)
A body established for the purposes of local government by or under a law of a State or a Territory.
An Australian public university.
An entity prescribed by the rules to be a State/Territory entity.</td><td><u>Core foreign entity</u>
(paragraphs 8(1)(a), (b) and (c) and paragraph 10(4)(b))
A foreign country.
The national government of a foreign country.
A Department or agency (however described) of either of the above.
An entity external to Australia prescribed in the rules to be a core foreign entity.</td></tr>
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<tr><td><u>Non-core State/Territory entity</u>
(paragraphs 7(d), (e) and (f), section 55)
A body established for the purposes of local government by or under a law of a State or a Territory.
An Australian public university.
An entity prescribed by the rules to be a State/Territory entity.</td><td><u>Non-core foreign entity</u>
(paragraphs 8(1)(d), (e), (f), (g), (h), (i), (j))
A province, state, self-governing territory, region, local council, municipality or other political subdivision (by whatever name known) of a foreign country.
A local council, municipality or other political subdivision (by whatever name known) of the above.
The government of any of the above.
A Department or agency (however described) of any of the above.
An authority of certain entities established for a public purpose (except universities).</td></tr>
</table>

Non-core foreign arrangements	
	• A foreign university that does not have institutional autonomy. • An entity external to Australia prescribed in the rules to be a foreign entity.

20. State/Territory entities must notify the Minister before entering a non-core foreign arrangement with a foreign entity. The Minister then has discretion to make a declaration that the State/Territory entity must not negotiate or enter the arrangement if the Minister is satisfied that the arrangement would adversely affect Australia's foreign relations or would be inconsistent with Australia's foreign policy.

21. In relation to foreign arrangements in operation between State/Territory entities and foreign entities, under Part 4, the Minister may make declarations that such arrangements are invalid and unenforceable, not in operation or required to be varied or terminated, as relevant, if the Minister is satisfied that the relevant arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy. This provides the Minister with an opportunity to ensure that foreign arrangements that pre-date the commencement of the Act, as well as arrangements entered after commencement which have already been assessed by the Minister under the frameworks established by Parts 2 or 3, do not continue to operate if they adversely affect Australia's foreign relations or are inconsistent with Australia's foreign policy.

22. In addition, Part 4 also provides that the Minister may make a declaration in relation to subsidiary arrangements that are in operation. Subsidiary arrangements are those entered under the auspices of a foreign arrangement affected by this Act. Under Part 4, the Minister may make declarations that such subsidiary arrangements are invalid and unenforceable, not in operation or required to be varied or terminated, as relevant, if the Minister is satisfied that the relevant arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy. The ability for the Minister to consider the application of this Act to subsidiary arrangements on a discretionary, case-by-case basis is an important aspect of the enforcement of the scheme established by this Act, ensuring that the consequences for 'head' foreign arrangements can flow to subsidiary arrangements and preventing the circumvention of the scheme.

23. Schedule 1 of this Act provides for transitional requirements relating to pre-existing foreign arrangements. Under this Schedule, State/Territory entities are required to notify the Minister of pre-existing foreign arrangements. If a State/Territory entity fails to notify the Minister of core foreign arrangements in accordance with this Schedule, the relevant arrangement is automatically deemed to be invalid and unenforceable, not in operation or required to be terminated by operation of this Act.

24. Part 5, Division 4 of this Act also establishes a public facing register of information relating to each foreign arrangement and subsidiary arrangement for which a State/Territory entity has given notice under the Act, the Minister has made a decision about, or is otherwise subject to this Act, subject to specified exemptions. This Register will ensure that parties, including prospective parties to subsidiary arrangements, and the public at large are aware of the application of the Act to any particular foreign arrangement or subsidiary arrangement.

25. The obligations in this Act are not intended to prohibit, restrict or discourage State/Territory entities from engaging with foreign governments, or from entering arrangements with foreign entities. Rather, this Act ensures such arrangements do not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy. Therefore this Act will support the States and Territories in undertaking effective, appropriate and informed international engagement with foreign governments.

FINANCIAL IMPACT

26. The establishment and administration of this scheme will have an ongoing financial impact, with costings to be finalised.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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

27. This Bill 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 Bill

28. The Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 (the Bill) establishes a legislative mechanism to enable Commonwealth engagement with arrangements between State/Territory entities and foreign entities.

29. Part 2 of this Act prohibits core State/Territory entities from negotiating or entering an arrangement with a core foreign entity (a core foreign arrangement) if approval from the Minister is not in force (sections 15 and 22).

30. Core State/Territory entities are defined as the States and Territories themselves, their governments and related departments and agencies (section 10). Core foreign entities are defined as foreign countries, their national governments and related departments and agencies (section 10).

31. Under Part 2, core State/Territory entities are required to notify the Minister about proposed arrangements with core foreign entities prior to negotiating and prior to entering the arrangement (sections 16 and 23 respectively). After receiving notice from the relevant State/Territory entity, the Minister must make a decision as soon as practicable within 30 days (subsections 17(1) and 24(1) respectively). The Minister must give approval if he or she is satisfied that the arrangement would not adversely affect Australia’s foreign relations and would not be inconsistent with Australia’s foreign policy (subsections 17(2) and 24(2) respectively). If the Minister is not so satisfied, he or she must refuse to provide approval (subsections 17(3) and 24(3) respectively) and the State/Territory entity will not be able to commence negotiations or enter into the arrangement. If the Minister does not make a decision within the 30 day period, the Minister is taken to have approved the proposed negotiation or arrangement.

32. If a core State/Territory entity enters a core foreign arrangement in contravention of the prohibition in Part 2, the Act provides that the arrangement is invalid and unenforceable, not in operation or required to be terminated by operation of this Act, as relevant. The Minister may also enforce the prohibitions in this Part by seeking an injunction from the High Court or Federal Court.

33. Part 3 applies to non-core foreign arrangements, which are arrangements between:

   a. a State/Territory entity that is not a core State/Territory entity and a foreign entity that is not a core foreign entity

b. a core State/Territory entity and a foreign entity that is not a core foreign entity, and

c. a State/Territory entity that is not a core State/Territory entity and a core foreign entity.

34. Under Part 3, a State/Territory entity must notify the Minister before entering a non-core foreign arrangement (section 34). The Minister then has discretion to make a declaration that the State/Territory entity must not negotiate or enter the arrangement if the Minister is satisfied that the arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy (sections 35 and 36, respectively).

35. If a State/Territory entity enters a foreign arrangement in contravention of the Minister's declaration in this Part, the Minister may make a declaration under Part 4 that the arrangement is invalid and unenforceable, not in operation or required to be varied or terminated, as relevant.

36. Under Part 4, the Minister may make declarations in relation to foreign arrangements and subsidiary arrangements in operation. The Minister may declare that such arrangements are invalid and unenforceable, not in operation or required to be varied or terminated, as relevant, if the Minister is satisfied that the relevant arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

37. Under Part 4, the Minister may also make declarations in relation to arrangements which are entered under the auspices of a foreign arrangement (subsidiary arrangements). In relation to subsidiary arrangements made under foreign arrangements which were entered unlawfully or are subject to a Ministerial declaration under Part 4, the Minister may declare them invalid and unenforceable, not in operation or required to be varied or terminated, as relevant, if the Minister is satisfied that the relevant subsidiary arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

38. Schedule 1 of this Bill provides for transitional requirements relating to pre-existing foreign arrangements. Under this Schedule, State/Territory entities are required to notify the Minister of pre-existing foreign arrangements. If a State/Territory entity fails to notify the Minister of a pre-existing core foreign arrangement in accordance with this Schedule, the relevant arrangement is automatically deemed to be invalid and unenforceable, not in operation or required to be terminated by operation of this Act, as relevant.

39. Part 5, Division 4 of this Act also establishes a public facing register, which must contain certain information related to foreign arrangements and subsidiary arrangements which are subject to, or affected by, this Act.

Human rights implications

40. The Bill engages the following rights and freedoms:

a. the right to a fair hearing, and

b. the prohibition on arbitrary interference with privacy.

41. It is well accepted that international human rights law obligations are owed to individuals only, and are not owed to non-natural persons, such as bodies corporate or bodies politic.

42. This Bill primarily regulates the negotiation of, entry into, and continuation of, arrangements between government entities, being State/Territory entities and foreign entities, and does not generally affect the rights of individuals. Accordingly, the Bill only engages the above rights to the limited extent that the Bill 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.

Right to a fair hearing

43. Article 14 of the International Covenant on Civil and Political Rights (ICCPR) provides that all people are to be equal before courts and tribunals and that everyone, in the determination of rights and obligations in civil proceedings, is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

44. To the extent that an individual (as opposed to a body politic or body corporate) may be affected by a decision of the Minister under this scheme, the measures in this Bill that limit the application of procedural fairness and exclude merits review and exclude judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) engage the right to a fair hearing.

Procedural fairness

45. The right to equality before courts and tribunals ensures ‘equality of arms’, which requires that the same procedural rights are provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.

46. Section 58 of the Bill provides that the Minister is not required to observe any requirements of procedural fairness in exercising a power or performing a function under this Bill.

47. The effect of this provision is to insert a clear legislative intention in the Bill to fully exclude the rules of procedural fairness that may otherwise be applicable in making certain decisions under this Act. This exclusion of procedural fairness may therefore limit the right to equality before courts and tribunals by limiting an individual’s access to reasons for a decision, evidence relied upon to reach that decision and the ability to respond to those reasons and evidence.

48. This exclusion of procedural fairness will only limit an individual’s right to equality before courts and tribunals to the extent that the individual (as opposed to a body politic or body corporate) is party to a subsidiary arrangement that is declared to be invalid and unenforceable, of no operation or which is required to be varied or terminated by the Minister under Part 4, Division 3.

49. However, this limitation on the right to equality before courts and tribunals is permissible as it is prescribed by law, 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 exclusion of procedural fairness is set out in the Bill, which will be publicly accessible as a Commonwealth enactment. The exclusion is sufficiently precise and clear to ensure that individuals who are party to subsidiary arrangements are aware that procedural fairness is excluded in relation to decisions that may affect them.

b. *Legitimate objective:* Excluding procedural fairness has the legitimate objective of allowing the Commonwealth to manage and protect Australia's foreign relations. This recognises that the provision of reasons itself could adversely affect Australia's foreign relations, especially to the extent that the decision may disclose Australia's foreign policy or position in relation to particular issues, which may disadvantage Australia's position in international forums or negotiations. As such, affording a hearing or providing reasons for a decision in these circumstances would defeat the object of the Bill, which is to protect and manage Australia's foreign relations.

c. *Rationally connected:* The exclusion of procedural fairness is rationally connected to the objective as it ensures that the Minister is not required to provide reasons to parties who are affected by decisions made under the Bill. This will ensure that decisions under the Bill do not themselves impact upon Australia's foreign relations.

d. *Proportionate*: In addition, as this Bill predominantly regulates the conduct of government entities, and the exclusion of procedural fairness will only affect individuals to the extent that they are parties to subsidiary arrangements and those arrangements have been subject to a Ministerial declaration, the exclusion of procedural fairness is proportionate to the objective.

Review of administrative decisions

50. Article 14 of the ICCPR provides that all people are to be equal before courts and tribunals and that everyone, in the determination of rights and obligations in civil proceedings, is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

51. The Bill does not provide that decisions made by the Minister under this Bill are subject to merits review, including review by the Administrative Appeals Tribunal.

52. In addition, judicial review under the ADJR Act will be excluded for decisions made under this Bill. The necessary consequential amendments to exclude the ADJR Act will be made by the Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 (the Consequential Amendments Bill). The human rights implications of the exclusion of ADJR Act review for decisions under this Bill are discussed in the Statement of Compatibility for the Consequential Amendments Bill.

53. While decisions under this Bill are not subject to merits review, individuals affected by a decision may still seek judicial review. This approach is consistent with human rights 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 exclusion of merits review (including by the Administrative Appeals Tribunal) for decisions made under this Bill will be clearly apparent from the Bill, which will be publicly accessible as a Commonwealth enactment. The provisions of the Bill (and the Consequential Amendments Bill) will not provide for such review, which would otherwise be necessary in order to ensure such review was available (see for example section 25 of the *Administrative Appeals Tribunal Act 1975*, which states that an enactment may provide for application to the Tribunal).

b. *Legitimate objective:* The exclusion of merits review is necessary to meet the legitimate objective of ensuring that decisions relating to Australia's foreign relations and foreign policy are within the remit of the Minister. This reflects that as decisions under this scheme will be assessed on the basis of Australia's foreign relations and foreign policy, such decisions should not be open for merits review given that it is the prerogative of the Commonwealth Government to determine Australia's foreign relations posture and foreign policy. Given the high political consequence of these decisions, as well as the impact such decisions have on Australia's relationship with other countries, Commonwealth-State relationships and national security, it is appropriate that the decisions are not subject to merits review. Policy decisions of a high political content have been identified by the Administrative Review Council as being generally unsuitable for merits review.[1] The Administrative Review Council notes that policy decisions of a high political content include decisions such as those affecting Australia's relations with other countries and concerning national security.

c. *Rationally connected:* The exclusion of merits review is rationally connected to the objective of the Bill as it ensures that decisions made by the Minister under this Bill, which are underpinned by considerations of foreign relations and foreign policy, are not subject to consideration by administrative review bodies. The limitation on access to merits review in this context is reasonable as it reflects the seriousness of the foreign relations and foreign policy considerations involved.

d. *Proportionate*: The exclusion of merits review is proportionate as individuals affected by a decision under this Bill may still seek judicial review by the Federal Court and Federal Circuit Court under subsection 39B(1) of the *Judiciary Act 1903*, or by the High Court under section 75(v) of the Constitution. These avenues will ensure that an affected individual still has an avenue to challenge decisions that affect them.

The prohibition on arbitrary interference with privacy

54. Article 17 of the 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.

55. The measures in this Bill which require State/Territory entities to provide notices to the Minister engage the prohibition on arbitrary interference with privacy, to the extent that the provision requires the disclosure of personal information.

[1] Administrative Review Council, 'What Decisions Should be Subject to Merits Review?' (1999), 4.22.

56. Sections 16, 23, 29, 34 and 38 of the Bill and clauses 2 and 3 of Schedule 1 of the Bill, require a State/Territory entity to give a notice to the Minister in certain circumstances in relation to prospective foreign arrangements or foreign arrangements that are in operation.

57. These sections do not directly require the provision of personal information. However, subsections 16(2), 23(2), 29(2), 34(2) and 38(2) of the Bill and clauses 2(5) and 3(3) of Schedule 1 of the Bill, provide that such notices must include any information prescribed by the rules and be accompanied by any documents prescribed by the rules.

58. It is unlikely that such notices would be required to contain, or would contain as a matter of course, personal information, as personal information is not relevant to the decisions of the Minister under this Bill. 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, or the names of individual parties to subsidiary arrangements.

59. Section 53 provides that the Minister must keep a public register of information relating to foreign arrangements and subsidiary arrangements which are subject to, or affected by, this Act. Subsection 53(2) provides that the Register must contain any information prescribed by the rules. Therefore, it is possible that the Register may include information relating to notices given by a State/Territory entity under Parts 2 or 3 or Schedule 1, to the extent prescribed by the rules. As such, it is possible that the Act may require the publication of any personal information contained in such notices.

60. However, this limitation on the right to privacy 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 requirements to provide certain information in notices to the Minister and for the Minister to keep the Register are set out clearly in this Bill, which will be publicly accessible as a Commonwealth enactment. In addition, the rules may prescribe further information that may be required to be contained in notices, and information that must be contained on the public Register. The rules are a form of delegated legislation and are therefore subject to Parliament's consideration and disallowance procedures before Parliament. These requirements are sufficiently precise and clear to ensure that individuals who are parties to arrangements regulated by the Bill (whether public officials on behalf of State/Territory entities or individuals who are a party to a subsidiary arrangement) are aware that there are certain requirements to provide information to the Minister, and safeguards to ensure sensitive information is excluded from publication on the 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 Bill. 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, this Bill online through the 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 this Bill, 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 the rules.

c. *Rationally connected:* Requiring the provision of information via notices under the Bill in order for the Minister to make decisions, and requiring the publication of certain information through the 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 Bill. The Minister needs relevant information upon which to base his or her decisions under the Bill, 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 foreign arrangement and will ensure the public has access to information about the status of an arrangement regulated by the Bill.

d. *Proportionate:* Subsection 53(3) provides safeguards to ensure that certain sensitive information must not be included on the Register, and therefore need not be made publicly available. This includes information that is commercially sensitive, subject to Cabinet confidentiality or legal professional privilege, which is protected by public interest immunity or which affects national security. In addition, paragraph 53(3)(d) provides that the Minister may prescribe in the rules information of a kind which must not be made available for public inspection. To the extent that notices did contain sensitive personal information, which is not relevant to the transparency purposes of the Register, it would be open to the Minister to prescribe in the rules that personal information must not be included on the Register.

Conclusion

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

NOTES ON CLAUSES

List of abbreviations

Acts Interpretation Act	*Acts Interpretation Act 1901*(Cth)
ANU	Australian National University
Legislation Act	*Legislation Act 2003* (Cth)

PART 1—PRELIMINARY

Division 1—Preliminary matters

Section 1 Short title

62. Section 1 provides for the short title of the Act to be the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020*.

Section 2 Commencement

63. Section 2 provides for the commencement of each provision of the Act, as set out in the table at subsection 2(1).

64. Subsection 2(1) provides that each provision of this Act 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.

65. Item 1 of the table provides that Part 1, as well as anything in the Act not elsewhere covered by the table, will commence on the day on which the Act receives Royal Assent. Part 1 of the Act concerns formal aspects of the Act, including key definitions and concepts.

66. Similarly, item 3 of the table provides that Parts 4 and 5 and Schedule 1 will commence on the day on which the Act receives Royal Assent.

67. Part 5 of the Act concerns the enforcement of the Act, as well as other matters including the making of the rules and the establishment of the Register. It is important that this Part, along with Part 1, commences upon Royal Assent in order to establish the central framework and structure of the Act, including allowing for the making of rules.

68. Part 4 of the Act provides for the Minister's powers under the Act, including the Minister's powers to make declarations in relation to foreign arrangements and subsidiary arrangements. Schedule 1 provides for transitional requirements in relation to pre-existing arrangements, including the requirement for State/Territory entities to notify the Minister of pre-existing arrangements. Arrangements notified under this Schedule may be subject to a Ministerial declaration under Part 4.

69. The commencement of Part 4 and Schedule 1 upon Royal Assent will allow the Minister to consider arrangements that are currently in operation, and which therefore may be having a current and real adverse effect on Australia's foreign relations or are being given effect to despite their inconsistency with Australia's foreign policy, as soon as possible.

70. Item 2 in the table provides that Parts 2 and 3 will commence on a date to be set by Proclamation, or otherwise the day after 3 months from Royal Assent.

71. Parts 2 and 3 provide for the Minister's decision-making powers in relation to prospective foreign arrangements.

72. The delayed commencement of Parts 2 and 3 will ensure State/Territory entities have adequate time to familiarise themselves with the new requirements of this Act. This time will also allow the Minister to prioritise the consideration of arrangements currently in operation to ensure that decisions can be made promptly in relation to any arrangements which may be

adversely affecting Australia's foreign relations or inconsistent with Australia's foreign policy.

73. This commencement period is limited to a period of three months, beginning on the day the Act receives Royal Assent. This finite period will ensure that commencement is not delayed beyond what is reasonably necessary to ensure the Minister is able to properly exercise the decision-making powers under Part 4.

74. Arrangements entered between the commencement of Parts 1, 4 and 5 upon Royal Assent and the commencement of Parts 2 and 3 upon Proclamation will be covered by the framework in Part 4. This will ensure that all relevant arrangements may be considered by the Minister under this Act and that there is no regulatory gap due to the delayed commencement of Parts 2 and 3.

75. Subsection 2(2) specifies that information in column 3 of the table at subsection 2(1) is not a part of the Act, and information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Section 3 Simplified outline of this Act

76. Section 3 sets out a simplified outline of the Act.

77. This outline is included to assist readers to understand the substantive provisions of this Act. It is not intended to be comprehensive and readers should rely upon the substantive provisions of the Act.

Section 4 Definitions

78. Section 4 defines terms that are used elsewhere in the Act.

79. This section provides that core terms, including the terms ***arrangement***, ***Australia's foreign policy***, ***core foreign arrangement***, ***core foreign entity***, ***core State/Territory entity***, ***foreign arrangement***, ***foreign entity***, ***legally binding***, ***State/Territory entity***, ***subsidiary arrangement***, ***under the auspices***, and ***variation of an arrangement*** are defined in relevant provisions of Part 1, Division 2. In addition, this section also provides that the term ***pre-existing foreign arrangement*** is defined in subclause 2(2) of Schedule 1. These definitions are of general application, despite their content not being elaborated in this section.

Definition of 'arrangement'

80. Section 4 provides that the term ***arrangement*** is defined in subsection 9(1).

81. Subsection 9(1) defines ***arrangement*** for the purposes of this Act as any written arrangement, agreement, contract, understanding or undertaking, whether or not it is legally binding, made in Australia or entered before, on or after the commencement day. This Act applies to two different types of arrangements, being foreign arrangements and subsidiary arrangements, both of which are defined separately in this section.

Definition of 'Australia'

82. Section 4 defines ***Australia***, when used in a geographical sense in this Act, to include the external Territories. This refers to Australia's seven external territories.

Definition of 'Australian law'

83. Section 4 defines ***Australian law***, for the purposes of this Act, to mean a law of the Commonwealth, a State or a Territory. This includes a law of the Australian Capital Territory, Northern Territory or of an external Territory, as per the definition of ***Territory*** separately in this section.

Definition of 'Australia's foreign policy'

84. Section 4 provides that the term ***Australia's foreign policy*** is defined in subsection 5(2).

85. Subsection 5(2) defines ***Australia's foreign policy*** to include policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia, regardless of whether the policy is written or publicly available or emanates from a particular member or body of the Commonwealth.

Definition of 'commencement day'

86. Section 4 defines ***commencement day*** for the purposes of this Act to mean the day section 1 of the Act commences.

87. Section 2, which relates to the commencement of this Act, provides that section 1, as part of Part 1, will commence upon Royal Assent.

Definition of 'core foreign arrangement'

88. Section 4 provides that the term ***core foreign arrangement*** is defined in subsection 10(2).

89. Core foreign arrangements, as defined under subsection 10(2), are a subset of foreign arrangements, as defined separately in this section.

90. Subsection 10(2) defines a ***core foreign arrangement*** as an arrangement between a core State/Territory entity, as defined separately in this section, and a core foreign entity, as defined separately in this section.

Definition of 'core foreign entity'

91. Section 4 provides that the term ***core foreign entity*** is defined in subsection 10(4).

92. Core foreign entities, as defined under subsection 10(4), are a subset of foreign entities, as defined separately in this section.

93. Subsection 10(4) defines a ***core foreign entity*** as a foreign country, the national government of a foreign country or a Department or agency of a foreign country or its national government (however described). A foreign country, its national government or a

Department or agency of the foreign country or its national government is a core foreign entity for the purposes of this Act regardless of whether that entity also falls within another category of foreign entity, as defined in subsection 8(1).

Definition of 'core State/Territory entity'

94. Section 4 provides that the term ***core State/Territory entity*** is defined in subsection 10(3).

95. Core State/Territory entities, as defined under subsection 10(3), are a subset of State/Territory entities, as defined separately in this section.

96. Subsection 10(3) defines a ***core State/Territory entity*** as a State or Territory, their government, or a Department or agency that is part of the State or Territory or its government (however described). A State or Territory, their government, or a Department or agency that is part of the State or Territory or its government is a core State/Territory entity for the purposes of this Act regardless of whether that entity also falls within another category of State/Territory entity, as defined in section 7.

Definition of 'court'

97. Section 4 defines ***court*** for the purposes of this Act to mean the High Court of Australia and the Federal Court of Australia.

98. This recognises that as any court proceedings under this Act relate to Australia's foreign relations, as well as potentially raising a number of constitutional considerations, these are the appropriate courts to consider such matters.

99. Accordingly, the High Court and Federal Court have exclusive jurisdiction under sections 52 (Minister's power to seek injunctions) and 57 (seeking compensation from the Commonwealth for acquisition of property on other than just terms).

Definition of 'exempt arrangement'

100. Section 4 defines an ***exempt arrangement*** as an arrangement of a kind that is prescribed by the rules to be an exempt arrangement.

101. The following prohibitions, requirements and powers in this Act do not apply to exempt arrangements:

- the prohibition on core State/Territory entities negotiating or entering arrangements with core foreign entities (core foreign arrangements) (subsections 15(2) and 22(2))
- the requirements for core State/Territory entities to give notice to the Minister:
  - if they propose to negotiate or enter a core foreign arrangement (subsections 16(3) and 23(3))
  - if they enter a core foreign arrangement (subsection 29(3)), and

    - of pre-existing arrangements that are core foreign arrangements (subclause 2(6) of Schedule 1)
- the requirement for State/Territory entities to give notice to the Minister:
    - if they propose to enter a non-core foreign arrangement with a foreign entity (subsection 34(3))
    - if they enter a non-core foreign arrangement (subsection 38(3)), and
    - of pre-existing arrangements that are non-core foreign arrangements (subclause 3(4) of Schedule 1)
- the consequences of State/Territory entities not notifying the Minister of pre-existing core foreign arrangements (subclauses 4(6)), 5(5) and 6(6) of Schedule 1).

102. The rules may prescribe particular kinds of arrangements to be exempt from the above prohibitions, requirements and powers.

103. For example, the Minister's power to prescribe exempt arrangements may include prescribing:

- thematic types of arrangements, such as research arrangements
- arrangements entered into during particular time periods, such as arrangements entered into prior to a certain date, and
- arrangements necessary to address emergency situations, such as arrangements in relation to disaster management or urgent public health matters.

104. Subsection 13(4) provides that the rules may prescribe that variations of arrangements of a kind are exempt, even if the rules do not prescribe that arrangements of that kind are exempt. As such, the rules may prescribe that certain kinds of variations of arrangements are exempt for the purposes of the Act.

Definition of 'foreign arrangement'

105. Section 4 provides that the term ***foreign arrangement*** is defined in subsection 6(2).

106. Foreign arrangements, as defined under subsection 6(2), are a subset of arrangements, as defined separately in this section.

107. Subsection 6(2) defines a ***foreign arrangement*** as an arrangement between a State/Territory entity, as defined separately in this section, and a foreign entity, as defined separately in this section.

Definition of 'foreign country'

108. Section 4 defines ***foreign country*** to mean any country that is outside Australia and the external Territories, whether or not it is an independent sovereign state. This reflects the definition of 'foreign country' in section 2B of the Acts Interpretation Act.

109. This definition is intended to cover all foreign countries, regardless of whether they constitute, or are recognised, either by Australia or others, as an independent sovereign state under international law. This breadth is necessary to ensure that any arrangements with an entity that presents itself and/or shares some of the characteristics of a foreign state are covered by this framework.

110. As such, both the United Kingdom, as an independent sovereign state, and itsdevolved administrations of Northern Ireland, Scotland and Wales, would constitute foreign countries for the purposes of this Act. In addition, entities where there are deficiencies or disputes as to their particular legal status, such as the Republic of Kosovo, would also constitute foreign countries for the purposes of this Act, regardless of whether or not they are recognised by Australia as states.

Definition of 'foreign entity'

111. Section 4 provides that the term ***foreign entity*** is defined in subsection 8(1).

112. Subsection 8(1) defines ***foreign entity*** as any of the following entities:

a. a foreign country

b. the national government of a foreign country

c. a Department or agency (however described) of a foreign country or its national government

d. a province, state, self-governing territory, region, local council, municipality or other political subdivision (by whatever name known) of a foreign country

e. a local council, municipality or other political subdivision (by whatever name known) of an entity covered by paragraph 8(1)(d)

f. the government of an entity covered by paragraph 8(1)(d) or (e)

g. a Department or agency (however described) of an entity covered by paragraph 8(1)(d), (e) or (f)

h. an entity (other than a university) that:

    i. is an authority of an entity covered by paragraph 8(1)(a), (b), (d), (e) or (f), and

    ii. is established for a public purpose

i. a university that:

    i. is located in a foreign country, and

    ii. does not have institutional autonomy (see subsection 8(2)), and

j. an entity that is external to Australia and is prescribed by the rules to be a foreign entity

but does not include:

k. a corporation that operates on a commercial basis, or

l. an entity that is prescribed by the rules as not being a foreign entity.

113. This definition is intended to operate broadly and cover all levels or tiers of government in a foreign country and their associated entities, regardless of the foreign country's system of government (be it federated or unitary). This recognises the variety of ways in which foreign countries arrange themselves and their governing structures and ensures the Act covers relevant entities regardless of this variation. Further explanation about the definition of 'foreign entity' is at section 8 below.

Definition of 'foreign law'

114. Section 4 defines ***foreign law***, for the purposes of this Act, to mean a law of a foreign country or part of a foreign country.

115. The term ***foreign country*** is defined separately in this section as a country that is outside Australia and the external Territories, whether or not it is an independent sovereign state. Accordingly, this definition will cover both the national laws of foreign countries, as well as the laws of political subdivisions of foreign countries, such as the laws of states or provinces of foreign countries.

Definition of 'gives effect to'

116. Section 4 provides a broad definition of the kinds of activities and circumstances in which a party is considered to ***give effect to*** an arrangement for the purposes of this Act.

117. This definition is relevant to provisions that prohibit State/Territory entities and foreign entities which are party to certain foreign arrangements and regulated Australian parties and other parties which are party to certain subsidiary arrangements from giving effect to those arrangements.

118. For example, subsection 30(4) prohibits a State/Territory entity from giving effect to, or holding out or conducting itself on the basis that it can give effect to, a core foreign arrangement which has been deemed invalid and unenforceable by operation of the Act.

119. This definition covers the potentially wide range of activities and conduct which may be engaged in by parties under an arrangement. This breadth is necessary to ensure that parties are not able to engage in activities to implement an arrangement which has been considered by the Minister as having an adverse effect on Australia's foreign relations or being inconsistent with Australia's foreign policy.

120. Paragraph (a) provides that a party gives effect to an arrangement if the party gives effect to the arrangement in any way and to any extent, whether directly or indirectly. For example, this would include a scenario where a party engages in conduct to give effect to an arrangement without referencing the arrangement, or without the arrangement explicitly contemplating that a party would engage in that particular conduct.

121. Paragraph (b) provides that a party also gives effect to an arrangement if the party takes any action to implement the arrangement, regardless of whether the arrangement contemplates that action being taken for those purposes. This paragraph also provides an inclusive list, by way of example, of actions or activities that constitute a party giving effect to an arrangement, if contemplated by the arrangement, which includes:

a. participating in discussions, forums, exchanges, visits or other dealings

b. promoting projects or other matters

c. engaging in activities, and

d. entering, or encouraging other entities to enter, other arrangements.

122. This list outlines the kinds of activities that a party to an arrangement might engage in to give practical effect to the arrangement and therefore the kinds of activities they should be prohibited from engaging in where the arrangement has been deemed invalid and unenforceable, not in operation or required to be terminated by operation of this Act, as relevant, or is subject to a Ministerial declaration.

123. Paragraph (c) provides that a party also gives effect to an arrangement if they do anything of a kind prescribed by the rules. This provides the Minister with the flexibility to list certain kinds of activity or conduct that should also be covered for the purposes of this definition.

124. This section provides that paragraphs (a), (b) and (c) of this definition do not limit each other. This means that none of these paragraphs alone provide an exhaustive definition of 'gives effect to' that should be read into the other paragraphs. For example, merely because paragraph (b) provides an illustrative list of activities does not mean that paragraph (a) is limited to that same list of activities. Further, activities could simultaneously fall into more than one of the different categories outlined in these paragraphs and need not exclusively fall into just one. For example, a party could be indirectly giving effect to an arrangement (under paragraph (a)) by engaging in an activity prescribed by the rules (under paragraph (c)).

125. Paragraph (d), (e) and (f) provide that the definition of 'gives effect to' does not include certain activities or conduct, being:

a. taking any action to terminate the arrangement (paragraph (d))

b. taking any action to vary the arrangement in accordance with a requirement under this Act (paragraph (e)), or

c. doing anything of a kind prescribed by the rules (paragraph (f)).

126. These paragraphs ensure that parties are not prohibited from complying with a requirement of this Act, or otherwise terminating the relevant arrangement, which may otherwise fall within this definition. The Minister will also have the ability to prescribe certain conduct or activities in the rules as not being covered by this definition in order to have the flexibility to address situations that may arise such that further activities or conduct need to be exempted from the definition.

Definition of 'legally binding'

127. Section 4 provides that the term ***legally binding*** is defined in subsection 9(2).

128. Subsection 9(2) provides that an arrangement is ***legally binding*** if any of the provisions of the arrangement confer legal rights or impose legal obligations that are legally enforceable under an Australian law or a foreign law.

Definition of 'negotiation'

129. Section 4 defines ***negotiation*** of an arrangement to mean discussions or dealings between the proposed parties that are directed towards the making of the arrangement.

130. This definition is intended to cover all forms of negotiations, whether they are formal or informal, preliminary, or previously scheduled. In addition, this definition is intended to cover both single incidences of negotiation, as well as series of negotiations, such as negotiations conducted over a period of time.

131. In order to be covered by this definition, the relevant discussions or dealings must be between the proposed parties to the arrangement. Accordingly, the prohibitions on negotiating core foreign arrangements and the requirements to notify the Minister if a State/Territory entity proposes to negotiate a core foreign arrangement in Part 2, Division 2 only arise once there are discussions or dealings between the core State/Territory entity and the core foreign entity, noting there could also be other parties involved. As such, internal discussions within a core State/Territory entity, such as discussions as to whether to pursue such an arrangement in the future, will not fall within the scope of the Act.

132. This definition only covers discussions or dealings that are directed towards the making of an arrangement. This recognises that this Act is not intended to limit normal discourse between State/Territory entities and foreign entities, and is only intended to apply where there is an intention to make an arrangement.

Definition of 'non-core foreign arrangement'

133. Section 4 defines a ***non-core foreign arrangement*** as a foreign arrangement that is not a core foreign arrangement.

134. A ***core foreign arrangement*** is defined separately in subsection 10(2) as an arrangement between:

a. a core State/Territory entity, and

b. a core foreign entity

whether or not other entities are also a party to the arrangement.

135. Accordingly, a non-core foreign arrangement for the purposes of this Act is an arrangement between:

a. a State/Territory entity that is not a core State/Territory entity and a foreign entity that is not a core foreign entity

i. for example, an arrangement between an Australian local council (paragraph 7(d) of the definition of State/Territory entity) and a foreign local council (paragraph 8(1)(d) or (e) of the definition of foreign entity)

b. a core State/Territory entity and a foreign entity that is not a core foreign entity

i. for example, an arrangement between an Australian Territory (paragraph 7(a) of the definition of State/Territory entity) and a self-governing territory of a foreign country (paragraph 8(1)(d) of the definition of foreign entity), or

c. a State/Territory entity that is not a core State/Territory entity and a core foreign entity

i. for example, an arrangement between an Australia local government (paragraph 7(d) of the definition of State/Territory entity) and a foreign national government Department or agency (however described) (paragraph 8(1)(c) of the definition of foreign entity).

136. Part 3 of this Act specifically applies to non-core foreign arrangements, as a subset of foreign arrangements. Part 3 provides a framework for the Minister to make a declaration that a State/Territory entity must not negotiate or enter a non-core foreign arrangement if the Minister is satisfied that the arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

137. The different framework for the Minister's consideration of non-core foreign arrangements, as opposed to the consideration of core foreign arrangements under Part 2, recognises that non-core arrangements are less likely to have a significant impact on Australia's foreign relations, given at least one of the parties to the arrangement does not have the same close connection to the State or Territory or foreign country as a core State/Territory entity or core foreign entity.

Definition of 'pre-existing foreign arrangement'

138. Section 4 provides that the term ***pre-existing foreign arrangement*** is defined in subclause 2(2) of Schedule 1.

139. Pre-existing foreign arrangements, as defined under subclause 2(2) of Schedule 1, are a subset of foreign arrangements, as defined separately in this section.

140. Subclause 2(2) of Schedule 1 defines a pre-existing foreign arrangement as a foreign arrangement that is in operation on the commencement day or comes into operation during the period that starts on the day after commencement day and ends on the day before Part 2 of the Act commences. This covers arrangements entered prior to the commencement day, or during the time between commencement day and the remainder of the Act commencing.

Definition of 'regulated Australian party'

141. Section 4 defines a ***regulated Australian party*** to an arrangement to mean any of the following entities that are a party to the relevant arrangement:

a. a State/Territory entity

b. an individual who is an Australian citizen or permanent Australian resident

c. an Australian entity (within the meaning of the *Foreign Acquisitions and Takeovers Act 1975*)

d. a partnership or an association incorporated or formed under an Australian law, and

e. any other entity prescribed by the rules to be a regulated Australian party.

142. This definition is intended to broadly cover key Australian entities which may be party to subsidiary arrangements, to ensure the effective enforcement of the prohibition on entering core foreign arrangements without Ministerial approval and of the Minister's declarations under Part 4. This recognises that a wide range of parties may enter into subsidiary arrangements beneath a foreign arrangement that has been entered unlawfully for the purposes of Part 2 or is subject to a declaration under Part 4, Division 2. Accordingly, in order to enforce the scheme established by the Act, the Minister should be able to require Australian parties to take steps to terminate such subsidiary arrangements and prohibit Australian parties from relying on or giving effect to them.

143. For example, in relation to subsidiary arrangements that are legally binding under Australian law, under section 46, a regulated Australian party:

a. must not give effect to an invalidated arrangement or hold out, or conduct itself on the basis, that it can give effect to the arrangement or that the arrangement is valid or enforceable (paragraph 46(2)(b)), or

b. must vary or terminate the arrangement in accordance with any specified requirements, and

    i. must notify the Minister as soon as practicable after doing so, and

    ii. must not give effect to the arrangement or hold out, or conduct itself on the basis, that it can give effect to the arrangement (paragraphs 46(3)(a) and (b)).

144. Paragraph (a) of the definition covers a State/Territory entity (which is separately defined in this section). The inclusion of State/Territory entities in this definition recognises that in addition to entering foreign arrangements with foreign entities, State/Territory entities may also enter into arrangements which are subsidiary to those foreign arrangements. Therefore, it is important to ensure that the Minister can require State/Territory entities to take steps to vary or terminate such arrangements, and to prohibit State/Territory entities from relying on or giving effect to them.

145. Paragraph (b) of the definition covers individuals who are Australian citizens or permanent Australian residents. Where an Australian citizen or permanent Australian resident is a party to a subsidiary arrangement, the Minister will be able to require that individual take steps to vary or terminate a subsidiary arrangement, and to prohibit that individual from relying on or giving effect to such arrangements.

146. Paragraph (c) of the definition covers an Australian entity, as defined in the *Foreign Acquisitions and Takeovers Act 1975*. Section 4 of that Act defines Australian entity to mean an Australian corporation (further defined to mean a corporation formed in Australia) or an Australian unit trust. Section 4 of that Act further defines Australian unit trust to mean a unit trust:

- the trustee of which holds relevant Australian assets
- the trustee of which carries on an Australian business
- the central management and control of which is in Australia
- in which one or more persons who are ordinarily resident in Australia hold more than 50% of the beneficial interests in the income or property of the unit trust, or
- that is listed for quotation in the official list of a stock exchange in Australia.

147. Paragraph (d) of the definition covers a partnership or association incorporated or formed under an Australian law. This would cover, for example, an Australian partnership (formed under Australian law) that is a party to a relevant subsidiary arrangement. As such, the Minister would be able to require that partnership (as a regulated Australian party) to vary or terminate a subsidiary arrangement, and would be able to prohibit the partnership from relying on or giving effect to the arrangement.

148. Paragraph (e) of the definition covers any other entity prescribed by the rules to be a regulated Australian party. As such, the rules may prescribe any other individual, body corporate, body politic or other entity as falling within this definition.

149. Finally, this section provides that the rules may prescribe an entity as not being a regulated Australian party. This gives the Minister the flexibility to prescribe other entities, whether types of entities or specific entities, as falling outside of the scope of the definition of regulated Australian party. This would mean that the Minister would be unable to require those entities to take certain actions under this Act, such as to vary or terminate a subsidiary arrangement in a specified way.

150. However, entities which are party to subsidiary arrangements but do not constitute regulated Australian parties are still subject to obligations under this Act, including not to give effect to a subsidiary arrangement subject to a Ministerial declaration under Part 4, Division 3 (see, for example, paragraph 46(2)(c)).

Definition of 'rules'

151. Section 4 defines the term ***rules*** to mean rules made under subsection 54(1).

152. Section 51 provides that the Minister may make rules, by legislative instrument, prescribing matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out, or giving effect to, the Act.

Definition of 'State/Territory entity'

153. Section 4 provides that the term ***State/Territory entity*** is defined in section 7.

154. Section 7 defines ***State/Territory entity*** as any of the following entities:

a. a State or Territory

b. the government of a State or Territory

c. a Department or agency (however described) that is part of a State or Territory or its government

d. a body established for the purposes of local government by, or under, a law of a State or Territory

e. a university established by, or under, a law of a State or Territory (noting section 55 provides that the ANU is to be treated as a State/Territory entity for the purposes of this Act), and

f. an entity that is prescribed by the rules to be a State/Territory entity.

Definition of 'subsidiary arrangement'

155. Section 4 provides that the term ***subsidiary arrangement*** is defined in section 12(1).

156. Subsection 12(1) provides that an arrangement is ***a subsidiary arrangement*** of a foreign arrangement if:

a. the arrangement is entered under the auspices of the foreign arrangement, and

b. the arrangement is not a foreign arrangement.

157. The meaning of the term ***under the auspices*** is defined separately in this section.

Definition of 'terminate'

158. Section 4 provides that to ***terminate*** an arrangement for the purposes of this Act includes to withdraw from the arrangement.

159. This definition ensures that a State/Territory entity or regulated Australian party which is required to terminate an arrangement under Part 2, Division 4 or Part 4, Division 2 or 3, as relevant, may withdraw from the arrangement where appropriate in the circumstances.

160. This recognises that multilateral foreign arrangements between State/Territory entities and multiple foreign entities will be covered by this Act, as well as multilateral subsidiary arrangements with Australian regulated parties. In such cases, it may not be possible for a State/Territory entity or regulated Australian party to unilaterally terminate the arrangement. It may be more appropriate for the State/Territory entity or regulated Australian party to instead withdraw from the arrangement and allow it to remain in force for all of the other parties.

161. This ensures that this Act only affects the arrangement to the extent necessary to protect Australia's foreign relations by enabling the arrangement to remain in force amongst

the other parties to the arrangement, despite the withdrawal of the relevant State/Territory entity or Australian regulated party.

Definition of 'territory'

162. Section 4 defines ***Territory***, for the purposes of this Act, to mean the Australian Capital Territory, the Northern Territory or an external Territory.

163. As such, the Act covers the six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), the two internal self-governing territories (the Australian Capital Territory and the Northern Territory) and Australia's seven external territories.

Definition of 'this Act'

164. Section 4 defines ***this Act*** to include the rules.

165. The ***rules*** are defined separately in this section to mean the rules made under section 54.

166. This definition has the effect that wherever 'this Act' is referred to in this Act, this will include the rules made under this Act. This is particularly important in relation to the application of this Act to variations of arrangements (defined in section 13). Subsection 13(1) provides that this Act applies in relation to a variation of an arrangement in the same way that it applies to an arrangement. As such, the definition of 'this Act' including the rules will ensure that wherever the rules refer to an arrangement, this should also be taken to be a reference to a variation of an arrangement.

Definition of 'under the auspices'

167. Section 4 provides that the term ***under the auspices*** is defined in subsection 12(2).

168. Subsection 12(2) provides that an arrangement is entered ***under the auspices*** of a foreign arrangement if the arrangement is entered at the same time, or after, the foreign arrangement is entered, and:

a. the arrangement is entered for the purposes of implementing the foreign arrangement, in any way and to any extent, whether directly or indirectly, and whether or not:

    i. the arrangement refers to the foreign arrangement, or

    ii. the foreign arrangement contemplates the arrangement, or arrangements of the same kind as the arrangement, being entered, or

b. both of the following are satisfied:

    i. the foreign arrangement contemplates the arrangement, or arrangements of the same kind as the arrangement, being entered (including, for example, by encouraging or promoting the arrangement, or arrangements of that kind, to be entered)

   ii. the arrangement is entered as a consequence of the foreign arrangement, or of any actions taken under the foreign arrangement, or

c. the arrangement and the foreign arrangement have a relationship of a kind prescribed by the rules.

169. This definition establishes the requisite connection or nexus between the foreign arrangement and the relevant subsidiary arrangement.

Definition of 'variation of an arrangement'

170. Section 4 provides that the term ***variation of an arrangement*** is defined in subsection 13(2).

171. Subsection 13(2) defines a ***variation of an arrangement*** as any written variation of an arrangement:

a. whether or not the variation is legally binding, and

b. whether or not the variation is made in Australia

and includes the exercise of an option to extend the arrangement.

172. This definition operates broadly to cover variations to arrangements regardless of whether they are substantive or not, legally binding or not, or where (in a geographic sense) they are made.

Division 2—Core provisions of this Act

173. This Division sets out the core provisions of this Act.

174. This Division provides for the object of this Act, and sets out the framework established in this Act for the purposes of achieving that object.

175. Key concepts which are central to the operation of this Act are also defined in this Division. Terms which are defined in this Division are of general application.

Section 5 Object of this Act

176. Section 5 sets out the object of this Act, and defines the term 'Australia's foreign policy' for the purposes of this Act.

177. This section is intended to provide a clear statement of the purpose, and intended effect, of the Act.

178. Subsection 5(1) provides that the object of this Act is to ensure that the Commonwealth is able to protect and manage Australia's foreign relations by ensuring that any arrangement between a State/Territory entity and a foreign entity does not, or is unlikely to, adversely affect Australia's foreign relations and is not, or is unlikely to be, inconsistent with Australia's foreign policy. The terms ***State/Territory entity*** and ***foreign entity*** are separately defined in sections 7 and 8 respectively.

179. The fundamental purpose of this Act is to protect Australia's foreign relations and ensure engagement with foreign entities across all levels of Australian government is not adverse to Australia's foreign relations and is consistent with Australia's foreign policy. The management and protection of Australia's foreign relations and foreign policy are within the responsibility of the Commonwealth Government.

180. To achieve this purpose, this Act provides a framework for the Commonwealth to assess the effect of arrangements between state, territory and local governments and any form of foreign government on Australia's foreign relations, and the consistency of those arrangements with Australia's foreign policy. This object reflects that the Act is not intended to prohibit or restrict States or Territories from entering into arrangements with foreign governments or associated entities. Rather, the Act ensures those arrangements are not inconsistent with Australia's foreign policy and do not adversely affect Australia's foreign relations.

181. Subsection 5(2) defines ***Australia's foreign policy*** for the purposes of this Act.

182. This subsection provides that ***Australia's foreign policy*** includes, but is not limited to, policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia, regardless of whether the policy is written or publicly available or emanates from a particular member or body of the Commonwealth.

183. This definition is intended to operate broadly and inclusively, and recognises that it is at the complete discretion of the Commonwealth Executive (and the Minister as the Minister responsible for matters of foreign policy) to determine Australia's foreign policy at any given time in relation to any particular matter, subject to any Commonwealth laws.

184. Paragraphs 5(2)(a) and (b) provide that Australia's foreign policy includes policy on matters relating to Australia's foreign relations or things outside Australia. Section 4 separately defines ***Australia***, when used in a geographical sense, to include the external Territories.

185. Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation with respect to matters or things outside the geographical limits of Australia, as well as legislation with respect to matters concerning Australia's relations with other nations.

186. Paragraphs 5(2)(c) and (d) provide that, for the purposes of this Act, Australia's foreign policy need not meet certain formalities. This includes that the policy need not be written, publicly available, and need not have been formulated, decided upon or approved by any particular member or body of the Commonwealth.

187. Paragraph 5(2)(d) recognises that foreign policy is dynamic, and ensures that the definition of Australia's foreign policy will be sufficiently flexible to cover a policy regardless of whether it was the product of, or approved by, the Cabinet, any other ministerial decision-making body, the Prime Minister or any other Minister, the Department of Foreign Affairs and Trade, or any other department of State.

188. These paragraphs ensure that the Minister is not required to identify a particular written policy, such as the Foreign Policy White Paper, prior ministerial or departmental

statements or other formal documents, in assessing whether or not an arrangement is consistent with, or is not inconsistent with, Australia's foreign policy.

189. The breadth and inclusivity of this definition reflects that, under this Act, the Minister may take into account a range of matters relating to Australia's foreign policy when assessing a particular proposed negotiation or arrangement, some of which may not be written or formalised. The range of negotiations and arrangements that are likely to come before the Minister necessitate this level of flexibility and discretion.

190. As section 15AA of the Acts Interpretation Act provides that statutes should be interpreted in accordance with their objects, all the other provisions of this Act are to be read as being designed to carry out this object.

Section 6 Foreign arrangements

191. Section 6 explains the application of this Act to foreign arrangements.

192. Subsection 6(1) provides that for the purposes of achieving the objects of this Act, the Act has provisions that apply to foreign arrangements.

193. Subsection 6(2) defines a ***foreign arrangement*** as an arrangement between a State/Territory entity and a foreign entity. The terms ***State/Territory entity*** and ***foreign entity*** are separately defined in sections 7 and 8 respectively.

194. This subsection provides that an arrangement between a State/Territory entity and a foreign entity constitutes a foreign arrangement whether or not other entities are also party to the arrangement. Accordingly, an arrangement will constitute a foreign arrangement so long as a State/Territory entity and a foreign entity are both party to the arrangement, and regardless of any other parties. For example, an arrangement between multiple parties, which includes a State/Territory entity and a foreign entity, as well as other parties such as commercial corporations, is still a foreign arrangement for the purposes of this Act.

195. This provision is relevant to the Minister's decision-making powers and functions under Parts 3 and 4 in relation to arrangements between State/Territory entities and foreign entities, and Part 2 in relation to the more limited subset of arrangements between core State/Territory entities and core foreign entities. These Parts provide a framework for the Minister to consider whether the negotiation of, entry into or continuation of a particular foreign arrangement, as relevant, adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy, which is essential to achieving the objects of this Act, provided for in section 5.

Section 7 What are State/Territory entities?

196. Section 7 defines what entities constitute State/Territory entities for the purposes of this Act.

197. State/Territory entities as defined in this section are subject to the provisions in this Act regarding foreign arrangements, as explained in section 6. State/Territory entities are subject to a number of requirements under this Act, including:

- the requirement to notify the Minister of proposals to enter and, in some circumstances negotiate, foreign arrangements
- the requirement to notify the Minister of pre-existing foreign arrangements, and
- the prohibitions on negotiating, entering or giving effect to certain foreign arrangements.

198. Section 7 defines ***State/Territory entity*** as any of the following entities:

a. a State or Territory

b. the government of a State or Territory

c. a Department or agency (however described) that is part of a State or Territory or its government

d. a body established for the purposes of local government by, or under, a law of a State or Territory

e. a university established by, or under, a law of a State or Territory (noting section 55 provides that the ANU is to be treated as a State/Territory entity for the purposes of this Act), and

f. an entity that is prescribed by the rules to be a State/Territory entity.

199. Section 7 provides that paragraphs (a) to (f) of this definition do not limit each other. Therefore, a particular entity may satisfy one or more of these paragraphs, and no one paragraph limits how another paragraph should be interpreted or applied.

200. Paragraph 7(a) of the definition covers a State or Territory. The States of the Commonwealth are New South Wales, Queensland, Tasmania, Victoria, Western Australia and South Australia.

201. The term ***Territory*** is defined separately in section 4 to mean the Australian Capital Territory, the Northern Territory or an external Territory.

202. As such, paragraph 7(a) will cover the six states (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia), the two territories (the Australian Capital Territory and the Northern Territory) and Australia's seven external territories. The extension of this definition to external Territories is necessary to achieve the legislative purpose of this Act. It recognises that arrangements made by Australia's external territories with foreign entities have the same potential to adversely affect Australia's foreign relations or be inconsistent with Australia's foreign policy as arrangements made by the internal self-governing Territories.

203. Paragraph 7(b) covers the government of a State or Territory. It is intended to cover the executive government of the State or Territory and is not intended to cover other branches of government, such as the legislature or the judiciary.

204. Paragraph 7(c) covers a Department or agency that is part of a State or Territory or its government, however described. This is intended to cover departments, and other agencies,

commissions and offices that are part of a State or Territory or its government. For example, the Department of Premier and Cabinet in a State, or the Department of the Chief Minister in a Territory, would constitute a Department of a State or Territory. In addition, the tourism commission of a State or Territory would be an agency that is part of a State or Territory. The words ‘however described’ in the definition ensure that entities that are akin to a Department or agency, but known by another name such as ‘commission’, are covered by the definition regardless of the fact that they are known by a different name.

205. Unlike the definition of foreign entity in subsection 8(1), this paragraph covers a Department or agency that is part of a State, Territory or its government. This is distinct from the definition of foreign entity, which covers a Department or agency of a foreign country or its national government (paragraph 8(1)(c)). Accordingly, this paragraph covers a narrower range of entities than the equivalent foreign category.

206. This recognises that the manner in which departments and agencies of States and Territories are structured is known, therefore justifying a narrower and more precise definition, whilst foreign states structure their governments in a myriad of different ways, necessitating breadth to cover equivalent entities. This narrower definition also reduces the scope of entities brought within the definition of State/Territory entity, thereby reducing regulatory burden on States and Territories as the key regulated party under this Act.

207. In addition, unlike the definitions of foreign entity, authorities of a State or Territory established for a public purpose are not covered by this definition. This recognises the legal separation of these bodies from State or Territory governments.

208. Paragraph 7(d) covers a body established for the purposes of local government by, or under, a law of a State or Territory. This covers all local government areas, regardless of their particular name, including councils, district councils, cities, shires, and towns. The inclusion of local government bodies recognises that local government bodies frequently enter arrangements with foreign entities, particularly sister city or friendship arrangements, which can potentially impact on Australia’s foreign relations or be inconsistent with Australia’s foreign policy.

209. Paragraph 7(e) covers universities established by, or under, a law of a State or a Territory. Australian universities generally have a significant international posture, and may enter arrangements with foreign entities that may adversely affect Australia’s foreign relations or be inconsistent with Australia’s foreign policy. This definition will cover universities to the extent that they are established by, or under, a State or Territory statute, but it is not intended that private universities will be covered.

210. Section 55 provides that this Act will apply to the ANU as if it were a State/Territory entity covered by paragraph 7(e). The effect of this is that ANU is treated like other universities covered by paragraph 7(e), despite the fact that it is established by Commonwealth legislation. This recognises that ANU is a public university equivalent to other public universities, regardless of the fact that it is not established by a law of a State or Territory.

211. Paragraph 7(f) provides that the definition also covers an entity that is prescribed by the rules to be a State/Territory entity. This paragraph ensures that this definition is flexible enough to address different State or Territory government structures, and to incorporate government entities that are not covered by the above definitions but may, by their

operations, be appropriately characterised as State/Territory entities. It is intended that the Minister would have the power to prescribe both types of entities as well as specific entities.

212. Arrangements entered into by public officials, or other agents, acting in their official capacity on behalf of any of the above entities would be considered to be entered into by a 'State/Territory entity'. For example, an arrangement entered by a State or Territory Minister on behalf of the relevant State or Territory government.

213. Paragraphs 7(g) and (h) provide that a State/Territory entity does not include a corporation that operates on a commercial basis or a hospital.

214. Paragraph 7(g) excludes corporations that operate on a commercial basis from the definition of State/Territory entity. This ensures that any commercial corporation, even one that is wholly or partly owned or controlled by a State or Territory, is not covered by the scheme established in this Act. This recognises that this scheme is not intended to regulate purely commercial head arrangements. For example, State or Territory-owned corporations, such as water corporations or port authorities, are not covered by this Act.

215. Paragraph 7(h) excludes hospitals from the definition of State/Territory entity.

216. Paragraph 7(i) provides that the rules may prescribe an entity as not being a State/Territory entity. As with paragraph 7(f), this ensures that this definition is flexible enough to address different State or Territory government structures and it is intended that the Minister would have the power to prescribe both types of entities and specific entities.

Section 8 What are foreign entities?

217. Section 8 defines what entities constitute foreign entities for the purposes of this Act.

218. Arrangements between State/Territory entities and foreign entities, defined as foreign arrangements, are the main kinds of arrangements regulated by this Act, as outlined in section 6. In addition, the conduct of foreign entities themselves is regulated by this Act in some circumstances, such as where parties to a foreign arrangement are prohibited from giving effect to certain foreign arrangements.

219. The definition of foreign entity is intended to operate broadly and cover all levels or tiers of government, regardless of the foreign country's system of government (be it federated or unitary). This recognises the variety of ways in which foreign countries arrange themselves and their governing structures.

220. Subsection 8(1) defines ***foreign entity*** as any of the following entities:

a. a foreign country

b. the national government of a foreign country

c. a Department or agency (however described) of a foreign country or its national government

d. a province, state, self-governing territory, region, local council, municipality or other political subdivision (by whatever name known) of a foreign country

e. a local council, municipality or other political subdivision (by whatever name known) of an entity covered by paragraph 8(1)(d)

f. the government of an entity covered by paragraph 8(1)(d) or (e)

g. a Department or agency (however described) of an entity covered by paragraph 8(1)(d), (e) or (f)

h. an entity (other than a university) that:

    i. is an authority of an entity covered by paragraph 8(1)(a), (b), (d), (e) or (f), and

    ii. is established for a public purpose, and

i. a university that:

    i. is located in a foreign country, and

    ii. does not have institutional autonomy (see subsection 8(2))

j. an entity that is external to Australia and is prescribed by the rules to be a foreign entity.

221. Section 8 provides that paragraphs 8(1)(a) to (j) of this definition do not limit each other. Therefore, a particular entity may satisfy one or more of these paragraphs to be considered a 'foreign entity', and no one paragraph limits how another paragraph should be interpreted or applied.

222. Paragraph 8(1)(a) provides that a foreign country is a foreign national entity. ***Foreign country*** is defined separately in section 4 to mean any country that is outside Australia and the external Territories, whether or not it is an independent sovereign state. This reflects the definition of 'foreign country' in section 2B of the Acts Interpretation Act.

223. This definition is intended to cover all foreign countries, regardless of whether they constitute, or are recognised, either by Australia or others, as an independent sovereign state under international law. This breadth is necessary to ensure that any arrangements with an entity that presents itself as, and/or shares some of the characteristics of, a foreign state are covered by this framework.

224. Paragraph 8(1)(b) provides that the national government of a foreign country is a foreign entity. In unitary states, this will cover the central government, whereas in federated states, this will cover the central federal government. Governments of states in federated systems are separately covered by paragraph 8(1)(f).

225. Paragraph 8(1)(c) provides that a Department or agency, however described, of an entity covered by paragraph 8(1)(a) (a foreign country) or (b) (the national government of a foreign country) is a foreign entity. A Department or agency of a foreign country or its national government is intended to cover departments of State, and other agencies, bureaus, commissions and offices of the foreign country or its executive national government.

226. The reference to ‘however described’ recognises that government structures vary across foreign countries. This ensures that entities which have the functions of Departments or agencies, or conduct themselves as such, are covered by this definition, regardless of how they are described in that jurisdiction.

227. Unlike the definition of State/Territory entity in section 7, this paragraph covers a Department or agency of a State, Territory or its government. This is distinct from the definition of State/Territory entity, which covers a Department or agency that is part of a foreign country or its national government (paragraph 7(c)). Accordingly, this paragraph covers a broader range of entities than the equivalent domestic category.

228. This recognises that foreign states structure their governments in a myriad of different ways, necessitating breadth to cover equivalent entities to State or Territory Departments or agencies.

229. Paragraph 8(1)(d) provides that component political subdivisions of a federal or central government are foreign entities. This subsection describes the types of component political subdivisions that are typically established by a federal or central government, including provinces, states, self-governing territories, regions, local councils, municipalities or any other political subdivision of a foreign country. These subdivisions may exist in multiple tiers, such as where provinces contain regions which in turn contain local councils.

230. Examples of entities covered by this paragraph may include provinces, such as the provinces of Buenos Aires or Santa Fe in Argentina, states, such as the states of California or Pennsylvania in the United States of America, regions, such as the regions of Brussels-Capital, Flemish and Walloon in Belgium, and local councils established by national legislation, such as the local councils of Christchurch City Council and Invercargill City Council in New Zealand.

231. In addition, the inclusion of ‘other political subdivision’ and ‘by whatever name known’ will ensure other forms of these types of entities are covered by the definition, regardless of the manner in which they are referred to in the foreign country. For example, this may include prefectures in Japan, cantons in Switzerland or Bosnia and Herzegovina, departments in France, and emirates in the United Arab Emirates.

232. Paragraph 8(1)(e) provides that political subdivisions such as local councils and municipalities that have their power devolved from an entity listed in paragraph 8(1)(d) are foreign entities. These entities principally exist in federal states.

233. To the extent that a local council or municipality has its power devolved directly from the federal or central government, it will be covered by paragraph 8(1)(d). Where a local council or municipality has its power devolved from a state or other political subdivision, it will be covered by paragraph 8(1)(e). This ensures that all forms of local government fall within the definition of foreign entity, regardless of the legal manner in which they have been established in the foreign country.

234. The inclusion of ‘other political subdivision’ and ‘by whatever name known’ will ensure other forms of these types of entities are covered regardless of the manner in which they are referred to in the foreign country (for example, as counties, districts, barrios or boroughs).

235. Paragraph 8(1)(f) provides that governments of the entities outlined in paragraphs 8(1)(d) and (e) are also covered by the definition, as well as the entities themselves in their own right. This is intended to cover the executive government of that political subdivision, such as state governments, for example the Government of the State of California, or local governments, such as the City and County of San Francisco.

236. Paragraph 8(1)(g) provides that a Department or agency, however described, of any of the entities outlined in paragraphs 8(1)(d), (e) or (f) is also covered by this definition. This is intended to cover departments, agencies, bureaus, commissions, offices and other bodies of a component political subdivision of a foreign country, or its government.

237. Paragraph 8(1)(h) provides that authorities of certain entities discussed above that are established for a public purpose, other than universities, are also covered by the definition of foreign entity.

238. Paragraph 8(1)(h) provides that a foreign entity also includes an entity (other than a university) that:

i. is an authority of an entity covered by paragraph 8(1)(a), (b), (d), (e) or (f), and

ii. is established for a public purpose.

239. This paragraph is intended to cover other forms of entities that are established by, or which might act in the name of, a foreign country or its government at any level and are established for a public purpose.

240. This paragraph would therefore cover bodies that are legally separate from the relevant foreign government (national or otherwise), but over which the government may exercise a degree of control. Similarly, it would cover entities that carry out the functions of, or a function of, the relevant government. However, it is not necessary that the authority be established by a law of the foreign country, or part of the foreign country, to be covered by this limb of the definition.

241. The exclusion of universities from paragraph 8(1)(h) provides that this limb of the definition is not intended to cover foreign universities that might otherwise be considered to be authorities of an entity covered by paragraphs 8(1)(a), (b), (d), (e) or (f) that are established for a public purpose.

242. The term public purpose is intended to operate broadly and may include the provision of law enforcement, public health services, education, or the conduct of foreign relations or the advancement of foreign policy objectives.

243. Examples of authorities established for a public purpose may include statutory bodies, as well as other forms of government entities. For example, an institution established by the national government of a foreign country for the public purpose of cultural outreach and international exchange may fall within the ambit of paragraph 8(1)(h).

244. Paragraph 8(1)(i) provides that certain foreign universities are foreign entities for the purposes of this definition.

245. This paragraph provides that where a foreign university does not have institutional autonomy, that foreign university is a foreign entity for the purposes of this Act.

246. Paragraph 8(1)(i) provides that a foreign entity, for the purposes of this Act, includes a university which:

i. is located in a foreign country, and

ii. does not have institutional autonomy (as provided for by subsection 8(2)).

247. Subparagraph 8(1)(i)(i) covers universities that are located in a foreign country. Section 4 defines ***foreign country*** to mean any country that is outside Australia and the external Territories, whether or not it is an independent sovereign state.

248. To the extent that a university that is primarily located and established in a foreign country maintains campuses within Australia, those campuses would fall within the scope of this subparagraph. This recognises that Australian campuses of foreign universities, although not located in a foreign country, form part of, and are controlled by, the founding university. Such universities will only be a foreign entity for the purposes of the Act if the university does not have institutional autonomy, and therefore subparagraph 8(1)(i)(ii) is satisfied.

249. Subparagraph 8(1)(i)(ii) provides that a foreign university only falls within this definition if it does not have institutional autonomy, as provided for by subsection 8(2).

250. Subsection 8(2) provides that, for the purposes of subparagraph 8(1)(i)(ii), a university does not have institutional autonomy if, and only if:

a) the rules prescribe circumstances in which a university is taken not to have institutional autonomy; and

b) those circumstances exist in relation to the university.

251. This recognises that foreign universities should be covered by the definition of foreign entity if they do not have institutional autonomy. Paragraph 8(1)(i) and subsection 8(2) are intended to cover foreign universities that lack institutional autonomy, as distinct from the levels of institutional autonomy enjoyed by Australian public universities.

252. The rules will prescribe the circumstances in which a foreign university does not have institutional autonomy. Those circumstances must exist in relation to the foreign university, for the foreign university to be considered a foreign entity for the purposes of the Act. By way of example only, a lack of institutional autonomy may include a government or a political party exerting control or influence over the university management, leadership, curriculum, and/or research activities.

253. In addition to coverage of foreign universities under paragraph 8(1)(i), universities will also fall within the definition of 'foreign entity' to the extent they are covered by another paragraph of the definition (other than paragraph 8(1)(h), which expressly excludes universities). For example, a military university which is established by a foreign Department of Defence would fall within the scope of a Department or agency (however described) of a foreign country or its national government, as per paragraph 8(1)(c).

254. Paragraph 8(1)(j) provides that a foreign entity includes an entity that is external to Australia and prescribed by the rules to be a foreign entity. This paragraph ensures that this definition is flexible enough to cover entities that are not specifically covered by the other paragraphs, including complex or novel foreign government structures. It is intended that the Minister would have the power to prescribe both types of entities as well as specific entities. However, the prescribed entities must be external to Australia, ensuring that the rules can clearly only include 'foreign' entities within the definition.

255. Arrangements entered into by public officials, or other agents, acting in their official capacity on behalf of any of the above entities would be considered to be entered into by a 'foreign entity'. For example, an arrangement entered into by a public official of a Department of State in a foreign country, in their official capacity on behalf of that Department.

256. Paragraph 8(1)(k) provides that a foreign entity does not include a corporation that operates on a commercial basis. This ensures that any commercial corporations, including those that are wholly or partly owned or controlled by a foreign government, are not covered by the Act. This recognises that this Act is not intended to regulate State/Territory entities entering purely commercial head arrangements. For example, foreign government-owned corporations are not covered by this Act.

257. Paragraph 8(1)(l) provides that a foreign entity does not include an entity that is prescribed by the rules as not being a foreign entity. As with paragraph 8(1)(j), this ensures that this definition is flexible enough to address complex or novel foreign government structures and it is intended that the Minister would have the power to prescribe both types of entities and specific entities.

Section 9 What is an arrangement?

258. Section 9 defines what constitutes an arrangement for the purposes of this Act.

259. Arrangements as defined in this section are subject to the requirements in this Act. This includes arrangements between State/Territory entities and foreign entities (being foreign arrangements, of which core foreign arrangements are a subset), as well as subsidiary arrangements.

260. Subsection 9(1) defines ***arrangement*** for the purposes of this Act as any written arrangement, agreement, contract, understanding or undertaking.

261. It is intended that this definition be interpreted broadly to cover any written arrangement which indicates a form of commitment between the two parties, regardless of whether that commitment is ongoing, legally binding or merely aspirational.

262. Examples of arrangements covered by this definition include sister city or friendship arrangements, arrangements pertaining to greater cooperation, collaboration or exchange, whether on certain subject matters or generally, strategic partnerships, joint initiatives and memoranda of understanding.

263. This definition only covers written arrangements. As such, oral arrangements, such as oral contracts, do not fall within the scope of the definition. A written arrangement may be in

any form, and will not need to be signed or be in a certain form, to fall within the definition for the purposes of this Act.

264. Treaties or other arrangements governed by public international law will not fall within the definition of arrangement because Australian States and Territories do not possess the power to enter into a treaty or arrangement that would be binding under public international law. This is within the exclusive responsibility of the Commonwealth.

265. Paragraph 9(1)(a) provides that, for the purposes of this Act, an arrangement, agreement, contract, understanding or undertaking is covered by this definition whether or not it is legally binding. As such, non-legally binding memoranda of understanding as well as contracts governed by the domestic law of one of the parties, or the domestic law of another third country, would constitute arrangements for the purposes of this Act.

266. Subsection 9(2) provides that an arrangement is ***legally binding*** if any of the provisions of the arrangement confer legal rights or impose legal obligations that are legally enforceable under an Australian law or a foreign law.

267. ***Australian law*** is defined separately in section 4 to mean a law of the Commonwealth, a State or a Territory. This includes a law of the Australian Capital Territory, Northern Territory or an external Territory. ***Foreign law*** is also defined separately in section 4 to mean a law of a foreign country or part of a foreign country.

268. For example, a contract between a State/Territory entity and a Canadian foreign entity which conferred legal rights and imposed legal obligations upon the parties would be legally binding for the purposes of this Act regardless of whether it is enforceable under State or Territory law, federal Australian law, provincial Canadian law or federal Canadian law.

269. For the purposes of this Act, subsection 9(2) provides that an arrangement is legally binding if *any* of its provisions confer legal rights or impose legal obligations that are enforceable. This will mean that where an arrangement provides that certain provisions are legally binding or enforceable (or this is apparent from the terms of the arrangement), it will be considered legally binding for the purposes of this Act. This will be the case even if some of its provisions (or even the majority of its provisions) are expressed as being not legally binding (whether explicitly or apparent from the terms of the arrangement). For example, if a single provision of a memorandum of understanding was expressed as binding on the parties, but the memorandum of understanding was otherwise expressed to not be binding on the parties, the memorandum of understanding would be legally binding for the purposes of this Act.

270. The consequences of unlawfully entering arrangements under Part 2, Division 4 vary depending on whether an arrangement is binding under Australian law, binding under foreign law or not legally binding. In addition, the Minister's power to make declarations under Part 4, Divisions 2 and 3, as well as the consequences of not notifying the Minister of arrangements under Schedule 1similarly vary depending on the legal nature of the arrangement.

271. The law which applies to an arrangement may be either Australian law or foreign law. This distinction is recognised in the Act and reflected in the definition of 'legally binding'. If the law which applies to an arrangement is an Australian law, then the relevant arrangement may be taken to be invalid and unenforceable by operation of this Act under section 30 and

clause 4 of Schedule 1, or declared to be so by Ministerial declaration under sections 41 or 46. In contrast, if the law which applies to an arrangement is a foreign law, then a State/Territory entity may be required to take steps to terminate the arrangement in accordance with that law by operation of this Act under section 31 or clause 5 of Schedule 1, or may be required to do so by Ministerial declaration under sections 42 or 47.

272. Paragraph 9(1)(b) provides that, for the purposes of this Act, an arrangement, agreement, contract, understanding or undertaking is covered by this definition whether or not it is made in Australia. As such, an arrangement between a State/Territory entity and a foreign entity would be covered regardless of whether it was made in the State or Territory, in that foreign country or in a third country.

273. Paragraph 9(1)(c) provides that, for the purposes of this Act, an arrangement, agreement, contract, understanding or undertaking is covered by this definition whether it is entered before, on or after the commencement day, being the day that section 1 commences, which is upon Royal Assent. Accordingly, this Act will cover both pre-existing arrangements as well as any arrangements made after the commencement of Parts 1, 4 and 5 and Schedule 1.

Section 10 Core foreign arrangements

274. Section 10 explains the application of this Act to core foreign arrangements.

275. Subsection 10(1) provides that for the purposes of achieving the objects of this Act, there are special provisions in the Act that apply to core foreign arrangements.

276. ***Core foreign arrangements*** are a limited subset of foreign arrangements that are subject to different requirements under this Act, given that they are between entities that are very close to the government of a State or Territory and the government of a foreign country. In these circumstances, core government arrangements are therefore more likely to affect Australia's foreign relations (as outlined in the note below subsection 10(2)).

277. The Act establishes certain requirements that apply to core foreign arrangements.

- Part 2 provides a framework for the Minister to approve or refuse to approve the negotiation of, or entry into, core foreign arrangements if such an arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy. This Part is essential to achieving the objects of this Act, as set out in section 5.

- Schedule 1 requires State/Territory entities to notify the Minister of pre-existing arrangements that are core foreign arrangements. Considering the significance of these arrangements to Australia's foreign relations, the consequence of failing to notify the Minister of these arrangements is that the arrangement would be invalid and unenforceable, not in operation or required to be terminated by operation of this Act.

278. Subsection 10(2) defines a ***core foreign arrangement*** as an arrangement between:

a. a core State/Territory entity, and

b. a core foreign entity

whether or not other entities are also a party to the arrangement.

279. This subsection provides that an arrangement between a core State/Territory entity and a core foreign entity is a core foreign arrangement whether or not other entities are also party to the arrangement. Accordingly, an arrangement will constitute a core foreign arrangement so long as a core State/Territory entity and a core foreign entity are both party to the arrangement, and regardless of any other parties. For example, an arrangement between multiple parties, which includes a core State/Territory entity and a core foreign entity, as well as other parties such as commercial corporations, is still a core foreign arrangement for the purposes of this Act.

280. The note under subsection 10(2) informs the reader that core foreign arrangements are a subset of foreign arrangements (as defined in section 6), and that there are special requirements in the Act in relation to core foreign arrangements because they are more likely to affect Australia's foreign relations. In addition, the note explains that Part 2 has special rules about negotiating or entering core foreign arrangements.

281. Subsections 10(3) and (4) define the terms core State/Territory entity and core foreign entity. These definitions are necessary to define what constitutes a core foreign arrangement. These definitions reflect that core foreign arrangements are a subset of foreign arrangements, as defined in section 6, as they are between specified categories of State/Territory entities, as defined in section 7, and foreign entities, as defined in subsection 8(1).

282. Subsection 10(3) provides that a ***core State/Territory entity*** is an entity covered by paragraph 7(a), (b) or (c) of the definition of State/Territory entity, being:

a. a State or Territory (paragraph 7(a))

b. the government of a State or Territory (paragraph 7(b)), or

c. a Department or agency (however described) that is part of a State or Territory or its government (paragraph 7(c)).

283. Subsection 10(3) provides that an entity covered by paragraph 7(a), (b) or (c) is a core State/Territory entity even if the entity is also covered by paragraph 7(d), (e) or (f).

284. This ensures that if an entity has the requisite close connection to a State or Territory government, it will always constitute a core State/Territory entity for the purposes of this Act, regardless of whether it may be separately characterised as another form of entity.

285. Accordingly, a State or Territory, its government, or a Department or agency that is part of the State or Territory or its government will constitute a core State/Territory entity for the purposes of this Act regardless of whether that entity may also fall within another category of State/Territory entity, as defined in section 7.

286. This subset of State/Territory entities reflects the entities which are inherently connected to, or form a central part of, a State or Territory, and recognises that the conduct of these entities is more likely to intersect or overlap with Australia's relations with, or policy in

relation to, a particular foreign country, the management of which is within the responsibility of the Commonwealth.

287. Paragraph 10(4)(a) provides that a ***core foreign entity*** is an entity covered by paragraph 8(1)(a), (b) or (c) of the definition of foreign entity, being:

a. a foreign country (paragraph 8(1)(a))

b. the national government of a foreign country (paragraph 8(1)(b)), or

c. a Department or agency (however described) of a foreign country or its national government (paragraph 8(1)(c)).

288. Paragraph 10(4)(a) provides that an entity covered by paragraph 8(1)(a), (b) or (c) is a core foreign entity even if the entity is also covered by paragraph 8(1)(d), (e), (f), (g), (h), (i) or (j).

289. This ensures that if an entity has the requisite close connection to a foreign government, it will always constitute a core foreign entity for the purposes of this Act, regardless of whether it may be separately characterised as another form of entity.

290. Accordingly, a foreign country, its national government, or a Department or agency of a foreign country or its government will constitute a core foreign entity for the purposes of this Act regardless of whether that entity may also fall within another category of foreign entity, as defined in subsection 8(1).

291. This subset of foreign entities reflects the entities which are inherently connected to, or form a central part of, a foreign country, and recognises that arrangements with these entities are more likely to have a significant bearing on Australia’s foreign relations than arrangements with the other foreign entities listed in subsection 8(1).

292. In addition, paragraph 10(4)(b) provides that the rules may prescribe an entity external to Australia as being a core foreign entity. This provides flexibility to prescribe further entities as core foreign entities where the entity is inherently connected to, or forms a central part of, a foreign country or the national government of a foreign country. For such entities, arrangements made with core State/Territory entities can have a significant impact on Australia’s foreign relations. The requirement that the entity be ‘external to Australia’ ensures that the rules can clearly only prescribe ‘foreign’ entities as falling within the definition of ‘core foreign entity’.

293. Subsection 10(4) also provides that a foreign entity does not include a corporation that operates on a commercial basis, consistent with the definition of foreign entity (and State/Territory entity). Accordingly, the rules under paragraph 10(4)(b) may not prescribe a corporation that operates on a commercial basis to be a core foreign entity.

Section 11 Application of this Act to subsidiary arrangements

294. Section 11 explains the application of this Act to subsidiary arrangements.

295. Subsection 11(1) provides that for the purposes of achieving the objects of this Act, there are provisions in the Act dealing with subsidiary arrangements of foreign arrangements.

296. The Act provides the Minister with decision-making powers under Part 4, Division 3 in relation to subsidiary arrangements of foreign arrangements. Under that Division, the Minister may make a declaration that a subsidiary arrangement is invalid and unenforceable, not in operation or is required to be varied or terminated, in certain circumstances, if the subsidiary arrangement would adversely affect Australia's foreign relations or be inconsistent with Australia's foreign policy.

Section 12 What is a subsidiary arrangement?

297. Section 12 defines what constitutes a subsidiary arrangement for the purposes of this Act.

298. Subsidiary arrangements as defined in this section may be subject to a Ministerial declaration under Part 4, Division 3 of this Act, where:

- the relevant head foreign arrangement was entered unlawfully or a declaration is in force in relation to it under Part 4, and
- the Minister is satisfied that the subsidiary arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

299. Subsection 12(1) provides that an arrangement is a ***subsidiary arrangement*** of a foreign arrangement if it:

a. is entered under the auspices of the foreign arrangement, and

b. is not a foreign arrangement.

300. Paragraph 12(1)(a) establishes the requisite connection or nexus between the foreign arrangement and the relevant subsidiary arrangement, being that the arrangement is entered under the auspices of the foreign arrangement.

301. Subsection 12(2) provides that an arrangement is entered ***under the auspices*** of a foreign arrangement for the purposes of paragraph 12(1)(a) if the arrangement is entered at the same time, or after, the foreign arrangement is entered, and:

a. the arrangement is entered for the purposes of implementing the foreign arrangement, in any way and to any extent, whether directly or indirectly, and whether or not:

    i. the arrangement refers to the foreign arrangement, or

    ii. the foreign arrangement contemplates the arrangement, or arrangements of the same kind as the arrangement, being entered, or

b. both of the following are satisfied:

    i. the foreign arrangement contemplates the arrangement, or arrangements of the same kind as the arrangement, being entered (including, for example, by encouraging or promoting the arrangement, or arrangements of that kind, to be entered)

ii. the arrangement is entered as a consequence of the foreign arrangement, or of any actions taken under the foreign arrangement, or

c. the arrangement and the foreign arrangement have a relationship of a kind prescribed by the rules.

302. This subsection provides that an arrangement is only subsidiary if it is entered at the same time, or after, the relevant foreign arrangement is entered. This ensures that this definition only covers arrangements which could be entered for the purposes of implementing the relevant foreign arrangement. As such, this definition will not cover arrangements that pre-date a head foreign arrangement, which may be later held out by parties as having been entered under the auspices of the foreign arrangement, for example, for the purposes of securing government funding.

303. Paragraph 12(2)(a) provides for the circumstances in which the subsidiary arrangement is entered for the purposes of implementing the foreign arrangement.

304. For the purposes of this paragraph, it is not relevant whether the arrangement implements the foreign arrangement directly or indirectly, refers to the relevant foreign arrangement or if the foreign arrangement contemplates the arrangement, or arrangements of that kind being entered. This ensures that all arrangements which do in fact, or which are intended to, give effect to an arrangement to any extent fall within this definition, regardless of the manner and the formality of this connection.

305. Types of subsidiary arrangements which may be covered under this paragraph are arrangements which arise directly from and directly implement an arrangement (such as a construction contract which was contemplated under a foreign arrangement related to infrastructure), as well as arrangements which are entered to implement the foreign arrangement, amongst other purposes (such as a construction contract that implements a foreign arrangement promoting infrastructure projects in a particular local government area, but also covers construction projects in a different local government area not covered by the foreign arrangement).

306. Paragraph 12(2)(b) covers subsidiary arrangements which are contemplated by foreign arrangements and are entered as a consequence of that arrangement, or related action.

307. This paragraph recognises that foreign arrangements may encourage, foster, promote or note the subsequent development of subsidiary arrangements. For example, some foreign arrangements may put in place mechanisms (such as funding, government incentives and other mechanisms) that are designed to encourage private entities to enter into certain commercial contracts.

308. Subparagraph 12(2)(b)(ii) ensures that this definition only covers arrangements which are entered as a consequence of the foreign arrangement. This recognises that foreign arrangements may contemplate a number of arrangements, and may do so in a particularly general manner, to be entered as a result of the arrangement, but that the parties to the subsidiary arrangement may not be aware of that arrangement, or did not intend to implement that arrangement.

309. For example, this paragraph would not cover a commercial mining contract that happened to give effect to a foreign arrangement related to energy and resources capacity

building which contemplated such arrangements, if the arrangement was not entered as a consequence of that arrangement (such as where the parties to the mining contract were not aware of the foreign arrangement or the contract would have progressed in the same manner regardless of the foreign arrangement). However, if the circumstances were such that the parties decided to pursue the mining contract as a result of the foreign arrangement, it would be entered into as a consequence of the foreign arrangement, and therefore be under the auspices of that arrangement for the purposes of this provision.

310. Paragraph 12(2)(c) provides that the rules may prescribe that arrangements which have a relationship of a certain kind with foreign arrangements are entered under the auspices of the foreign arrangement for the purposes of paragraph 12(1)(a). This gives the Minister flexibility to prescribe relationships between arrangements where there is a sufficiently close and direct connection between the foreign arrangement and the subsidiary arrangement. Where such a close connection exists and is prescribed in the rules, the subsidiary arrangement will be subject to the requirements of this Act.

311. Subsection 12(1)(b) provides that an arrangement is not a subsidiary arrangement if it is, itself, a foreign arrangement. This recognises that foreign arrangements, being arrangements between State/Territory entities and foreign entities, are considered under the specific provisions established by Parts 2 and 3 of this Act, as relevant. This means that an arrangement to which a State/Territory entity and a foreign entity is a party will always be considered a foreign arrangement even if it is itself entered under the auspices of another foreign arrangement. This is necessary to ensure the arrangement is considered under the frameworks of Part 2 or 3 as appropriate, which provide for consequences tailored to an arrangement's potential impact on Australia's foreign relations.

312. Section 12(2) also provides that paragraphs 12(2)(a), (b) and (c) do not limit each other. Therefore, a particular arrangement may satisfy one or more of these paragraphs, and no one paragraph limits how another paragraph should be interpreted or applied.

313. Subsection 12(3) provides that, for the purposes of subsection 12(1), it does not matter whether the parties were aware, when entering the subsidiary arrangement, that the foreign arrangement:

a. was entered in contravention of this Act, or

b. was invalid, unenforceable, not in operation, terminated, required to be terminated or affected in any other way by the operation of this Act.

314. This makes clear that an arrangement constitutes a subsidiary arrangement under this Act if it satisfies the factors in subsection 12(1), regardless of whether the parties to the subsidiary arrangement were aware of the application of this Act to the relevant foreign arrangement.

315. For example, it does not matter whether the parties to the subsidiary arrangement were aware that the foreign arrangement under which they contracted was automatically invalidated by operation of this Act under section 30. Their arrangement will still be a subsidiary arrangement for the purposes of this Act. The Register established by section 53 of this Act will assist to provide parties with notice of the status of foreign arrangements under this Act under which they may be contracting.

316. This reflects the Act's purpose, being to protect and manage Australia's foreign relations. While there may be inconvenience and cost to parties that may have been unaware they that had entered a subsidiary arrangement under the auspices of a foreign arrangement affected by this Act, the ability to regulate such subsidiary arrangements is necessary in order to achieve the objective of this Act.

317. It is important to note that this definition only establishes what arrangements will be subsidiary arrangements for the purposes of the Act. There are no automatic consequences that apply to subsidiary arrangements—the Minister will always need to consider such arrangements on a case-by-case basis, and be satisfied that the subsidiary arrangement has an adverse impact on Australia's foreign relations or is inconsistent with Australia's foreign policy before any consequences will apply.

Section 13 Application of this Act to variations of arrangements

318. Section 13 provides for the application of this Act to variations of arrangements.

319. Subsection 13(1) provides for the general application of the Act to variations of arrangements.

320. This subsection provides that this Act applies in relation to a variation of an arrangement in the same way it applies in relation to an arrangement.

321. This provision ensures that the requirements, obligations and powers established by this Act apply equally to arrangements and variations of those arrangements. This recognises that variations of arrangements covered by this Act, of any form, may have the same adverse effect on Australia's foreign relations and may be inconsistent with Australia's foreign policy in the same way as an arrangement. For example, an arrangement in its original form may not meet this test, but if it is varied in a particular way then it may become adverse to Australia's foreign relations or inconsistent with Australia's foreign policy. For this reason, variations must be subject to the same requirements as arrangements.

322. The example under subsection 13(1) explains that, because of this subsection, if a core State/Territory entity proposes to negotiate or make a variation of a core foreign arrangement, the entity is required to notify the Minister of the proposal or variation under Part 2, in the same manner as the entity would be required to notify the Minister of a proposal to negotiate or enter a core foreign arrangement itself.

323. Another example of the effect of section 13 is that, under Part 4, Division 2, the Minister could declare a variation of an arrangement in operation to be invalid and unenforceable, not in operation or required to be terminated, as relevant, in the same manner as an arrangement.

324. This subsection will also ensure that a variation to an exempt arrangement will be exempted in the same way that the arrangement is. In accordance with the definition of ***exempt arrangement*** in section 4, if the rules prescribe that a type of arrangement is exempt, a variation of that type of arrangement is also exempt for the purposes of this Act, and therefore certain provisions of this Act do not apply to that variation.

325. Subsection 13(1) also provides that the application of this Act to variations of arrangements applies regardless of whether the arrangement is made before, on or after the commencement day.

326. Accordingly, this Act will apply to:

- variations made to arrangements which were considered by the Minister in their original form under Parts 2 or 3 of this Act, and
- variations made to pre-existing arrangements, as long as the variation was made on or after commencement day.

327. However, paragraph 13(5)(c) (discussed below) provides that subsection 13(1) does not apply to pre-existing foreign arrangements covered by Schedule 1 of the Act. The effect of this is that variations of pre-existing arrangements, where the variation is made prior to the commencement of this Act, will not be covered by this Act.

328. Subsection 13(2) defines a ***variation of an arrangement*** as any written variation of an arrangement:

a. whether or not the variation is legally binding, and

b. whether or not the variation is made in Australia

and includes the exercise of an option to extend the arrangement.

329. It is intended that this definition be interpreted broadly to cover any form of variation of an arrangement, as long as it is in writing. It is also intended that variations would be covered by this definition whether or not the variation makes substantive changes to the arrangement.

330. For example, a variation may include substantive amendments to the scope or deliverables of an arrangement, or amendments to the timeframes in the arrangement, as well as minor or technical amendments.

331. Paragraph 13(2)(a) provides that a variation of an arrangement includes variations that are both legally binding and non-legally binding.

332. For example, a variation may include an amendment to the existing terms of a legally-binding contractual arrangement, or the inclusion of new provisions or the removal of existing provisions in a non-legally binding memorandum of understanding.

333. Paragraph 13(2)(b) provides that a variation of an arrangement is covered by this definition whether or not it is made in Australia. As such, a variation of a foreign arrangement would be covered regardless of whether it was made in the relevant State or Territory, in the relevant foreign country or in a third country.

334. Subsection 13(2) also provides that a variation of an arrangement includes the exercise of an option to extend the arrangement. This recognises that the extension of an arrangement, despite the fact that there may be no changes in substance to the existing

arrangement, may still adversely affect Australia's foreign relations or be inconsistent with Australia's foreign policy.

335. Subsection 13(3) provides for the additional application of the Act to variations of arrangements for subsidiary arrangements.

336. This subsection provides that, without limiting subsection (1), this Act applies as if a reference to an arrangement that is entered under the auspices of a foreign arrangement includes a reference to:

a. a variation of an arrangement that is made under the auspices of a foreign arrangement

b. an arrangement that is entered under the auspices of a variation of a foreign arrangement.

337. This ensures that the provisions in this Act which relate to subsidiary arrangements cover both variations to existing subsidiary arrangements, as well as subsidiary arrangements that are entered under a foreign arrangement that has been the subject of a variation.

338. Subsection 13(4) provides for the application of this provision to exempt arrangements.

339. This subsection provides that, without limiting subsection (1), the rules may prescribe that variations of arrangements of a kind are exempt, even if the rules do not prescribe that arrangements of that kind are exempt.

340. This subsection ensures that the rules can prescribe types of variations that are exempt from the operation of certain provisions of this Act, independent of whether the type of arrangement they vary is also exempt. This provision is necessary because the effect of subsection 13(1), in combination with the definition of ***exempt arrangement*** in section 4, will ensure that variations of types of arrangements that are exempt are also exempt, but not enable variations to independently be exempt.

341. This subsection therefore enables the rules to prescribe certain types of variations to be exempt where it might not be necessary to exempt the type of arrangements they vary. For example, the rules could prescribe that variations to correct minor errors in foreign arrangements are exempt from the application of this Act.

342. Subsection 13(5) provides for the circumstances in which the application of this Act to variations does not apply.

343. This subsection provides that subsections 13(1), (3) and (4) do not apply in:

a. subsection 13(2), which defines a variation of an arrangement

b. subsection 9(1), which defines arrangement, and

c. Schedule 1, which concerns pre-existing foreign arrangements.

344. Paragraphs 13(5)(a) and (b) clarify that the application of this Act to variations of arrangements does not apply to related definitional concepts (definitions of 'variation of

arrangement' and 'arrangement'), so as to maintain the integrity of those definitions. Without this technical provision, these definitions could operate in an indeterminate manner and produce unintended consequences.

345. Paragraph 13(5)(c) provides that the application of this Act to variations of arrangements does not apply in Schedule 1. This is on the basis that Schedule 1 solely relates to pre-existing arrangements. As discussed above, any variation to a pre-existing arrangement prior to commencement merely forms part of the text of that arrangement (that is then itself required to be considered under this Act), and therefore need not be separately considered. However, a variation of a pre-existing arrangement after commencement will be subject to Part 2 or 3, as relevant.

PART 2—NEGOTIATING AND ENTERING CORE FOREIGN ARRANGEMENTS

347. Part 2 of this Act requires that the Minister's approval be in place before a core foreign arrangement is negotiated or entered. This provides the Minister with an opportunity to ensure that proposed core foreign arrangements can only be negotiated or entered if they will not adversely affect Australia's foreign relations and are not inconsistent with Australia's foreign policy.

348. Under this Part, core State/Territory entities are prohibited from negotiating or entering an arrangement with a core foreign entity if approval from the Minister is not in force. After receiving notice from the relevant core State/Territory entity, the Minister must consider the negotiation or arrangement, and make a decision as soon as practicable as whether to provide approval to allow for the commencement of the negotiation or entry into an arrangement with a core foreign entity. If the Minister does not make a decision within 30 days of the notice being given, the Minister will be taken to have given approval. If the Minister refuses to provide approval, the core State/Territory entity will not be able to commence negotiations or enter into the arrangement with the core foreign entity.

349. Australia's relations with foreign states are within the responsibility of the Commonwealth, and arrangements with foreign states are normally within the domain of the Commonwealth Government—in particular, the negotiation of, and entry into, treaties and other multilateral arrangements binding under international law (which are not covered by this Act). Core foreign arrangements, as a subset of foreign arrangements, may intersect or overlap with Australia's relations with foreign states, as well as Australia's foreign policy interests. Therefore, it is appropriate that core foreign arrangements are not able to be progressed until the Minister has made a decision, either expressly or because the 30 day time period has expired, to approve the proposed negotiation of, and entry into, a core foreign arrangement. This protects against adverse effects on Australia's foreign relations and ensures consistency with Australia's foreign policy, which is the object of this Act, as set out in section 5.

350. Part 2 differs from the framework in Part 3, which covers non-core foreign arrangements and does not prohibit State/Territory entities from negotiating or entering into such arrangements while the Minister is considering whether doing so would be adverse to Australia's foreign relations or inconsistent with Australia's foreign policy.

351. Under Part 2, core State/Territory entities are required to seek the Minister's approval to commence negotiation of, and enter into, a core foreign arrangement. This ensures that the Minister may consider and respond to the foreign relations and foreign policy impact of a particular core foreign arrangement at an early stage. This dual approval requirement also recognises that the substance of arrangements may change substantially during the course of negotiations. In order to manage the impact of an arrangement on Australia's foreign relations and foreign policy position, it is necessary for the Minister to be able to separately consider both the negotiations and the text of the arrangement as agreed between parties. This requirement also gives certainty to the parties, and ensures that a core State/Territory entity does not expend time and effort in negotiating the text of a core foreign arrangement where the Minister is of the view that the negotiation of the proposed arrangement would adversely affect Australia's foreign relations or would be inconsistent with Australia's foreign policy.

352. Under Part 2, core State/Territory entities are also required to notify the Minister once they have entered a core foreign arrangement, to ensure the Minister has a final copy of the core foreign arrangement.

Division 1—Simplified outline of this Part

Section 14 Simplified outline of this Part

353. Section 14 sets out a simplified outline of Part 2 of the Act.

354. This outline is included to assist readers to understand the substantive provisions of Part 2 of the Act. It is not intended to be comprehensive and readers should rely upon the substantive provisions of this Part.

Division 2—Negotiating core foreign arrangements

Section 15 Prohibition on negotiations without the Minister's approval

355. Section 15 prohibits core State/Territory entities from negotiating arrangements with core foreign entities (core foreign arrangements), unless the Minister has approved the negotiation.

356. In accordance with this section, a core State/Territory entity can only negotiate an arrangement with a core foreign entity if the Minister has given approval for the negotiation proceeding under subsection 17(2) or by virtue of subsection 21(2) and that approval is in force.

357. As such, a core State/Territory entity would be prohibited from negotiating core foreign arrangements under this section where:

a. it had not given notice to the Minister, as required by subsection 16(1)

b. it had given notice under subsection 16(1), but the Minister had not yet made a decision under subsections 17(2) or (3) and the 30 day time period set out in section 21 had not yet expired

c. the Minister had approved the negotiation proceeding under subsection 17(2) but the approval was not yet in force under paragraph 19(a)

d. the Minister had approved the negotiation proceeding under subsection 17(2) but had revoked the approval decision under subsection 17(4), and the revocation was in force under paragraph 19(b), or

e. the Minister had refused to give approval for the negotiation proceeding under subsection 17(3).

358. This prohibition is necessary to ensure that core State/Territory entities are not able to commence negotiating an arrangement with a core foreign entity where:

- the Minister has not been given an opportunity to assess the negotiations for their effect on Australia's foreign relations and consistency with Australia's foreign policy, or

- the negotiations have been assessed by the Minister as adversely affecting Australia's foreign relations or being inconsistent with Australia's foreign policy.

359. However, the prohibition only applies for a short period (30 days), reflecting the fact that the Minister must make a decision promptly, after which time the State/Territory entity may proceed with the negotiations with deemed approval under section 21.

360. This prohibition is essential to achieving the purpose of the Act, which is to ensure that arrangements between State/Territory entities and foreign entities are consistent with Australia's foreign policy (which is determined by the Commonwealth) and do not adversely affect Australia's foreign relations (which are managed by the Commonwealth). In particular, given the significant impact that core foreign arrangements may have on Australia's foreign relations and foreign policy, it is necessary to prohibit core State/Territory entities from entering into such arrangements without the Minister's approval to achieve this object. In addition, this prohibition is necessary to enable enforcement of the Act, to ensure that the Minister's approval requirements under this Division cannot be circumvented.

361. Subsection 15(2) provides that this prohibition does not apply to an exempt arrangement.

362. Under section 4, the rules may prescribe kinds of arrangements as ***exempt arrangements***. Accordingly, a core State/Territory entity is not prohibited by this provision from negotiating core foreign arrangements of a kind which have been prescribed in the rules as exempt.

363. Where the Minister has considered it appropriate to exempt certain classes of core foreign arrangements in the rules, this subsection recognises that core State/Territory entities should not be prohibited from negotiating core foreign arrangements that fall within this class.

364. Under paragraph 52(1)(a), the Minister may seek an injunction in the High Court or Federal Court to enforce this prohibition. For example, if a core State/Territory entity commenced negotiations in relation to an arrangement with a core foreign entity without the Minister's approval, the Minister could seek an injunction from the High Court or Federal Court, preventing the core State/Territory entity from continuing the negotiations.

Section 16 Requirement to notify the Minister about negotiations

365. Section 16 establishes a requirement for a core State/Territory entity to notify the Minister about proposed negotiations with a core foreign entity.

366. Subsection 16(1) provides that a core State/Territory entity must give a notice to the Minister if it proposes to negotiate an arrangement with a core foreign entity (a core foreign arrangement, consistent with the definition in subsection 10(2)).

367. The notice ensures that the Minister has oversight and visibility of all proposed negotiations between core State/Territory entities and core foreign entities. In addition, the notice requirement ensures that the Minister has sufficient information in order to make a decision as to whether the proposed negotiation would not adversely affect Australia's foreign relations and would not be inconsistent with Australia's foreign policy.

368. Under subsection 16(1), the core State/Territory entity must provide notice to the Minister prior to commencing negotiations. There is no set timeframe within which the core State/Territory entity must provide notice to the Minister under this section as, due to the operation of section 15, the core State/Territory entity is prohibited from commencing negotiations until the Minister's approval is in force.

369. It is intended that the core State/Territory entity must notify the Minister prior to commencing any form of negotiation, regardless of whether that negotiation is preliminary or informal. ***Negotiation*** is defined in section 4 as meaning discussions or dealings between the proposed parties that are directed towards the making of the arrangement.

370. In particular, it is intended that the Minister must be notified before a core State/Territory entity approaches a core foreign entity with the intention of negotiating an arrangement. In circumstances where a core foreign entity approaches a core State/Territory entity in relation to negotiating an arrangement, and the core State/Territory entity is interested in pursuing an arrangement, then they must notify the Minister of the proposed negotiations.

371. The note under subsection 16(1) informs the reader that if the core State/Territory entity proposes to enter the resultant arrangement, the entity is required to give the Minister another notice about the proposed entry under section 23.

372. Subsection 16(1) provides that the notice to the Minister must be in accordance with the requirements in subsection 16(2).

373. Subsection 16(2) provides that the notice must:

a. be in writing

b. be in the approved form (if any)

c. include any information prescribed by the rules

d. be accompanied by any documents prescribed by the rules, and

e. be given in the approved way (if any).

374. Paragraph 16(2)(a) requires that the notice be given in writing. It is necessary for the core State/Territory entity to provide the notice in writing given the nature of the information that must be included in the notice. Given that the Minister must rely on this information when making a decision about negotiations under section 17, it is appropriate for the core State/Territory entity to provide the notice in writing.

375. Paragraph 16(2)(b) provides that, if the Minister approves a form under section 62 for the purposes of this provision, the notice must be in that approved form. Similarly, paragraph 16(2)(e) provides that, if the Minister approves a way of giving notice under section 63 for the purposes of this provision, the notice must be given in that approved way.

376. In addition, the Minister may prescribe in the rules any information that must be included in the notice under paragraph 16(2)(c) and any documents that must accompany the

notice under paragraph 16(2)(d). If the rules prescribe these matters, the core State/Territory entity must provide the required information and/or documents with its notice.

377. For example, the rules may require core State/Territory entities to provide information about the proposed scope of the negotiations, subject matter, timing, and parties. If the rules required this, paragraphs 16(2)(c) and 16(2)(d) ensure that the Minister receives all of the necessary information and documents to assess the effect of the negotiations on Australia's foreign relations and their consistency with Australia's foreign policy.

378. Subsection 16(3) provides that this requirement does not apply to an exempt arrangement.

379. Under section 4, the Minister may prescribe certain kinds of arrangements as ***exempt arrangements***. Accordingly, a core State/Territory entity is not required by this provision to provide notice to the Minister if it proposes to negotiate an arrangement of a kind which have been prescribed in the rules as exempt.

380. This recognises core State/Territory entities should not be required to provide a notice about the negotiation of core foreign arrangements of a kind which have already been assessed by the Minister as exempt from the requirements of the Act by prescription in the rules.

381. Under paragraph 52(1)(b), the Minister may seek an injunction from the High Court or Federal Court to enforce this requirement. For example, if a core State/Territory entity commenced negotiations for a core foreign arrangement without providing a notice to the Minister, the Minister could seek an injunction from the High Court or Federal Court, requiring the core State/Territory entity to provide a notice to the Minister containing the required information. The Minister may choose to seek an injunction in some circumstances where he or she wishes to have the necessary information before them in order to make a decision under section 17 to approve or refuse to approve the negotiations proceeding.

Section 17 The Minister's decision about negotiations

382. Section 17 provides for the Minister to make decisions about proposed negotiations between core State/Territory entities and core foreign entities.

383. Subsection 17(1) provides that if a core State/Territory entity provides the Minister with a notice about its proposed negotiation of a core foreign arrangement under subsection 16(1), then the Minister must make a decision in relation to the proposed negotiation as soon as practicable.

384. The Minister may either decide to give approval for the negotiation to proceed under subsection 17(2), or refuse to give approval for the negotiation to proceed under subsection 17(3).

385. The note under subsection 17(1) informs the reader that section 21(2) provides that if the Minister does not make a decision within 30 days of being given the notice, then the Minister is taken to have given approval for the negotiation proceeding. This will provide certainty for core State/Territory entities as to when they can proceed with a proposed negotiation. That is, if the Minister does not make a decision within the Minister's response period, approval is taken to have been given and therefore the prohibition under section 15 is

lifted and the core State/Territory entity is able to commence the negotiations. The note also informs the reader that the effect of subsection 21(4) is that, after the 30 day period expires, the Minister will no longer be able to make a decision under section 17.

386. Accordingly, the Minister must make a decision under this section as soon as practicable within that 30 day time period. Courts have generally accepted that the meaning of 'as soon as practicable' will depend on the circumstances of each case based on all the available evidence.[2] Therefore, although the maximum time period within which the Minister can make a decision under this section is 30 days, if it were practicable for the Minister to make a decision 14 days after receiving the notice, then the Minister must make the decision by that date.

387. The Minister's decisions under this Part are to be exercised personally (this power cannot be delegated, consistent with paragraph 56(2)(a)) and that the Minister may be required to assess a number of notices, both under this Division, as well as under other provisions of this Act, at a particular time.

388. Subsection 17(2) provides that the Minister must approve the proposed negotiations if he or she is satisfied that the negotiation:

a. would not adversely affect, or would be unlikely to adversely affect, Australia's foreign relations, and

b. would not be, or would be unlikely to be, inconsistent with Australia's foreign policy.

389. ***Australia's foreign policy*** is defined in subsection 5(2) to include policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia. Under this definition, it does not matter whether or not the policy is written or publicly available or has been formulated, decided upon, or approved by any particular member or body of the Commonwealth.

390. The assessment of the criteria in subparagraphs 17(2)(a) and (b) is a matter for the Minister based on his or her judgment. The Minister must be satisfied of both criteria in order to approve negotiations under this subsection. For example, if the Minister is satisfied that the proposed negotiation is unlikely to adversely affect Australia's foreign relations, but is likely to be inconsistent with Australia's foreign policy, the Minister must refuse to approve it under subsection 17(3).

391. In practice, the Minister will likely seek advice from a range of sources in making a decision under section 17, depending on the nature of the particular factual scenario before him or her. It may be appropriate for the Minister to consult with other Ministers, or seek advice from particular agencies, in making a decision under this section to the extent necessary based on the particular notice and negotiation.

392. The note under subsection 17(2) informs the reader that, if the Minister gives approval for the negotiation proceeding, the Minister must give the core State/Territory entity written notice of that decision under subsection 18(1).

[2] See for example, *Williams v R* (1986) 60 ALJR 636

393. If the Minister approves the negotiations proceeding under this subsection, and once his or her approval has come into force under section 19, the prohibition under section 15 will no longer apply and the core State/Territory entity may commence negotiations with the core foreign entity. Alternatively, if the Minister does not make a decision under this section within 30 days, the Minister will be taken to have given approval for the negotiations commencing and the prohibition under section 15 will also be lifted, and the core State/Territory entity may commence negotiations with the core foreign entity.

394. Subsection 17(3) provides that the Minister must refuse to give approval for the negotiation proceeding if the Minister is not satisfied of the criteria in subsection 17(2). This means that the Minister must refuse to approve the arrangement if:

- either of the criteria in subsections 17(2)(a) and (b) are not satisfied, or
- both of the criteria in subsections 17(2)(a) and (b) are not satisfied.

395. The note under subsection 17(3) informs the reader that if the Minister refuses to give approval under this subsection, he or she must give the core State/Territory entity written notice of that decision under section 20.

396. Subsection 17(4) provides that the Minister may revoke an approval decision he or she has made in relation to proposed negotiations if he or she ceases to be satisfied of the matters on which the approval decision was made. This enables the Minister to take account of, and respond to, changing circumstances in Australia's foreign policy and foreign relations. For example, the Minister could revoke his or her initial approval given under subsection 17(2) if, after the Minister has given approval to negotiations proceeding, events take place that prompt a change in Australia's foreign policy with the result that the Minister is no longer satisfied that the proposed negotiation is not inconsistent with Australia's foreign policy.

397. There is no time limit placed on when the Minister may revoke an approval decision, but in practice the Minister is only likely to do so prior to the core State/Territory entity providing the Minister with notice of their proposed entry into the core foreign arrangement under Part 2, Division 3 (under section 23). If Australia's foreign policy had changed by the time this notice was given, the Minister would take it into account when making a decision under section 23, rather than seeking to end the negotiation of the arrangement by revoking an approval decision.

398. The note under subsection 17(4) informs the reader that if the Minister revokes an approval decision under this subsection, he or she must give the core State/Territory entity written notice of that decision under subsection 18(2).

399. Subsection 17(5) provides that the Minister cannot revoke a refusal decision. If the core State/Territory entity believes that it can make changes that would allow it to pursue the negotiations in a way that would not adversely affect Australia's foreign relations to be inconsistent with Australia's foreign policy, it would seek a new approval by providing a new notice under section 16, rather than seeking to have the refusal decision revoked.

400. The note to subsection 17(5) informs the reader of this by stating that the Minister may make a new decision to give approval under section 17 if the core State/Territory entity gives the Minister a new notice under subsection 16(1).

401. For example, if after the Minister had refused to approve certain negotiations, there had been a change in Australia's foreign policy or foreign relations posture relevant to the proposed negotiations, the core State/Territory entity could seek the Minister's approval for the negotiations to now commence in that different environment. Alternatively, the Minister may have provided feedback to the core State/Territory entity about changes they could make to their approach to negotiations that might remedy the Minister's concerns.

Section 18 Notices relating to the Minister's approval under subsection 17(2)

402. Section 18 sets out the requirements that apply when the Minister is providing notice of his or her decisions to approve negotiations and to revoke approvals under section 17. These notices give certainty to core State/Territory entities about whether the prohibition in section 15 applies to proposed negotiations.

403. This requirement solely relates to notices relating to the Minister's approval decisions under section 17. The Minister is not required to provide a notice under this section where the Minister is taken to have approved negotiations by virtue of section 21.

404. Subsection 18(1) provides that the Minister must, as soon as practicable after making an approval decision under subsection 17(2), give the core State/Territory entity a written notice stating:

a. that the Minister gives approval for the negotiation to proceed, and

b. the day that approval comes into force.

405. The provision of this notice will be the mechanism through which the Minister notifies the core State/Territory entity of his or her approval decisions in relation to negotiations that have been the subject of a notice from the core State/Territory entity under subsection 16(1). In addition, this notice will provide certainty to the core State/Territory entity of the day on which the Minister's approval comes into force, and therefore the day upon which the prohibition on commencing negotiations under section 15 is lifted in respect of that arrangement.

406. Subsection 18(2) provides that the Minister must, as soon as practicable after deciding to revoke an approval decision under subsection 17(4), give the core State/Territory entity a written notice stating:

a. that the Minister's approval is revoked

b. the day the revocation comes into force, and

c. that the Minister's approval is no longer in force from that day.

407. Where the Minister chooses to exercise the discretion to revoke an approval under subsection 17(4), the provision of this notice will be the mechanism through which the Minister notifies the core State/Territory entity of his or her decision. In addition, this notice will serve to notify the core State/Territory entity of the day in which the Minister's approval is no longer in force, and therefore the day upon which the prohibition on commencing negotiations under section 15 recommences in respect of that arrangement.

408. The Minister's notice may include information beyond that required by paragraphs 18(1)(a) and (b) and 18(2)(a), (b) and (c), which serve as the minimum requirements. However, there is no requirement for the Minister to provide reasons for his or her decision, which is made clear by the exclusion of procedural fairness in section 58.

Section 19 When the Minister's approval under subsection 17(2) is in force

409. Section 19 provides for when the Minister's approval under subsection 17(2) is in force.

410. The Minister is required under section 18 to specify a day on which the approval notice or revocation notice under subsection 17(2) comes into force. In relation to approval decisions made under subsection 17(2), paragraph 19(a) clarifies that the approval decision comes into force on the day specified in the Minister's notice under subsection 18(1).

411. In relation to revocation decisions made under subsection 17(4), paragraph 19(b) clarifies that the Minister's approval ceases to be in force on the day specified in the Minister's notice under subsection 18(2).

412. For example, the Minister may make an approval decision on 1 June and specify that the approval decision comes into force on 1 July. On 15 July, the Minister then makes a decision under subsection 17(4) to revoke the approval decision, and specifies in the revocation notice that the approval decision ceases to be in force from 16 July. In this example:

- the approval decision came into force on 1 July
- the approval was in force from 1 July to 15 July
- the approval ceased to be in force from 16 July.

413. This requirement solely relates to when the Minister's approval under section 17 is in force. Section 21 provides for when the Minister is taken to have given approval for negotiations commencing under that section, and when that approval is in force.

Section 20 Notice of the Minister's refusal under subsection 17(3)

414. Section 20 requires the Minister to give written notice to a core State/Territory entity of his or her decision to refuse to approve negotiations under subsection 17(3).

415. The provision of this notice will be the mechanism through which the Minister notifies the core State/Territory entity of his or her refusal decision in relation to negotiations that have been the subject of a notice from the core State/Territory entity under subsection 16(1). This notice gives certainty to core State/Territory entities that the prohibition in section 15 applies to the proposed negotiations.

416. Under this section, the Minister must, as soon as practicable after making a decision to refuse to give approval under subsection 17(3), give the core State/Territory entity a written notice of his or her decision.

417. There is no requirement for the Minister to specify in the notice a day on which the refusal decision comes into force, given the core State/Territory entity is prohibited from negotiating an arrangement if the Minister's approval is not in place.

418. As compared with refusal notices in relation to entry into arrangements under section 27, section 20 does not explicitly empower the Minister to suggest changes to the proposed negotiation. This mechanism is more appropriate at the stage of proposed entry into an arrangement, given negotiations are at an earlier stage when the text of an arrangement is unlikely to be known. It is open to the Minister to make informal suggestions to core State/Territory entities regarding the circumstances in which he or she may be satisfied of the matters in subsection 17(2), and the core State/Territory entity may issue a new notice for negotiations to that effect.

Section 21 When the Minister is taken to have given approval for negotiations

419. Section 21 provides for when the Minister is taken to have given approval for negotiations for the purposes of this Division.

420. This provision provides certainty to core State/Territory entities as to the outer limits of the period in which the Minister may consider, and make a decision about proposed negotiations under section 17. This ensures that core State/Territory entities are not unduly or disproportionately delayed in commencing negotiations with a core foreign entity, whilst providing the Minister with an appropriate amount of time in which to make a decision under section 17 to either approve, or refuse to approve, those negotiations.

421. Paragraphs 21(1)(a) and (b) provide that this provision applies where a core State/Territory entity has given the Minister a notice under subsection 16(1) about its proposal to negotiate an arrangement with a core foreign entity and the Minister has not made a decision under subsections 17(2) or (3) within the 30 day period that starts on the day the notice is given.

422. Accordingly, this provision applies if the Minister has not made a decision under section 17 in respect of proposed negotiations of a core foreign arrangement within 30 days after a notice is given.

423. This period will provide certainty for core State/Territory entities as to when they can proceed with a proposed negotiation.

424. A period of 30 days is a reasonable amount of time to enable the Minister to consider the proposed negotiations, and make a decision under section 17, while still providing a short and finite period within which a core State/Territory entity is prohibited from commencing the proposed negotiations. The length of this period also recognises that the Minister's decisions under this Part are to be exercised personally (this power cannot be delegated, consistent with paragraph 56(2)(a)) and that the Minister may be required to assess a number of notices, both under this Division as well as under other provisions of this Act, at the same time. Accordingly the Minister may need more time to make a decision in relation to some proposed negotiations than others based on the complexity of the issues they may raise, or the number of other assessments before the Minister at that time.

425. Subsection 21(2) provides that, if the circumstances provided in subsection 21(1) are met, then the Minister is taken to have given approval under this section for the negotiation proceeding.

426. Accordingly, if the Minister has not made a decision under section 17 within 30 days of the notice being provided, the Minister is taken to have given approval for those negotiations by virtue of this provision, and the prohibition under section 15 will be lifted, allowing the core State/Territory entity to commence negotiations with the core foreign entity.

427. Given the automatic operation of this provision, the Minister is not required to give notice to the core State/Territory that the Minister has been taken to have made an approval decision under this section.

428. The note under subsection 21(2) informs the reader that the Minister's approval under this subsection may not be revoked.

429. Subsection 21(3) provides that the Minister's approval under subsection 21(2) comes into force immediately after the end of the 30 day period provided for in paragraph 21(1)(b). The prohibition in subsection 15(1) which prevents a core State/Territory entity from negotiating a foreign arrangement with a core foreign entity is lifted when an approval under subsection 21(2) comes into force. Therefore, the approval will come into force immediately after the end of the 30 day period, and the prohibition will be lifted.

430. Subsection 21(4) provides that, if the circumstances in subsection 21(1) are met then the Minister is no longer able to make a decision under section 17. This means that it is not open to the Minister to make a decision to approve the negotiation (under subsection 17(2)) or to refuse to approve the negotiation (under subsection 17(3)).

431. If a core State/Territory entity is able to commence negotiations by virtue of this provision, where the Minister would have refused to approve the negotiations because she was not satisfied that the arrangement would not adversely affect Australia's foreign relations or would not be inconsistent with Australia's foreign policy, it is open to the Minister to refuse to approve any resultant arrangement under Part 2, Division 3.

Division 3—Entering core foreign arrangements

Section 22 Prohibition on entering core foreign arrangements

432. Section 22 prohibits core State/Territory entities from entering arrangements with core foreign entities (core foreign arrangements), unless the Minister has approved entry into the arrangement.

433. In accordance with this section, a core State/Territory entity can only enter an arrangement with a core foreign entity if the Minister has given approval for the State/Territory entity to enter the arrangement as proposed under subsection 24(2), or by virtue of subsection 28(2), and that approval is in force.

434. As such, a core State/Territory entity would be prohibited from entering core foreign arrangements under this section where:

a. it had not given notice to the Minister, as required by subsection 23(1)

b. it had given notice under subsection 23(1), but the Minister had not yet made a decision under subsections 24(2) or (3) and the 30 day time period set out in section 28 had not yet expired

c. the Minister had approved the core State/Territory entity entering the arrangement under subsection 24(2) but the approval was not yet in force under paragraph 26(a)

d. the Minister had approved the core State/Territory entity entering the arrangement under subsection 24(2) but had revoked the approval decision under subsection 24(4), and the revocation was in force under paragraph 26(b), or

e. the Minister had refused to give approval for the core State/Territory entity entering the arrangement under subsection 24(3).

435. This prohibition is necessary to ensure that core State/Territory entities are not able to enter an arrangement with a core foreign entity where:

- the Minister has not been given an opportunity to assess the arrangement for its effect on Australia's foreign relations and consistency with Australia's foreign policy
- the arrangement has been assessed by the Minister as adversely affecting Australia's foreign relations or being inconsistent with Australia's foreign policy.

436. However, the prohibition only applies for a short period (30 days), reflecting the fact that the Minister must make a decision promptly, after which time the State/Territory entity may enter the arrangement with deemed approval under section 28.

437. This prohibition is essential to achieving the purpose of the Act, which is to ensure that arrangements between State/Territory entities and foreign entities are consistent with Australia's foreign policy (which is determined by the Commonwealth) and do not adversely affect Australia's foreign relations (which are managed by the Commonwealth). In particular, given the significant impact that core foreign arrangements may have on Australia's foreign relations and foreign policy, it is necessary to prohibit core State/Territory entities from entering into such arrangements without the Minister's approval to achieve this object. In addition, this prohibition is necessary to enable enforcement of the Act, to ensure that the Minister's approval requirements under this Division cannot be circumvented.

438. Note 1 under subsection 22(1) informs the reader that, if the State/Territory entity enters the arrangement without the Minister's approval, then section 30, 31 or 32 automatically applies to the arrangement to make it invalid, unenforceable or not in operation, or to require the State/Territory entity to terminate it. The note also informs the reader that those sections also prohibit the parties from giving effect to the arrangement.

439. Note 2 under subsection 22(1) informs the reader that similar consequences may apply to any subsidiary arrangements of the arrangement, in accordance with sections 46 to 48 of this Act.

440. Subsection 22(2) provides that this prohibition does not apply to an exempt arrangement.

441. Under section 4, the rules may prescribe kinds of arrangements as ***exempt arrangements***. Accordingly, a core State/Territory entity is not prohibited by this provision from entering core foreign arrangements of a kind which have been prescribed in the rules as exempt.

442. Where the Minister has considered it appropriate to exempt certain classes of core foreign arrangements in the rules, this subsection recognises that core State/Territory entities should not be prohibited from entering core foreign arrangements that fall within this class.

443. Under paragraph 52(1)(c), the Minister may seek an injunction in the High Court or Federal Court to enforce this prohibition. For example, if a core State/Territory entity proposed to enter an arrangement with a core foreign entity without the Minister's approval, the Minister could seek an injunction from the High Court or Federal Court, preventing the core State/Territory entity from entering the arrangement.

Section 23 Requirement to notify the Minister before entering core foreign arrangements

444. Section 23 establishes a requirement for a core State/Territory entity to notify the Minister about proposals to enter an arrangement with a core foreign entity.

445. Subsection 23(1) provides that a core State/Territory entity must give a notice to the Minister if it proposes to enter an arrangement with a core foreign entity (a core foreign arrangement, consistent with the definition in subsection 10(2)).

446. The notice ensures that the Minister has oversight and visibility of all proposals to enter arrangements between core State/Territory entities and core foreign entities. In addition, the notice requirement ensures that the Minister has sufficient information in order to make a decision as to whether the proposed arrangement would not adversely affect Australia's foreign relations and would not be inconsistent with Australia's foreign policy.

447. Under subsection 23(1), the core State/Territory entity must provide notice to the Minister prior to entering the core foreign arrangement. There is no set timeframe within which the core State/Territory entity must provide notice to the Minister under this section as, due to the operation of section 22, the core State/Territory entity is prohibited from entering the arrangement until the Minister's approval is in force.

448. The note under subsection 23(1) informs the reader that if the core State/Territory entity enters the core foreign arrangement, the entity is required to give the Minister another notice containing a copy of the arrangement as entered under section 29.

449. Subsection 23(1) provides that the notice to the Minister must be in accordance with the requirements in subsection 23(2).

450. Subsection 23(2) provides that the notice must:

a. be in writing

b. be in the approved form (if any)

c. be accompanied by a copy of the proposed arrangement

d. specify the day it is proposed to enter the arrangement

e. include any information prescribed by the rules

f. be accompanied by any documents prescribed by the rules, and

g. be given in the approved way (if any).

451. Paragraph 23(2)(a) requires that the notice be given in writing. It is necessary for the core State/Territory entity to provide the notice in writing given the nature of the information that must be included in the notice. Given that the Minister must rely on this information when making a decision about proposed arrangements under section 24, it is appropriate for the core State/Territory entity to provide the notice in writing.

452. Paragraph 23(2)(b) provides that, if the Minister approves a form under section 62 for the purposes of this provision, the notice must be in that approved form. Similarly, paragraph 23(2)(g) provides that, if the Minister approves a way of giving notice under section 63 for the purposes of this provision, the notice must be given in that approved way.

453. Paragraph 23(2)(c) requires the notice to be accompanied by a copy of the proposed arrangement. This requirement ensures that the Minister is able to make a decision under section 23 on the basis of the specific text of the proposed core foreign arrangement. A core State/Territory entity must provide a copy of the foreign arrangement under this provision, regardless of the nature and contents of the arrangement.

454. Paragraph 23(2)(d) requires the notice to specify the day the State/Territory proposes to enter the arrangement. This requirement will assist the Minister in prioritising consideration of arrangements for which there might be strong external factors justifying entry by a particular date, such as multilateral arrangements. However, the Minister is not required to make a decision under section 24 in relation to a core foreign arrangement prior to the proposed entry date, unless that entry date is after the conclusion of the specified period for Ministerial consideration under section 28.

455. In addition, the Minister may prescribe in the rules any information that must be included in the notice under paragraph 23(2)(e) and any documents that must accompany the notice under paragraph 23(2)(f). If the rules prescribe these matters, the core State/Territory entity must provide the required information and/or documents with its notice.

456. For example, the rules may require core State/Territory entities to provide information about the parties and any proposed implementation plans or subsidiary arrangements. If the rules required this, paragraphs 23(2)(e) and 23(2)(f) ensure that the Minister receives all of the necessary information and documents to assess the effect of the proposed arrangement on Australia’s foreign relations and its consistency with Australia’s foreign policy.

457. Subsection 23(3) provides that this requirement does not apply to an exempt arrangement.

458. Under section 4, the Minister may prescribe certain kinds of arrangements as ***exempt arrangements***. Accordingly, a core State/Territory entity is not required by this provision to provide notice to the Minister if it proposes to enter an arrangement of a kind which have been prescribed in the rules as exempt.

459. This recognises core State/Territory entities should not be required to provide a notice about the proposed entry into core foreign arrangements of a kind which have already been assessed by the Minister as exempt from the requirements of the Act by prescription in the rules.

460. Under paragraph 52(1)(d), the Minister may seek an injunction from the High Court or Federal Court to enforce this requirement. For example, if a core State/Territory entity commenced entering a core foreign arrangement without providing a notice to the Minister, the Minister could seek an injunction from the High Court or Federal Court, requiring the core State/Territory entity to provide a notice to the Minister containing the required information. The Minister may choose to seek an injunction in some circumstances where he or she wishes to have the necessary information before them in order to make a decision under section 24 to approve or refuse to approve the State/Territory entity entering the arrangement.

Section 24 The Minister's decision about proposals to enter core foreign arrangements

461. Section 24 provides for the Minister to make decisions about proposals for core State/Territory entities to enter foreign arrangements with core foreign entities.

462. Subsection 24(1) provides that if a core State/Territory entity provides the Minister with a notice about its proposal to enter a core foreign arrangement under subsection 23(1), then the Minister must make a decision in relation to the proposed arrangement as soon as practicable.

463. The Minister may either decide to give approval for the core State/Territory entity to enter the arrangement under subsection 24(2), or refuse to give approval for the core State/Territory entity to enter the arrangement under subsection 24(3).

464. The note under subsection 24(1) informs the reader that section 28 provides that if the Minister does not make a decision within 30 days of being given the notice, then the Minister is taken to have given approval for the core State/Territory entity to enter the arrangement. This will provide certainty for core State/Territory entities as to when they can enter the proposed arrangement. That is, if the Minister does not make a decision within the Minister's response period, approval is taken to have been given and therefore the prohibition under section 22 is lifted and the core State/Territory entity is able to enter the arrangement. The note also informs the reader that the Minister will no longer be able to make a decision under this section about the proposed arrangement (see subsection ^28(4)).

465. Accordingly, the Minister must make a decision under this section as soon as practicable within that 30 day time period. Courts have generally accepted that the meaning of 'as soon as practicable' will depend on the circumstances of each case based on all the

available evidence.[3] Therefore, although the maximum time period within which the Minister can make a decision under this section is 30 days, if it were practicable for the Minister to make a decision 14 days after receiving the notice, then the Minister must make the decision by that date.

466. It is appropriate for the Minister to be required to make a decision under section 24 as soon as practicable within the specified period, to give certainty to core State/Territory entities as to the outer limits of the period for the Minister to make a decision under this section, whilst allowing the Minister flexibility to make a decision as soon as practicable, considering that the Minister's decisions under this Part are to be exercised personally (this power cannot be delegated, consistent with paragraph 56(2)(a)) and that the Minister may be required to assess a number of notices, both under this Division, as well as under other provisions of this Act, at a particular time.

467. Subsection 24(2) provides that the Minister must give approval for the core State/Territory to enter the arrangement as proposed if the Minister is satisfied that the proposed arrangement:

a. would not adversely affect, or would be unlikely to adversely affect, Australia's foreign relations, and

b. would not be, or would be unlikely to be, inconsistent with Australia's foreign policy.

468. ***Australia's foreign policy*** is defined in subsection 5(2) to include policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia. Under this definition, it does not matter whether or not the policy is written or publicly available or has been formulated, decided upon, or approved by any particular member or body of the Commonwealth.

469. The assessment of the criteria in subparagraphs 24(2)(a) and (b) is a matter for the Minister based on his or her judgment. The Minister must be satisfied of both criteria in order to approve entry into an arrangement under this subsection. For example, if the Minister is satisfied that the proposed arrangement is unlikely to adversely affect Australia's foreign relations, but is likely to be inconsistent with Australia's foreign policy, the Minister must refuse to approve it under subsection 24(3).

470. In practice, the Minister will likely seek advice from a range of sources in making a decision under section 24, depending on the nature of the particular factual scenario before him or her. It may be appropriate for the Minister to consult with other Ministers, or seek advice from particular agencies, in making a decision under this section to the extent necessary based on the particular notice and proposed arrangement.

471. The note under subsection 24(2) informs the reader that, if the Minister gives approval for the core State/Territory entity to enter the arrangement, the Minister must give the core State/Territory entity written notice of that decision under subsection 25(1).

472. If the Minister approves entry into the proposed core foreign arrangement under this subsection, and once his or her approval has come into force under section 26, the prohibition

[3] See for example, *Williams v R* (1986) 60 ALJR 636

under section 22 will no longer apply and the core State/Territory entity may enter the arrangement with the core foreign entity. Alternatively, if the Minister does not make a decision under this section within 30 days, the Minister will be taken to have given approval for the core State/Territory entity to enter the arrangement and the prohibition under section 22 will also be lifted, and the core State/Territory entity may enter the arrangement.

473. Subsection 24(3) provides that the Minister must refuse to give approval for the core State/Territory entity to enter the arrangement if the Minister is not satisfied of the criteria in subsection 24(2). This means that the Minister must refuse to approve the arrangement if:

- either of the criteria in subsections 24(2)(a) and (b) are not satisfied, or
- both of the criteria in subsections 24(2)(a) and (b) are not satisfied.

474. The note under subsection 24(3) informs the reader that if the Minister refuses to give approval under this subsection, he or she must give the core State/Territory entity written notice of that decision under section 27.

475. Subsection 24(4) provides that the Minister may revoke an approval decision he or she has made in relation to a proposed core foreign arrangement if he or she ceases to be satisfied of the matters on which the approval decision was made. This enables the Minister to take account of, and respond to, changing circumstances in Australia's foreign policy and foreign relations. For example, the Minister could revoke his or her initial approval given under subsection 24(2) if, after the Minister has given approval for the arrangement to be entered, events take place that prompt a change in Australia's foreign policy with the result that the Minister is no longer satisfied that the proposed arrangement is not inconsistent with Australia's foreign policy.

476. The note under subsection 24(4) informs the reader that if the Minister revokes an approval decision under this subsection, he or she must give the core State/Territory entity written notice of that decision under subsection 25(2).

477. Subsection 24(5) provides that the Minister cannot revoke an approval decision after the core State/Territory enters the arrangement.

478. However, the note under subsection 24(5) informs the reader that if the Minister is no longer satisfied of the matters in subclause 24(2) after the arrangement is entered, the Minister has the discretion to make a declaration under Part 4 in relation to the arrangement. If, for example, Australia's foreign policy had changed following entry into the arrangement so that the Minister was no longer satisfied that the core foreign arrangement was not inconsistent with Australia's foreign policy, the Minister could make a declaration under that Part 4, Division 2.

479. Subsection 24(6) provides that the Minister cannot revoke a refusal decision.

480. The note under subsection 24(6) informs the reader that the Minister may make a new decision to give approval under this section if the core State/Territory entity gives the Minister a new notice under subsection 23(1). This reflects that paragraph 27(b) allows the Minister to recommend changes to the text of the arrangement to the core State/Territory entity that could be made in order to satisfy the Minister of the approval factors in subsection 24(2).

Section 25 Notices relating to Minister's approval under subsection 24(2)

481. Section 25 sets out the requirements that apply when the Minister is providing notice of his or her decisions to approve entry into proposed arrangements and to revoke approvals under section 24. These notices give certainty to core State/Territory entities about whether the prohibition in section 22 applies to a proposed arrangement.

482. This requirement solely applies to notices relating to the Minister's approval decisions under section 24. The Minister is not required to provide a notice under this section relating to where the Minister is taken to have approved entry into an arrangement by virtue of the operation of section 28.

483. Subsection 25(1) provides that the Minister must, as soon as practicable after making an approval decision under subsection 24(2), give the core State/Territory entity a written notice stating:

a. that the Minister gives approval for the core State/Territory to enter the arrangement, and

b. the day that approval comes into force.

484. The provision of this notice will be the mechanism through which the Minister notifies the core State/Territory entity of his or her approval decisions in relation to proposed arrangements that have been the subject of a notice from the core State/Territory entity under subsection 23(1). In addition, this notice will provide certainty to the core State/Territory entity of the day on which the Minister's approval comes into force, and therefore the day upon which the prohibition on entering core foreign arrangements under section 22 is lifted in respect of that arrangement.

485. Subsection 25(2) provides that the Minister must, as soon as practicable after deciding to revoke an approval decision under subsection 23(4), give the core State/Territory entity a written notice stating:

a. that the Minister's approval is revoked

b. the day the revocation comes into force, and

c. that the Minister's approval is no longer in force from that day.

486. Where the Minister chooses to exercise the discretion to revoke an approval under subsection 24(4), the provision of this notice will be the mechanism through which the Minister notifies the core State/Territory entity of his or her decision. In addition, this notice will serve to notify the core State/Territory entity of the day in which the Minister's approval is no longer in force, and therefore the day upon which the prohibition on entering core foreign arrangements under section 21 recommences in respect of that arrangement.

487. The Minister's notice may include information beyond that required by paragraphs 25(1)(a) and (b) and 27(2)(a), (b) and (c), which serve as the minimum requirements. However, there is no requirement for the Minister to provide reasons for his or her decision, which is made clear by the exclusion of procedural fairness in section 58.

Section 26 When the Minister's approval under subsection 24(2) is in force

488. Section 26 provides for when the Minister's approval under subsection 24(2) is in force.

489. The Minister is required under section 25 to specify a day on which the approval notice or revocation notice under section 24 comes into force. In relation to approval decisions made under subsection 24(2), paragraph 26(a) clarifies that the approval decision comes into force on the day specified in the Minister's notice under subsection 25(1).

490. In relation to revocation decisions made under subsection 24(4), paragraph 26(b) clarifies that the Minister's approval ceases to be in force on the day specified in the Minister's notice under subsection 25(2).

491. For example, the Minister may make an approval decision on 1 June and specify that the approval decision comes into force on 1 July. On 15 July, the Minister then makes a decision under subsection 24(4) to revoke the approval decision, and specifies in the revocation notice that the approval decision ceases to be in force from 16 July. In this example:

- the approval decision came into force on 1 July
- the approval was in force from 1 July to 15 July
- the approval ceased to be in force from 16 July.

492. This requirement solely relates to when the Minister's approval under subsection 24(2) is in force. Section 28 provides for when the Minister is taken to have given approval for core State/Territory entities to enter a proposed arrangement, and when that approval is in force.

Section 27 Notice of the Minister's refusal under subsection 24(3)

493. Section 27 establishes the requirements that apply when the Minister is providing notice of his or her decision to refuse to approve entry into a core foreign arrangement under subsection 24(3).

494. The provision of this notice will be the mechanism through which the Minister will notify the core State/Territory entity of his or her refusal decisions in relation to arrangements that have been the subject of a notice under subsection 23(1). This notice gives certainty to the core State/Territory entity whether the prohibition on entering the arrangement under section 22 remains in place in respect of that arrangement.

495. Under this section, the Minister must, as soon as practicable after making a decision to refuse to give approval under subsection 24(3), give the core State/Territory entity a written notice of his or her decision.

496. The written notice must state:

a. the Minister's decision, and

b. if the Minister considers that changes could be made to the arrangement that could allow the Minister to give approval for the core State/Territory entity entering an arrangement with the core foreign entity, the Minister's recommended changes.

497. Paragraph 27(b) allows the Minister to recommend changes to the text of the arrangement to the core State/Territory entity that could be made in order to satisfy the Minister of the approval factors in subsection 24(2).

498. Examples of changes that may be recommended include changes to insert or remove certain sections, such as ensuring that termination sections form part of the arrangement, or changes to the text of certain provisions, such as recommending a shorter duration for the arrangement.

499. The note under paragraph 27(b) informs the reader that a core State/Territory entity could decide to give a new notice to the Minister under subsection 23(1) for an amended arrangement that incorporates the Minister's recommended changes.

500. There is no requirement for the Minister to give approval under paragraph 24(2) to an arrangement which has been amended to incorporate the Minister's recommended changes under paragraph 27(b). In order to approve such an amended arrangement, the Minister must be satisfied that the amended arrangement does not adversely affect Australia's foreign relations and is not inconsistent with Australia's foreign policy. This ensures that any arrangement approved by the Minister meets the policy intention of this Act, recognising that Australia's foreign relations and foreign policy may change during any period of amendments.

501. There is no requirement for the Minister to specify in the notice a day on which the refusal decision comes into force, given the core State/Territory entity is prohibited from entering an arrangement if an approval is not in place.

Section 28 When the Minister is taken to have given approval for proposals to enter core foreign arrangements

502. Section 28 provides for when the Minister is taken to have given approval to enter core foreign arrangements for the purposes of this Division.

503. This provision provides certainty to core State/Territory entities as to the outer limits of the period in which the Minister may consider, and make a decision about approval to enter a core foreign arrangement under section 24. This ensures that core State/Territory entities are not unduly or disproportionately delayed in entering arrangements with a core foreign entity, whilst providing the Minister with an appropriate amount of time in which to make a decision under section 24 to either approve, or refuse to approve, entry into that arrangement.

504. Paragraphs 28(1)(a) and (b) provide that this provision applies where a core State/Territory entity has given the Minister a notice under subsection 23(1) about its proposal to enter into an arrangement with a core foreign entity and the Minister has not made a decision under subsections 24(2) or (3) within the 30 day period that starts on the day the notice is given.

505. Accordingly, this provision applies if the Minister has not made a decision under section 24 in respect of entry into of a core foreign arrangement within 30 days after a notice is given.

506. This period will provide certainty for core State/Territory entities as to when they can proceed to enter a core foreign arrangement.

507. A period of 30 days is a reasonable amount of time to enable the Minister to consider the proposed arrangement, and make a decision under section 24, while still providing a short and finite period within which a core State/Territory entity is prohibited from entering the arrangement. The length of this period also recognises that the Minister's decisions under this Part are to be exercised personally (this power cannot be delegated, consistent with paragraph 56(2)(a)) and that the Minister may be required to assess a number of notices, both under this Division as well as under other provisions of this Act, at the same time. Accordingly the Minister may need more time to make a decision in relation to some proposed arrangements than others based on the complexity of the issues they may raise, or the number of other assessments before the Minister at that time.

508. Subsection 28(2) provides that, if the circumstances provided in subsection 28(1) are met, then the Minister is taken to have given approval under this section for the core State/Territory entity to enter into the core foreign arrangement.

509. Accordingly, if the Minister has not made a decision under section 24 within 30 days of the notice being provided, the Minister is taken to have given approval for the entry into the core foreign arrangement by virtue of this provision, and the prohibition under section 22 will be lifted, allowing the core State/Territory entity to enter into the arrangement with the core foreign entity.

510. Given the automatic operation of this provision, the Minister is not required to give notice to the core State/Territory that the Minister has been taken to have made an approval decision under this section.

511. The note under subsection 28(2) informs the reader that the Minister's approval under this subsection may not be revoked.

512. Subsection 28(3) provides that the Minister's approval under subsection 28(2) comes into force immediately after the end of the 30 day period provided for in paragraph 28(1)(b). The prohibition in subsection 22(1) which prevents a core State/Territory entity from entering into a foreign arrangement with a core foreign entity is lifted when an approval under subsection 28(2) comes into force. Therefore, the approval will come into force immediately after the end of the 30 day period, and the prohibition will be lifted.

513. Subsection 28(4) provides that, if the circumstances in subsection 28(1) are met then the Minister is no longer able to make a decision under section 24. This means that it is not open to the Minister to make a decision to approve entry into the arrangement (under subsection 24(2)) or to refuse to approve entry into the arrangement (under subsection 24(3)).

514. If a core State/Territory entity is able to enter into a core foreign arrangement by virtue of this provision, where the Minister would have refused to approve the entry into the arrangement because she was not satisfied that the arrangement would not adversely affect Australia's foreign relations or would not be inconsistent with Australia's foreign policy, it is

open to the Minister to make a declaration about the arrangement under Part 4, Division 2, once the arrangement is in operation.

Section 29 Requirement to notify the Minister about entering core foreign arrangements

515. Section 29 establishes a requirement for core State/Territory entities to provide the Minister with a copy of each arrangement they have entered with core foreign entities (core foreign arrangements), after entry into the arrangement.

516. Subsection 29(1) provides that a core State/Territory entity must give a notice to the Minister within 14 days, or such longer period prescribed by the rules, of entering an arrangement with a core foreign entity. The notice must be accompanied by a copy of the arrangement.

517. This section will apply to a core State/Territory entity regardless of whether the Minister has made an approval decision under subsection 24(2) or their proposed entry into the core foreign arrangement was deemed approved by operation of section 28.

518. The provision of the final arrangement ensures that the Minister has visibility of the final agreed text of all core foreign arrangements entered by core State/Territory entities. As core State/Territory entities may decide not to proceed with an arrangement following Ministerial approval (or deemed Ministerial approval) under this Division, this notification provision is necessary to ensure that the Minister is aware of all core foreign arrangements in operation, and therefore has sufficient information in order to be able to properly exercise the Minister's powers under Part 4, as and if necessary.

519. Subsection 29(1) also provides that the notice to the Minister must be in accordance with the requirements in subsection 29(2).

520. Subsection 29(2) provides that the notice must:

a. be in writing

b. be accompanied by a copy of the arrangement

c. include any information prescribed by the rules; and

d. be accompanied by any other documents prescribed by the rules.

521. Paragraph 29(2)(a) requires that the notice be given in writing. It is necessary for the core State/Territory entity to provide the notice in writing given the nature of the information that must be included in the notice, particularly the final copy of the arrangement.

522. Paragraph 29(2)(b) provides that the notice must be accompanied by a copy of the relevant core foreign arrangement, as entered. This will ensure that the Minister has a copy of the final version of the core foreign arrangement that the core State/Territory entity has entered.

523. In relation to those core foreign arrangements for which the Minister has approved entry into under subsection 24(2), this will give the Minister certainty as to whether the text

of the arrangement as entered reflects the text as approved or has been altered. If the text is not as approved, Division 4 of this Part will apply to the core foreign arrangement, given it will have been entered without the Minister's approval in contravention of the prohibition in subsection 22(1).

524. In relation to core foreign arrangements for which entry has been deemed approved by operation of section 28, as well as generally, this notification mechanism will ensure the Minister has sufficient information to assess in the future whether the arrangement as entered adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy for the purposes of the Minister's powers under Part 4, as necessary. This notice will therefore enable the Minister to assess his or her satisfaction of those factors at any given future point, should there be a change in Australia's foreign relations and foreign policy posture.

525. In addition, the Minister may prescribe in the rules any information that must be included in the notice under paragraph 29(2)(c) and any documents that must accompany the notice under paragraph 29(2)(d). If the rules prescribe these matters, the core State/Territory entity must provide the required information and/or documents with its notice.

526. Subsection 29(3) provides that this requirement does not apply to an exempt arrangement.

527. Under section 4, the Minister may prescribe kinds of arrangements as ***exempt arrangements***. Accordingly, a core State/Territory entity is not required by this provision to provide notice to the Minister if it has entered a core foreign arrangement of a kind which have been prescribed in the rules as exempt.

528. This recognises core State/Territory entities should not be required to provide a notice about the entry into a core foreign arrangement of a kind which have already been assessed by the Minister as exempt from the requirements of the Act by prescription in the rules.

529. Under paragraph 52(1)(e), the Minister may seek an injunction from the High Court or Federal Court to enforce this requirement. For example, if a core State/Territory entity entered a core foreign arrangement without providing a notice to the Minister, the Minister could seek an injunction from the High Court or Federal Court, requiring the core State/Territory entity to provide a notice to the Minister containing the required information.

Division 4—Consequences of unlawfully entering core foreign arrangements

Subdivision A—Effect on legally binding arrangements

Section 30 Arrangements that purport to be legally binding under Australian law

530. Section 30 sets out the consequences that apply to core foreign arrangements that purport to be legally binding under Australian law where there has been a contravention of the prohibition in section 22 on entering such arrangements without the Minister's approval.

531. Subsection 30(1) applies to an arrangement between a core State/Territory entity and a core foreign entity that:

a. a core State/Territory entity has entered in contravention of the prohibition in subsection 22(1), and

b. purports to be legally binding under an Australian law.

532. This means that section 30 will apply where a core State/Territory entity has entered an arrangement with a core foreign entity despite:

a. having not given notice to the Minister as required by subsection 23(1)

b. having given notice under section 23, but the Minister having not made a decision under subsection 24(2) or (3) and the 30-day period starting on the day the notice was given having not yet elapsed

c. the Minister having approved entry into the arrangement under subsection 24(2) but the approval not being in force under paragraph 26(a)

d. the Minister having approved entry into the arrangement under subsection 24(2) but having revoked the approval decision under subsection 24(4), and the revocation being in force under paragraph 27(b), or

e. the Minister having refused to give approval for entry into the arrangement under subsection 24(3).

533. Paragraph 30(1)(b) provides that this provision applies to arrangements which purport to be legally binding. This recognises that the effect of this section is that an arrangement entered unlawfully under this Part is, and always has been, invalid and unenforceable. Accordingly, arrangements covered by this provision, such as commercial contracts, would be legally binding but for the operation of this Act.

534. Subsection 30(2) provides that the effect on the arrangement of the core State/Territory entity's contravention is that the arrangement is invalid and unenforceable and is taken to have always been invalid and unenforceable.

535. As such, arrangements covered by this section will be invalidated from the beginning of their purported existence. This provision invalidates the arrangement by operation of this Act; there is no requirement for the Minister to issue a declaration or take any other steps in order to invalidate an arrangement under this section.

536. This provision is necessary to enforce this Act and to ensure that core foreign arrangements which have an adverse effect on Australia's foreign relations or which are inconsistent with Australia's foreign policy, as well as core foreign arrangements where the Minister has not yet had the opportunity (either at all, or because the window of time prescribed in paragraph 28(b) has not expired) to assess the impact on Australia's foreign relations and foreign policy, should not be allowed to enter into force.

537. It is appropriate to invalidate not only core foreign arrangements entered into in contravention of the Minister's refusal decision under subsection 24(3), but also

arrangements that were not notified under subsection 23(1), or where the Minister had not yet made a decision and the period of time for the Minister to do so had not yet expired. The framework in this Act provides that, in order to protect and manage Australia's foreign relations, no core foreign arrangement should be entered into, unless the Minister has approved the core foreign arrangement or the arrangement is deemed approved by operation of section 28. This recognises that all core foreign arrangements, by their nature, have an impact on Australia's foreign relations. Therefore, although such arrangements have not been assessed against the criteria in subsection 24(2), it is appropriate to provide that they are invalid and unenforceable due to their inherent impact on Australia's foreign relations and the fact that they have been entered into in contravention of this Act, which has the object of protecting and managing Australia's foreign relations.

538. Providing that these core foreign arrangements are void from the beginning of their purported existence recognises that such arrangements should never have been entered into, given they were entered into contrary to the statutory prohibition in subsection 22(1).

539. Where a core foreign arrangement is subject to this section, subsection 30(3) requires the core State/Territory entity to take certain steps within a specified or prescribed period of having entered a core foreign arrangement in contravention of the Act.

540. Paragraph 30(3)(a) requires a core State/Territory entity to notify the core foreign entity within 14 days (or such longer period that may be prescribed by the rules) that:

a. this section applies to the core foreign arrangement, and

b. the core foreign arrangement is, and is taken to have always been, invalid and unenforceable.

541. The Minister can prescribe a longer period in the rules within which a core State/Territory entity must notify the core foreign entity in compliance with paragraph 30(3)(a). This provides the Minister with flexibility to extend the period for notification if circumstances warrant this.

542. This requirement ensures that the core foreign entity that would, but for the operation of this section, be a party to the arrangement with the core State/Territory entity is made aware that the arrangement is invalid and unenforceable by virtue of the operation of this section of the Act. This requirement is necessary given that subsection 30(5) prohibits the core foreign entity from giving effect to the arrangement (discussed further below).

543. Paragraph 30(3)(b) requires the core State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 30(3)(a) to notify the core foreign entity of the Act's application to, and effect on, the arrangement. This notice must be provided to the Minister in writing.

544. This requirement is necessary to ensure the Minister is informed of when the core foreign entity has been advised about the invalidation of an arrangement under section 30.

545. Subsection 30(4) provides that the core State/Territory entity is prohibited from:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that:

i. it can give effect to the arrangement, or

ii. the arrangement is valid or enforceable.

546. Due to the operation of section 59, this section prohibits the core State/Territory entity from engaging in these actions both within and outside of Australia.

547. This prohibition is necessary to ensure that the core State/Territory entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite the arrangement being invalidated by operation of subsection 30(2). This ensures that arrangements that are entered into in contravention of the requirements in this Act cannot be informally given effect. This is a necessary enforcement mechanism, as contraventions of the Act deprive the Minister of the opportunity to assess arrangements for any adverse effect they might have on Australia's foreign relations and their consistency with Australia's foreign policy.

548. Paragraph 30(4)(a) prohibits the core State/Territory entity from giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

549. For example, in relation to an infrastructure arrangement that was a core foreign arrangement entered into in contravention of this Act, under this paragraph, the core State/Territory entity would be prohibited from commencing anticipated construction projects, engaging subcontractors, distributing funding or giving financial effect to the arrangement, amongst other things.

550. Paragraph 30(4)(b) prohibits the core State/Territory entity from holding out, or conducting itself on the basis, that it can give effect to the arrangement or that the arrangement is valid or enforceable.

551. This prohibition ensures that a core State/Territory entity cannot represent publicly or to other parties that the relevant arrangement is not affected by this provision. This also ensures that other parties are not induced to take action, such as entering subsidiary arrangements, on the basis of such misrepresentations. This transparency objective is further strengthened by the publication requirements of the Register under section 53, which ensures that the public and potential parties to subsidiary arrangements are aware of the application of this Act to a particular foreign arrangement.

552. For example, under this paragraph, a core State/Territory entity would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to, or continuing to publish, the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

553. Subsection 30(5) provides that the core foreign entity, from the time it is notified by the core State/Territory entity, is prohibited from doing the following in Australia:

a. giving effect to the arrangement; or

b. holding out, or conducting itself on the basis, that:

   i. it can give effect to the arrangement; or

   ii. the arrangement is valid or enforceable.

554. This prohibition is necessary to ensure that the core foreign entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way in Australia, if the arrangement has been invalidated by operation of subsection 30(2). This is a corresponding restriction on the core foreign entity that is party to the arrangement, complementing the prohibition in subsection 30(4).

555. This subsection only prohibits the core foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

556. The Minister will be able seek an injunction against the core State/Territory entity to enforce compliance with the requirements of subsections 30(3), (4) or (5) (as per paragraph 52(1)(f)). For example, if a core State/Territory entity had failed to notify the core foreign entity within the relevant period, the Minister could seek an injunction in the High Court or Federal Court to force the State/Territory entity to do so.

557. Part 4, Division 3 enables the Minister to consider any subsidiary arrangements that are entered under the auspices of a head arrangement that was entered in contravention of the prohibition in subsection 22(1). As such, the Minister will be able to consider any subsidiary arrangements under head arrangements that have been invalidated by operation of section 30, on a case-by-case basis, to determine if they should be similarly invalidated or required to be varied or terminated.

Section 31 Arrangements that are legally binding under foreign law

558. Section 31 sets out the consequences that apply to core foreign arrangements that are legally binding under foreign law where there has been a contravention of the prohibition in section 22 on entering such arrangements without the Minister's approval.

559. Subsection 31(1) applies to arrangements between a core State/Territory entity and a core foreign entity that:

a. a core State/Territory entity has entered in contravention of the prohibition in subsection 22(1), and

b. are legally binding under foreign law.

560. This means that section 31 will apply where a core State/Territory entity has entered an arrangement with a core foreign entity despite:

a. having not given notice to the Minister as required by subsection 23(1)

b. having given notice under section 23, but the Minister having not made a decision under subsections 24(2) or (3)) and the 30-day period starting on the day the notice was given having not yet elapsed

c. the Minister having approved entry into the arrangement under subsection 24(2) but the approval not being in force under paragraph 26(a)

d. the Minister having approved entry into the arrangement under subsection 24(2) but having revoked the approval decision under subsection 24(4), and the revocation being in force under paragraph 26(b), or

e. the Minister having refused to give approval for entry into the arrangement under subsection 24(3).

561. As compared with subsection 30(2) in relation to arrangements that purport to be binding under Australian law, section 31 does not operate to invalidate the arrangement by operation of law. This Act does not purport to invalidate an arrangement that is binding under the law of another country. Instead, the core State/Territory entity is required to take steps to terminate the arrangement pursuant to subsection 31(2), as discussed below.

562. Subsection 31(2) provides that the core State/Territory entity must take certain steps after entering an arrangement in contravention of the Act:

a. within 14 days (or such longer period, if any, that is prescribed by the rules):

    i. notify the core foreign entity that this section applies to the arrangement, and

    ii. take steps to terminate the arrangement in accordance with the foreign law under which the arrangement is binding, and

b. as soon as practicable after it has complied with either of the above requirements, notify the Minister in writing of its compliance with that requirement.

563. The Minister can prescribe a longer period in the rules within which a core State/Territory entity must notify the core foreign entity in compliance with paragraph 31(2)(a). This will provide the Minister with the flexibility to extend the period for notification if circumstances warrant this.

564. The requirement under subparagraph 31(2)(a)(i) to notify the core foreign entity that is a party to the arrangement will ensure that the core foreign entity is aware of the application of this provision to the arrangement, and the fact that the core State/Territory entity is required to terminate it in accordance with the foreign law. This is necessary given the prohibitions relevant to the core foreign entity in subsection 31(4) (discussed further below).

565. Subparagraph 31(2)(a)(ii) requires the core State/Territory entity to take steps to commence the termination process for the arrangement, whatever that process might be under the relevant foreign law. The core State/Territory entity must take these steps within 14 days of entry into the arrangement. As this Act does not purport to invalidate an arrangement that is binding under foreign law, this paragraph requires the relevant Australian party (that is, the core State/Territory entity) to terminate the arrangement so that it is no longer in operation. As with the policy underpinning subsection 30(2), termination of the arrangement is an essential part of the enforcement of this Act, where a core State/Territory entity has contravened the requirements under the Act and thereby either directly contravened the

Minister's refusal decision or deprived the Minister of the opportunity to assess the arrangement under the scheme.

566. The core State/Territory entity is only required to take steps to terminate the arrangement in accordance with the foreign law within the 14 day time period. This recognises that the termination of the arrangement may not be able to be achieved within that timeframe, depending on the requirements and process under the relevant foreign law, but that steps must be taken to commence that process.

567. A period longer than 14 days can be prescribed in the rules, providing a longer period within which a core State/Territory entity must take steps to commence the termination process. This will provide the Minister with the flexibility to extend the period if circumstances warrant this.

568. Paragraph 31(2)(b) requires the core State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 31(2)(a) to notify the foreign entity and take steps to terminate the arrangement in accordance with the foreign law. This notice must be provided to the Minister in writing.

569. This requirement is necessary to ensure the Minister is informed of when the core foreign entity has been advised about the operation of the Act and that the core State/Territory entity has taken steps to commence the process of terminating the arrangement.

570. Subsection 31(3) prohibits the core State/Territory entity from:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

571. Due to the operation of section 59, this section prohibits the core State/Territory entity, from engaging in such conduct both within and outside of Australia.

572. This is necessary to ensure that the core State/Territory entity does not rely on, give effect to or hold out the arrangement as still in effect in any way, despite the requirement for them to terminate it under subparagraph 31(2)(a)(ii). This ensures that core State/Territory entities are not able to subvert the scheme in this Act by informally giving effect to the arrangement, despite the entity being required to terminate it. This is a necessary enforcement mechanism for contraventions of the Act, which deprive the Minister of the opportunity to assess arrangements for any adverse impact they might have on Australia's foreign relations and for their consistency with Australia's foreign policy.

573. Paragraph 31(3)(a) prohibits the core State/Territory entity from giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

574. For example, in relation to an infrastructure arrangement that is a core foreign arrangement that is binding under foreign law and entered in contravention of this Act, under this paragraph, the core State/Territory entity would be prohibited from commencing

anticipated construction projects, engaging subcontractors, distributing funding or giving financial effect to the arrangement, amongst other things.

575. Paragraph 31(3)(b) prohibits the core State/Territory entity from holding out, or conducting itself on the basis, that it can give effect to the arrangement.

576. This prohibition ensures that a core State/Territory cannot represent publicly or to other parties that the relevant arrangement is not affected by this provision.

577. For example, under this paragraph, a core State/Territory entity would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to, or continuing to publish, the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

578. Subsection 31(4) provides that the core foreign entity, from the time it is notified by the core State/Territory entity, is prohibited from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

579. This is necessary to ensure that the core foreign entity does not rely on, give effect to or hold out the arrangement as still in effect in any way in Australia, given the requirement under subparagraph 31(2)(a)(ii) that the core State/Territory entity take steps to terminate it. This is a corresponding restriction on the foreign entity that is party to the arrangement, complementing the prohibition in subsection 31(3).

580. This subsection only prohibits the core foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

581. The Minister will be able seek an injunction against the core State/Territory entity to enforce compliance with the requirements of subsections 31(2), (3) or (4) (as per paragraph 52(1)(f)). For example, if a core State/Territory entity had failed to notify the core foreign entity or to take steps to terminate an arrangement within the relevant period, the Minister could seek an injunction in the High Court or Federal Court to force the core State/Territory entity to do so.

582. Part 4, Division 3 enables the Minister to consider any subsidiary arrangements that are entered under the auspices of a head arrangement that was entered in contravention of the prohibition in subsection 22(1). As such, the Minister will be able to consider any subsidiary arrangements under head arrangements that are required to be terminated under section 31, on a case-by-case basis, to determine if they should be invalidated or required to be varied or terminated.

Subdivision B—Effect on non-legally binding arrangements with foreign national entities

Section 32 Arrangements that are not legally binding

583. Section 32 sets out the consequences that apply to arrangements that are not legally binding where there has been a contravention of the prohibition in section 22 on entering such arrangements without the Minister's approval.

584. Subsection 32(1) provides that this section applies to arrangements between a core State/Territory entity and a core foreign entity that:

a. a core State/Territory entity has entered or varied in contravention of the prohibition in subsection 22(1), and

b. are not legally binding.

585. This means that section 32 will apply where a State/Territory entity has entered an arrangement with a core foreign entity despite:

a. having not given notice to the Minister as required by subsection 23(1)

b. having given notice under section 23, but the Minister having not made a decision under subsections 24(2) or (3)) and the 30-day period starting on the day the notice was given having not yet elapsed

c. the Minister having approved entry into the arrangement under subsection 24(2) but the approval not being in force under paragraph 26(a)

d. the Minister having approved entry into the arrangement under subsection 24(2) but having revoked the approval decision under subsection 24(4), and the revocation being in force under paragraph 26(b), or

e. the Minister having refused to give approval for entry into the arrangement under subsection 24(3).

586. Subsection 32(2) provides that the effect on the arrangement of the core State/Territory entity's contravention is that the arrangement is not in operation and is taken to have never been in operation.

587. Given the arrangement is not legally binding, it is appropriate to describe it as no longer, and never have been, in operation, rather than being invalidated or unenforceable. Accordingly, by virtue of this section, a non-legally binding arrangement is not in effect, in force or having any other operation.

588. For example, a memorandum of understanding that expresses the parties' commitment to undertaking certain research and training activities would no longer be in operation, and the parties could not undertake those activities in accordance with subsections 32(4) and (5) (as discussed below).

589. As such, this means that the arrangements will be rendered to not have been in operation from the beginning of their purported existence by operation of this Act. There is

no requirement for the Minister to issue a declaration or take any other steps in order to render an arrangement to not be in operation under this section.

590. This provision is necessary to enforce this Act and to ensure that arrangements which are inconsistent with Australia's foreign policy or have an adverse effect on Australia's foreign relations, as well as arrangements where the Minister has not yet had the opportunity to assess the effect on Australia's foreign policy and foreign relations, should not continue into operation.

591. Providing that these arrangements are taken to have never been in operation recognises that such arrangements should never have been entered into, given they were entered into contrary to the statutory prohibition in subsection 22(1).

592. It is appropriate for these consequences to apply not only to arrangements entered into in contravention of the Minister's refusal decision under subsection 24(3), but also to arrangements that were not notified under subsection 23(1), or where the Minister had not yet made a decision. The framework in this Act provides that, in order to protect and manage Australia's foreign relations, no arrangement with a core foreign entity should be entered into, unless the Minister has approved the arrangement. This recognises that all arrangements with core foreign entities, by their nature, have an impact on Australia's foreign relations. Therefore, although such arrangements have not been assessed against the criteria in subsection 24(2), it is appropriate to provide that they are not in operation due to their inherent impact on Australia's foreign relations and the fact that they have been entered into in contravention of this Act, which has the object of protecting and managing Australia's foreign relations.

593. This reasoning stands notwithstanding the fact that the arrangements this provision regulates are not legally binding. Non-binding arrangements still impact upon Australia's foreign relations and represent a commitment between a core State/Territory entity and a core foreign entity.

594. Subsection 32(3) provides that the core State/Territory entity must take certain steps within a specified or prescribed period of having entered an arrangement in contravention of the Act.

595. Paragraph 32(3)(a) requires the core State/Territory entity to notify the core foreign entity within 14 days (or such longer period that may be prescribed by the rules) that:

a. this section applies to the arrangement, and

b. the arrangement is not, and is taken never to have been, in operation.

596. This requirement will ensure that the core foreign entity that would, but for the operation of this section, be a party to the arrangement with the core State/Territory entity is made aware that the arrangement is not in operation by virtue of the operation of this section of the Act. This requirement is necessary given that the core foreign entity is prohibited from giving effect to the arrangement in Australia by subsection 32(5) (discussed further below).

597. The Minister can prescribe a longer period in the rules within which a core State/Territory entity must notify the core foreign entity in compliance with

paragraph 32(3)(a). This provides the Minister with flexibility to extend the period for notification if circumstances warrant this.

598. Paragraph 32(3)(b) requires the core State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 32(3)(a) to notify the core foreign entity of the Act's application to, and effect on, the arrangement. This notice must be provided to the Minister in writing.

599. This requirement is necessary to ensure the Minister is informed when the core foreign entity has been put on notice about the operation of the Act on the relevant arrangement.

600. Subsection 32(4) provides that the core State/Territory entity is prohibited from doing the following:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that:

    i. it can give effect to the arrangement, or

    ii. the arrangement is in operation.

601. Due to the operation of section 59, this section prohibits the core State/Territory entity, from engaging in such conduct both within and outside of Australia.

602. This prohibition is necessary to ensure that the core State/Territory entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite the arrangement being deemed to not be in operation by operation of subsection 32(2). This ensures that arrangements that are entered into in contravention of the requirements in this Act cannot be informally given effect. This is a necessary enforcement mechanism for contraventions of the Act, which deprive the Minister of the opportunity to assess arrangements for any adverse effect they might have on Australia's foreign relations and their consistency with Australia's foreign policy.

603. Paragraph 32(4)(a) prohibits the core State/Territory entity from giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

604. For example, in relation to an infrastructure arrangement with a core foreign entity that is not legally binding and was entered in contravention of this Act, under this paragraph, the core State/Territory entity would be prohibited from commencing anticipated construction projects, engaging subcontractors to distributing funding or giving financial effect to the arrangement, amongst other things.

605. Paragraph 32(4)(b) prohibits the core State/Territory entity from holding out, or conducting itself on the basis, that it can give effect to the arrangement or that the arrangement is in operation.

606. This prohibition ensures that a core State/Territory cannot represent publicly or to other parties that the relevant arrangement is not affected by this provision. This also ensures that other parties are not induced to take action, such as entering subsidiary arrangements, on the basis of such misrepresentations. This transparency objective is further strengthened by the publication requirements of the Register under section 53, which ensures that the public and potential parties to subsidiary arrangements are aware of the application of this Act to a particular foreign arrangement.

607. For example, under this paragraph, a core State/Territory entity would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to, or continuing to publish, the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

608. Subsection 32(5) provides that the core foreign entity, from the time it is notified by the core State/Territory entity, is prohibited from doing the following in Australia:

a. giving effect to the arrangement; or

b. holding out, or conducting itself on the basis, that:

    i. it can give effect to the arrangement; or

    ii. the arrangement is in operation.

609. This prohibition is necessary to ensure that the core foreign entity does not rely upon, give effect to or hold out the arrangement as still in operation in any way in Australia, despite the arrangement being rendered to not be in operation by virtue of subsection 30(2). This is a corresponding restriction on the core foreign entity that is party to the arrangement, complementing the prohibition in subsection 32(4).

610. This subsection only prohibits the core foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

611. The Minister will be able seek an injunction against the core State/Territory entity to enforce compliance with the requirements of subsections 32(3), (4) or (5) (as per paragraph 52(1)(f)). For example, if a core State/Territory entity had failed to notify the core foreign entity under paragraph 32(3)(a) within the relevant period, the Minister could seek an injunction in the High Court or Federal Court to force the State/Territory entity to do so.

612. Part 4, Division 3 enables the Minister to consider any subsidiary arrangements that are entered under the auspices of a head arrangement that was entered in contravention of the prohibition in subsection 22(1). As such, the Minister will be able to consider any subsidiary arrangements under head arrangements that have been rendered inoperable under section 32, on a case-by-case basis, to determine if they should be invalidated or required to be varied or terminated.

PART 3—ENTERING NON-CORE FOREIGN ARRANGEMENTS

613. Part 3 of this Act requires State/Territory entities to notify the Minister prior to entering a non-core foreign arrangement.

614. This Part covers non-core foreign arrangements, being foreign arrangements that are not core foreign arrangements, as defined in section 4.

615. Core arrangements are those arrangements between core State/Territory entities and core foreign entities—these are covered by Part 2 of this Act.

616. Accordingly, Part 3 covers arrangements between:

a. a State/Territory entity that is not a core State/Territory entity and a foreign entity that is not a core foreign entity

b. a core State/Territory entity and a foreign entity that is not a core foreign entity, and

c. a State/Territory entity that is not a core State/Territory entity and a core foreign entity.

617. This Part empowers the Minister to declare that a State/Territory entity must not negotiate or enter a non-core foreign arrangement if the Minister considers the negotiation or arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy. The Minister's power to make a declaration that a State/Territory entity must not negotiate the arrangement recognises that the Minister may become aware of such negotiations outside of this legislative framework and, if they pose a risk to Australia's foreign relations or foreign policy, should be able to require that they not commence or continue, as relevant.

618. As compared with Part 2, Part 3 does not require the Minister to consider and make a decision about every proposed negotiation or entry into a non-core foreign arrangement. Further, State/Territory entities are not prohibited from negotiating or entering non-core foreign arrangements without the Minister's approval. Rather, State/Territory entities may commence negotiations for an arrangement, or proceed with entering the arrangement, unless and until the Minister exercises his or her discretion by making a declaration. This discretionary framework recognises that non-core foreign arrangements are less likely to have a significant impact on Australia's foreign relations, given at least one of the parties to the arrangement does not have the same close connection to the State or Territory or foreign country as a core State/Territory entity or core foreign entity.

619. In these circumstances, it is appropriate that the Minister have the discretion to make declarations only in cases where it is required, rather than in every case. This strikes an appropriate balance between the risk posed by the type of arrangement and the burden placed upon State/Territory entities. It allows a State/Territory entity to proceed with negotiating or entering non-core foreign arrangements with foreign entities without being required to wait for Ministerial approval, but also allows the Minister to make a declaration if the non-core foreign arrangement would pose a risk to Australia's foreign relations or foreign policy.

Division 1—Simplified outline of this Part

Section 33 Simplified outline of this Part

620. Section 33 sets out a simplified outline of Part 3.

621. This outline is included to assist readers to understand the substantive provisions of Part 3. It is not intended to be comprehensive and readers should rely upon the substantive provisions of this Part.

Division 2—Entering non-core foreign arrangements

Subdivision A—Requirement to notify the Minister about proposals to enter non-core foreign arrangements

Section 34 Requirement to notify the Minister about proposals to enter non-core foreign arrangements

622. Section 34 establishes a requirement for State/Territory entities to notify the Minister where they propose to enter a non-core foreign arrangement.

623. Subsection 34(1) provides that a State/Territory entity must give a notice to the Minister if it proposes to enter an arrangement with a foreign entity, and that arrangement is a non-core foreign arrangement.

624. Paragraph 34(1)(b) provides that this notification requirement only applies where the relevant foreign arrangement is a non-core foreign arrangement.

625. A ***non-core foreign arrangement*** is defined in section 4 as a foreign arrangement that is not a core foreign arrangement.

626. A ***core foreign arrangement*** is defined in section 10 as an arrangement between a ***core State/Territory entity*** (defined in subsection 7(3)) and a ***core foreign entity*** (as defined in subsection 10(4)). The negotiation of, and entry into, core foreign arrangements is provided for under Part 2.

627. Accordingly, this notification requirement applies to arrangements between:

a. a State/Territory entity that is not a core State/Territory entity and a foreign entity that is not a core foreign entity

    i. for example, an arrangement between an Australian local council (paragraph 7(d) of the definition of State/Territory entity) and a foreign local council (paragraph 8(1)(d) or (e) of the definition of foreign entity)

b. a core State/Territory entity and a foreign entity that is not a core foreign entity

    i. for example, an arrangement between an Australian Territory (paragraph 7(a) of the definition of State/Territory entity) and a foreign self-governing territory of a foreign country (paragraph 8(1)(d) of the definition of foreign entity), or

c. a State/Territory entity that is not a core State/Territory entity and a core foreign entity

    i. for example, an arrangement between an Australian local government (paragraph 7(d) of the definition of State/Territory entity) and a foreign national government Department or agency (however described) (paragraph 8(1)(c) of the definition of foreign entity).

628. The notice ensures that the Minister still has oversight and visibility of all proposed non-core foreign arrangements and has sufficient information in order to make a decision on a case-by-case basis as to whether the proposed arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

629. Under this subsection, the State/Territory entity must provide notice to the Minister prior to entering the arrangement. There is no set timeframe within which the State/Territory entity must provide notice to the Minister prior to entering the arrangement. A State/Territory entering a non-core foreign arrangement without giving notice under this provision does not affect the Minister's power to make a declaration about foreign arrangements that are in operation under Part 4, Division 2, if the Minister is satisfied that that arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

630. The note under subsection 34(1) informs the reader that if the State/Territory entity enters the arrangement, it is required to give the Minister another notice under section 38.

631. This provision only requires a State/Territory entity to provide notice prior to entering a non-core foreign arrangement, and does not require a State/Territory entity to provide notice prior to commencing negotiations in relation to that arrangement (unlike Part 2, which requires notification of both proposals to negotiate and enter core foreign arrangements).

632. This more limited notification requirement ensures that the requirements placed upon State/Territory entities by this Act are commensurate to the impact that the relevant arrangement may have on Australia's foreign relations or foreign policy. By not requiring that State/Territory entities notify the Minister of negotiations, this ensures that State/Territory entities are not unduly burdened or delayed in negotiating non-core foreign arrangements, whilst still providing an avenue for the Minister to make a declaration in relation to negotiations which have an adverse effect on Australia's foreign relations or are inconsistent with Australia's foreign policy, should the Minister become aware of them.

633. Subsection 34(1) provides that the notice to the Minister must be in accordance with the requirements in subsection 34(2).

634. Subsection 34(2) provides that the notice must:

a. be in writing

b. be in the approved form (if any)

c. be accompanied by a copy of the proposed arrangement

d. include any information prescribed by the rules

e. be accompanied by any documents prescribed by the rules

f. be given in the approved way (if any); and

g. be given in the period (if any) prescribed by the rules.

635. Paragraph 34(2)(a) requires that the notice be given in writing. It is necessary for the State/Territory entity to provide the notice in writing given the nature of the information that must be included in the notice. Given that the Minister must rely on this information when making a decision about proposed arrangements under section 36, it is appropriate for the core State/Territory entity to provide the notice in writing.

636. Paragraph 34(2)(b) provides that, if the Minister approves a form under section 62 for the purposes of this provision, the notice must be in that approved form. Similarly, paragraph 34(2)(f) provides that, if the Minister approves a way of giving notice under section 63 for the purposes of this provision, the notice must be given in that approved way.

637. Paragraph 34(2)(c) requires the notice to be accompanied by a copy of the proposed arrangement. This requirement ensures that the Minister is able to make a decision under section 34 on the basis of the specific text of the proposed non-core foreign arrangement. A State/Territory entity must provide a copy of the foreign arrangement under this provision, regardless of the nature and contents of the arrangement.

638. In addition, the Minister may prescribe in the rules any information that must be included in the notice under paragraph 34(2)(d) and any documents that must accompany the notice under paragraph 34(2)(e). If the rules prescribe these matters, the core State/Territory entity must provide the required information and/or documents with its notice.

639. For example, the rules may require core State/Territory entities to provide information about the parties and any proposed implementation plans or subsidiary arrangements. If the rules required this, paragraphs 34(2)(d) and 34(2)(f) ensure that the Minister receives all of the necessary information and documents to assess the effect of the negotiations on Australia's foreign relations and their consistency with Australia's foreign policy.

640. Paragraph 34(2)(g) provides that the notice must be given the period (if any) prescribed by the rules. This allows the Minister to specify the relevant period prior to entry into a non-core foreign arrangement necessary to facilitate his or her proper consideration of whether to make a declaration under section 36.

641. Subsection 34(3) provides that this requirement does not apply to an exempt arrangement.

642. Under section 4, the Minister may prescribe certain kinds of arrangements as ***exempt arrangements***. Accordingly, a State/Territory entity is not required by this provision to provide notice to the Minister if it proposes to enter an arrangement of a kind which have been prescribed in the rules as exempt.

643. This recognises State/Territory entities should not be required to provide a notice about the proposed entry into non-core foreign arrangements of a kind which have already been assessed by the Minister as exempt from the requirements of the Act by prescription in the rules.

644. Under paragraph 52(1)(g), the Minister may seek an injunction from the High Court or Federal Court to enforce this requirement. For example, if a core State/Territory entity commenced entering a non-core foreign arrangement without providing a notice to the Minister, the Minister could seek an injunction from the High Court or Federal Court, requiring the core State/Territory entity to provide a notice to the Minister containing the required information.

Subdivision B—Declarations about negotiations or proposals to enter non-core foreign arrangements

Section 35 Declarations about negotiating non-core foreign arrangements

645. Section 35 provides a power for the Minister to make a declaration in relation to negotiations of non-core foreign arrangements.

646. Subsection 35(1) provides that the Minister may make a declaration under subsection 35(2) if:

a. the Minister becomes aware that a State/Territory entity proposes to negotiate, or is negotiating, an arrangement with a foreign entity

b. the arrangement is a non-core foreign arrangement

c. if the State/Territory entity is proposing to negotiate the arrangement—the Minister is satisfied that the proposed negotiation:

   i. would adversely affect, or would be likely to adversely affect, Australia's foreign relations, or

   ii. would be, or would be likely to be, inconsistent with Australia's foreign policy, and

d. if the State/Territory entity is negotiating the arrangement—the Minister is satisfied that the negotiation:

   i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

   ii. is, or is likely to be, inconsistent with Australia's foreign policy.

647. Paragraphs 35(1)(a) and (b) provide that the Minister may make a declaration under subsection 35(2) if the State/Territory is proposing to negotiate, or is in the course of negotiating, an arrangement with a foreign entity that is a non-core foreign arrangement and the Minister becomes aware of this. Clause 4 defines a ***non-core foreign arrangement*** as a foreign arrangement that is not a core arrangement. Accordingly, this provision applies to negotiations for arrangements between:

- State/Territory entities that are not core State/Territory entities and foreign entities that are not core foreign entities
- core State/Territory entities and foreign entities that are not core foreign entities, and

- State/Territory entities that are not core State/Territory entities and core foreign entities.

648. A State/Territory entity is not required to notify the Minister of proposed negotiations of non-core foreign arrangements under Subdivision A of this Division. However, the power in this section allows the Minister to make a declaration if the Minister becomes otherwise aware of a proposed or ongoing negotiation, and he or she is satisfied of the factors in paragraph 35(1)(c). This ensures that State/Territory entities may negotiate foreign arrangements freely, until or unless the Minister is of the view that the negotiation adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

649. Paragraph 35(1)(c) requires that the Minister, when making a declaration in relation to a proposed negotiation of a non-core foreign arrangement (that is, where the negotiations have not yet commenced), be satisfied that the proposed negotiation:

a. would adversely affect, or would be likely to adversely affect, Australia's foreign relations, or

b. would be, or would be likely to be, inconsistent with Australia's foreign policy.

650. Paragraph 35(1)(d) requires that the Minister, when making a declaration in relation to the negotiation of a non-core foreign arrangement that is already underway, be satisfied that the negotiation:

a. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

b. is, or is likely to be, inconsistent with Australia's foreign policy.

651. ***Australia's foreign policy*** is defined in subsection 5(2) to include policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia. Under this definition, it does not matter whether or not the policy is written or publicly available or has been formulated, decided upon, or approved by any particular member or body of the Commonwealth.

652. Under paragraphs 35(1)(c) and (d), the Minister may make a declaration if:

- either of the criteria in subparagraphs (i) and (ii) are satisfied, or

- both of the criteria in subparagraphs (i) and (ii) are satisfied.

653. Therefore, the Minister need only be satisfied of one of these criteria in order to exercise his or her discretion to make a declaration under subsection 35(2). For example, if the Minister is satisfied that the proposed negotiation would not be likely to be inconsistent with Australia's foreign policy but would be likely to adversely affect Australia's foreign relations, he or she may make a declaration under subsection 35(2).

654. The assessment of the criteria in subparagraphs 35(1)(c)(i) and (ii), and 35(1)(d)(i) and (ii), is a matter for the Minister based on his or her judgment.

655. The test in paragraph 35(1)(c) is assessed against the same criteria as the test in Part 2 in relation to negotiations between core State/Territory entities and core foreign entities

(subsection 17(2)). These tests are framed differently because negotiations of core foreign arrangements require the Minister's approval under Part 2, whereas negotiations of non-core foreign arrangements give rise to a discretionary power for the Minister to make a declaration not to negotiate the arrangement (under Part 3), but do not require Ministerial approval to continue negotiations. The test in subsection 17(2) is framed in the negative. That is, when the Minister is satisfied that the negotiation does not adversely affect Australia's foreign relations and is not inconsistent with Australia's foreign policy, he or she must approve a proposed negotiation. Conversely, the test in this paragraph is framed in the positive, so that the Minister may make a declaration when he or she is satisfied that the proposed negotiation would adversely affect Australia's foreign relations or would be inconsistent with Australia's foreign policy. Both of these tests allow the Minister to intervene where the negotiation of a foreign arrangement will adversely affect Australian's foreign relations or be inconsistent with Australia's foreign policy.

656. The two different frameworks provided for in paragraphs 35(1)(c) and (d) recognise that the Minister may make a declaration to require that a State/Territory entity either not start, or not continue, negotiations for a non-core foreign arrangement. These paragraphs therefore cover both those scenarios.

657. The first note under subsection 35(1) informs the reader that the Minister is required to take into account certain matters provided for in section 51.

658. Subsection 51(2) provides that when making a decision about a declaration under these subsections, the Minister must take into account the following matters in relation to the State or Territory to which the arrangement relates, to the extent that information in relation to them has been provided to the Minister by the relevant State or Territory:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

659. The matters must be considered in relation to the State or Territory to which the arrangement relates. This is not a reference to the State/Territory entity that is party to the arrangement, unless a State or Territory is a party to the arrangement in its own right, but to the State or Territory to which the State/Territory entity is related. For example, if a South Australian government Department is party to an arrangement, the Minister is required to have regard to these matters in relation to South Australia.

660. For example, if the State or Territory has provided the Minister information that a declaration under subsection 35(2) that negotiation of a non-core foreign arrangement must not commence may impede the acquisition of goods (such as crude or refined petroleum or specialised equipment or machinery) by the State or Territory, the Minister must take this information into account in considering whether to make a declaration under this section, and it is open to the Minister not to make a declaration.

661. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning the matters has been given to them in accordance with subsection 51(3). The matters can be considered together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent of the performance of the subsidiary arrangement may be interconnected with the financial consequences for the relevant State or Territory.

662. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

663. The second note under subsection 35(1) informs the reader that section 37 deals with general matters about the declaration, including revocation and giving notice to the State/Territory entity.

664. If subsection 35(1) applies, the Minister may make a declaration under subsection 35(2) that the State/Territory entity must not start, or continue, to negotiate the arrangement, as relevant to the circumstances. The Minister's declaration must be in writing.

665. The power in subsection 35(2) is discretionary and the Minister need not make a declaration regarding a negotiation covered by subsection 35(1). The Minister will assess such negotiations, as required, on a case-by-case basis, to decide whether the declaration is necessary to manage and protect Australia's foreign policy and foreign relations.

666. In practice, the Minister will likely seek advice from a range of sources in making a declaration under section 35(2), depending on the nature of the particular factual scenario before him or her. It may be appropriate for the Minister to consult with other Ministers, or seek advice from particular agencies, in making a declaration under this section to the extent necessary based on the particular negotiation.

667. Subsection 35(3) provides that the State/Territory entity must comply with the declaration.

668. Under paragraph 52 (1)(h), the Minister may seek an injunction in the High Court or Federal Court to enforce this prohibition. For example, if a State/Territory entity did not cease negotiations in relation to a non-core foreign arrangement in contravention of the Minister's declaration under this section, the Minister could seek an injunction from the High

Court or Federal Court, preventing the State/Territory entity from continuing the negotiations.

669. Subsection 35(4) provides that a declaration made under subsection 35(2) is not a legislative instrument.

670. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under these provisions are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular negotiation on a case-by-case basis.

671. The Minister may delegate decisions made under this section, in accordance with section 56.

Section 36 Declarations about proposals to enter non-core foreign arrangements

672. Section 36 provides a power for the Minister to make a declaration in relation to proposals to enter non-core foreign arrangements.

673. Subsection 36(1) provides that the Minister may make a declaration under subsection 36(2) if:

a. a State/Territory entity proposes to enter an arrangement with a foreign entity (whether or not notice of the proposal was given to the Minister under section 34)

b. the arrangement is a non-core foreign arrangement, and

c. the Minister is satisfied that the proposed arrangement:

    i. would adversely affect, or would be likely to adversely affect, Australia's foreign relations, or

    ii. would be, or would be likely to be, inconsistent with Australia's foreign policy.

674. Paragraphs 36(1)(a) and (b) provide that the Minister may make a declaration under subsection 36(2) if a State/Territory entity is proposing to enter an arrangement with a foreign entity that is a non-core foreign arrangement. Clause 4 defines a ***non-core foreign arrangement*** as a foreign arrangement that is not a core arrangement. Accordingly, this provision applies to proposals to enter arrangements between:

- State/Territory entities that are not core State/Territory entities and foreign entities that are not core foreign entities

- core State/Territory entities and foreign entities that are not core foreign entities, and

- State/Territory entities that are not core State/Territory entities and core foreign entities.

675. Paragraph 36(1)(a) provides that a proposal to enter a non-core arrangement is covered by this provision regardless of whether notice of the proposal has been given to the Minister under section 34. Section 34 requires State/Territory entities to give notice to the Minister prior to entering a non-core foreign arrangement. Accordingly, the Minister has the power to make a declaration under this section regardless of whether the State/Territory entity has given notice under that section, or whether there are deficiencies in that notice.

676. Paragraph 36(1)(c) requires that, when making a declaration, the Minister be satisfied that the proposed arrangement:

a. would adversely affect, or would be likely to adversely affect, Australia's foreign relations, or

b. would be, or would be likely to be, inconsistent with Australia's foreign policy.

677. ***Australia's foreign policy*** is defined in subsection 5(2) to include policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia. Under this definition, it does not matter whether or not the policy is written or publicly available or has been formulated, decided upon, or approved by any particular member or body of the Commonwealth.

678. Under paragraph 36(1)(c), the Minister may make a declaration if:

- either of the criteria in subparagraphs 36(1)(c)(i) and (ii) are satisfied, or

- both of the criteria in subparagraphs 36(1)(c)(i) and (ii) are satisfied.

679. Therefore, the Minister need only be satisfied of one of these criteria in order to exercise his or her discretion to make a declaration under subsection 36(2). For example, if the Minister is satisfied that the proposed arrangement would not be likely to be inconsistent with Australia's foreign policy but would be likely to adversely affect Australia's foreign relations, he or she may make a declaration under subsection 36(2).

680. The assessment of the criteria in subparagraphs 36(1)(c)(i) and (ii) is a matter for the Minister based on his or her judgment.

681. The test in paragraph 36(1)(c) is assessed against the same criteria as the test in Part 2 in relation to proposed arrangements between core State/Territory entities and core foreign entities (subsection 24(2)). These tests are framed differently because the Minister's approval is required under Part 2 to enter into a core arrangement, whereas a proposal to enter a foreign arrangement other than core arrangements gives rise to a discretionary power for the Minister to make a declaration not to enter into the arrangement (under Part 3), but does not require Ministerial approval. Both of these tests ensure that arrangements which adversely affect Australian's foreign relations or are inconsistent with Australia's foreign policy may not be entered.

682. The first note under subsection 36(2) informs the reader that the Minister is required to take into account certain matters provided for in section 51 when considering whether to make a declaration under this section.

683. Subsection 51(2) provides that when making a decision about a declaration under subsection 36(2), the Minister must take into account the following matters in relation to the State or Territory to which the arrangement relates, to the extent that information in relation to these matters has been provided to the Minister by the relevant State or Territory:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

684. The requirement that the Minister have regard to these matters will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration that the State/Territory entity must not enter a non-core foreign arrangement.

685. The matters must be considered in relation to the State or Territory to which the arrangement relates. This is not a reference to the State/Territory entity that is party to the arrangement, unless a State or Territory is a party to the arrangement in its own right, but to the State or Territory to which the State/Territory entity is related. For example, if a South Australian government Department is party to an arrangement, the Minister is required to have regard to these matters in relation to South Australia.

686. For example, if the State or Territory has provided the Minister information that a declaration under subsection 36(2) that a State/Territory entity must not enter a non-core foreign arrangement may impede the acquisition of goods (such as crude or refined petroleum or specialised equipment or machinery) by the State or Territory, the Minister must take this information into account in considering whether to make a declaration under this section, and it is open to the Minister not to make a declaration.

687. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning the matters has been given to them in accordance with subsection 51(3). The matters can be considered together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent

of the performance of the subsidiary arrangement may be interconnected with the financial consequences for the relevant State or Territory.

688. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

689. The second note under subsection 36(1) informs the reader that section 37 deals with general matters about the declaration, including revocation and giving notice to the State/Territory entity.

690. If subsection 36(1) applies, the Minister may make a declaration under subsection 36(2) that the State/Territory entity must not enter the arrangement. The Minister's declaration must be in writing.

691. The power in subsection 36(2) is discretionary and the Minister need not make a declaration regarding an arrangement covered by subsection 36(1). The Minister will assess such proposed arrangements on a case-by-case basis to decide whether the declaration is necessary to manage and protect Australia's foreign policy and foreign relations.

692. In practice, the Minister will likely seek advice from a range of sources in making a declaration under section 36(2), depending on the nature of the particular factual scenario before him or her. It may be appropriate for the Minister to consult with other Ministers, or seek advice from particular agencies, in making a declaration under this section to the extent necessary based on the particular negotiation.

693. Subsection 36(3) provides that the State/Territory entity must comply with the declaration.

694. Under paragraph 52(1)(i), the Minister may seek an injunction in the High Court or Federal Court to enforce this prohibition. For example, if a State/Territory entity proposed to enter a non-core foreign arrangement in contravention of the Minister's declaration under this section, the Minister could seek an injunction from the High Court or Federal Court, preventing the State/Territory entity from entering the arrangement.

695. Alternatively, the first note under subsection 36(3) informs the reader that if the State/Territory entity enters the non-core foreign arrangement in contravention of the Minister's declaration under this section, then the Minister may make a declaration under Part 4, Division 2 of the Act. Paragraph 40(1)(b) provides that the Minister may make a declaration under that Division if a State/Territory entity entered an arrangement in contravention of subsection 36(3).

696. The first note also informs the reader that, if the Minister does make such a declaration, the relevant arrangement will be invalid, unenforceable, not in operation or required to be varied or terminated to the extent specified in the declaration. In addition, the declaration may also prohibit the parties from giving effect to the arrangement or from holding out that they are able to give effect to the arrangement.

697. In addition, the second note under subsection 36(3) informs the reader that the Minister may make a similar declaration under Part 4, Division 3 in relation to any subsidiary arrangements of the non-core foreign arrangement entered in contravention of the Minister's

declaration under this section. The second note refers the reader to sections 46 to 48 of this Act, which allow the Minister to make declarations about arrangements entered under the auspices of foreign arrangements (being subsidiary arrangements).

698. Subsection 36(4) provides that a declaration made under subsection 36(2) is not a legislative instrument. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under these provisions are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular negotiation on a case-by-case basis.

699. The Minister may delegate decisions made under this section, in accordance with section 56.

Subdivision C—Matters relating to declarations under this Part

Section 37 Matters relating to declarations under this Part

700. Section 37 provides for a range of matters relating to Ministerial declarations made under this Part in relation to negotiations, or proposals to enter, non-core foreign arrangements.

701. Subsection 37(1) provides that this section applies if the Minister makes a declaration under subsection 35(2) or 36(2) in relation to negotiations, or proposals to enter an arrangement between a State/Territory entity and a foreign entity, other than a core arrangement.

702. Subsection 37(2) provides that the declaration must specify the day the declaration comes into force. This will serve to notify the State/Territory entity of the day on which the Minister's declaration comes into force, and therefore the day upon which the State/Territory entity must comply with the declaration.

703. Subsection 37(3) provides that the Minister may revoke a declaration if he or she ceases to be satisfied of the matters on which he or she made the declaration. For example, if the Minister is no longer satisfied that the relevant negotiations adversely affect Australia's foreign relations or are no longer inconsistent with Australia's foreign policy, the Minister may revoke the declaration and therefore the State/Territory entity may commence, or re-commence, the negotiations.

704. If the Minister decides to revoke a declaration, subsection 37(5) provides that he or she must give the State/Territory entity a written notice as soon as practicable that states that the declaration is revoked. This will serve to notify the State/Territory entity of the day on which the Minister's declaration is revoked and no longer in force, and therefore the day upon which the requirement to comply with the declaration ceases.

705. Subsection 37(4) provides that the Minister must, as soon as practicable after making the declaration, give the State/Territory entity a written notice that:

a. states the Minister's decision to make the declaration

b. is accompanied with a copy of the declaration, and

c. complies with any requirements prescribed by the rules.

706. This provision ensures that the State/Territory entity has notice of the Minister's decision and access to a copy of the declaration, and therefore is on notice of its obligations and any requirement to comply with the declaration under the relevant provision.

707. The Minister's notice may include information additional to that required by paragraphs 37(4)(a), (b) and (c), which serve as the minimum requirements. However, there is no requirement for the Minister to provide reasons for his or her decision, which is made clear by the exclusion of procedural fairness in section 58.

Subdivision D—Requirement to notify the Minister about entering non-core foreign arrangements

Section 38 Requirement to notify the Minister about entering non-core foreign arrangements

708. Section 38 establishes a requirement for State/Territory entities to provide the Minister with a copy of each non-core foreign arrangement they have entered with a foreign entity, after entry into the arrangement.

709. Subsection 38(1) provides that a State/Territory entity must give a notice to the Minister within 14 days, or such longer period prescribed by the rules, of entering a non-core foreign arrangement with a foreign entity. The notice must be accompanied by a copy of the arrangement.

710. The provision of the final arrangement ensures that the Minister has visibility of the final agreed text of all non-core foreign arrangements entered by State/Territory entities. As State/Territory entities may decide not to proceed with a non-core arrangement following notification to the Minister under this Division, this notification provision is necessary to ensure that the Minister is aware of all non-core foreign arrangements in operation, and therefore has sufficient information in order to be able to properly exercise the Minister's powers under Part 4, as and if necessary.

711. Subsection 38(1) also provides that the notice to the Minister must be in accordance with the requirements in subsection 38(2).

712. Subsection 38(2) provides that the notice must:

a. be in writing

b. be accompanied by a copy of the arrangement

c. include any information prescribed by the rules; and

d. be accompanied by any other documents prescribed by the rules.

713. Paragraph 38(2)(a) requires that the notice be given in writing. It is necessary for the State/Territory entity to provide the notice in writing given the nature of the information that must be included in the notice, particularly the final copy of the arrangement.

714. Paragraph 38(2)(b) provides that the notice must be accompanied by a copy of the relevant non-core foreign arrangement, as entered. This will ensure that the Minister has a copy of the final version of the non-core foreign arrangement that the State/Territory entity has entered. This will also give the Minister sufficient information to assess in the future whether the arrangement as entered adversely effects Australia's foreign relations or is inconsistent with Australia's foreign policy for the purposes of the Minister's powers under Part 4, as necessary. This notice will therefore enable the Minister to assess his or her satisfaction of those factors at any given future point, should there be a change in Australia's foreign relations and foreign policy posture.

715. In addition, the Minister may prescribe in the rules any information that must be included in the notice under paragraph 38(2)(c) and any documents that must accompany the notice under paragraph 38(2)(d). If the rules prescribe these matters, the State/Territory entity must provide the required information and/or documents with its notice.

716. Subsection 38(3) provides that this requirement does not apply to an exempt arrangement.

717. Under section 4, the Minister may prescribe kinds of arrangements as ***exempt arrangements***. Accordingly, a State/Territory entity is not required by this provision to provide notice to the Minister if it has entered a non-core foreign arrangement of a kind which have been prescribed in the rules as exempt.

718. This recognises State/Territory entities should not be required to provide a notice about the entry into a non-core foreign arrangement of a kind which have already been assessed by the Minister as exempt from the requirements of the Act by prescription in the rules.

719. Under paragraph 52(1)(j), the Minister may seek an injunction from the High Court or Federal Court to enforce this requirement. For example, if a State/Territory entity entered a non-core foreign arrangement without providing a notice to the Minister, the Minister could seek an injunction from the High Court or Federal Court, requiring the State/Territory entity to provide a notice to the Minister containing the required information.

PART 4—THE MINISTER'S POWERS TO MAKE DECLARATIONS ABOUT FOREIGN ARRANGEMENTS, AND SUBSIDIARY ARRANGEMNETS, THAT ARE IN OPERATION

721. Part 4 of this Act empowers the Minister to make declarations in relation to foreign arrangements and subsidiary arrangements that are in operation.

722. The declaration making powers in this Part apply to core foreign arrangements, non-core foreign arrangements and subsidiary arrangements.

723. This Part provides the Minister with the ability to ensure that foreign arrangements that pre-date the commencement of the Act, as well as foreign arrangements entered after commencement which have already been assessed by the Minister under the frameworks established by Parts 2 or 3, do not continue to operate if they adversely affect Australia's foreign relations or are inconsistent with Australia's foreign policy.

724. In addition, this provides an opportunity for the Minister to make a declaration in relation to non-core foreign arrangements entered in contravention of a declaration under Part 3. This is necessary to ensure that the Minister's declarations under that Part can be effectively enforced, as such arrangements have already been assessed as having an adverse effect on Australia's foreign relations or being inconsistent with Australia's foreign policy.

725. Part 4 also provides that the Minister may make declarations in relation to subsidiary arrangements entered under the auspices of a foreign arrangement:

a. in relation to which the Minister has made a declaration under Part 4, Division 2

b. entered in contravention of the prohibition on entering core foreign arrangements without Ministerial approval in Part 1

c. entered in contravention of a declaration prohibiting a State/Territory entity from entering a non-core foreign arrangement in Part 3, or

d. which is a pre-existing core foreign arrangement which has been deemed to be invalid and unenforceable, not in operation or required to be terminated because the core State/Territory entity did not notify the Minister of the arrangement under Schedule 1 of this Act.

726. Under Part 4, the Minister's declaration can, depending on the nature of the arrangement,:

- declare that the arrangement is invalid and unenforceable
- require the State/Territory entity to terminate or vary the arrangement
- require the State/Territory entity to notify the foreign entity that a declaration is in force in relation to the arrangement
- prohibit the State/Territory entity from giving effect to the arrangement or hold out, or conduct itself on the basis, that it can give effect to the arrangement

727. These powers allow the Minister to assess, on a case-by-case basis, whether the above listed consequences in relation to foreign arrangements should also flow to subsidiary arrangements of those foreign arrangements, where those subsidiary arrangements also adversely affect Australia's foreign relations or are inconsistent with Australia's foreign policy.

728. The Minister's powers under this Part are discretionary, allowing the Minister to make a declaration on a case-by-case basis where he or she considers that an arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

729. In relation to pre-existing arrangements, this discretionary power is necessary because Parts 2 and 3 of this Act only enable the Minister to consider arrangements that are proposed to be entered following the commencement of those Parts upon Proclamation or three months after Royal Assent, if no Proclamation is made. It is important that this Act has a mechanism to allow the Minister to consider arrangements that are already in operation at the date of commencement, given that such arrangements may pose a risk to Australia's foreign relations and foreign policy in the same manner as future arrangements. Schedule 1 of this Act requires State/Territory entities to notify the Minister of such pre-existing foreign arrangements in order to facilitate the Minister's effective exercise of these powers.

730. In relation to foreign arrangements entered into after commencement, and which may have already been assessed by the Minister under Part 2 or 3, this discretionary power recognises that Australia's foreign policy and foreign relations are not static concepts or indicia against which arrangements can be assessed at a point in time and then left to run their course. Rather, Australia's foreign policy and foreign relations evolve and change in response to a range of domestic and international factors. As such, it may be necessary for the Minister to reconsider an arrangement that was previously approved or for which a Ministerial declaration was not made, because the Minister considers it now adversely affects Australia's foreign relations or because he or she no longer considers it is consistent with Australia's foreign policy.

Division 1—Simplified outline of this Part

Section 39 Simplified outline of this Part

731. Section 39 sets out a simplified outline of Part 4 of the Act.

732. This outline is included to assist readers to understand the substantive provisions of Part 4 of the Act. It is not intended to be comprehensive and readers should rely upon the substantive provisions of this Part.

Division 2—The Minister's power to make declarations about foreign arrangements that are in operation

Subdivision A—When the Minister may make declarations about foreign arrangements

Section 40 When the Minister may make declarations under this Division

733. Section 40 provides for the circumstances in which the Minister may make a declaration under Division 2 in relation to a foreign arrangement.

734. Subsection 40(1) provides that the Minister may make a declaration under this Division in relation to an arrangement between a State/Territory entity and a foreign entity if:

a. the Minister is satisfied that the arrangement:

  i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

  ii. is, or is likely to be, inconsistent with Australia's foreign policy, or

b. the State/Territory entity entered the arrangement in contravention of subsection 36(3).

735. This section ensures that the Minister can only make a declaration under this Division where the Minister has assessed the effect of the foreign arrangement on Australia's foreign relations and its consistency with Australia's foreign policy. This assessment is necessary to fulfil the object of this Act.

736. ***Australia's foreign policy*** is defined in subsection 5(2) to include policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia. Under this definition, it does not matter whether or not the policy is written or publicly available or has been formulated, decided upon, or approved by any particular member or body of the Commonwealth.

737. Paragraph 40(1)(a) requires the Minister to consider the relevant foreign arrangement and be satisfied of either or both of these factors, in order to make a declaration under this Division. This reflects the factors that the Minister must be satisfied of under Parts 2 and 3 in relation to prospective arrangements, and ensures that the Minister can only exercise his or her powers under this Division to make a declaration where necessary to support the object of this Act.

738. Paragraph 40(1)(b) provides that the Minister may make a declaration in relation to a non-core foreign arrangement which was entered in contravention of subsection 36(3). Under subsection 36(2), the Minister may make a written declaration that a State/Territory entity must not enter a non-core foreign arrangement if the Minister is satisfied that the arrangement would adversely affect Australia's foreign relations or would be inconsistent with Australia's foreign policy. If the Minister makes such a declaration, subsection 36(3) requires the State/Territory entity to comply with that declaration. If the State/Territory entity proceeds to enter into the arrangement in contravention of subsection 36(3), then paragraph 40(1)(b) provides an avenue for the Minister to deal with that arrangement, without having to again

consider whether the arrangement will adversely affect Australia's foreign relations or be inconsistent with Australia's foreign policy.

739. The note under subsection 40(1) informs the reader that the Minister must take into account certain matters provided for in section 51 if he or she exercises their discretion to make a declaration under this Division. Those matters are discussed below in relation to declarations made under each of these subsections, as well as in relation to section 51.

740. Subsection 40(2) provides that the Minister may make a declaration under this Division, irrespective of whether:

a. the arrangement was entered before or after the commencement day

b. the Minister previously decided, in relation to the arrangement:

   i. not to make a declaration under this Division, or

   ii. to make a different declaration under this Division

c. if the arrangement is a core foreign arrangement—the Minister gave approval under subsections 24(2) or 28(2) for the core State/Territory entity to enter the arrangement, or

d. if the arrangement is a non-core foreign arrangement—the Minister did not make a declaration under subsection 36(2) prohibiting the State/Territory entity entering the arrangement.

741. These paragraphs clarify the scope of the Minister's power to make a declaration deeming arrangements to be invalid, not in operation or required to be terminated or varied, as relevant. The Minister's power is therefore not limited only to arrangements which have not yet been assessed under this Act, but extends to all arrangements in operation.

742. Paragraph 40(2)(a) provides that the Minister may make a declaration irrespective of whether the relevant foreign arrangement was entered before or after the commencement day. This clarifies that the Minister may make a declaration in relation to pre-existing arrangements, as well as arrangements entered after commencement of this Act.

743. This is essential in ensuring that the Minister has the power to consider arrangements which were entered prior to the commencement of this Act, and therefore have not been assessed for their consistency with Australia's foreign policy or effect on Australia's foreign relations. State/Territory entities are required under Schedule 1 of this Act to notify the Minister of all pre-existing arrangements which are in operation as at the commencement day. Such arrangements may be adverse to Australia's foreign relations or inconsistent with Australia's foreign policy in the same way as prospective arrangements and it is therefore necessary for the Minister to have the power to assess, and make declarations in relation to, such arrangements. This ensures that the Minister can achieve the object of this Act (set out in section 5) and effectively protect and manage Australia's foreign relations.

744. In addition, this paragraph ensures that the Minister can consider arrangements that are entered after commencement day. Core foreign arrangements which are entered after commencement day may only be entered with the Minister's approval under Part 2. Non-core

foreign arrangements may be entered unless the Minister has made a declaration in relation to them under Part 3.

745. Paragraphs 40(2)(b), (c) and (d) provide that it does not matter whether the Minister has previously considered the arrangement:

- under Division 2 of this Part, and had not made a declaration or had made a different declaration at that stage (for example, if the Minister had previously made a declaration requiring that the arrangement be varied under subsection 41(3), 42(2) or 43(3), but later seeks to make a declaration that the arrangement be terminated under those subsections)
- under Part 2, and given approval for the core State/Territory entity to enter the core foreign arrangement (under subsection 24(2) or 28(2)), or
- under Part 3, and decided not to make a declaration prohibiting the State/Territory entity from entering the non-core foreign arrangement (under subsection 36(2)).

746. This is necessary to ensure that the Minister has the ability to revisit the ongoing appropriateness of arrangements if circumstances change. This recognises that Australia's foreign relations and foreign policy are not static but can evolve in response to domestic and international factors. For example, an arrangement which is consistent with Australia's foreign policy upon entry may become inconsistent with foreign policy over time, as circumstances change and Australia's foreign policy evolves. As such, it is appropriate for the Minister to have the power to make declarations in relation to such arrangements in order to achieve the object of this Act (set out in section 5) and effectively manage Australia's foreign relations.

747. Paragraph 40(2)(b) provides that it does not matter whether the Minister had previously decided not to make a declaration under Division 2 of this Part, or to make a different declaration in relation to the arrangement under Division 2. Division 2 of this Part enables the Minister to make a declaration in relation to foreign arrangements in operation at any time where the Minister is satisfied the arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy, or where the arrangement was entered into in contravention of a declaration under subsection 36(3), as discussed above in relation to subsection 40(1).

748. This ensures that, even if the Minister has previously considered a foreign arrangement and at that point determined that it did not adversely affect Australia's foreign relations and was consistent with Australia's foreign policy, or decided not to make a declaration despite it having been entered into in contravention of subsection 36(2), does not mean that the Minister cannot consider the arrangement again at another point. It will still be open to the Minister to make a declaration under this Division, in order to protect Australia's foreign relations and foreign policy as required throughout the life of the arrangement.

749. Paragraph 40(2)(b) applies to both core foreign arrangements and non-core foreign arrangements because Division 2 of this Part enables the Minister to make declarations in relation to both types of foreign arrangements.

750. Paragraph 40(2)(c) provides that for core foreign arrangements, it does not matter whether the Minister had previously given approval for the core State/Territory entity to enter the relevant arrangement under subsection 24(2) or 28(2).

751. Similarly, paragraph 40(2)(d) provides that, for non-core foreign arrangements, it does not matter whether the Minister did not previously exercise his or her discretion to make a declaration under subsection 36(2) in relation to the arrangement, prohibiting the State/Territory entity from entering the relevant arrangement.

752. This ensures that it is open to the Minister to make a declaration under this Division even if:

- the Minister had previously assessed the arrangement as having no adverse effect on Australia's foreign relations and to be consistent with Australia's foreign policy
- the Minister had approved entry into the arrangement (for core foreign arrangements) or not made a declaration prohibiting entry into the arrangement (for non-core foreign arrangements), and
- the State/Territory entity had entered the arrangement on that basis.

Subdivision B—Declarations about legally binding foreign arrangements

Section 41 Foreign arrangements that are legally binding under Australian law

753. Section 41 provides a discretion for the Minister to make a declaration in relation to foreign arrangements that are legally binding under Australian law.

754. Subsection 41(1) provides that the Minister may make a declaration under subsection 41(2) or (3) in relation to an arrangement between a State/Territory entity and a foreign entity (defined as a ***foreign arrangement*** in section 6) if:

a. subsection 40(1) is satisfied in relation to the arrangement, and

b. apart from the declaration, the arrangement would be legally binding under an Australian law.

755. All foreign arrangements which would be legally binding under Australian law but for the operation of the declaration are covered by this provision, regardless of whether they are core foreign arrangements or non-core foreign arrangements. Under subsection 9(2), an arrangement is ***legally binding*** if it confers legal rights or imposes legal obligations that are legally enforceable under an Australian law or a foreign law (as defined in clause 4)

756. Paragraph 41(1)(a) provides that the Minister may make a declaration about a foreign arrangement that is legally binding under Australian law if subsection 40(1) is satisfied in relation to the arrangement. Subsection 40(1) provides that the Minister may make a declaration in relation to a foreign arrangement under this Division if:

a. the Minister is satisfied that the arrangement:

i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

ii. is, or is likely to be, inconsistent with Australia's foreign policy, or

b. the State/Territory entity entered the non-core foreign arrangement in contravention of subsection 36(3) (that is, the Minister made a declaration that the State/Territory entity must not enter the arrangement under Part 3 and the State/Territory entity entered the arrangement in contravention of that declaration).

757. Paragraph 41(1)(b) recognises that the effect of a declaration made under section 41 (specifically subsection 41(2)) can be to render a foreign arrangement to be, and to be taken always to have been, invalid and unenforceable to the specified extent. In such a case, the foreign arrangement is taken to never have existed to the specified extent, and therefore may not have been capable of creating legal rights and obligations. Accordingly, foreign arrangements covered by such a declaration are expressed to be legally binding apart from the declaration made under subsection 41(1).

758. The first note under subsection 41(1) provides that the Minister must take into account certain matters provided for in section 51 when considering whether to make a declaration under subsections 41(2) or (3).

759. Subsection 51(2) provides that when making a decision about a declaration under these subsections, the Minister must take into account the following matters in relation to the State or Territory to which the arrangement relates, to the extent that information in relation to them has been provided to the Minister by the relevant State or Territory:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

760. The requirement that the Minister have regard to these matters will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration in relation to a legally binding foreign arrangement.

761. The matters must be considered in relation to the State or Territory to which the arrangement relates. This is not a reference to the State/Territory entity that is party to the arrangement, unless a State or Territory is a party to the arrangement in its own right, but to the State or Territory to which the State/Territory entity is related. For example, if a South Australian government Department is party to an arrangement, the Minister is required to have regard to these matters in relation to South Australia.

762. For example, if the State or Territory has provided the Minister information that a declaration that a legally binding arrangement is invalid under subsection 41(2) may impede the acquisition of goods (such as crude or refined petroleum or specialised equipment or machinery) by the State or Territory under the arrangement, the Minister must take this information into account in considering whether to make a declaration under this section. If the Minister is of the view that the declaration may result in the significant impediment to the State or Territory, it would be open to the Minister to decide to declare that the arrangement should be varied (rather than declare that it is invalid, or require that it be terminated). Alternatively, the Minister might not make a declaration at all.

763. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning the matters has been given to the Minister in accordance with subsection 51(3). The matters can be considered together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent of the performance of the subsidiary arrangement may be interconnected with the financial consequences for the relevant State or Territory.

764. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

765. The second note under subsection 41(1) informs the reader that section 44 deals with general matters about a declaration made under subsection 41(1), including matters such as revocation and giving notice to the State/Territory entity.

766. Section 41 provides different options for the Minister when making a declaration in relation to a foreign arrangement that is legally binding under Australian law. The Minister may make a declaration that:

- the arrangement is invalid and unenforceable to the specified extent and from the specified day under subsection 41(2)
- the arrangement is to be varied or terminated under subsection 41(3).

767. The different mechanisms in subsections 41(2) and (3) give the Minister flexibility and a range of options to address the nature of the foreign arrangement and other circumstances. The option that the Minister selects may be influenced by the matters the Minister must take into account under subsection 51(2) (discussed above).

768. For example, if the Minister considers that only certain parts of the foreign arrangement need to be amended to manage the effect on Australia's foreign relations, the Minister could make a declaration under subsection 41(3) to require the variation of the arrangement, allowing it otherwise to remain in force. Alternatively, depending on the nature of the arrangement, the Minister may consider it appropriate to require parties to terminate in accordance with a termination process outlined in the arrangement, rather than declare it invalid and unenforceable by operation of the Act. The Minister may also consider that a particular option is preferable over another based on his or her assessment of the factors under subsection 51(2) (as discussed above in relation to that provision).

769. These powers are discretionary and the Minister need not make a declaration regarding an arrangement covered by subsection 41(1). Declarations under section 41 will be considered on a case-by-case basis to decide whether the invalidation, variation or termination of an arrangement is necessary to manage and protect Australia's foreign relations and foreign policy.

770. Subsection 41(2) allows the Minister to make a declaration that an arrangement that satisfies the criteria in subsection 41(1) is invalid and unenforceable to the specified extent. The Minister's declaration under subsection 41(2) must be in writing.

771. Paragraph 41(2)(a) provides that the declaration may provide that the arrangement:

a. is invalid and unenforceable to the specified extent and from the specified day, or

b. if the arrangement was entered in contravention of subsection 36(3)—is, and is taken to have always been, invalid and unenforceable to the specified extent.

772. Subparagraph 41(2)(a)(i) allows the Minister to declare an arrangement to be invalid and unenforceable *to the specified extent* and *from the specified day*. This provides the Minister with flexibility to respond to the specific circumstances of the case and only invalidate an arrangement to the minimum extent necessary to manage the impact of the arrangement on Australia's foreign relations or foreign policy. The Minister can also manage the impact on the parties by specifying a day on which the arrangement becomes invalid and unenforceable to the specified extent. For example, this might allow the parties to make appropriate arrangements in advance of the invalidity taking effect.

773. Subparagraph 41(2)(a)(ii) applies if the arrangement was entered in contravention of subsection 36(3), which requires a State/Territory entity to comply with a declaration from the Minister prohibiting that entity from entering a non-core foreign arrangement. In such circumstances, where the non-core foreign arrangement was entered in contravention of the Act, it is appropriate that the contravening arrangement is, and is taken to always have been, invalid and unenforceable to the specified extent.

774. Under paragraph 41(2)(a), the Minister need not declare that the whole of the arrangement is invalid and unenforceable, but has the power to specify the extent to which the arrangement is invalid and unenforceable. This allows the Minister to only declare that parts of the arrangement are invalid and unenforceable. Alternatively, the Minister could specify that the arrangement is invalid and enforceable in its entirety.

775. Paragraph 41(2)(b) requires the State/Territory entity to, within the period specified in the declaration, notify the foreign entity that:

i. a declaration is in force under subsection 41(2) in relation to the arrangement, and

ii. the arrangement is invalid and unenforceable to the specified extent.

776. The State/Territory is also required to give the foreign entity a copy of the declaration.

777. This requirement ensures that the foreign entity that would, but for the operation of the declaration, be a party to the arrangement with the State/Territory entity is made aware that the arrangement is invalid and unenforceable by virtue of the operation of the declaration made under subsection 41(2). This requirement is necessary in order to require the foreign entity to comply with the declaration to the extent it applies to the entity (dealt with in subsection 41(5), which is discussed further below).

778. Paragraph 41(2)(c) requires the State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 41(2)(b) to notify the foreign entity of the declaration's application to, and effect on, the arrangement. This notice must be provided to the Minister in writing.

779. This requirement is necessary to ensure the Minister is informed of when the foreign entity has been advised about the invalidation of an arrangement under subsection 41(2).

780. Paragraph 41(2)(d) provides that the State/Territory entity must not, to the specified extent and from the specified day:

a. give effect to the arrangement, or

b. hold out, or conduct itself on the basis, that:

   i. it can give effect to the arrangement, or

   ii. the arrangement is valid or enforceable.

781. Due to the operation of section 59, this section prohibits the State/Territory entity from engaging in these actions both within and outside of Australia.

782. This prohibition is necessary to ensure that the State/Territory entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite the arrangement being invalidated by operation of a declaration made under subsection 41(2). This ensures that arrangements that are entered into in contravention of the requirements in this Act cannot be informally given effect. This is a necessary enforcement mechanism, as contraventions of the Act deprive the Minister of the opportunity to assess arrangements for any adverse effect they might have on Australia's foreign relations and their consistency with Australia's foreign policy.

783. Subparagraph 41(2)(d)(i) prohibits the State/Territory entity from, to the extent specified in the declaration, giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

784. Subparagraphs 41(2)(d)(ii) and (iii) prohibit the State/Territory entity from, to the extent specified in the declaration, holding out, or conducting itself on the basis, that it can give effect to the arrangement or that the arrangement is valid or enforceable.

785. These prohibitions ensure that a State/Territory entity cannot represent publicly or to other parties that the relevant arrangement is not affected by a declaration made under this provision. This also ensures that other parties are not induced to take action, such as entering subsidiary arrangements, on the basis of such misrepresentations.

786. Paragraph 41(2)(e) provides that the foreign entity, to the specified extent and from the specified day, is prohibited from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that:

    i. it can give effect to the arrangement, or

    ii. the arrangement is valid or enforceable.

787. This prohibition is necessary to ensure that the foreign entity does not rely upon, give effect to or hold out the arrangement as still in effect in Australia to the specified extent, if the arrangement has been invalidated by a declaration under subsection 41(2).

788. This subsection only prohibits the foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

789. The prohibitions in paragraphs 41(2)(d) and (e) ensure that the scheme in this Act is not rendered ineffective by parties being able to informally give effect to an arrangement, despite it being invalidated.

790. Subsection 41(3) allows the Minister to make a declaration that an arrangement that satisfies the criteria in subsection 40(1) is required to be varied or terminated in accordance with any specified requirements. The Minister's declaration under subsection 41(3) must be in writing.

791. Subsection 41(2) provides that the Minister's declaration made under paragraph 48(2)(a) has effect accordingly.

792. Paragraph 41(3)(a) provides that the Minister may make a declaration that:

a. the State/Territory entity must, within the period specified in the declaration, notify the foreign entity that:

    i. a declaration is in force under this subsection in relation to the arrangement, and

    ii. the arrangement is required to be varied or terminated in accordance with any specified requirements.

793. The State/Territory entity must also give the foreign entity a copy of the declaration.

794. For example, the Minister may make a declaration requiring a State/Territory entity to vary the arrangement to remove certain provisions, or to terminate the arrangement as a whole in accordance with specified requirements, such as within certain timeframes.

795. Subsection 41(6) provides that, for the purposes of paragraph 41(3)(b), the declaration may require that the arrangement be varied or terminated in accordance with the Australian law under which it is binding, in accordance with any other requirements, or in accordance with both the Australian law and other requirements.

796. This gives the Minister discretion to determine the manner in which an arrangement is varied or terminated. For example, the Minister may require that the arrangement be varied in accordance with any variation provisions in the arrangement itself, in addition to the requirements under Australian law.

797. Subparagraph 41(3)(b) requires the State/Territory to vary or terminate the arrangement in accordance with any requirements specified in the declaration. This places an obligation on the State/Territory entity to comply with the Minister's declaration, in addition to the requirement to notify the foreign entity of the declaration under paragraph 41(3)(a).

798. Paragraph 41(3)(c) requires the State/Territory entity to, as soon as practicable after complying with the requirement to notify the foreign entity, or the requirement to vary or terminate the arrangement, notify the Minister of their compliance with that requirement. This notification must be in writing.

799. This notification requirement ensures that the Minister is informed when the State/Territory entity has complied with the requirement in a declaration to notify the foreign entity and vary or terminate the arrangement. If the State/Territory entity has not complied, the Minister may seek an injunction to enforce compliance with the declaration (as per paragraph 52(1)(k)).

800. Paragraphs 41(3)(d) and (e) provide that the Minister's declaration may prohibit conduct in relation to the varied or terminated arrangement by State/Territory entities and foreign entities to the arrangement.

801. In relation to State/Territory entities, paragraph 41(3)(d) prohibits the State/Territory entity, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

802. This prohibition in relation to State/Territory entities operates extraterritorially by virtue of section 59 (that is, State/Territory entities are prohibited from engaging in these activities both within and outside Australia).

803. This prohibition is necessary to ensure that the State/Territory entity does not rely upon, give effect to or hold out the arrangement to extent that it has been varied or terminated in accordance with a declaration by the Minister under subsection 41(3). In relation to foreign

entities, paragraph 41(3)(e) prohibits each foreign entity, to the specified extent and from the specified day, from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

804. This prohibition is necessary to ensure that foreign entities do not rely upon, give effect to or hold out the arrangement to the extent that it has been varied or terminated in accordance with a declaration by the Minister under subsection 41(3).

805. This subsection prohibits foreign entities from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

806. Subsection 41(4) provides that the State/Territory entity must comply with a declaration made under this section to the extent that the declaration applies to that entity. The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(k)).

807. Subsection 41(5) provides that a foreign entity must comply with a declaration made under this section to the extent that the declaration applies to that entity and if the entity has been given a copy of the declaration under paragraph 41(2)(b) or 41(3)(a). The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(k)).

808. As set out above, subsection 41(6) provides that, for the purposes of paragraph 41(3)(b), the declaration may require that the arrangement be varied or terminated in accordance with the Australian law under which it is binding, in accordance with any other requirements, or in accordance with both the Australian law and other requirements.

809. Subsection 41(7) provides that Ministerial declarations made under subsections 41(2) and (3) are not legislative instruments. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under these provisions are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular arrangement and the entities that are parties to that arrangement on a case-by-case basis.

Section 42 Foreign arrangements that are legally binding under foreign law

810. Section 42 provides a discretion for the Minister to make a declaration in relation to foreign arrangements that are legally binding under foreign law.

811. Subsection 42(1) provides that the Minister may make a declaration under subsection 42(2) in relation to an arrangement between a State/Territory entity and a foreign entity (defined as a ***foreign arrangement*** in section 6) if:

a. subsection 40(1) is satisfied in relation to the arrangement, and

b. the arrangement is legally binding under a foreign law.

812. All foreign arrangements which would be legally binding under a foreign law are covered by this provision, regardless of whether they are core foreign arrangements or non-core foreign arrangements. Under subsection 9(2), an arrangement is ***legally binding*** if it confers legal rights or imposes legal obligations that are legally enforceable under an Australian law or a foreign law (as defined in clause 4)

813. Paragraph 42(1)(a) provides that the Minister may make a declaration about a foreign arrangement that is legally binding under a foreign law if subsection 40(1) is satisfied in relation to the arrangement. Subsection 40(1) provides that the Minister may make a declaration in relation to a foreign arrangement under this Division if:

a. the Minister is satisfied that the arrangement:

    i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

    ii. is, or is likely to be, inconsistent with Australia's foreign policy, or

b. the State/Territory entity entered the non-core arrangement in contravention of subsection 36(3) (that is, the Minister made a declaration that the State/Territory entity must not enter the arrangement under Part 3 and the State/Territory entity entered the arrangement in contravention of that declaration).

814. Paragraph 42(1)(b) provides that the Minister may make a declaration under this section if the arrangement is legally binding under a foreign law. ***Foreign law*** is defined in section 4 to mean a law of a foreign country, or part of a foreign country.

815. The first note under subsection 42(1) provides that the Minister must take into account certain matters provided for in section 51 when considering whether to make a declaration under subsections 42(2).

816. Subsection 51(2) provides that when making a decision about a declaration under these subsections, the Minister must take into account the following matters in relation to the State or Territory to which the arrangement relates, to the extent that information in relation to them has been provided to the Minister by the relevant State or Territory:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

817. The requirement that the Minister have regard to these matters will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration in relation to a foreign arrangement that is legally binding under foreign law.

818. The matters must be considered in relation to the State or Territory to which the arrangement relates. This is not a reference to the State/Territory entity that is party to the arrangement, unless a State or Territory is a party to the arrangement in its own right, but to the State or Territory to which the State/Territory entity is related. For example, if a South Australian government Department is party to an arrangement, the Minister is required to have regard to these matters in relation to South Australia.

819. For example, if a State or Territory has provided the Minister information that a declaration that an arrangement which is legally binding under foreign law is required to be terminated under subsection 42(2) may impede the acquisition of goods (such as crude or refined petroleum or specialised equipment or machinery) by the State or Territory under the arrangement, the Minister must take this information into account in considering whether to make a declaration under this section. If the Minister is of the view that the declaration may result in the significant impediment to the State or Territory, it would be open to the Minister to decide to declare that the arrangement should be varied (rather than require that it be terminated). Alternatively, the Minister might not make a declaration at all.

820. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning the matters has been given to the Minister in accordance with subsection 51(3). The matters can be considered together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent of the performance of the arrangement may be interconnected with the financial consequences for the relevant State or Territory.

821. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

822. The second note under subsection 42(1) informs the reader that section 44 deals with general matters about a declaration made under subsection 42(1), including matters such as revocation and giving notice to the State/Territory entity.

823. Unlike section 41 (which applies to foreign arrangements that are legally binding under Australian law), section 42 does not enable the Minister to make a declaration that the arrangement is invalid or unenforceable. This Act does not purport to invalidate an arrangement that is binding under the law of another country. Instead, the State/Territory

entity is required to vary or terminate the arrangement consistent with the Minister's declaration under subsection 42(2), as discussed below.

824. These powers are discretionary and the Minister need not make a declaration regarding an arrangement covered by subsection 42(1). Declarations under section 42 will be considered on a case-by-case basis to decide whether the variation or termination of an arrangement is necessary to manage and protect Australia's foreign relations and foreign policy.

825. Subsection 42(2) allows the Minister to make a declaration that an arrangement that satisfies the criteria in subsection 40(1) is required to be varied or terminated in accordance with any specified requirements. The Minister's declaration under subsection 42(2) must be in writing.

826. Paragraph 42(2)(a) provides that the Minister may make a declaration that:

a. the State/Territory entity must, within the period specified in the declaration, notify the foreign entity that:

    i. a declaration is in force under this subsection in relation to the arrangement, and

    ii. the arrangement is required to be varied or terminated in accordance with any specified requirements.

827. The State/Territory entity must also give the foreign entity a copy of the declaration.

828. This requirement ensures that the foreign entity that is a party to the arrangement with the State/Territory entity is made aware that the arrangement is required to be varied or terminated by the operation of the declaration made under subsection 42(2). This requirement is necessary in order to require the foreign entity to comply with the declaration to the extent it applies to the entity (dealt with in subsection 42(4), which is discussed further below).

829. Paragraph 42(2)(b) provides that the Minister may make a declaration that the State/Territory entity must, in accordance with any specified requirements, vary or terminate the arrangement.

830. For example, the Minister may make a declaration requiring a State/Territory entity to vary an arrangement to remove certain provisions, or to terminate the arrangement as a whole in accordance with specified requirements, such as within certain timeframes.

831. Subsection 42(5) provides that, for the purposes of paragraph 42(2)(b), the declaration may require that the arrangement be varied or terminated in accordance with the foreign law under which it is binding, in accordance with any other requirements, or in accordance with both the foreign law and other requirements.

832. This gives the Minister discretion to determine the manner in which an arrangement is varied or terminated. For example, the Minister may require that the arrangement be varied in accordance with any variation provisions in the arrangement itself, in addition to the requirements under the foreign law.

833. Paragraph 42(2)(b) requires the State/Territory to vary or terminate the arrangement in accordance with any requirements specified in the declaration. This places an obligation on the State/Territory entity to comply with the Minister's declaration, in addition to the requirement to notify the foreign entity of the declaration under paragraph 42(2)(a).

834. Paragraph 42(2)(c) requires the State/Territory entity to, as soon as practicable after complying with the requirement to notify the foreign entity or the requirement to vary or terminate the arrangement, notify the Minister of their compliance with those requirements. This notification must be in writing.

835. This notification requirement ensures that the Minister is informed when the State/Territory entity has complied with the requirement in a declaration to notify the foreign entity and the requirement to vary or terminate the arrangement. If the State/Territory entity has not complied, the Minister may seek an injunction to enforce compliance with the declaration (as per paragraph 52(1)(k)).

836. Paragraphs 42(2)(d) and (e) provide that the Minister's declaration may prohibit conduct in relation to the varied or terminated arrangement by State/Territory entities and foreign entities to the arrangement.

837. In relation to State/Territory entities, paragraph 42(2)(d) prohibits the State/Territory entity, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

838. This prohibition in relation to State/Territory entities operates extraterritorially by virtue of section 59 (that is, State/Territory entities are prohibited from engaging in these activities both within and outside Australia).

839. This prohibition is necessary to ensure that State/Territory entities do not rely upon, give effect to or hold out the arrangement to the extent that it has been varied or terminated in accordance with a declaration by the Minister under subsection 42(2).

840. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

841. In relation to foreign entities, paragraph 42(2)(e) prohibits each foreign entity, to the specified extent and from the specified day, from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

842. This prohibition is necessary to ensure that foreign entities do not rely upon, give effect to or hold out the arrangement to the extent that it has been varied or terminated in accordance with a declaration by the Minister under subsection 42(2).

843. This subsection prohibits foreign entities from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

844. Subsection 42(3) provides that the State/Territory entity must comply with a declaration made under this section to the extent that the declaration applies to that party. The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(k)).

845. Subsection 42(4) provides that a foreign entity must comply with a declaration made under this section to the extent that the declaration applies to that entity and if the entity has been given a copy of the declaration under paragraph 42(2)(a). The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(k)).

846. As set out above, subsection 42(5) provides that, for the purposes of paragraph 42(2)(b), the declaration may require that the arrangement be varied or terminated in accordance with the foreign law under which it is binding, in accordance with any other requirements, or in accordance with both the foreign law and other requirements.

847. Subsection 42(6) provides that Ministerial declarations made under subsection 42(2) are not legislative instruments. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under this provision are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular arrangement and the entities that are parties to that arrangement on a case-by-case basis.

Subdivision C—Declarations about non-legally binding foreign arrangements

Section 43 Foreign arrangements that are not legally binding

848. Section 43 provides a discretion for the Minister to make a declaration in relation to foreign arrangements that are not legally binding.

849. Subsection 43(1) provides that the Minister may make a declaration under subsection 43(2) or (3) in relation to an arrangement between a State/Territory entity and a foreign entity (defined as a ***foreign arrangement*** in section 6) if:

c. subsection 40(1) is satisfied in relation to the arrangement, and

d. the arrangement is not legally binding.

850. All foreign arrangements which are not legally binding are covered by this provision, regardless of whether they are core foreign arrangements or non-core foreign arrangements.

851. Paragraph 43(1)(a) provides that the Minister may make a declaration about a foreign arrangement that is legally binding under Australian law if subsection 40(1) is satisfied in relation to the arrangement. Subsection 40(1) provides that the Minister may make a declaration in relation to a foreign arrangement under this Division if:

a. the Minister is satisfied that the arrangement:

    i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

    ii. is, or is likely to be, inconsistent with Australia's foreign policy, or

b. the State/Territory entity entered the non-core arrangement in contravention of subsection 36(3) (that is, the Minister made a declaration that the State/Territory entity must not enter the arrangement under Part 3 and the State/Territory entity entered the arrangement in contravention of that declaration).

852. Paragraph 43(1)(b) provides that the Minister may make a declaration under this section if an arrangement is not legally binding. Under subsection 9(2), an arrangement is ***legally binding*** if it confers legal rights or imposes legal obligations that are legally enforceable under an Australian law or a foreign law (as defined in clause 4)

853. The first note under subsection 43(1) provides that the Minister must take into account certain matters provided for in section 51 when considering whether to make a declaration under subsections 43(2) or (3).

854. Subsection 51(2) provides that when making a decision about a declaration under these subsections, the Minister must take into account the following matters in relation to the State or Territory to which the arrangement relates, to the extent that information in relation to them has been provided to the Minister by the relevant State or Territory:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

855. The requirement that the Minister have regard to these matters will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration in relation to a foreign arrangement that is not legally binding.

Non-binding arrangements can still reflect important commitments between parties, so it is appropriate for these factors to be considered by the Minister.

856. The matters must be considered in relation to the State or Territory to which the arrangement relates. This is not a reference to the State/Territory entity that is party to the arrangement, unless a State or Territory is a party to the arrangement in its own right, but to the State or Territory to which the State/Territory entity is related. For example, if a South Australian government Department is party to an arrangement, the Minister is required to have regard to these matters in relation to South Australia.

857. For example, if a non-legally binding arrangement was very close to completion, and this information was provided to the Minister, the Minister must take this into account in considering whether to make a declaration under this section, and in consideration of that matter, it would be open to the Minister to decide to declare that the arrangement should be varied (rather than declare that it is not in operation, or require that it be terminated). Alternatively, the Minister might not make a declaration at all.

858. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning the matters has been given to them in accordance with subsection 51(3). The matters can be considered together or separately. The matters can be considered together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent of the performance of the subsidiary arrangement may be interconnected with the financial consequences for the relevant State or Territory.

859. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

860. The second note under subsection 43(1) informs the reader that section 44 deals with general matters about a declaration made under subsection 43(1), including matters such as revocation and giving notice to the State/Territory entity.

861. Section 43 provides different options for the Minister when making a declaration in relation to a foreign arrangement that is not legally binding. The Minister may make a declaration that:

- the arrangement is not in operation to the specified extent and from the specified day under subsection 43(2)
- the arrangement is to be varied or terminated under subsection 43(3).

862. The different mechanisms in subsections 43(2) and (3) give the Minister flexibility and a range of options to address the nature of the foreign arrangement and other circumstances. The option that the Minister selects may be influenced by the matters the Minister must take into account under subsection 51(2) (discussed above).

863. For example, if the Minister considers that only certain parts of the foreign arrangement need to be amended to manage the effect on Australia’s foreign relations, the Minister could make a declaration under subsection 43(3) to require the variation of the arrangement, allowing it otherwise to remain in force. Alternatively, depending on the nature

of the arrangement, the Minister may consider it appropriate declare it invalid and unenforceable by operation of the Act. The Minister may also consider that a particular option is preferable over another based on his or her assessment of the factors under subsection 51(2) (as discussed above in relation to that provision).

864. These powers are discretionary and the Minister need not make a declaration regarding an arrangement covered by subsection 43(1). Declarations under section 43 will be considered on a case-by-case basis to decide whether it is necessary to declare the arrangement to be not in operation, or to require it to be varied or terminated, in order to manage and protect Australia's foreign relations and foreign policy.

865. Subsection 43(2) allows the Minister to make a declaration that an arrangement that satisfies the criteria in subsection 40(1) is not in operation to the specified extent. The Minister's declaration under subsection 43(2) must be in writing.

866. Paragraph 43(2)(a) provides that the declaration may provide that the arrangement:

a. is not in operation to the specified extent and from the specified day, or

b. if the non-core foreign arrangement was entered in contravention of subsection 36(3)—is not, and is taken never to have been, in operation to the specified extent.

867. Given the arrangement is not legally binding, it is appropriate to describe it as no longer, and never have been, in operation, rather than being invalidated or unenforceable. Accordingly, by virtue of this section, a non-legally binding arrangement is not in effect, in force or having any other operation.

868. For example, a memorandum of understanding that expresses the parties' commitment to undertaking certain research and training activities would no longer be in operation, and the parties could not undertake those activities in accordance with paragraphs 43(2)(d) and (e) (as discussed below).

869. Subparagraph 43(2)(a)(i) allows the Minister to declare an arrangement to be not in operation *to the specified extent* and *from the specified day*. This provides the Minister with flexibility to respond to the specific circumstances of the case and only declare an arrangement to not be in operation to the minimum extent necessary to manage the impact of the arrangement on Australia's foreign relations or foreign policy. The Minister can also manage the impact on the parties by specifying a day on which the arrangement is taken to not be in operation to the specified extent. For example, this might allow the parties to make appropriate arrangements in advance of the operation of the arrangement ceasing.

870. Subparagraph 43(2)(a)(ii) applies if the arrangement was entered in contravention of subsection 36(3), which requires a State/Territory entity to comply with a declaration from the Minister prohibiting that entity from entering a non-core foreign arrangement. In such circumstances, where the non-core foreign arrangement was entered in contravention of the Act, it is appropriate that the contravening non-core foreign arrangement is not, and is taken never to have been, in operation to the specified extent.

871. Under paragraph 43(2)(a), the Minister need not declare that the whole of the arrangement to be not in operation, but has the power to specify the extent to which the

arrangement is not in operation. This allows the Minister to only declare that parts of the arrangement are not in operation. Alternatively, the Minister could specify that the arrangement is not in operation in its entirety.

872. Paragraph 43(2)(b) requires the State/Territory entity to, within the period specified in the declaration, notify the foreign entity that:

   i. a declaration is in force under subsection 43(2) in relation to the arrangement, and

   ii. the arrangement is not in operation to the specified extent.

873. The State/Territory is also required to give the foreign entity a copy of the declaration.

874. This requirement ensures that the foreign entity that would, but for the operation of the declaration, be a party to the arrangement with the State/Territory entity is made aware that the arrangement is not in operation by virtue of the operation of the declaration made under subsection 43(2). This requirement is necessary in order to require the foreign entity to comply with the declaration to the extent it applies to the entity (dealt with in subsection 43(5), which is discussed further below).

875. Paragraph 43(2)(c) requires the State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 43(2)(b) to notify the foreign entity of the declaration's application to, and effect on, the arrangement. This notice must be provided to the Minister in writing.

876. This requirement is necessary to ensure the Minister is informed of when the foreign entity has been advised that an arrangement is no longer in operation to the specified extent under subsection 43(2).

877. Paragraph 43(2)(d) provides that the State/Territory entity must not, to the specified extent and from the specified day:

a. give effect to the arrangement, or

b. hold out, or conduct itself on the basis, that:

   i. it can give effect to the arrangement, or

   ii. the arrangement is in operation.

878. Due to the operation of section 59, this section prohibits the State/Territory entity from engaging in these actions both within and outside of Australia.

879. This prohibition is necessary to ensure that the State/Territory entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite the arrangement no longer being in operation to the specified extent due to a declaration made under subsection 43(2). This ensures that arrangements that are entered into in contravention of the requirements in this Act cannot be informally given effect. This is a necessary enforcement mechanism, as contraventions of the Act deprive the Minister of the opportunity to assess arrangements for any adverse effect they might have on Australia's foreign relations and their consistency with Australia's foreign policy.

880. Subparagraph 43(2)(d)(i) prohibits the State/Territory entity from, to the extent specified in the declaration, giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

881. Subparagraphs 43(2)(d)(ii) and (iii) prohibit the State/Territory entity from, to the extent specified in the declaration, holding out, or conducting itself on the basis, that it can give effect to the arrangement or that the arrangement is in operation.

882. This prohibition ensures that a State/Territory entity cannot represent publicly or to other parties that the relevant arrangement is not affected by a declaration made under this provision. This also ensures that other parties are not induced to take action, such as entering subsidiary arrangements, on the basis of such misrepresentations.

883. Paragraph 43(2)(e) provides that the foreign entity, to the specified extent and from the specified day, is prohibited from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that:

    i. it can give effect to the arrangement, or

    ii. the arrangement is in operation.

884. This prohibition is necessary to ensure that the foreign entity does not rely upon, give effect to or hold out the arrangement as still in effect in Australia to the specified extent, if the arrangement has been deemed not to be in operation by a declaration under subsection 43(2).

885. This subsection only prohibits the foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

886. The prohibitions in paragraphs 43(2)(d) and (e) ensure that the scheme in this Act is not rendered ineffective by parties being able to informally give effect to an arrangement, despite it no longer being in operation due to a declaration made under subsection 43(2).

887. Subsection 43(2) provides that the Minister's declaration made under paragraph 43(2)(a) has effect accordingly.

888. Subsection 43(3) allows the Minister to make a declaration that an arrangement that satisfies the criteria in subsection 40(1) is required to be varied or terminated in accordance with any specified requirements. The Minister's declaration under subsection 43(3) must be in writing.

889. Paragraph 43(3)(a) provides that the Minister may make a declaration that:

a. the State/Territory entity must, within the period specified in the declaration, notify the foreign entity that:

i. a declaration is in force under this subsection in relation to the arrangement, and

ii. the arrangement is required to be varied or terminated in accordance with any specified requirements.

890. The State/Territory entity must also give the foreign entity a copy of the declaration.

891. This requirement ensures that the foreign entity that is a party to the arrangement with the State/Territory entity is made aware that the arrangement is required to be varied or terminated by the operation of the declaration made under subsection 43(3). This requirement is necessary in order to require the foreign entity to comply with the declaration to the extent it applies to the entity (dealt with in subsection 43(5), which is discussed further below).

892. Paragraph 43(3)(b) provides that the Minister may make a declaration that the State/Territory entity must vary or terminate the arrangement in accordance with any specified requirements.

893. For example, the Minister may make a declaration requiring a State/Territory entity to vary the arrangement to remove certain provisions, or to terminate the arrangement as a whole in accordance with specified requirements, such as within certain timeframes.

894. Subsection 43(6) provides that, for the purposes of paragraph 43(3)(b), the declaration may require that the arrangement be varied or terminated in accordance with any variation or termination clause of the arrangement, in accordance with any other requirements, or in accordance with any variation or termination clause and other requirements. This gives the Minister discretion to determine the manner in which an arrangement is varied or terminated.

895. Subparagraph 43(3)(b) requires the State/Territory to vary or terminate the arrangement in accordance with any requirements specified in the declaration. This places an obligation on the State/Territory entity to comply with the Minister's declaration, in addition to the requirement to notify the foreign entity of the declaration under paragraph 43(3)(a).

896. Paragraph 43(3)(c) requires the State/Territory entity to, as soon as practicable after complying with the requirement to notify the foreign entity and vary or terminate the arrangement, notify the Minister of their compliance with those requirements. This notification must be in writing.

897. This notification requirement ensures that the Minister is informed when the State/Territory entity has complied with the requirement in a declaration to notify the foreign entity and vary or terminate the arrangement. If the State/Territory entity has not complied, the Minister may seek an injunction to enforce compliance with the declaration (as per paragraph 52(1)(k)).

898. Paragraphs 43(3)(d) and (e) provide that the Minister's declaration may prohibit conduct in relation to the varied or terminated arrangement by State/Territory entities and foreign entities to the arrangement.

899. In relation to State/Territory entities, paragraph 43(3)(d) prohibits the State/Territory entity, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

900. This prohibition in relation to State/Territory entities operates extraterritorially by virtue of section 59 (that is, State/Territory entities are prohibited from engaging in these activities both within and outside Australia).

901. This prohibition is necessary to ensure that State/Territory entities do not rely upon, give effect to or hold out the arrangement to the extent that it has been varied or terminated in accordance with a declaration by the Minister under subsection 43(2).

902. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

903. In relation to foreign entities, paragraph 43(3)(e) prohibits each foreign entity, to the specified extent and from the specified day, from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

904. This prohibition is necessary to ensure that foreign entities do not rely upon, give effect to or hold out the arrangement to the extent that it has been varied or terminated in accordance with a declaration by the Minister under subsection 43(3).

905. This subsection prohibits foreign entities from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

906. Subsection 43(4) provides that the State/Territory entity must comply with a declaration made under this section to the extent that the declaration applies to that entity. The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(k)).

907. Subsection 43(5) provides that a foreign entity must comply with a declaration made under this section to the extent that the declaration applies to that entity and if the entity has been given a copy of the declaration under paragraph 43(2)(b) or 43(3)(a). The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(k)).

908. As set out above, subsection 43(6) provides that, for the purposes of paragraph 43(3)(b), the declaration may require that the arrangement be varied or terminated in accordance with any variation or termination clause of the arrangement, in accordance with any other requirements, or in accordance with any variation or termination clause and other requirements.

909. Subsection 43(7) provides that Ministerial declarations made under subsections 43(2) and (3) are not legislative instruments. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under these provisions are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular arrangement and the entities that are parties to that arrangement on a case-by-case basis.

Subdivision D— Matters relating to declarations under this Division

Section 44 Matters relating to declarations about foreign arrangements

910. Section 44 provides for a range of matters relating to Ministerial declarations made under subsections 41(2) or (3), 42(2) or 43(2) or (3) in relation to foreign arrangements.

911. Subsection 44(1) provides that this section applies if the Minister makes a declaration under:

- subsection 41(2), which allows the Minister to make a declaration that a foreign arrangement that is legally binding under Australian law is invalid and unenforceable and prevents parties from giving effect to that arrangement
- subsection 41(3), which allows the Minister to make a declaration requiring a State/Territory entity to vary or terminate a foreign arrangement that is legally binding under Australian law and prevents parties from giving effect to that arrangement
- subsection 42(2), which allows the Minister to make a declaration requiring a State/Territory entity to vary or terminate a foreign arrangement that is legally binding under foreign law and prevents parties from giving effect to that arrangement
- subsection 43(2), which allows the Minister to make a declaration that a foreign arrangement that is not legally binding is not in operation and prevents parties from giving effect to that arrangement, and
- subsection 43(3), which allows the Minister to make a declaration requiring a State/Territory entity to vary or terminate a foreign arrangement that is not legally binding and prevents parties from giving effect to that arrangement.

912. Subsection 44(2) provides that a Minister's declaration must specify the day it comes into force. This provides certainty to parties about the day upon which the prohibitions on giving effect to the arrangement take effect in relation to the parties. This allows the parties to manage their affairs accordingly, to avoid unintentionally breaching the prohibitions.

913. Subsection 44(3) provides that the Minister may revoke a declaration if he or she ceases to be satisfied of the matters on which he or she made the declaration. For example, if the Minister has made a declaration under subsection 43(1) but then ceases to be satisfied that the arrangement is not legally binding then the Minister could revoke the declaration.

914. If the Minister decides to revoke a declaration, subsection 44(7) provides that the Minister must, as soon as practicable, give the State/Territory entity a written notice that states that the declaration is revoked. This informs the State/Territory entity that the declaration is no longer in force, meaning that the prohibitions on giving effect to the arrangement no longer apply.

915. Subsection 44(4) provides that the Minister may only revoke a declaration prior to it coming into force. As such, the Minister can only revoke a declaration up until the day on which it comes into force as specified in the declaration. This will ensure that the State/Territory entity has certainty as to the status and effect of the declaration, before taking irreversible action to terminate the arrangement.

916. Subsection 44(5) provides that, if the Minister revokes the declaration then the Minister must revoke any declaration made under subsection 46(2) or (3), 47(2) or 48(2) or (3). These subsections allow the Minister to declare:

- that a subsidiary arrangement that is legally binding under Australian law is invalid and unenforceable (subsection 46(2))

- that a subsidiary arrangement that is legally binding under Australian law is required to be varied or terminated (subsection 46(3))

- that a subsidiary arrangement that is legally binding under a foreign law is required to be varied or terminated (subsection 47(2))

- that a subsidiary arrangement that is not legally binding is no longer in operation (subsection 48(2)), or

- that a subsidiary arrangement that is not legally binding is required to be varied or terminated (subsection 48(3)).

917. To the extent that the Minister's ability to make a declaration under these provisions in relation to a subsidiary arrangement is premised on the existence of a declaration under sections 41, 42 or 43 (see subparagraph 45(1)(a)(i)), it is appropriate that a declaration in relation to a subsidiary arrangement is required to be revoked if the declaration in relation to the foreign arrangement is revoked. This is the effect of subsection 44(5).

918. Subsection 44(6) provides that the Minister must, as soon as practicable after making a declaration under sections 41, 42 or 43, give the State/Territory entity a written notice that states his or her decision to make the declaration and provide a copy of the declaration. The Minister's notice must also comply with any requirements prescribed by the rules.

919. This ensures that the State/Territory entity has notice of the Minister's decision and access to a copy of the declaration, and therefore is on notice of their obligations and any prohibitions under the relevant provision.

920. The Minister's notice may include information additional to that required by paragraphs 44(5)(a), (b) and (c), which serve as the minimum requirements. However, there is no requirement for the Minister to provide reasons for his or her decision, which is made clear by the exclusion of procedural fairness in section 54. In particular, the Minister is not required to account for his or her consideration of the matters provided for in section 51.

921. Subsection 44(7) provides that the Minister is required to give a State/Territory entity notice of the revocation of a declaration under subsection 44(3) as soon as practicable. The notice must be in writing and must state that the declaration is revoked. This provides the State/Territory entity with notice about the status and effect of the declaration and therefore whether the State/Territory entity is prohibited from giving effect to the arrangement.

Division 3—The Minister's power to make declarations about subsidiary arrangements that are in operation

Subdivision A—When the Minister may make declarations about subsidiary arrangements

Section 45 When the Minister may make declarations under this Division

922. Section 45 provides for the circumstances in which the Minister may make a declaration in relation to a subsidiary arrangement for the purposes of this Act. These powers allow for the Minister to declare that a subsidiary arrangement is invalid and unenforceable, not in operation or required to be varied or terminated.

923. This is an essential enforcement mechanism of the scheme established by this Act. If a foreign arrangement is assessed as having an adverse effect on Australia's foreign relations or as inconsistent with Australia's foreign policy, any subsidiary arrangements made under the auspices of that foreign arrangement, whether or not the arrangement is a core foreign arrangement, may also have an adverse impact and so should be subject to similar consequences after a case-by-case assessment by the Minister.

924. Under section 12, an arrangement is a ***subsidiary arrangement*** of a foreign arrangement if it is entered under the auspices of the foreign arrangement and is not itself a foreign arrangement. Section 12 also provides that an arrangement is entered ***under the auspices*** of a foreign arrangement if the arrangement is entered at the same time, or after, the foreign arrangement is entered and:

- it is entered for the purposes of implementing the foreign arrangement in any way and to any extent, whether directly or indirectly, and whether or not:
  - the arrangement refers to the foreign arrangement, or
  - the foreign arrangement contemplates the arrangement, or arrangements of the same kind as the arrangement, being entered, or
- both of the following are satisfied:
  - the foreign arrangement contemplates the arrangement, or arrangements of the same kind as the arrangement being entered
  - the arrangement is entered as a consequence of the foreign arrangement, or of any actions taken under the arrangement, or
- the arrangement and the foreign arrangement have a relationship of a kind prescribed in the rules.

925. Subsection 45(1) provides that the Minister may make a declaration under Division 3 in relation to a subsidiary arrangement of a foreign arrangement if:

a. any of the following apply to the foreign arrangement:

   i. a declaration is in force under subsections 41(2) or (3), 42(2) or 43(2) or (3) in relation to the foreign arrangement

   ii. the foreign arrangement was entered in contravention of subsection 22(1) or 36(3)

   iii. clause 4, 5 or 6 of Schedule 1 applies to the foreign arrangement, and

b. the Minister is satisfied that the subsidiary arrangement:

   i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

   ii. is, or is likely to be, inconsistent with Australia's foreign policy.

926. Subparagraph 45(1)(a)(i) recognises that the Minister should be able to make a declaration about a subsidiary arrangement if the Minister has exercised his or her discretion under Division 2 of this Part in relation to a foreign arrangement. The subsections listed in subparagraph 45(1)(a)(i) cover a declaration that:

- a foreign arrangement that is legally binding under Australian law is invalid and unenforceable (subsection 41(2))
- a State/Territory entity must vary or terminate a foreign arrangement that is legally binding under Australian (subsection 41(3))
- a State/Territory entity must vary or terminate a foreign arrangement that is legally binding under foreign law (subsection 42(2))
- a foreign arrangement that is not legally binding is not in operation (subsection 43(2)), and
- a State/Territory entity must vary or terminate a foreign arrangement that is not legally binding (subsection 43(3)).

927. Subparagraph 45(1)(a)(ii) recognises that the Minister should be able to make a declaration about a subsidiary arrangement if a State/Territory entity has entered a foreign arrangement in contravention of:

- the prohibition on entering core foreign arrangements without the Minister's approval (under subsection 22(1) in Part 2), or
- a declaration that a State/Territory entity must not enter a non-core foreign arrangement (under subsection 36(3) in Part 3).

928. Subparagraph 45(1)(a)(iii) recognises that the Minister should be able to make a declaration about a subsidiary arrangement made under the auspices of a pre-existing core

foreign arrangement where a State/Territory entity has not notified the Minister of the pre-existing foreign core arrangement, in contravention of paragraph 2(3)(a) of Schedule 1.

929. Paragraph 45(1)(b) provides that the Minister may only make a declaration in relation to a subsidiary arrangement if the Minister is satisfied that the subsidiary arrangement:

- adversely affects, or is likely to adversely affect, Australia's foreign relations, or
- is, or is likely to be, inconsistent with Australia's foreign policy.

930. ***Australia's foreign policy*** is defined in subsection 5(2) to include policy that the Minister is satisfied is the Commonwealth's policy on matters that relate to Australia's foreign relations or things outside Australia. Under this definition, it does not matter whether or not the policy is written or publicly available or has been formulated, decided upon, or approved by any particular member or body of the Commonwealth.

931. The note under subsection 45(1) informs the reader that the Minister must take into account certain matters provided for in section 51 if he or she exercises their discretion to make a declaration under subsections this Division. Those matters are discussed below in relation to declarations made under each of these subsections, as well as in relation to section 51.

932. Subsection 45(2) provides for a range of matters that are not relevant when the Minister is considering whether to exercise his or her discretion to make a declaration under this Division in relation to a subsidiary arrangement.

933. This subsection provides that the Minister may make a declaration irrespective of whether:

a. the subsidiary arrangement was entered before or after the commencement day, or

b. the Minister previously decided:

    i. not to make a declaration under this Division in relation to the subsidiary arrangement, or

    ii. to make a different declaration under this Division in relation to the subsidiary arrangement.

934. Paragraph 45(2)(a) provides that the Minister may make a declaration in relation to pre-existing subsidiary arrangements, as well as subsidiary arrangements entered after the commencement day. Section 4 defines the ***commencement day*** as the day that section 1 of the Act commences, which is upon Royal Assent.

935. This is important in ensuring that the Minister has the power to consider subsidiary arrangements which were entered both before and after Royal Assent for this Act. Subsidiary arrangements entered prior to the commencement are capable of affecting Australia's foreign relations and foreign policy. It is therefore necessary for the Minister to have the power to make declarations in relation to such arrangements if the Minister assesses that the criteria in subsection 45(1)(b) are met. This ensures that the Minister can effectively protect and

manage Australia's foreign relations, consistent with the object of this Act as set out in section 5.

936. Paragraph 45(2)(b) ensures that the Minister can make a declaration about a subsidiary arrangement under this Division even if the Minister has previously decided:

- not to make a declaration under Division 3 in relation to the same subsidiary arrangement, or
- to make a different declaration under Division 3 in relation to the same subsidiary arrangement.

937. This is necessary to ensure that the Minister has the ability to revisit whether subsidiary arrangements should remain in effect when circumstances change, as is the case for foreign arrangements under the auspices of which subsidiary arrangements may be entered (see, for example, paragraph 40(2)(b)). This recognises that Australia's foreign relations and foreign policy are not static but are ever-evolving in response to domestic and international factors and if the Minister revisits a foreign arrangement in light of changed circumstances, the Minister should similarly be able to revisit any subsidiary arrangements that sit beneath it.

938. It is appropriate for the Minister to have the power to make declarations in relation to such arrangements in order to effectively manage Australia's foreign relations.

Subdivision B—Declarations about legally binding subsidiary arrangements

Section 46 Subsidiary arrangements that are legally binding under Australian law

939. Section 46 provides a discretion for the Minister to make a declaration in relation to subsidiary arrangements that are legally binding under Australian law.

940. Subsection 46(1) provides that the Minister may make a declaration under subsection 46(2) or (3) in relation to a subsidiary arrangement if:

a. subsection 45(1) is satisfied in relation to the subsidiary arrangement, and

b. apart from the declaration, the subsidiary arrangement would be legally binding under an Australian law.

941. All subsidiary arrangements which are legally binding under Australian law are covered by this provision, whether the contravening foreign arrangement under the auspices of which the subsidiary arrangement is made is legally binding under Australian law, legally binding under foreign law, or is not legally binding. Under subsection 9(2), an arrangement is ***legally binding*** if it confers legal rights or imposes legal obligations that are legally enforceable under an Australian law or a foreign law (as defined in clause 4). Subsidiary arrangements will be considered on a case-by-case basis.

942. This provision is necessary for the enforcement of this legislative framework. In some cases, subsidiary arrangements may have the same intended effect or operation as a foreign arrangement that has been invalidated, terminated, varied or deemed not to be in operation under the requirements of this Act. To achieve the policy intention of the Act, subsidiary

arrangements that achieve substantially the same effect as contravening foreign arrangements must also be dealt with.

943. In addition, subsidiary arrangements can themselves impact upon Australia's foreign relations. For example, subsidiary arrangements often represent the practical implementation of a foreign arrangement, and may be foreseen, intended or encouraged by the parties to the foreign arrangement. This could occur where the foreign arrangement contains high-level political commitments, such as memoranda of understanding related to collaboration or capacity building.

944. Paragraph 46(1)(a) provides that the Minister may only make a declaration about a subsidiary arrangement that is legally binding under Australian law if subsection 45(1) is satisfied in relation to the subsidiary arrangement. Subsection 45(1) provides that the Minister may make a declaration in relation to a subsidiary arrangement under this Division if:

a. either:

    i. a declaration is in force under subsections 41(2) or (3), 42(2) or 43(2) or (3) in relation to the foreign arrangement, or

    ii. the foreign arrangement was entered in contravention of subsection 22(1) or 36(3), and

b. the Minister is satisfied that the subsidiary arrangement:

    i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

    ii. is, or is likely to be, inconsistent with Australia's foreign policy.

945. Paragraph 46(1)(b) recognises that the effect of a declaration made under section 46 (specifically subsection 46(2)) can be to render a subsidiary arrangement to be, and to always have been, invalid and unenforceable. In such a case, the subsidiary arrangement is taken to never have existed, and was therefore incapable of creating legal rights and obligations. Accordingly, subsidiary arrangements covered by such a declaration would be legally binding but for the operation of the declaration made under this provision.

946. The first note under subsection 46(1) informs the reader that the Minister must take into account certain matters provided for in section 51 when considering whether to make a declaration under subsection 46(2) or (3).

947. These matters must be taken into account as they relate to the State or Territory to which the subsidiary arrangement relates. This will be the State or Territory related to the State/Territory entity that is party to the head foreign arrangement under the auspices of which the subsidiary arrangement was entered. For example, if the State/Territory entity to the head foreign arrangement is a Western Australian government Department, the subsidiary arrangement relates to the State of Western Australia. Therefore, the Minister must consider these matters in relation to Western Australia.

948. Subsection 51(2) provides that when making a decision about a declaration under these subsections, the Minister must take into account the following matters in relation to the State or Territory to which the arrangement relates, to the extent that information in relation to them has been provided to the Minister by the relevant State or Territory:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the subsidiary arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

949. The requirement that the Minister have regard to these matters will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration in relation to the subsidiary arrangement.

950. For example, a declaration that a subsidiary arrangement which is legally binding is invalid under subsection 46(2) could have significant financial consequences for the relevant State or Territory (such as in relation to major infrastructure contracts). If this information has been provided to the Minister, the Minister must take this into account in considering whether to make a declaration under this section. If the Minister is of the view that the declaration may result in significant financial consequences for the State or Territory, it would be open to the Minister to decide to declare that the arrangement should be varied (rather than declare it invalid or require that it be terminated). Alternatively, the Minister might not make a declaration at all.

951. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning those matters has been given to the Minister. They can be considered together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent of the performance of the subsidiary arrangement may be interconnected with the financial consequences for the relevant State or Territory.

952. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

953. The second note under subsection 46(1) informs the reader that section 49 deals with general matters about the declaration, including revocation and giving notice to the parties.

954. Section 46 provides different options for the Minister when making a declaration in relation to a subsidiary arrangement that is legally binding under Australian law. The Minister may make a declaration that:

- the subsidiary arrangement is invalid and unenforceable under subsection 46(2), or
- the subsidiary arrangement is to be varied or terminated under subsection 46(3).

955. The different mechanisms in subsections 46(2) and (3) give the Minister flexibility and a range of options to address the nature of the subsidiary arrangement and other circumstances. The option that the Minister selects may be influenced by the matters the Minister must take into account under subsection 51(2) (discussed above).

956. For example, if the Minister considers that only certain parts of the subsidiary arrangement need to be amended to manage the effect on Australia's foreign relations, the Minister could make a declaration under subsection 46(3) to require the variation of the arrangement, allowing it otherwise to remain in force. Additionally, depending on the nature of the subsidiary arrangement, the Minister may consider it appropriate to require parties to terminate it in accordance with a termination process outlined in the subsidiary arrangement, rather than declare it invalid and unenforceable by operation of the Act. The Minister may also consider that a particular option is preferable over another based on his or her assessment of the factors under subsection 51(2) (as discussed above in relation to that provision).

957. These powers are discretionary and the Minister need not make a declaration regarding a subsidiary arrangement covered by subsection 46(1). Subsidiary arrangements will not be automatically invalidated by operation of this Act. The Minister will assess subsidiary arrangements on a case-by-case basis to decide whether the invalidation of a subsidiary arrangement is necessary to manage and protect Australia's foreign relations and foreign policy.

958. Subsection 46(2) provides the Minister with a power to make a written declaration that a subsidiary arrangement is invalid and unenforceable.

959. Paragraph 46(2)(a) provides that the declaration may provide that the subsidiary arrangement:

a. is invalid and unenforceable to the specified extent and from the specified day, or

b. if the foreign (head) arrangement was entered in contravention of subsection 22(1) or 36(3)—is, and is taken to have always been, invalid and unenforceable to the specified extent.

960. Subparagraph 46(2)(a)(i) allows the Minister to declare a subsidiary arrangement to be invalid and unenforceable *to the specified extent* and *from the specified day*. This provides the Minister with flexibility to respond to the specific circumstances of the case and only invalidate a subsidiary arrangement to the minimum extent necessary to manage the impact of the arrangement on Australia's foreign relations or foreign policy. The Minister can also manage the impact on the parties by specifying a day on which the subsidiary arrangement becomes invalid and unenforceable to the specified extent. For example, this might allow the parties to make appropriate arrangements in anticipation of the invalidity taking effect.

961. Subparagraph 46(2)(a)(ii) applies if the foreign arrangement (under the auspices of which the subsidiary arrangement was entered) was entered in contravention of subsection 22(1) (which prohibits core State/Territory entities from entering a core foreign arrangement if the Minister's approval is not in force) or subsection 36(3) (which requires a State/Territory entity to comply with a declaration from the Minister prohibiting that entity from entering a non-core foreign arrangement). In such circumstances, where the foreign arrangement was entered in contravention of the Act, it is appropriate that a subsidiary arrangement entered under the auspices of that contravening foreign arrangement is, and is taken to always have been, invalid and unenforceable to the specified extent.

962. The Minister need not declare that the whole of the subsidiary arrangement is invalid and unenforceable, but has the power to specify the extent to which the arrangement is invalid and unenforceable. This allows the Minister to only declare that parts of the subsidiary arrangement, such as those parts which directly reference the head foreign arrangement, or those parts which are contemplated by the head foreign arrangement, are invalid and unenforceable. This complements subsection 46(6), which provides that the Minister's declaration-making power is limited to the extent that the subsidiary arrangement was entered under the auspices of the head arrangement, which is discussed further below. Alternatively, the Minister could specify that the subsidiary arrangement is invalid and unenforceable in its entirety.

963. Paragraphs 46(2)(b) and (c) provide that the Minister's declaration may prohibit conduct in relation to the invalidated subsidiary arrangement by regulated Australian parties and other parties to the arrangement.

964. ***Regulated Australian party*** is defined in section 4 to mean any of the following entities that are a party to an arrangement (but not entities prescribed by the rules as not being regulated Australian parties):

- a State/Territory entity
- an individual who is an Australian citizen or permanent Australian resident
- an Australian entity within the meaning of the *Foreign Acquisitions and Takeovers Act 1975*
- a partnership or an association incorporated or formed under an Australian law
- any other entity prescribed by the rules to be a regulated Australian party.

965. The term ‘other parties’ is not defined, but may be foreign parties or Australian parties which do not fall within the definition of regulated Australian parties. This would include those prescribed under the rules as not being regulated Australian parties.

966. In relation to regulated Australian parties, paragraph 46(2)(b) prohibits each regulated Australian party, to the specified extent and from the specified day, from doing the following:

i. giving effect to the arrangement

ii. holding out, or conducting itself on the basis, that it can give effect to the arrangement, or

iii. holding out, or conducting itself on the basis, that the arrangement is valid or enforceable.

967. This prohibition in relation to regulated Australian parties operates extraterritorially by virtue of section 59 (that is, regulated Australian parties are prohibited from engaging in these activities both within and outside Australia).

968. In relation to other parties to the subsidiary arrangement, paragraph 46(2)(c) prohibits each other party, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement in Australia

b. holding out in Australia, or conducting itself in Australia on the basis, that it can give effect to the arrangement, or

c. holding out in Australia, or conducting itself in Australia on the basis, that the arrangement is valid or enforceable.

969. This subsection only prohibits other parties from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

970. These prohibitions are essential to ensure that parties to the subsidiary arrangement do not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite the arrangement being invalidated by virtue of the Minister’s declaration. This ensures that the scheme in this Act is not rendered ineffective by parties being able to informally give effect to an arrangement, despite it being invalidated.

971. For example, under this paragraph, a core State/Territory entity would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to, or continuing to publish, the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

972. Subsection 46(2) provides that the Minister’s declaration made under paragraph 46(2)(a) has effect accordingly.

973. Subsection 46(3) provides the Minister with a power to make a written declaration requiring the variation or termination of a subsidiary arrangement.

974. Subparagraph 46(3)(a)(i) provides that the Minister may make a declaration that each regulated Australian party to a subsidiary arrangement must vary or terminate the arrangement in accordance with any specified requirements.

975. For example, the Minister may make a declaration requiring regulated Australian parties to vary the subsidiary arrangement to remove certain provisions, or to terminate the arrangement as a whole in accordance with specified requirements, such as within certain timeframes.

976. Subsection 46(5) provides that, for the purposes of paragraph 46(3)(a), the declaration may require that the subsidiary arrangement be varied or terminated in accordance with the Australian law under which it is binding, in accordance with any other requirements, or in accordance with both the Australian law and other requirements.

977. This gives the Minister discretion to determine the manner in which an arrangement is varied or terminated. For example, the Minister may require that the arrangement be varied in accordance with any variation provisions in the arrangement itself, in addition to the requirements under Australian law.

978. Subparagraph 46(3)(a)(ii) requires the regulated Australian parties to, as soon as practicable after complying with the requirement to vary or terminate the arrangement, notify the Minister of their compliance with that requirement. This notification must be in writing.

979. This notification requirement ensures that the Minister is informed when the Australian regulated parties have complied with the requirement in a declaration to vary or terminate the subsidiary arrangement. If the parties have not complied, the Minister may seek an injunction to enforce the declaration (as per paragraph 52(1)(l)).

980. Paragraphs 46(3)(b) and (c) provide that the Minister's declaration may prohibit conduct in relation to the varied or terminated subsidiary arrangement by regulated Australian parties and other parties to the arrangement.

981. In relation to regulated Australian parties, paragraph 46(3)(b) prohibits each regulated Australian party, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

982. This prohibition in relation to regulated Australian parties operates extraterritorially by virtue of section 59 (that is, regulated Australian parties are prohibited from engaging in these activities both within and outside Australia).

983. In relation to other parties to the subsidiary arrangement, paragraph 46(3)(c) prohibits each other party, to the specified extent and from the specified day, from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

984. This prohibition is necessary to ensure that the other parties to the subsidiary arrangement do not rely upon, give effect to or hold out the arrangement as still in effect to the extent it has been varied or terminated in Australia, despite a Ministerial declaration requiring that the arrangement be varied or terminated being issued under subsection 46(3). This is a corresponding restriction on the other parties to the arrangement, complementing the prohibition in paragraph 46(3)(b).

985. This subsection prohibits other parties that are not regulated Australian parties from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

986. Subsection 46(4) provides that each party to the subsidiary arrangement, whether or not an Australian regulated party, must comply with a declaration made under this section to the extent that the declaration applies to that party and if the Minister has given the party a copy of the declaration under subsection 49(5). The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(l)).

987. As set out above, subsection 46(5) provides that, for the purposes of paragraph 46(3)(a), the declaration may require that the subsidiary arrangement be varied or terminated in accordance with the Australian law under which it is binding, in accordance with any other requirements, or in accordance with both the Australian law and other requirements.

988. Subsection 46(6) provides that where the Minister decides to make a declaration under subsection 46(2) or (3), he or she may only do so to the extent that the subsidiary arrangement was entered under the auspices of the head arrangement. This will ensure that the Minister has discretion to only invalidate a subsidiary arrangement to the extent that the subsidiary arrangement is related to the relevant foreign arrangement.

989. Subsection 46(7) provides that Ministerial declarations made under subsections 46(2) and (3) are not legislative instruments. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under these provisions are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular subsidiary arrangement and the parties to that arrangement on a case-by-case basis.

Section 47 Subsidiary arrangements that are legally binding under foreign law

990. Section 47 provides a discretion for the Minister to make a declaration in relation to subsidiary arrangements that are legally binding under foreign law.

991. Subsection 47(1) provides that the Minister may make a declaration under subsection 47(2) in relation to a subsidiary arrangement if:

c. subsection 45(1) is satisfied in relation to the subsidiary arrangement, and

d. the subsidiary arrangement is legally binding under a foreign law.

992. All subsidiary arrangements which are legally binding under foreign law are covered by this provision, whether the contravening foreign arrangement under the auspices of which the subsidiary arrangement is made is legally binding under Australian law, legally binding under foreign law, or is not legally binding. Under subsection 9(2), an arrangement is ***legally binding*** if it confers legal rights or imposes legal obligations that are legally enforceable under an Australian law or a foreign law (as defined in clause 4). Subsidiary arrangements will be considered on a case-by-case basis.

993. This provision is necessary for the enforcement of this legislative framework. In some cases, subsidiary arrangements may have the same intended effect or operation as a foreign arrangement that has been invalidated, terminated varied, or deemed not to be in operation under the requirements of this Act. To achieve the policy intention of the Act, subsidiary arrangements that achieve substantially the same effect as contravening foreign arrangements must also be dealt with.

994. In addition, subsidiary arrangements can themselves impact upon Australia's foreign relations. For example, subsidiary arrangements often represent the practical implementation of a foreign arrangement, and may be foreseen, intended or encouraged by the parties to the foreign arrangement. This could occur where the foreign arrangement contains high level political commitments, such as memoranda of understanding related to collaboration or capacity building.

995. Paragraph 47(1)(a) provides that the Minister may only make a declaration about a subsidiary arrangement that is legally binding under foreign law if subsection 45(1) is satisfied in relation to the subsidiary arrangement. Subsection 45(1) provides that the Minister may make a declaration in relation to a subsidiary arrangement under this Division if:

a. either:

    i. a declaration is in force under subsections 41(2) or (3), 42(2) or 43(2) or (3) in relation to the foreign arrangement, or

    ii. the foreign arrangement was entered in contravention of subsection 22(1) or 36(3), and

b. the Minister is satisfied that the subsidiary arrangement:

    i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

    ii. is, or is likely to be, inconsistent with Australia's foreign policy.

996. The first note under subsection 47(1) provides that the Minister must take into account certain matters provided for in section 51 when considering whether to make a declaration under subsections 47(2).

997. These matters must be taken into account as they relate to the State or Territory to which the subsidiary arrangement relates. This will be the State or Territory related to the

State/Territory entity that is party to the head foreign arrangement under the auspices of which the subsidiary arrangement was entered. For example, if the State/Territory entity to the head foreign arrangement is a Western Australian government Department, the subsidiary arrangement relates to the State of Western Australia. Therefore, the Minister must consider these matters in relation to Western Australia.

998. Subsection 51(2) provides that when making a decision about a declaration under these subsections, the Minister must take into account the following matters in relation to the State or Territory to which the arrangement relates, to the extent that information in relation to them has been provided to the Minister by the relevant State or Territory:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

999. The requirement that the Minister have regard to these matters will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration in relation to a subsidiary arrangement that is legally binding under foreign law.

1000. For example, a declaration that a subsidiary arrangement which is legally binding under a foreign law must be terminated under subsection 46(2) could have significant financial consequences for the relevant State or Territory (such as in relation to major infrastructure contracts). If this information has been provided to the Minister, the Minister must take this into account in considering whether to make a declaration under this section. If the Minister is of the view that the declaration may result in significant financial consequences for the State or Territory, it would be open to the Minister to decide to declare that the arrangement should be varied (rather than declare require that it be terminated). Alternatively, the Minister might not make a declaration at all.

1001. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning those matters has been given to the Minister. They can be considered

together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent of the performance of the subsidiary arrangement may be interconnected with the financial consequences for the relevant State or Territory.

1002. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

1003. The second note under subsection 47(1) informs the reader that section 49 deals with general matters about the declaration, including revocation and giving notice to the parties.

1004. Subsection 46(2) provides the Minister with a power to make a written declaration requiring that the subsidiary arrangement be varied or terminated.

1005. These powers are discretionary and the Minister need not make a declaration regarding a subsidiary arrangement covered by subsection 47(1). Subsidiary arrangements will not be automatically required to be terminated by operation of this Act. The Minister will assess subsidiary arrangements on a case-by-case basis to decide whether the invalidation of a subsidiary arrangement is necessary to manage and protect Australia's foreign relations and foreign policy.

1006. Paragraph 47(2)(a) provides that the Minister may make a written declaration that:

a. each regulated Australian party to the subsidiary arrangement must:

    i. vary or terminate the arrangement in accordance with any specified requirements, and

    ii. as soon as practicable after doing so, notify the Minister is writing of its compliance.

1007. As compared with subsection 46(2) in relation to subsidiary arrangements that would be binding under Australian law but for the operation of a declaration under that subsection, section 47 does not operate to invalidate the subsidiary arrangement by operation of law. This Act does not purport to invalidate an arrangement that is binding under the law of another country. Instead, any regulated Australian parties to the subsidiary arrangement are required by a declaration under subsection 47(2) to vary or terminate the arrangement.

1008. The different mechanisms in subparagraph 47(2)(a)(i) give the Minister flexibility to address the nature of the subsidiary arrangement and other circumstances. The option that the Minister selects may be influenced by the matters the Minister must take into account under subsection 51(2) (discussed above).

1009. For example, if the Minister considers that only certain parts of the subsidiary arrangement need to be amended to manage the effect on Australia's foreign relations, the Minister could make a declaration under subsection 47(2) to require the variation of the arrangement, allowing it otherwise to remain in force. Additionally, depending on the nature of the subsidiary arrangement, the Minister may consider it appropriate to require the regulated Australian parties to the arrangement to terminate it in accordance with a termination process outlined in the subsidiary arrangement.

1010. Subparagraph 47(2)(a)(ii) requires the regulated Australian parties to, as soon as practicable after complying with the requirement to vary or terminate the arrangement, notify the Minister of their compliance with that requirement. This notification must be in writing.

1011. This notification requirement ensures that the Minister is informed when the Australian regulated parties have complied with the requirement in a declaration to vary or terminate the subsidiary arrangement. If the parties have not complied, the Minister may seek an injunction to enforce the declaration (as per paragraph 52(1)(l)).

1012. Paragraphs 47(2)(b) and (c) provide that the Minister's declaration may prohibit conduct in relation to the invalidated subsidiary arrangement by regulated Australian parties and other parties to the arrangement.

1013. ***Regulated Australian party*** is defined in section 4 to mean any of the following entities that are a party to an arrangement (but not entities prescribed by the rules as not being regulated Australian parties):

- a State/Territory entity
- an individual who is an Australian citizen or permanent Australian resident
- an Australian entity within the meaning of the *Foreign Acquisitions and Takeovers Act 1975*
- a partnership or an association incorporated or formed under an Australian law
- any other entity prescribed by the rules to be a regulated Australian party.

1014. The term 'other parties' is not defined, but may be foreign parties or Australian parties which do not fall within the definition of regulated Australian parties. This would include those prescribed under the rules as not being regulated Australian parties.

1015. In relation to regulated Australian parties, paragraph 47(2)(b) prohibits each regulated Australian party, to the specified extent and from the specified day, from doing the following:

i. giving effect to the arrangement, or

ii. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

1016. This prohibition in relation to regulated Australian parties operates extraterritorially by virtue of section 59 (that is, regulated Australian parties are prohibited from engaging in these activities both within and outside Australia).

1017. In relation to other parties to the subsidiary arrangement, paragraph 47(2)(c) prohibits each other party, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement in Australia

b. holding out in Australia, or conducting itself in Australia on the basis, that it can give effect to the arrangement.

1018. This subsection only prohibits other parties from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

1019. These prohibitions are essential to ensure that parties to the subsidiary arrangement do not rely upon, give effect to or hold out the arrangement given that it is required to be varied or terminated under the declaration. This ensures that the scheme in this Act is not rendered ineffective by parties being able to informally give effect to an arrangement.

1020. For example, under this paragraph, a regulated Australian party would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to, or continuing to publish, the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

1021. Paragraphs 47(2)(b) and (c) allow the Minister to prohibit the parties from engaging in this conduct *to the specified extent* and *from the specified day*. These paragraphs provide the Minister with flexibility to respond to the specific circumstances of the case and only require that parties not engage in that conduct to the extent that conduct gives effect to the provisions of the arrangement as varied, for example. This recognises that the Minister may only require parties to vary the subsidiary arrangement to the minimum extent necessary to manage the impact of the arrangement on Australia's foreign relations or foreign policy. The Minister can also manage the impact on the parties by specifying a day on which the subsidiary arrangement should not be given effect to or held out to the specified extent. For example, this might allow the parties to make appropriate arrangements in anticipation of the termination occurring.

1022. Subsection 47(3) provides that each party to the subsidiary arrangement, whether or not an Australian regulated party, must comply with a declaration made under this section to the extent that the declaration applies to that party and if the Minister has given the party a copy of the declaration under subsection 49(5). The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(l)).

1023. Subsection 47(4) provides that, for the purposes of paragraph 47(2)(a), the declaration may require that the subsidiary arrangement be varied or terminated in accordance with the foreign law under which it is binding, in accordance with any other requirements, or in accordance with both the foreign law and other requirements.

1024. This gives the Minister discretion to determine the manner in which an arrangement is varied or terminated. For example, the Minister may require that the arrangement be varied in accordance with any variation provisions in the arrangement itself, in addition to the requirements under foreign law.

1025. Subsection 47(5) provides that where the Minister decides to make a declaration under subsection 47(2), he or she may only do so to the extent that the subsidiary arrangement was entered under the auspices of the head arrangement. This will ensure that the Minister has discretion to only require a subsidiary arrangement to be terminated to the extent necessary to protect and manage Australia's foreign relations.

1026. Subsection 47(6) provides that Ministerial declarations made under subsection 47(2) are not legislative instruments. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under these provisions are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular subsidiary arrangement and the parties to that arrangement on a case-by-case basis.

Subdivision C—Declarations about non-legally binding foreign arrangements

Section 48 Subsidiary arrangements that are not legally binding

1027. Section 48 provides a discretion for the Minister to make a declaration in relation to subsidiary arrangements that are not legally binding.

1028. Subsection 48(1) provides that the Minister may make a declaration under subsection 48(2) or (3) in relation to a subsidiary arrangement if:

a. subsection 45(1) is satisfied in relation to the subsidiary arrangement, and

b. the subsidiary arrangement is not legally binding.

1029. All subsidiary arrangements which are not legally binding are covered by this provision, whether the contravening foreign arrangement under the auspices of which the subsidiary arrangement is made is legally binding under Australian law, legally binding under foreign law, or is not legally binding. Under subsection 9(2), an arrangement is ***legally binding*** if it confers legal rights or imposes legal obligations that are legally enforceable under an Australian law or a foreign law (as defined in clause 4). Subsidiary arrangements will be considered on a case-by-case basis.

1030. This provision is necessary for the enforcement of this legislative framework. In some cases, subsidiary arrangements may have the same intended effect or operation as a foreign arrangement that has been invalidated, terminated or rendered inoperable under the requirements of this Act. To achieve the policy intention of the Act, subsidiary arrangements that achieve substantially the same effect as contravening foreign arrangements must also be dealt with.

1031. In addition, subsidiary arrangements can themselves impact upon Australia’s foreign relations. For example, subsidiary arrangements often represent the practical implementation of a foreign arrangement, and may be foreseen, intended or encouraged by the parties to the foreign arrangement. This could occur where the foreign arrangement contains high level political commitments, such as memoranda of understanding related to collaboration or capacity building.

1032. Paragraph 48(1)(a) provides that the Minister may only make a declaration about a subsidiary arrangement that is not legally binding if subsection 45(1) is satisfied in relation to the subsidiary arrangement. Subsection 45(1) provides that the Minister may make a declaration in relation to a subsidiary arrangement under this Division if:

a. either:

i. a declaration is in force under subsections 41(2) or (3), 42(2) or 43(2) or (3) in relation to the foreign arrangement

ii. the foreign arrangement was entered in contravention of subsection 22(1) or 36(3), or

iii. clause 4, 5 or 6 of Schedule 1 applies to the foreign arrangement, and

b. the Minister is satisfied that the subsidiary arrangement:

i. adversely affects, or is likely to adversely affect, Australia's foreign relations, or

ii. is, or is likely to be, inconsistent with Australia's foreign policy.

1033. The first note under subsection 48(1) provides that the Minister must take into account certain matters provided for in section 51 when considering whether to make a declaration under subsections 48(2) or (3).

1034. These matters must be taken into account as they relate to the State or Territory to which the subsidiary arrangement relates. This will be the State or Territory related to the State/Territory entity that is party to the head foreign arrangement under the auspices of which the subsidiary arrangement was entered. For example, if the State/Territory entity to the head foreign arrangement is a Western Australian government Department, the subsidiary arrangement relates to the State of Western Australia. Therefore, the Minister must consider these matters in relation to Western Australia.

1035. The factors the Minister must take into account when considering whether to make a declaration under subsections 48(2) or (3) are:

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe)

h. any other matter that the Minister considers is relevant.

1036. The requirement that the Minister have regard to these matters will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration in relation to a subsidiary arrangement that is not legally binding. Non-binding arrangements can still reflect important commitments between parties, so it is appropriate for these factors to be considered by the Minister.

1037. For example, if a non-legally binding subsidiary arrangement was very close to completion, and this information was provided to the Minister, the Minister must take this into account in making a declaration under this section, and in consideration of that matter, it would be open to the Minister to decide to declare that the arrangement should be varied (rather than declare that it is not in operation, or require that it be terminated). Alternatively, the Minister might not make a declaration at all.

1038. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning the matters has been given to them in accordance with subsection 51(3). The matters can be considered together or separately.

1039. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

1040. The second note under subsection 48(1) informs the reader that section 49 deals with general matters about the declaration, including revocation and giving notice to the parties.

1041. Section 48 provides different options for the Minister when making a declaration in relation to a subsidiary arrangement that is not legally binding. The Minister may make a declaration that:

- the subsidiary arrangement is not in operation under subsection 48(2), or
- the subsidiary arrangement is to be varied or terminated under subsection 48(3).

1042. The different mechanisms in subsections 48(2) and (3) give the Minister flexibility and a range of options to address the nature of the subsidiary arrangement and other circumstances. For example, if the Minister considers that only certain parts of the subsidiary arrangement need to be amended to manage the effect on Australia's foreign relations, the Minister could make a declaration under subsection 48(3) to require the variation of the arrangement, allowing it otherwise to remain in operation. Additionally, depending on the nature of the subsidiary arrangement, the Minister may consider it appropriate to require parties to terminate in accordance with a termination process outlined in the subsidiary arrangement, rather than declare it not in operation. The Minister may also consider that a particular option is preferable over another based on his or her assessment of the factors under subsection 51(2) (as discussed above in relation to that provision).

1043. These powers are discretionary and the Minister need not make a declaration regarding a subsidiary arrangement covered by subsection 48(1). Subsidiary arrangements will not be automatically deemed not to be in operation by operation of this Act. The Minister will assess subsidiary arrangements on a case-by-case basis to decide whether rendering them not in operation is necessary to manage and protect Australia's foreign relations and foreign policy.

1044. Subsections 48(2) and (3) provide the Minister with powers to make a written declaration about a subsidiary arrangement.

1045. Subsection 48(2) provides the Minister with a power to make a written declaration that a subsidiary arrangement is not in operation.

1046. Paragraph 48(2)(a) provides that the declaration may provide that:

a. the subsidiary arrangement:

    i. is not in operation, to the specified extent and from the specified day, or

    ii. if the foreign (head) arrangement was entered in contravention of subsection 22(1) or 36(3)—is not, and is taken never to have been, in operation to the specified extent.

1047. Subparagraph 48(2)(a)(i) allows the Minister to declare a subsidiary arrangement to be not in operation *to the specified extent* and *from the specified day*. This provides the Minister with flexibility to respond to the specific circumstances of the case and only render inoperable a subsidiary arrangement to the minimum extent necessary to manage the impact of the arrangement on Australia's foreign relations or foreign policy. The Minister can also manage the impact on the parties by specifying a day on which the subsidiary arrangement becomes inoperable to the specified extent. For example, this might allow the parties to make appropriate arrangements in anticipation of that day.

1048. Subparagraph 48(2)(a)(ii) applies if the foreign arrangement (under the auspices of which the subsidiary arrangement was entered) was entered in contravention of subsection 22(1) (which prohibits core State/Territory entities from entering a core foreign arrangement if the Minister's approval is not in force) or subsection 36(3) (which requires a State/Territory entity to comply with a declaration from the Minister prohibiting that entity from entering a non-core foreign arrangement). In such circumstances, where the foreign arrangement was entered in contravention of the Act, it is appropriate that a subsidiary arrangement entered under the auspices of that contravening foreign arrangement is, and is taken to always have been, not in operation to the specified extent.

1049. The Minister need not declare that the whole of the subsidiary arrangement is not in operation, but has the power to specify the extent to which the arrangement is not in operation. This would allow the Minister to only declare that parts of the subsidiary arrangement, such as those parts which directly reference the head foreign arrangement, or those parts which are contemplated by the head foreign arrangement, are not in operation. This complements subsection 48(6), which provides that the Minister's declaration-making power is limited to the extent that the subsidiary arrangement was entered under the auspices of the head arrangement (discussed further below). Alternatively, the Minister could specify that the subsidiary arrangement is not in operation in its entirety.

1050. Paragraphs 48(2)(b) and (c) provide that the Minister's declaration may prohibit conduct in relation to a subsidiary arrangement that has been declared not to be in operation by regulated Australian parties and other parties to the arrangement.

1051. ***Regulated Australian party*** is defined in section 4 to mean any of the following entities that are a party to an arrangement (but not entities prescribed by the rules as not being regulated Australian parties):

- a State/Territory entity
- an individual who is an Australian citizen or permanent Australian resident
- an Australian entity within the meaning of the *Foreign Acquisitions and Takeovers Act 1975*
- a partnership or an association incorporated or formed under an Australian law
- any other entity prescribed by the rules to be a regulated Australian party.

1052. The term 'other parties' is not defined, but may be foreign parties or Australian parties which do not fall within the definition of regulated Australian parties. This would include those prescribed under the rules as not being regulated Australian parties.

1053. In relation to regulated Australian parties, paragraph 48(2)(b) prohibits each regulated Australian party, to the specified extent and from the specified day, from doing the following:

i. giving effect to the arrangement

ii. holding out, or conducting itself on the basis, that it can give effect to the arrangement, or

iii. holding out, or conducting itself on the basis, that the arrangement is in operation.

1054. This prohibition in relation to regulated Australian parties operates extraterritorially by virtue of section 59 (that is, regulated Australian parties are prohibited from engaging in these activities both within and outside Australia).

1055. In relation to other parties to the subsidiary arrangement, paragraph 48(2)(c) prohibits each other party, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement in Australia

b. holding out in Australia, or conducting itself in Australia on the basis, that it can give effect to the arrangement, or

c. holding out in Australia, or conducting itself in Australia on the basis, that the arrangement is in operation.

1056. This subsection only prohibits other parties from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

1057. These prohibitions are essential to ensure that parties to the subsidiary arrangement do not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite

the arrangement being rendered not in operation by virtue of the Minister's declaration. This ensures that the scheme in this Act is not rendered ineffective by parties being able to informally give effect to an arrangement, despite it not being in operation.

1058. For example, under this paragraph, a regulated Australian party would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to, or continuing to publish, the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

1059. Subsection 48(2) provides that the Minister's declaration made under paragraph 48(2)(a) has effect accordingly.

1060. Paragraph 48(3)(a) provides that the Minister may make a declaration that each regulated Australian party to a subsidiary arrangement must vary or terminate the arrangement in accordance with any specified requirements.

1061. For example, the Minister may make a declaration requiring regulated Australian parties to vary the subsidiary arrangement to remove certain provisions, or to terminate the arrangement as a whole in accordance with specified requirements, such as within certain timeframes.

1062. Subsection 48(5) provides that, for the purposes of paragraph 48(3)(a), the declaration may require that the subsidiary arrangement be varied or terminated in accordance with any variation or termination clause of the arrangement, or in accordance with any other requirements, or in accordance with any variation or termination clause and other requirements.

1063. This gives the Minister discretion to determine the manner in which an arrangement is varied or terminated. For example, the Minister may require that the arrangement be varied in accordance with any variation provisions in the arrangement itself, in addition to any other requirements the Minister sees fit to include.

1064. Subparagraph 48(3)(a)(ii) requires the regulated Australian parties to, as soon as practicable after complying with the requirement to vary or terminate the arrangement, notify the Minister of their compliance with that requirement. This notification must be in writing.

1065. This notification requirement ensures that the Minister is informed when the Australian regulated parties have complied with the requirement in a declaration to vary or terminate the subsidiary arrangement. If the parties have not complied, the Minister may seek an injunction to enforce the declaration (as per paragraph 52(1)(l)).

1066. Paragraphs 48(3)(b) and (c) provide that the Minister's declaration may prohibit conduct in relation to the varied or terminated subsidiary arrangement by regulated Australian parties and other parties to the arrangement.

1067. In relation to regulated Australian parties, paragraph 48(3)(b) prohibits each regulated Australian party, to the specified extent and from the specified day, from doing the following:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

1068. This prohibition in relation to regulated Australian parties operates extraterritorially by virtue of section 59 (that is, regulated Australian parties are prohibited from engaging in these activities both within and outside Australia).

1069. In relation to other parties to the subsidiary arrangement, paragraph 48(3)(c) prohibits each other party, to the specified extent and from the specified day, from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

1070. This prohibition is necessary to ensure that the other parties to the subsidiary arrangement do not rely upon, give effect to or hold out the arrangement as still in effect to the extent that it has been varied or terminated in Australia, despite the arrangement being required to be varied or terminated by Ministerial declaration under subsection 48(3). This is a corresponding restriction on the other parties to the arrangement, complementing the prohibition in paragraph 48(3)(b).

1071. This subsection prohibits other parties that are not regulated Australian parties from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

1072. Subsection 48(4) provides that each party to the subsidiary arrangement, whether or not an Australian regulated party, must comply with a declaration made under this section to the extent that the declaration applies to that party and if the Minister has given the party a copy of the declaration under subsection 49(5). The Minister will be able to seek an injunction from the High Court or Federal Court to enforce compliance (see paragraph 52(1)(l)).

1073. As set out above, subsection 48(5) provides that, for the purposes of paragraph 48(3)(a), the declaration may require that the subsidiary arrangement be varied or terminated in accordance with any variation or termination clause of the arrangement, in accordance with any other requirements, or in accordance with both a variation or termination clause and other requirements.

1074. Subsection 48(6) provides that where the Minister decides to make a declaration under subsection 48(2) or (3), he or she may only do so to the extent that the subsidiary arrangement was entered under the auspices of the head arrangement. This will ensure that the Minister has discretion to only render inoperable a subsidiary arrangement to the extent necessary to protect and manage Australia's foreign relations.

1075. Subsection 48(7) provides that Ministerial declarations made under subsections 48(2) and (3) are not legislative instruments. The effect of this provision is to clarify that Ministerial declarations will not be legislative instruments for the purposes of the Legislation Act. This provision is declaratory in effect, as Ministerial declarations under these

provisions are not of a legislative character. The declarations are administrative in nature, as they provide for the application of the Act to a particular subsidiary arrangement and the parties to that arrangement on a case-by-case basis.

Subdivision D—Matters relating to declarations under this Division

Section 49 Matters relating to declarations about subsidiary arrangements

1076. Section 49 provides for a range of matters relating to Ministerial declarations made under subsections 46(2) or (3), 47(2) or 48(2) or (3) in relation to subsidiary arrangements.

1077. Subsection 49(1) provides that this section applies if the Minister makes a declaration under:

- subsection 46(2), which allows the Minister to make a declaration that a subsidiary arrangement that is legally binding under Australian law is invalid and unenforceable and prevents parties from giving effect to that subsidiary arrangement
- subsection 46(3), which allows the Minister to make a declaration requiring a regulated Australian party to vary or terminate a subsidiary arrangement that is legally binding under Australian law and prevents parties from giving effect to that subsidiary arrangement
- subsection 47(2), which allows the Minister to make a declaration requiring a regulated Australian party to vary or terminate a subsidiary arrangement that is legally binding under foreign law and prevents parties from giving effect to that subsidiary arrangement
- subsection 48(2), which allows the Minister to make a declaration that a subsidiary arrangement that is not legally binding is not in operation and prevents parties from giving effect to that subsidiary arrangement, and
- subsection 48(3), which allows the Minister to make a declaration requiring a regulated Australian party to vary or terminate a subsidiary arrangement that is not legally binding and prevents parties from giving effect to that subsidiary arrangement.

1078. Subsection 49(2) provides that a Minister's declaration must specify the day it comes into force. This provides certainty to parties about the day upon which the prohibitions on giving effect to the subsidiary arrangement take effect in relation to the parties. This allows the parties to manage their affairs accordingly, to avoid unintentionally breaching the prohibition.

1079. Subsection 49(3) provides that the Minister may revoke a declaration if he or she ceases to be satisfied of the matters on which he or she made the declaration. For example, if the Minister revokes a decision in relation to the relevant foreign arrangement, under the auspices of which the subsidiary arrangement was made, then the Minister would cease to be satisfied that the criteria in paragraph 45(1)(a) are met and that the Minister has the ability to make a declaration about the subsidiary arrangement. In that case, the Minister would revoke a declaration in relation to the related subsidiary arrangements under this subsection.

1080. If the Minister decides to revoke a declaration, subsection 49(6) provides that he or she is required to take reasonable steps to provide the parties with a written notice that states that the declaration is revoked as soon as practicable. This provision only requires the Minister to take reasonable steps, noting the practical difficulties in providing written notice to certain foreign parties to the arrangement.

1081. Subsection 49(4) provides that the Minister may only revoke a declaration prior to it coming into force. As such, the Minister can only revoke a declaration up until the day on which it comes into force as specified in the declaration. This will ensure that the parties to the subsidiary arrangement have certainty as to its status and effect, before taking irreversible action to terminate the arrangement.

1082. Subsection 49(5) provides that the Minister must take reasonable steps to provide the parties to the subsidiary arrangement with notice of the decision to make a declaration as soon as practicable. The Minister is required to provide a written notice that states his or her decision to make the declaration and provide a copy of the declaration. The Minister's notice must also comply with any requirements prescribed by the rules.

1083. This ensures that all parties have notice of the Minister's decision and access to a copy of the declaration, and therefore are on notice of their obligations and any prohibitions under the relevant provision.

1084. The Minister's notice may include information additional to that required by paragraphs 49(5)(a), (b) and (c), which serve as the minimum requirements. However, there is no requirement for the Minister to provide reasons for his or her decision, which is made clear by the exclusion of procedural fairness in section 58. In particular, the Minister is not required to account for his or her consideration of the matters provided for in section 51.

PART 5—OTHER MATTERS

1085. Part 5 of this Act sets out provisions which relate to the enforcement, application and general operation of the Act.

1086. This includes provisions enabling the Minister to seek injunctions to enforce compliance with the Act (section 52), requiring the Minister to establish a register for decisions and notices provided under the Act (section 53), providing for the Minister to make rules under the Act (section 54), providing for delegation by the Minister of some of the powers under the Act (section 56) and providing for compensation for acquisitions of property by the Commonwealth (section 57).

Division 1—Simplified outline of this Part

Section 50 Simplified outline of this Part

1087. Section 50 sets out a simplified outline of Part 5 of the Act.

1088. This outline is included to assist readers to understand the substantive provisions of Part 5 of the Act. It is not intended to be comprehensive and readers should rely upon the substantive provisions of this Part.

Division 2—Matters that the Minister must take into account when making declarations under this Act

Section 51 Matters that the Minister must take into account

1089. Section 51 provides for certain matters the Minister must take into account when making a decision whether to make a declaration in relation to an arrangement under the Act.

1090. Subsection 51(1) provides that this section applies to the following subsections in this Act:

a. subsection 35(2) (which is about declarations that prohibit State/Territory entities from negotiating non-core foreign arrangements)

b. subsection 36(2) (which is about declarations that prohibit State/Territory entities from entering non-core foreign arrangements)

c. subsection 41(2) or (3) (which are about declarations that affect foreign arrangements that are legally binding under Australian law)

d. subsection 42(2) (which is about declarations that affect foreign arrangements that are legally binding under foreign law)

e. subsection 43(2) or (3) (which are about declarations that affect foreign arrangements that are not legally binding)

f. subsection 46(2) or (3) (which are about declarations that affect subsidiary arrangements that are legally binding under Australian law)

g. subsection 47(2) (which is about declarations that affect subsidiary arrangements that are legally binding under foreign law), or

h. subsection 48(2) or (3) (which are about declarations that affect subsidiary arrangements that are not legally binding).

1091. These provisions concern the Minister's discretionary ability to make declarations in relation to non-core foreign arrangements (under Part 3), foreign arrangements that are in operation (under Part 4, Division 2) and subsidiary arrangements (under Part 4, Division 3).

1092. The term 'arrangement' as referred to in subsections 51(1), (2) and (3) covers the Minister's declaration-making powers in relation to negotiations (in relation to subsection 35(2)), entry into arrangements (in relation to subsection 36(2)) and arrangements in operation (in relation to Part 4, Divisions 2 and 3).

1093. Subsection 51(2) provides the list of matters that the Minister must take into account, in relation to the State or Territory to which the arrangement relates, when making the decision whether to make a declaration under the subsections listed in subsection 51(1):

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe), and

h. any other matter that the Minister considers is relevant.

1094. Subsection 51(2) provides that the Minister is required to consider these matters to the extent that information concerning those matters has been given to the Minister by the State or Territory, in accordance with subsection 51(3), which is discussed below.

1095. The matters listed in subsection 51(2) must be taken into account as they relate to the State or Territory to which the subsidiary arrangement relates. This will be the State or Territory related to the State/Territory entity that is:

- proposing to enter or is already engaging in negotiations in relation to a non-core foreign arrangement

- proposing to enter a non-core foreign arrangement
- a party to a foreign arrangement, or
- a party to the head foreign arrangement under the auspices of which the subsidiary arrangement was entered.

1096. Where the State/Territory entity that is party to the arrangement is a State or Territory in its own right, the matters in subsection 51(2) must be considered in relation to that State or Territory. For example, where the State/Territory entity that is a party to an arrangement is the State of Queensland, they will also be the State to which the arrangement relates and in relation to which the Minister must take into account the matters listed in subsection 51(2).

1097. Where another State/Territory entity is party to the arrangement, the matters in subsection 51(2) must be considered in relation to the State or Territory to which the State/Territory entity relates. In relation to a subsidiary arrangement, this will be the State or Territory related to the State/Territory entity that is party to the head foreign arrangement under the auspices of which the subsidiary arrangement was entered. For example, if the State/Territory entity to the head foreign arrangement is a Western Australian government Department, the subsidiary arrangement relates to the State of Western Australia. Therefore, the Minister must consider these matters in relation to Western Australia.

1098. The requirement that the Minister have regard to the matters in subsection 51(2) will ensure that the Minister fully considers the implications and consequences for the relevant State or Territory of making a declaration in relation to an arrangement.

1099. For example, a declaration that an arrangement which is legally binding is invalid could have significant financial consequences for the relevant State or Territory (such as in relation to major infrastructure contracts). If this information has been provided to the Minister, the Minister must take this into account in considering whether to make a declaration. If the Minister is of the view that the declaration may result in significant financial consequences for the State or Territory, it would be open to the Minister to decide to declare that the arrangement should be varied (rather than declare it invalid or require that it be terminated). Alternatively, the Minister might not make a declaration at all

1100. The Minister must consider all of the matters in subsection 51(2) to the extent that information concerning those matters has been given to the Minister. These matters can be considered together or separately, as in some cases they may be so interconnected that they cannot be considered separately. For example, the extent of the performance of the subsidiary arrangement may be interconnected with the financial consequences for the relevant State or Territory.

1101. Paragraph 51(2)(h) provides that the Minister may consider any other matter that he or she considers to be relevant. This recognises that the Minister is not limited to considering the matters listed in subsection 51(2).

1102. Subsection 51(3) provides that a State or Territory may, on a discretionary basis, give the Minister information concerning the matters listed in subsection 51(2), but if they choose to do so, they must comply with certain requirements. The information may only be given:

a. in writing

b. in the approved form (if any), and

c. in the approved way (if any).

1103. This will allow the relevant State or Territory (which may be different to the State/Territory entity that is a party to the arrangement) to put before the Minister any information that is related to the matters listed in subsection 51(2). It will be important, and in the State or Territory's interests, to provide this information to the Minister for the purposes of the Minister's consideration of these matters as the requirement for the Minister to consider the matters in subsection 51(2) is limited to the extent that information concerning those matters has been given to the Minister.

1104. The Minister is not required to provide reasons for his or her decisions under this Act, by virtue of the exclusion of procedural fairness under section 58. As such, the Minister does not have to account for his or her consideration of these matters as part of any declaration the Minister decides to make that is referred to in subsection 51(1).

Division 3—Enforcement

Section 52 Injunctions

1105. Section 52 provides that the Minister may seek an injunction from the High Court or Federal Court in certain circumstances to require entities regulated by this Act to comply with certain provisions.

1106. The Minister's ability to seek injunctive relief and the court's ability to grant it is essential to the effectiveness of the framework established by this Act. It will enable the Minister to deal with non-compliance where it is necessary to enforce the scheme and protect and manage Australia's foreign relations. Injunctive relief is an appropriate mechanism in these circumstances, rather than seeking to impose civil or criminal penalties on State/Territory entities or foreign entities.

1107. Subsection 52(1) outlines the circumstances in which the Minister's power to seek an injunction applies.

1108. Subsection 52(1) provides that the Minister must be satisfied that an entity has contravened, is contravening, or is proposing to contravene a provision listed in paragraphs 52(1)(a) to (o).

1109. This recognises that the Minister may become aware that an entity plans to contravene a relevant provision of the Act before the contravention occurs, or that an entity is in the process of contravening such a provision. As such, this ensures that the Minister may seek an injunction to proactively prevent or stop a contravention, as well as in circumstances where a contravention has already occurred.

1110. For example, the Minister may be able to seek an injunction if he or she becomes aware that a core State/Territory entity has planned a series of negotiations in relation to an arrangement with a core foreign entity, was in the process of negotiating that arrangement or had completed negotiations, in contravention of subsection 15(1).

1111. The term ‘entity’ is used in section 52 to cover the broad range of parties that are regulated by this Act, by virtue of being a party to a foreign arrangement or subsidiary arrangement covered by the Act. This includes State/Territory entities, core State/Territory entities, foreign entities, core foreign entities, regulated Australian parties and other parties.

1112. Subsection 52(1) provides that the provisions that section 52 applies to, and therefore the Minister may seek an injunction for a contravention of, are:

a. subsection 15(1), which prohibits core State/Territory entities from negotiating core foreign arrangements without the Minister’s approval

b. subsection 16(1), which requires core State/Territory entities to notify the Minister about proposed negotiations with core foreign entities

c. subsection 22(1), which prohibits core State/Territory entities from entering core foreign arrangements without the Minister’s approval

d. subsection 23(1), which requires core State/Territory entities to notify the Minister about proposals to enter core foreign arrangements

e. subsection 29(1), which requires core State/Territory entities to notify the Minister about entering core foreign arrangements

f. subsections 30(3), (4) and (5), 31(2), (3) and (4), and 32(3), (4) and (5), which require core State/Territory entities and core foreign entities that are party to unlawful core foreign arrangements to take certain steps and/or not engage in certain activities or conduct

g. subsection 34(1), which requires State/Territory entities to notify the Minister about proposals to enter non-core foreign arrangements

h. subsection 35(3), which prohibits State/Territory entities from negotiating non-core foreign arrangements in contravention of a Ministerial declaration

i. subsection 36(3), which prohibits State/Territory entities from entering non-core foreign arrangements in contravention of a Ministerial declaration

j. subsection 38(1), which requires State/Territory entities to notify the Minister about entering non-core foreign arrangements

k. subsections 41(4) or (5), 42(3) or (4) and 43(4) or (5), which require State/Territory entities and foreign entities that are party to non-core foreign arrangements to take certain steps and/or not engage in certain activities or conduct, pursuant to a Ministerial declaration

l. subsections 46(4), 47(3) or 48(4), which require parties to subsidiary arrangements which give effect to foreign arrangements to take certain steps and/or not engage in certain activities or conduct, pursuant to a Ministerial declaration

m. subclause 2(3) of Schedule 1, which requires State/Territory entities to notify the Minister about pre-existing foreign arrangements that are core foreign arrangements

n. subclause 3(2) of Schedule 1, which requires State/Territory entities to notify the Minister about pre-existing non-core foreign arrangements, and

o. subclauses 4(3), (4) or (5), 5(2), (3) or (4), or 6(3), (4) or (5) of Schedule 1, which require core State/Territory entities and core foreign entities that are party to pre-existing foreign arrangements that are core foreign arrangements, where the relevant notice was not provided to the Minister, take certain steps and/or not engage in certain activities or conduct.

1113. This will ensure that the Minister can enforce the key obligations and prohibitions under this Act, which are essential to the Commonwealth's ability to manage and protect Australia's foreign relations (which is the object of the Act, as set out in section 5).

1114. Subsection 52(2) provides that the Minister may apply to the court for an injunction to require the entity to comply with the relevant provision of the Act.

1115. Section 4 defines ***court*** for the purposes of this Act to mean the High Court of Australia and the Federal Court of Australia. These are the most appropriate courts to decide matters under this Act, which will likely deal with foreign relations, foreign policy and constitutional considerations.

1116. An injunction allows a court to require the relevant entity to cease contravention of the particular provision. Failure to comply with an injunction granted by the court will constitute contempt of court, in accordance with existing court rules and procedures.

1117. Subsection 52(3) provides that the court must grant an injunction on such terms it considers appropriate if it is satisfied that the entity has contravened, is contravening or is proposing to contravene the relevant provision of this Act.

1118. Where the court is satisfied of the contravention, it will be required to grant an injunction under this section. This provides the court with the discretion to evaluate whether there is in fact a contravention by an entity in a given case as well as the terms on which an injunction is to be granted.

Division 4—The Public Register

Section 53 The Minister must keep a public register

1119. Section 53 requires the Minister to keep certain information relating to foreign arrangements considered under the Act on a publicly available register.

1120. The Public Register (the Register) is a transparency measure. It is intended to ensure the public availability of certain information relating to the application of this Act and the foreign arrangements that fall within its scope.

1121. Subsection 53(1) provides that the Minister must keep a register of information relating to:

a. each foreign arrangement for which:

    i. a State/Territory entity has given a notice to the Minister under this Act

    ii. the Minister has made a decision under this Act, or

    iii. sections 30, 31 or 32, or clauses 4, 5 or 6 of Schedule 1 has applied (but only where the Minister is aware of the application of those sections to the foreign arrangement), and

b. each subsidiary arrangement of a foreign arrangement, as detailed above, for which:

    i. a State/Territory entity has given a notice to the Minister under this Act, or

    ii. the Minister has made a decision about under Part 4, Division 3.

1122. This subsection ensures that the Minister must keep a register of information relating to all arrangements, whether foreign arrangements or subsidiary arrangements, which are subject to, and may be affected by, the operation of this Act.

1123. Subparagraph 53(1)(a)(iii) clarifies that the Minister is only required to keep a register of information relating to foreign arrangements which are invalid and unenforceable, not in operation or required to be terminated by operation of Part 2, Division 4 or Division 3 of Schedule 1, to the extent that the Minister is aware of the application of those provisions to the relevant arrangement.

1124. In relation to Part 2, Division 4, this subparagraph recognises that the Minister may not be aware that a core State/Territory entity has unlawfully entered a core foreign arrangement under that Part until the State/Territory entity provides the requisite notice under section 29 (in relation to core foreign arrangements).

1125. In relation to Division 3 of Schedule 1, this subparagraph recognises that the Minister would not necessarily be aware of pre-existing foreign arrangements that are subject to those provisions as Division 3 applies where a core State/Territory entity has failed to notify the Minister of pre-existing foreign arrangements that are core foreign arrangements under Division 2.

1126. Subsection 53(2) specifies the information that must be included on the Register relating to each foreign arrangement and subsidiary arrangement outlined at subclause 53(1). This includes:

a. the title of the arrangement

b. the parties to the arrangement

c. whether any decisions (including declarations) were made by the Minister under this Act in relation to each arrangement, and

d. any information prescribed by the rules.

1127. Including the title of the foreign or subsidiary arrangement (paragraph 53(2)(a)) will ensure that the arrangement can be easily identified. Outlining the parties to the foreign arrangement (paragraph 53(2)(b)) will provide transparency as to which State/Territory entities and foreign entities, core or otherwise, are party to the arrangement.

1128. Paragraph 53(2)(c) requires the Minister to outline which arrangements have been subject to a decision or declaration under this Act. This is particularly important for parties seeking to enter subsidiary arrangements under a foreign arrangement. The Register will give these parties awareness of the status of those foreign arrangements, including whether a foreign arrangement is invalid and unenforceable, not in operation or required to be terminated by operation of this Act or by Ministerial declaration. The Register will allow such parties to be on notice about the consequences that may flow to any subsidiary arrangement they may enter, given the Minister's power to make declarations in relation to subsidiary arrangements entered under the auspices of unlawful foreign arrangements under Part 4, Division 3.

1129. Paragraph 53(2)(d) allows the Minister to prescribe by the rules any additional information he or she considers should be included on the Register. This provides the Minister with the flexibility to prescribe additional information that may support the transparency principles underpinning the Register.

1130. Subsection 53(3) provides that, despite subsection 53(2), certain information must not be included on the Register.

1131. These exceptions to the requirement to include prescribed information on the publicly available Register reflect circumstances in which it would not be appropriate for the Minister to publish such information, or the publication of that information would have a detrimental impact.

1132. Subsection 53(3) provides that the following information must not be included on the Register:

a. information that the Minister is satisfied:

   i. is commercially sensitive

   ii. would disclose the contents of document prepared for the purposes of a meeting of the Cabinet of a State or Territory

   iii. would disclose the deliberations of a meeting of the Cabinet of a State or Territory

   iv. is the subject of legal professional privilege

   v. is protected by public interest immunity

   vi. affects national security, or

b. information about notices given by a core State/Territory entity in relation to proposed negotiations with core foreign entities under subsection 16(1)

c. information about the Minister's recommended changes to a core foreign arrangement, in accordance with paragraph 27(b), which are included in a notice under section 27, or

d. any information prescribed by the rules.

1133. The exceptions in paragraph 53(3)(a) represent common and well-understood exemptions from publication requirements.

1134. The terms commercially sensitive, legal professional privilege, public interest immunity and national security are not defined and are intended to be given their ordinary meaning.

1135. Subparagraph 53(3)(a)(i) provides that information which is commercially sensitive must not be included on the Register. This is intended to protect against the public release of information which would be detrimental to the parties' commercial operations, or disclose confidential commercial information. For example, the Minister must not include information on the Register to the extent that the information was sensitive or confidential commercial information relating to a company's operations, expenditure or employees, or was other sensitive information that could cause detriment if released.

1136. Subparagraphs 53(3)(a)(ii) and (iii) provide that information which would disclose the contents of a document prepared for the purposes of a State or Territory Cabinet meeting, or which would disclose the deliberations of such a meeting, must not be included on the Register. This represents longstanding protections for deliberations of Cabinet, recognising that the release of such information can prejudice the effective working of governments.

1137. Subparagraph 53(3)(a)(iv) provides that information which is subject to legal professional privilege must not be not be included on the Register. This recognises the longstanding common law immunity of legal professional privilege and that this Act should not require the disclosure of information which would reveal communications between a client and their lawyer, made for the dominant purpose of giving or obtaining legal advice or services.

1138. Subparagraph 53(3)(a)(v) provides that information which is protected by public interest immunity must not be included on the Register. This is also a common law immunity and this exemption ensures that the Minister is not required to disclose information publically which would be prejudicial to the public interest.

1139. Finally, subparagraph 53(3)(a)(vi) provides that information which affects national security must not be included on the Register. This may include information which relates to intelligence assessments or other national security information. The term national security is not defined but could include matters relating to the protection of Australia and its people from threats and harm, including in relation to espionage, foreign interference, terrorism and political violence. It may also include matters in relation to the defence and protection of the integrity of Australia's borders as well as information relating to the activities of security intelligence and law enforcement agencies.

1140. Paragraph 53(3)(b) provides that information about notices given by a core State/Territory entity in relation to proposed negotiations with a core foreign entity under Part 2 must not be included on the Register. This recognises that publication of such

information could adversely affect the conduct of those negotiations, especially when they are at a preliminary stage. As the Register may still include information on whether the resultant core foreign arrangement was approved by the Minister under Part 2 (and therefore whether that arrangement was entered into contrary to the prohibitions in that Part), this exemption appropriately protects negotiations, without causing detriment to any future subsidiary parties.

1141. In addition, paragraph 53(3)(c) provides that information about the Minister's recommended changes to a foreign arrangement (referred to in paragraph 27(b)) must not be included on the Register. Paragraph 27(b) provides for the Minister, in refusing to give approval to core State/Territory entities seeking to enter into core arrangements with core foreign entities, to recommend changes that—if made—could allow her or him to give approval to the proposed arrangement. Excluding information about the Minister's recommended changes from the Register will ensure that potentially sensitive matters, including bilateral or diplomatic considerations, are not available for public inspection.

1142. Paragraph 53(3)(d) provides that the rules may prescribe any other information of a kind that must not be included on the Register. This ensures that there is flexibility to withhold other types of information from publication, where the Minister is satisfied that to do so may not be appropriate or may be detrimental.

1143. Subsection 53(4) provides that the Register must be made available for public inspection on the internet. This requirement ensures that the broader public has independent access to information relating to foreign arrangements and subsidiary arrangements subject to this Act, and are therefore able to verify the status of a particular negotiation or arrangement. It is intended that the Register would be made publicly available online, which will ensure that members of the public are able to easily access the information included within it.

1144. Subsection 53(4) provides that the Minister may correct or update information on the Register. This is an administrative provision to ensure that the Register reflects the most accurate information in order to inform the public, and parties to potential subsidiary arrangements, of the application of the Act to particular negotiations or arrangements.

Division 5—The rules

Section 54 The rules

1145. Section 54 provides a broad rule making power to the Minister.

1146. Subsection 54(1) provides that the Minister may make rules, by legislative instrument, prescribing matters:

a. required or permitted by this Act to be prescribed; or

b. necessary or convenient to be prescribed for carrying out, or giving effect to, this Act.

1147. This is a broad rule making power and will ensure that the Minister has the authority to make such rules as are necessary to ensure the effective operation of this Act. This provision will therefore provide the Minister with the flexibility to prescribe matters in the rules where further detail is required, necessary or convenient.

1148. In addition, the Minister's rule making power is specifically referred to in a number of provisions, including the ability to prescribe:

- arrangements as exempt arrangements (section 4)
- conduct of a kind which constitutes, or does not constitute, 'giving effect' to an arrangement (section 4)
- entities to be, or not to be, regulated Australian parties (section 4), a State/Territory entity (section 7), or a foreign entity (subsection 8(1))
- an entity to be a core foreign entity (section 10)
- arrangements that have a relationship of a kind with a foreign arrangement to be entered under the auspices of a foreign arrangement (section 12)
- how the Act applies to variations of arrangements (section 13)
- information to be included and documents to accompany a notice regarding proposed negotiations or entry of arrangements, as relevant, under sections 16, 23, 29, 34, or 38
- a longer period for State/Territory entities to give notice to the Minister regarding entry of arrangements under sections 29 or 38
- a longer period for core State/Territory entities to notify a core foreign entity that certain sections apply to the arrangement, and the effect of those sections (paragraphs 30(3)(a), 31(2)(a) or 32(3)(a) and paragraphs 4(3)(a), 5(2)(a) or 6(3)(a) of Schedule 1)
- a longer period for State/Territory entities to take steps to terminate a foreign arrangement binding under foreign law (paragraph 31(2)(a) and paragraph 5(2)(a) of Schedule 1)
- requirements for the Minister's notices of declarations (paragraphs 37(4)(c), 44(6)(c) and 49(5)(c))
- matters to be kept on the Register and information which must not be made available for public inspection (section 53)
- a longer period for State/Territory entities to give notice to the Minister in relation to pre-existing foreign arrangements (paragraphs 2(3)(d) and 3(2)(b) of Schedule 1), and
- information to be included and documents to accompany a notice regarding pre-existing foreign arrangements under subclause 2(5) and 3(3) of Schedule 1).

1149. Rules made under this section are legislative instruments for the purposes of the Legislation Act, and are subject to disallowance. This will ensure appropriate parliamentary scrutiny of any rules made under this section, including by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

1150. Subsection 54(2) clarifies that the rules may not prescribe certain matters which are not appropriately included in rules.

1151. Subsection 54(2) specifies that the rules may not:

a. create an offence or civil penalty

b. provide powers of arrest, detention, entry, search or seizure

c. impose a tax

d. set an amount to be appropriated form the Consolidated Revenue Fund under an appropriation in this Act, or

e. directly amend the text of this Act.

1152. As such, provisions to address any of the matters in paragraphs 54(2)(a) to (e) must be achieved by way of amendments to the Act.

Division 6—The Australian National University

Section 55 Application of this Act to the Australian National University

1153. Section 55 provides for the application of this Act to the Australian National University, which is established by the *Australian National University Act 1991* (Cth).

1154. Subsection 55(2) provides that this Act applies to the Australian National University as if it were a State/Territory entity covered by paragraph 7(e). Paragraph 7(e) defines ***State/Territory entity*** to mean a university established by, or under, a law of a State or Territory.

1155. The note under subsection 55(1) informs the reader that the effect of subsection 55(1) is that the ANU is a State/Territory entity for the purposes of this Act.

1156. It is appropriate for this Act to apply to the ANU even though it is established by Commonwealth, rather than State or Territory, legislation. As a public university, the ANU is equivalent to other public universities established by, or under, State or Territory legislation and may also enter into arrangements with foreign entities that affect Australia's foreign relations. Like many other universities, the ANU has a significant international posture and therefore the capacity to impact upon Australia's foreign relations and foreign policy when entering arrangements with foreign entities.

1157. As a State/Territory entity, the ANU will be subject to the requirements in Part 3, applying to non-core foreign arrangements. The effect of this is that the ANU must notify the Minister about proposed entry (and entry) into an arrangement with a foreign entity. The Minister would be able to make a declaration prohibiting a State/Territory entity from negotiating or entering the arrangement if the Minister is satisfied that the negotiation or arrangement:

a. would adversely affect, or would be likely to adversely affect, Australia's foreign relations, or

b. would be, or would be likely to be, inconsistent with Australia's foreign policy.

1158. Subsection 55(2) provides that, if the ANU is the only State/Territory entity that is a party, or proposed party, to a foreign arrangement, then section 51 does not apply when the Minister is making a decision to make a declaration in relation to the foreign arrangement (paragraph 55(2)(a)) or a subsidiary arrangement of the foreign arrangement (paragraph 55(2)(b)).

1159. Subsection 51(2) provides the list of matters that the Minister must take into account, in relation to the State or Territory to which the arrangement relates, when making the decision whether to make a declaration under the subsections listed in subsection 51(1):

a. the importance of the arrangement in assisting or enhancing the functioning of the State or Territory

b. the extent of the performance of the arrangement

c. whether the declaration would impair the continued existence of the State or Territory as an independent entity

d. whether the declaration would significantly curtail or interfere with the capacity of the State or Territory to function as a government

e. whether the declaration would have significant financial consequences for the State or Territory

f. whether the declaration would impede the acquisition of goods or services by the State or Territory, including, for example, for the purposes of infrastructure

g. whether the declaration would have an effect on the capacity of the State or Territory to complete an existing project that is to be delivered under the arrangement (either at all, or within the intended timeframe), and

h. any other matter that the Minister considers is relevant.

1160. In the case of the ANU, these factors will not be relevant to the Minister's decision. As an entity established by Commonwealth legislation, the Minister's decision about arrangements involving the ANU will not affect a State or Territory in the same way as other entities covered by the definition of State/Territory entity.

Division 7—Other matters

Section 56 Delegation by the Minister

1161. Section 56 provides the Minister with an ability to delegate certain powers under the Act to specified officers in the Department.

1162. Subsection 56(1) provides that the Minister may delegate all or any of his or her powers or functions, other than those powers or functions listed under subsection 56(2), to:

a. the Secretary of the Department, or

b. a person who holds or performs the duties of a Senior Executive Service (SES) officer in the Department.

1163. This broad power of delegation, as limited by subsection 56(2), is necessary to enable the efficient administration of this Act. It is appropriate that the Minister be able to delegate his or her functions or powers to senior members of the Department to provide flexibility and to ensure that decisions under the Act are made in a timely manner. It is not practicable, feasible or necessary for the Minister to personally exercise all powers and functions under the Act, considering the number of arrangements required to be notified. To require as such could lead to delays in making decisions under the Act.

1164. This section only allows delegation to the Secretary or SES level employees. This ensures that the powers and functions of the Act are only exercisable by appropriately senior officers with experience and judgement in matters of foreign affairs, foreign policy and public administration.

1165. However, subsection 56(2) provides that the Minister may not delegate his or her powers or functions which relate to core foreign arrangements, and the making of the rules.

1166. This subsection provides that the Minister may not delegate any of his or her powers of functions under:

a. Part 2 (which relates to negotiating and entering core foreign arrangements)

b. Part 4 in relation to core foreign arrangements, or

c. section 54 (which relates to making the rules).

1167. The requirement that the Minister personally exercise his or her powers in relation to approving negotiations and entry of core foreign arrangements (dealt with in Part 2), and in relation to core foreign arrangements which are in operation (dealt with in Part 4) recognises the significance of those arrangements to Australia's foreign relations. It is appropriate that these decisions are not delegated given the foreign policy considerations required to be assessed by the Minister. Decisions about core foreign arrangements are likely to be more complex and sensitive in relation to core foreign arrangements than foreign arrangements generally, given that the foreign party to a core foreign arrangement is, or is closely connected to, a foreign country.

1168. Paragraph 56(2)(b) provides that the Minister may not delegate his or her powers in relation to core foreign arrangements under Part 4. Therefore, it is open to the Minister to delegate any of his or her other powers or functions under that Part, such as those powers or functions relating to non-core foreign arrangements that are not core foreign arrangements, or subsidiary arrangements.

1169. Delegations under subsection 56(1) must be in writing. Subsection 56(3) specifies that the delegate must comply with any written directions of the Minister in exercising powers or performing functions under the delegation.

1170. It is intended that sections 34AA to 34A of the Acts Interpretation Act relating to delegations apply to delegations under this section. These sections relate to delegations to persons holding a specified office or position from time to time, the effect of delegation and

the exercise of powers and performance of functions that depend upon the opinion of a delegate.

Section 57 Compensation for acquisition of property

1171. Section 57 ensures that any acquisition of property by operation of this Act is done on just terms.

1172. Subsection 57(1) provides that if the operation of this Act would result in the acquisition of property from a person otherwise than on just terms, within the meaning of the Constitution, the Commonwealth is liable to pay a reasonable amount of compensation. This ensures that this Act does not interfere with a person's property rights in a way that contravenes paragraph 51(xxxi) of the Constitution.

1173. Subsection 57(2) confers jurisdiction on the High Court of Australia and the Federal Court of Australia to determine the amount of compensation necessary to ensure that the acquisition takes place on just terms.

1174. Under this subsection, if the Commonwealth and the relevant person do not agree on the amount of compensation, the person may institute proceedings in the court for the recovery of such reasonable compensation as the court determines. Section 4 defines ***court*** for the purposes of this Act as the High Court and the Federal Court.

Section 58 Requirements in relation to procedural fairness

1175. Section 58 provides that the Minister is not required to observe any requirements of procedural fairness in exercising a power or performing a function under this Act.

1176. This provision is intended to represent a clear legislative intention to fully exclude the rules of procedural fairness that may otherwise be applicable to making certain decisions under this Act.

1177. It is appropriate to fully exclude procedural fairness (in terms of both the hearing and bias rules) in the context of this legislative scheme as its object and purpose is to enable the Minister to protect and manage Australia's foreign relations and ensure all Australian government entities act consistently with Australia's foreign policy.

1178. The Minister's decision-making powers and functions under this Act relate to this purpose and involve considerations entirely within the Commonwealth's and, by proxy the Minister's, responsibility and discretion. Australia's foreign relations and foreign policy evolve with time and in response to international events and circumstances, and are not always appropriate to be made public or shared with State/Territory entities, courts or the public at large. This is strengthened by the fact that the Minister's decisions in relation to core foreign arrangements must be personally exercised.

1179. In addition, as this Act predominately regulates the conduct of State or Territory governments, the exclusion of procedural fairness will not unduly trespass on personal rights and liberties.

1180. Given the nature of decisions made under this Act, the Minister's impartiality (or appearance of impartiality) is not relevant to the exercise of his or her decision-making

powers. This is because the Minister's decisions will be based on considerations of foreign policy and foreign relations, as determined by the Commonwealth and promulgated through the Minister. For example, whether an arrangement is approved or subject to a Ministerial declaration under this framework is dependent on whether the Minister is satisfied that the arrangement does not adversely affect Australia's foreign relations and is not inconsistent with Australia's foreign policy.

1181. In addition, as the Minister is not required to observe any requirement of procedural fairness, the Minister is not required to afford persons an opportunity to be heard before exercising powers or performing functions under this Act.

1182. This recognises that, in certain circumstances, the provision of reasons itself could adversely affect Australia's foreign relations, especially to the extent that the decision may be based upon classified information. As such, affording a hearing in these circumstances would defeat the object of the Act, which is to protect and manage Australia's foreign relations.

Section 59 Extraterritorial application and extension to external Territories

1183. Section 59 provides that the Act applies throughout Australia, including to the external Territories, and has extraterritorial application.

1184. Subsection 59(1) provides that the Act applies both within and outside Australia. Section 4 defines ***Australia***, in a geographical sense, to include the external Territories.

1185. This provision extends the operation of the Act beyond Australia's territorial jurisdiction. This reflects that the Act is intended to apply to foreign arrangements, whether or not those arrangements are made in Australia, and to the conduct of State/Territory entities and regulated Australian parties in giving effect to or holding out an arrangement, wherever that conduct occurs.

1186. For example, the notification obligations in this Act will apply to an arrangement made by a State/Territory entity with a foreign entity even if the arrangement were made in the relevant foreign country (of the foreign entity) or a third country.

1187. The extraterritorial application of the Act is essential to the enforcement of this Act and to ensure that State/Territory entities and regulated Australian parties are not able to avoid the obligations and prohibitions in this Act by negotiating or entering arrangements, or giving effect to such arrangements, outside of Australia.

1188. The extraterritorial application of the Act is modified by certain provisions that limit the Act's operation to 'in Australia'. For example, under subsection 30(5), core foreign entities are prohibited from giving effect to an arrangement that is invalidated by operation of the Act *in Australia*. There are similar modifications to the Act's extraterritorial application in relation to the conduct of:

a. core foreign entities under Part 2, Division 4 and Division 3 of Schedule 1

b. foreign entities under Part 4, Division 2, and

c. parties to subsidiary arrangements which are not Australian regulated parties under Part 4, Division 3.

1189. This Act does not purport to compel foreign parties to act in a certain way except within Australia's territorial jurisdiction, noting that certain foreign parties will enjoy immunities in Australia pursuant to the *Foreign States Immunities Act 1985*.

1190. Subsection 59(2) provides that the Act extends to every external territory.

1191. This provision extends the operation of the Act to Australia's external Territories. This is necessary to ensure that the notification obligations, and associated prohibitions, under this Act apply equally where negotiation of, or entry into, a foreign arrangement occurs in an external Territory.

Section 60 Crown to be bound

1192. Section 60 provides that this Act binds the Crown in each of its capacities.

1193. Accordingly, this Act binds the executive governments of the Commonwealth and of the States and Territories. As this Act primarily regulates the conduct of State/Territory entities (which, as defined in section 4, includes the executive governments of the States and Territories) it is necessary to bind those governments under this Act.

Section 61 Concurrent operation with State and Territory laws

1194. Section 61 addresses the relationship between this Act and State and Territory laws.

1195. Section 61 provides that this Act is not intended to exclude or limit the operation of a law of a State or Territory, to the extent that the law is capable of operating concurrently with this Act.

1196. This section seeks to provide for potential conflicts of law where section 109 of the Constitution may apply, and ensures that State and Territory laws, where relevant, are able to operate concurrently with this Act.

Section 62 Approved forms

1197. Section 62 provides that the Minister may approve forms for the purposes of this Act.

1198. Section 62 provides that the Minister may approve one or more forms for the purposes of a provision of this Act that provides for something to be done in an approved form. The Minister's approval of the form must be in writing.

1199. The provisions in this Act which require State/Territory entities to notify the Minister about proposed negotiations, proposals to enter, or entry into arrangements under Parts 2 and 3, and pre-existing foreign arrangements under Schedule 1 provide that the relevant notice must be in the approved form (if any) (paragraphs 16(2)(b), 23(2)(b), 34(2)(b) and 51(3)(b), and paragraphs 2(5)(a) and 3(3)(b) of Schedule 1).

1200. As such, under this section, the Minister may approve one or more forms for the purposes of providing notice under these provisions. This gives the Minister the ability to determine the most appropriate form for notices to be in for the purposes of this Act.

1201. The Minister may approve more than one kind of form for the purposes of a provision. This gives the Minister and, if he or she does approve more than one kind of form, State/Territory entities, flexibility in the form of notices.

Section 63 Approved ways of giving notices to the Minister

1202. Section 63 provides that the Minister may approve ways in which a State/Territory entity must give a notice for the purposes of this Act.

1203. This section provides that the Minister may approve one or more ways in which a State/Territory entity may or must give a notice for the purposes of a provision of this Act that provides for a notice to be given in an approved way. The Minister's approval of a way of giving notice must be in writing.

1204. The provisions in this Act which require State/Territory entities to notify the Minister about proposed negotiations, proposals to enter, or entry into arrangements under Parts 2 and 3, and pre-existing foreign arrangements under Schedule 1 provide that the relevant notice must be given in the approved way (if any) (paragraphs 16(2)(e), 23(2)(g), 34(2)(f) and 51(3)(c), and paragraphs 2(5)(e) and 3(3)(g) of Schedule 1).

1205. As such, under this subsection, the Minister may approve the manner in which notices can, or must, be provided under those provisions. This gives the Minister the ability to determine the most appropriate manner for notices to be provided to him or her for the purposes of this Act.

Section 64 Schedule 1

1206. Section 64 provides that Schedule 1 has effect. Schedule 1 provides for transitional requirements relating to pre-existing foreign arrangements.

SCHEDULE 1—TRANSITIONAL REQUIREMENTS RELATING TO PRE-EXISTING FOREIGN ARRANGEMENTS

1207. Schedule 1 to the Act provides for transitional requirements relating to pre-existing foreign arrangements.

1208. In order to support the exercise of the Minister's discretion to make declarations in relation to foreign arrangements and subsidiary arrangements in operation under Part 4, this Schedule establishes a requirement for State/Territory entities to notify the Minister of pre-existing foreign arrangements, and any related known subsidiary arrangements.

1209. The requirements in this Schedule ensure that the Minister is made aware of all foreign arrangements that State/Territory entities have entered prior to commencement, or prior to all Parts of this Act commencing, that remain in operation.

1210. Without this requirement, and given many foreign arrangements are not publicly available, the Minister would not know the range of arrangements on foot between State/Territory entities and foreign entities, and the specifics of those arrangements, including the existence of any related subsidiary arrangements. This Schedule therefore requires that State/Territory entities notify the Minister of all pre-existing foreign arrangements which are in operation. This places the Minister in a position to have visibility of all arrangements in operation at the complete commencement of this Act. The Minister will then have information allowing him or her to effectively assess the effect of an arrangement on Australia's foreign relations and foreign policy in order to decide whether or not to exercise his or her discretion to make a declaration under Part 4.

1211. The note under the title to this Schedule refers the reader to section 64 of the Act, which provides that Schedule 1 has effect.

Division 1—Simplified outline of this Schedule

Clause 1 Simplified outline of this Schedule

1212. Clause 1 of Schedule 1 sets out a simplified outline of Schedule 1of the Act.

1213. This outline is included to assist readers to understand the substantive provisions of Schedule 1. It is not intended to be comprehensive and readers should rely upon the substantive provisions of this Schedule.

Division 2—Requirement to notify the Minister about pre-existing foreign arrangements

Clause 2 Requirement to notify Minister about pre-existing foreign arrangements that are core foreign arrangements

1214. Clause 2 of Schedule 1 requires core State/Territory entities to notify the Minister about pre-existing foreign arrangements that are core foreign arrangements (referred to here as pre-existing core foreign arrangements, although not defined in the Act as such).

1215. This notice ensures that the Minister has visibility of all core foreign arrangements to which core State/Territory entities are party, in order to inform the exercise of the Minister's

discretion to make a declaration concerning core foreign arrangements in operation under Part 4. Without this requirement, the Minister may not be aware of all of the relevant core foreign arrangements in operation upon commencement of the Act as a whole, which would limit his or her ability to effectively exercise this discretion, and therefore manage the impact of such arrangements on Australia's foreign relations and foreign policy.

1216. In conjunction with the notification requirements in sections 16 and 23 in relation to prospective core foreign arrangements, and section 29 in relation to core foreign arrangements entered after full commencement of this Act, this clause will give the Minister the full picture of all core foreign arrangements which are in force as of a particular date.

1217. Subclause 2(1) provides that this requirement applies to a pre-existing foreign arrangement between a core State/Territory entity and a core foreign entity (a core foreign arrangement, as defined in section 10) (referred to as a pre-existing core foreign arrangement here).

1218. Subclause 2(2) provides that a ***pre-existing foreign arrangement*** is a foreign arrangement that:

a. is in operation on the commencement day, or

b. comes into operation during the period that:

   i. starts on the day after commencement day, and

   ii. ends on the day before Part 2 of the Act commences.

1219. This subclause ensures that this provision covers all foreign arrangements which are in operation at the time at which all of the provisions of the Act have commenced.

1220. Whether an arrangement is in operation is a question of fact, and may involve consideration of factors such as whether the term of the arrangement has expired and whether the parties are continuing to give effect to the arrangement. The intention is to cover all arrangements that are on foot at the time all of the provisions of the Act have commenced.

1221. An arrangement that has been terminated, or is otherwise not in existence (for example, due to the limited duration of the arrangement) is not required to be notified under this clause. This ensures that this provision does not impose an undue regulatory burden on State/Territory entities to notify of historical arrangements, which do not impact Australia's foreign relations or foreign policy as they are not currently in operation.

1222. Paragraph 2(2)(a) provides that a pre-existing foreign arrangement includes foreign arrangements that are in operation on the commencement day. Section 4 defines the ***commencement day*** as the day that section 1 of the Act commences, which is upon Royal Assent. This will cover arrangements which are entered prior to the commencement of this Act, and continue in operation.

1223. Paragraph 2(2)(b) provides that a pre-existing foreign arrangement includes a foreign arrangement that comes into operation following commencement of section 1 (upon Royal Assent) but prior to the commencement of Part 2 (upon Proclamation, or three months after Royal Assent if a Proclamation has not been made within that period).

1224. This reflects the delayed commencement of Parts 2 and 3 of this Act and addresses a potential regulatory gap by ensuring that that foreign arrangements entered during this period are still brought to the attention of the Minister (as they are not required to be notified under Parts 2 or 3).

1225. Subclause 2(3) provides that the core State/Territory entity must give a notice to the Minister in accordance with subclauses 2(4) and (5) within three months after commencement day, or such longer period as prescribed by the rules (if any).

1226. The three month period allows sufficient time for core State/Territory entities to identify and collate information about all core foreign arrangements currently in operation and provide notice to the Minister. This allows the Minister to promptly and effectively exercise his or her discretion and manage the impact of any of those arrangements on Australia's foreign relations or foreign policy.

1227. Although a core State/Territory entity would not have the full three month period to notify of arrangements entered after the commencement of section 1, but prior to the commencement of Part 2 of the Act, this recognises that such arrangements would be front of mind for core State/Territory entities and they would not be required to undertake historical or other searches to ascertain the required information.

1228. The rules may also prescribe a longer period than three months within which a core State/Territory entity must provide notice to the Minister. This may be warranted where, for example, it becomes clear once the Act has commenced that a longer period is necessary, such as in relation to arrangements entered immediately prior to the commencement of Part 2.

1229. The note under subclause 2(3) informs the reader that if the core State/Territory entity fails to give notice in accordance with this provision before the end of the specified or prescribed period, then Division 3 of this Schedule applies to the relevant arrangement. Division 3 provides that, if a core foreign arrangement is not notified under this clause, the arrangement is deemed to be invalid and unenforceable, not in operation or required to be terminated, as relevant.

1230. Subclauses 2(4) and (5) detail the procedural requirements for notices under this clause.

1231. Subclause 2(4) provides that the notice must be in writing, specify the core foreign arrangement and be accompanied by a copy of the core foreign arrangement.

1232. This subclause ensures that the core State/Territory entity provides sufficient information to enable the Minister to exercise his or her discretion under Part 4, Division 2 to determine whether he or she is satisfied that the foreign arrangement adversely affects Australia's foreign relations or is inconsistent with Australia's foreign policy.

1233. The requirement that the notice be given in writing is necessary given the nature of the information that must be included in the notice. Given that the Minister must rely on this information in order to exercise the discretion in Part 4, it is appropriate for the core State/Territory entity to reduce it to writing.

1234. In addition, the requirement that the notice specify the core foreign arrangement and be accompanied by a copy of the foreign arrangement ensures that the Minister is able to

exercise his or her discretion on the basis of the specific text on the core foreign arrangement. A core State/Territory entity must provide a copy of the foreign arrangement under this provision, regardless of the nature and contents of the arrangement.

1235. For example, a core State/Territory entity must provide the Minister with a copy of the core foreign arrangement under this clause even if it contains information which is commercially sensitive. This recognises that the Minister needs to have all relevant information before them in order to effectively exercise their discretion to make a declaration. However, such sensitive information must not be included on the Register in accordance with subsection 53(3).

1236. Subclause 2(5) provides that the notice must also:

a. be in the approved form (if any)

b. if the core State/Territory entity knows that there is another arrangement that is a subsidiary arrangement of the arrangement:

   i. include details about the subsidiary arrangement, and

   ii. if the core State/Territory entity has a copy of the subsidiary arrangement, be accompanied by a copy of the subsidiary arrangement

c. include any information prescribed by the rules

d. be accompanied by any documents prescribed by the rules, and

e. be given in the approved way (if any).

1237. Paragraph 2(5)(a) provides that, if the Minister approves a form under section 62 for the purposes of this provision, the notice must be in that approved form. Similarly, paragraph 2(5)(e) provides that, if the Minister approves a way of giving notice under section 63 for the purposes of this provision, the notice must be given in that approved way.

1238. Paragraph 2(5)(b) ensures the Minister receives details of any known relevant subsidiary arrangements to the core foreign arrangement.

1239. The requirement that the notice include details about any subsidiary arrangements to the core foreign arrangement within the core State/Territory entity's knowledge, and a copy of such arrangements if available to the core State/Territory entity, ensures that the Minister is able to exercise his or her discretion under Part 4, Division 3 if he or she makes a declaration under Part 4, Division 2 in respect to the relevant foreign arrangement or the foreign arrangement is affected by Division 3 of this Schedule, on the basis of the specific text on the subsidiary arrangement.

1240. Subparagraph 2(5)(b)(ii) only requires the core State/Territory entity to provide a copy of the subsidiary arrangement if the core State/Territory entity has a copy of that arrangement. For example, if a core State/Territory was aware from discussions with a third party that that party had entered into a subsidiary arrangement under the relevant foreign arrangement, the core State/Territory entity would be required to include details about that

subsidiary arrangement in this notice, but would only be required to provide a copy if the third party had given the core State/Territory a copy of the arrangement.

1241. A core State/Territory entity must provide the Minister with a copy of the subsidiary arrangement under this clause even if it contains information which is commercially sensitive. This recognises that the Minister needs to have all relevant information before them in order to effectively exercise their discretion to make a declaration. However, such sensitive information must not be included on the Register in accordance with subsection 53(3).

1242. In addition, the Minister may prescribe in the rules any information that must be included in the notice under paragraph 2(5)(c) and any documents that must accompany the notice under paragraph 2(5)(d). If the rules prescribe these matters, the core State/Territory entity must provide the required information and/or documents with its notice.

1243. These paragraphs give flexibility for the Minister to specify the information that he or she requires in order to consider whether to exercise his or her discretion and assess the consistency of the core foreign arrangement, and any associated subsidiary arrangements, with Australia's foreign policy and their effect on Australia's foreign relations. The ability to approve a form to be used in providing the notice, and a way of giving notice, also allows the Minister to ensure that necessary information is provided in a consistent and methodical manner.

1244. Subclause 2(6) provides that this requirement does not apply to an arrangement that is exempt.

1245. Under section 4, the Minister may prescribe kinds of arrangements as ***exempt arrangements***. Accordingly, a core State/Territory entity is not required by this provision to provide notice to the Minister if it is party to an arrangement of a kind which have been prescribed in the rules as exempt.

1246. This recognises that core State/Territory entities should not be required to provide a notice to the Minister to assist in the exercise of her discretion under Part 4 in relation to arrangements of a kind which have already been assessed by the Minister as exempt from the requirements of the Act by prescription in the rules.

1247. Under paragraph 52(1)(m), the Minister may seek an injunction from the High Court or Federal Court to enforce this requirement. For example, if a core State/Territory entity did not provide a notice to the Minister, or did not notify of specific arrangements, the Minister could seek an injunction from the High Court or Federal Court, requiring the State/Territory entity to provide a notice to the Minister containing the required information.

Clause 3 Requirement to notify Minister about pre-existing foreign arrangements that are non-core foreign arrangements

1248. Clause 3 of Schedule 1 requires State/Territory entities to notify the Minister about pre-existing foreign arrangements that are non-core foreign arrangements (referred to here as pre-existing non-core foreign arrangements, although not defined in the Act as such).

1249. This clause complements clause 2, and ensures that the Minister has visibility of all pre-existing non-core foreign arrangements to which State/Territory entities are party, in order to inform the exercise of the Minister's discretion to make a declaration concerning

foreign arrangements in operation under Part 4. Without this requirement, the Minister may not be aware of all of the relevant non-core foreign arrangements in operation upon commencement of the Act as a whole, which would limit his or her ability to effectively exercise this discretion, and therefore manage the impact of such arrangements on Australia's foreign relations and foreign policy.

1250. In conjunction with the notification requirements in section 34 in relation to prospective non-core foreign arrangements, and section 38 in relation to non-core foreign arrangements entered after full commencement of this Act, this clause will give the Minister the full picture of all non-core foreign arrangements which are in force as of a particular date.

1251. Subclause 3(1) provides that this requirement applies to a pre-existing foreign arrangement between a State/Territory entity and a foreign entity, if the arrangement is a non-core foreign arrangement.

1252. Section 4 defines a ***non-core foreign arrangement*** as a foreign arrangement that is not a ***core foreign arrangement*** (as defined in subsection 10(2). Pre-existing arrangements that are core foreign arrangements are covered by clause 2 of Schedule 1.

1253. A non-core foreign arrangement for the purposes of this Act is an arrangement between:

a. a State/Territory entity that is not a ***core State/Territory entity*** (as defined in subsection 10(3)) and a foreign entity that is not a ***core foreign entity*** (as defined in subsection 10(4))

b. a core State/Territory entity and a foreign entity that is not a core foreign entity, or

c. a State/Territory entity that is not a core State/Territory entity and a core foreign entity

1254. Subclause 2(2) of this Schedule provides that a ***pre-existing foreign arrangement*** is a foreign arrangement that:

a. is in operation on the commencement day, or

b. comes into operation during the period that:

   i. starts on the day after commencement day, and

   ii. ends on the day before Part 2 of the Act commences.

1255. This ensures that this clause covers all non-core foreign arrangements which are in operation at the time at which all of the provisions of the Act have commenced.

1256. Subclause 3(2) provides that the State/Territory entity must give a notice to the Minister within six months after commencement day, or such longer period as prescribed by the rules (if any).

1257. Section 4 defines the ***commencement day*** as the day that section 1 of the Act commences, which is upon Royal Assent.

1258. The six month period allows sufficient time for State/Territory entities to identify and collate information about all pre-existing non-core foreign arrangements currently in operation and provide notice to the Minister. This six month period is longer than the three month period provided for in clause 2 in relation to pre-existing core foreign arrangements between core State/Territory entities and core foreign entities. This is appropriate, as it gives priority to the arrangements between parties closely connected to the relevant State/Territory or foreign government, which are therefore more likely to affect Australia's foreign policy or foreign relations. The Minister can therefore prioritise consideration of those core foreign arrangements, and provide a longer period for State/Territory entities to provide notice in relation to pre-existing non-core foreign arrangements.

1259. The six month period provides a sufficient period for State/Territory entities to identify and notify the Minister of pre-existing non-core foreign arrangements, while still allowing the Minister to promptly exercise his or her discretion if any of those arrangements would have an adverse effect on Australia's foreign relations or be inconsistent with Australia's foreign policy.

1260. The rules may also prescribe a longer period than six months within which a State/Territory entity must provide notice to the Minister. This may be warranted where, for example, it becomes clear once the Act has commenced that a longer period is necessary in order for the relevant entities to complete their review and identify all pre-existing non-core foreign arrangements which are in operation.

1261. Subclause 3(3) details the procedural requirements for notices under this clause.

1262. Subclause 3(3) provides that the notice must:

a. be in writing

b. be in the approved form (if any)

c. be accompanied by a copy of the arrangement

d. if the State/Territory entity knows that there is another arrangement that is a subsidiary arrangement of the arrangement:

    i. include details about the subsidiary arrangement, and

    ii. if the State/Territory entity has a copy of the subsidiary arrangement, be accompanied by a copy of the subsidiary arrangement

e. include any information prescribed by the rules

f. be accompanied by any documents prescribed by the rules, and

g. be given in the approved way (if any).

1263. The requirement that the notice be given in writing under paragraph 3(3)(a) is necessary given the nature of the information that must be included in the notice. Given that the Minister must rely on this information in order to exercise the discretion in Part 4, it is appropriate for the State/Territory entity to reduce it to writing.

1264. Paragraph 3(3)(b) provides that, if the Minister approves a form under section 62 for the purposes of this provision, the notice must be in that approved form. Similarly, paragraph 3(3)(g) provides that, if the Minister approves a way of giving notice under section 63 for the purposes of this provision, the notice must be given in that approved way.

1265. In addition, the requirement that the notice be accompanied by a copy of the non-core foreign arrangement under paragraph 3(3)(c) ensures that the Minister is able to exercise his or her discretion on the basis of the specific text of the non-core foreign arrangement. A State/Territory entity must provide a copy of the non-core foreign arrangement under this provision, regardless of the nature and contents of the arrangement.

1266. Paragraph 3(3)(d) ensures the Minister receives details of any known relevant subsidiary arrangements to the non-core foreign arrangement.

1267. The requirement that the notice include details about any subsidiary arrangements to the non-core foreign arrangement within the State/Territory entity's knowledge, and a copy of such arrangements if available to the State/Territory entity, ensures that the Minister is able to exercise his or her discretion under Part 4, Division 3 if he or she makes a declaration under Part 4, Division 2 in respect to the relevant foreign arrangement, on the basis of the specific text on the subsidiary arrangement.

1268. Subparagraph 3(3)(d)(ii) only requires the State/Territory entity to provide a copy of the subsidiary arrangement if the State/Territory entity has a copy of that arrangement. For example, if a State/Territory was aware from discussions with a third party that that party had entered into a subsidiary arrangement under the relevant foreign arrangement, the State/Territory entity would be required to include details about that subsidiary arrangement in this notice, but would only be required to provide a copy if the third party had given the State/Territory a copy of the arrangement.

1269. A State/Territory entity must provide the Minister with a copy of the subsidiary arrangement under this clause even if it contains information which is commercially sensitive. This recognises that the Minister needs to have all relevant information before them in order to effectively exercise their discretion to make a declaration. However, such sensitive information must not be included on the Register in accordance with subsection 53(3).

1270. In addition, the Minister may prescribe in the rules any information that must be included in the notice under paragraph 3(3)(e) and any documents that must accompany the notice under paragraph 3(3)(f). If the rules prescribe these matters, the State/Territory entity must provide the required information and/or documents with its notice.

1271. These paragraphs give flexibility for the Minister to specify the information that he or she requires in order to consider whether to exercise his or her discretion and assess the consistency of the non-core foreign arrangement, and any associated subsidiary arrangements, with Australia's foreign policy and their effect on Australia's foreign relations. The ability to approve a form to be used in providing the notice, and a way of giving notice, also allows the Minister to ensure that necessary information is provided in a consistent and methodical manner.

1272. Subclause 3(4) provides that the requirement to give a notice to the Minister under subclause 3(2) does not apply to an arrangement that is exempt.

1273. Under section 4, the Minister may prescribe kinds of arrangements as ***exempt arrangements***. Accordingly, a State/Territory entity is not required by this provision to provide notice to the Minister if it is party to an arrangement of a kind which have been prescribed in the rules as exempt.

1274. This recognises State/Territory entities should not be required to provide a notice to the Minister to assist in the exercise of her discretion under Part 4 in relation to arrangements of a kind which have already been assessed by the Minister as exempt from the requirements of the Act by prescription in the rules.

1275. Under paragraph 52(1)(n), the Minister may seek an injunction from the High Court or Federal Court to enforce this requirement. For example, if a State/Territory entity did not provide a notice to the Minister, the Minister could seek an injunction from the High Court or Federal Court, requiring the State/Territory entity to provide a notice to the Minister containing the required information.

Division 3—Consequences for failing to notify Minister about pre-existing foreign arrangements that are core foreign arrangements

Subdivision A—Pre-existing foreign arrangements that are legally binding

Clause 4 Arrangements that are legally binding under Australian law

1276. Clause 4 sets out the consequences that apply to pre-existing foreign arrangements that purport to be legally binding under Australian law where there has been a contravention of paragraph 2(3)(a), which requires a core State/Territory entity to notify the Minister, within a three month period, of each pre-existing foreign arrangement with a core foreign entity.

1277. Subclause 4(1) applies to an arrangement if:

a. a core State/Territory entity contravenes paragraph 2(3)(a) in relation to a pre-existing foreign arrangement between the core State/Territory entity and a core foreign entity, and

b. apart from this clause, the arrangement would be legally binding under an Australian law.

1278. This means that clause 4 will apply where a core State/Territory entity is a party to a pre-existing foreign arrangement with a core foreign entity and had not given a notice to the Minister (in accordance with subclause 2(4)) within the three month period specified in paragraphs 2(3)(c) and (d) or such longer period prescribed by the rules).

1279. The core State/Territory entity is required to provide the notice in accordance with the requirements of subclause 2(4). This only requires the provision of the written notice specifying the arrangement, accompanied by a copy of the arrangement. This limited requirement ensures that a pre-existing core foreign arrangement is not invalidated by reason of clause 4 if the core State/Territory entity fails to provide the more detailed information required by subclause 2(5) within the three month period. As long as the core State/Territory entity provides the minimum information required by subclause 2(4), this will be sufficient to satisfy the notice requirement and avoid invalidation under clause 4.

1280. Paragraph 4(1)(b) provides that this provision applies to arrangements which would, apart from this clause, be legally binding under Australian law. This recognises that the effect of this clause is that an arrangement entered in contravention of paragraph 2(3)(a) is invalid and unenforceable after the contravention. Accordingly, arrangements covered by this provision, such as commercial contracts, would be legally binding but for the operation of this Schedule.

1281. Subclause 4(2) provides that the effect on the arrangement of the core State/Territory entity's contravention is that the arrangement is invalid and unenforceable after the contravention (that is, after the three month period has expired with no notice being given).

1282. As such, arrangements covered by this clause will be invalidated if a notice consistent with the requirements of subclause 2(4) has not been provided within the three month period set out in paragraphs 2(3)(c) and (d) expires. This provision invalidates the arrangement by operation of this Schedule; there is no requirement for the Minister to issue a declaration or take any other steps in order to invalidate an arrangement under this clause.

1283. This provision is necessary to enforce this Act to and to ensure that pre-existing core foreign arrangements which have not been notified to the Minister are not allowed to continue in force. The failure to provide the notice deprives the Minister of an opportunity to assess the impact of the arrangement on Australia's foreign relations and foreign policy.

1284. Pre-existing core foreign arrangements, by their nature, have an impact on Australia's foreign relations. Therefore, although such arrangements have not been assessed against the criteria in paragraph 40(1)(a) (in Part 4 of this Act), it is appropriate to provide that they are invalid and unenforceable due to their inherent impact on Australia's foreign relations and the fact that they have not been notified to the Minister in accordance with this Act, which has the object of protecting and managing Australia's foreign relations.

1285. Where a pre-existing core foreign arrangement is subject to this clause, subclause 4(3) requires the core State/Territory entity to take certain steps within a specified or prescribed period of having contravened the requirement to provide notice of the arrangement.

1286. Paragraph 4(3)(a) requires a core State/Territory entity to notify the core foreign entity within 14 days (or such longer period that may be prescribed by the rules) that:

a. this clause applies to the arrangement, and

b. the arrangement is invalid and unenforceable.

1287. This requirement ensures that the core foreign entity that would, but for the operation of this clause, be a party to the pre-existing core foreign arrangement with the core State/Territory entity is made aware that the arrangement is invalid and unenforceable by virtue of the operation of this clause of the Schedule. This requirement is necessary given that subclause 4(5) prohibits the core foreign entity from giving effect to the arrangement (discussed further below). If the core State/Territory entity does not comply with this timeframe then the Minister is able to seek an injunction from the High Court or Federal Court under paragraph 52(1)(o) to require compliance with the requirements.

1288. Under paragraph 4(3)(a), a period longer than 14 days can be prescribed in the rules to provide a longer period within which a core State/Territory entity must notify the core foreign

entity. This provides flexibility to extend the period for notification if circumstances warrant this.

1289. Paragraph 4(3)(b) requires the core State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 4(3)(a) to notify the core foreign entity of the Act's application to, and effect on, the arrangement. This notice must be provided to the Minister in writing.

1290. This requirement is necessary to ensure the Minister is informed of when the core foreign entity has been advised about the invalidation of an arrangement under clause 4. A failure to provide the Minister with a notice under this paragraph will allow the Minister to seek an injunction against the core State/Territory entity to force it to notify the core foreign entity (as per paragraph 52(1)(o)).

1291. Subclause 4(4) provides that the core State/Territory entity is prohibited, at any time after the contravention, from:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that:

  i. it can give effect to the arrangement, or

  ii. the arrangement is valid or enforceable.

1292. Due to the operation of section 59 of this Act, this clause prohibits the core State/Territory entity from engaging in these actions both within and outside of Australia.

1293. This prohibition is necessary to ensure that the core State/Territory entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite the arrangement being invalidated by operation of subclause 4(2). This ensures that arrangements that are invalidated due to a failure to comply with the notice requirements in paragraph 2(3)(a) cannot be informally given effect. This is a necessary enforcement mechanism, as contraventions of the notice requirements deprive the Minister of the opportunity to assess arrangements for any adverse effect they might have on Australia's foreign relations and their consistency with Australia's foreign policy.

1294. Paragraph 4(4)(a) prohibits the core State/Territory entity from giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

1295. For example, in relation to an infrastructure arrangement that was a pre-existing core foreign arrangement that was not notified to the Minister as required by paragraph 2(3)(a), under this paragraph, the core State/Territory entity would be prohibited from continuing projects covered by the arrangement or giving financial effect to the arrangement, amongst other things.

1296. Paragraph 4(4)(b) prohibits the core State/Territory entity from holding out, or conducting itself on the basis, that it can give effect to the arrangement or that the arrangement is valid or enforceable.

1297. This prohibition ensures that a core State/Territory entity cannot represent publicly or to other parties that the relevant arrangement is not affected by this provision. This also ensures that other parties are not induced to take action, such as entering subsidiary arrangements, on the basis of such misrepresentations.

1298. For example, under this paragraph, a core State/Territory entity would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to or continuing to publish the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

1299. Subclause 4(5) provides that the core foreign entity, from the time it is notified by the core State/Territory entity under subclause 4(3), is prohibited from doing the following in Australia:

a. giving effect to the arrangement; or

b. holding out, or conducting itself on the basis, that:

    i. it can give effect to the arrangement; or

    ii. the arrangement is valid or enforceable.

1300. This prohibition is necessary to ensure that the core foreign entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way in Australia, if the arrangement has been invalidated by operation of subclause 4(2). This is a corresponding restriction on the core foreign entity that is party to the arrangement, complementing the prohibition in subclause 4(4).

1301. This subclause only prohibits the core foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

1302. The Minister will be able seek an injunction against the core State/Territory entity to enforce compliance with the requirements of subclauses 4(3), (4) or (5) (as per paragraph 52(1)(o)). For example, if a State/Territory entity had failed to notify the foreign entity within the relevant period, the Minister could seek an injunction in the High Court or Federal Court to force the State/Territory entity to do so.

1303. Part 4, Division 3 enables the Minister to make declarations in relation to any subsidiary arrangements that were entered under the auspices of a core foreign arrangement to which this clause applies. As such, the Minister will be able to consider any subsidiary arrangements under core foreign arrangements that have been invalidated by operation of clause 4, on a case-by-case basis, to determine if they should be similarly deemed to be invalid and unenforceable, not in operation or required to be varied or terminated, as relevant.

Clause 5 Arrangements that are legally binding under foreign law

1304. Clause 5 sets out the consequences that apply to pre-existing core foreign arrangements that are legally binding under foreign law where there has been a contravention of paragraph 2(3)(a), which requires a core State/Territory entity to notify the Minister,

within a three month period, of each pre-existing foreign arrangement with a core foreign entity.

1305. Subclause 5(1) applies to an arrangement if:

a. a core State/Territory entity contravenes paragraph 2(3)(a) in relation to a pre-existing foreign arrangement between the core State/Territory entity and a core foreign entity, and

c. the arrangement is legally binding under a foreign law.

1306. This means that clause 5 will apply where a core State/Territory entity is a party to a pre-existing foreign arrangement with a core foreign entity and had not given a notice to the Minister (in accordance with subclause 2(4)) within the three month period specified in paragraphs 2(3)(c) and (d) or such longer period prescribed by the rules).

1307. The core State/Territory entity is required to provide the notice in accordance with the requirements of subclause 2(4). This only requires the provision of the written notice specifying the arrangement, accompanied by a copy of the arrangement. This limited requirement ensures that a pre-existing core foreign arrangement is not required to be terminated by reason of clause 5 if the core State/Territory entity fails to provide the more detailed information required by subclause 2(5) within the three month period. As long as the core State/Territory entity provides the minimum information required by subclause 2(4), this will be sufficient to satisfy the notice requirement and avoid the arrangement being required to be terminated under clause 5.

1308. As compared with subclause 4(2) in relation to arrangements that purport to be binding under Australian law, clause 5 does not operate to invalidate the arrangement by operation of law. This Act does not purport to invalidate an arrangement that is binding under the law of another country. Instead, the core State/Territory entity is required to take steps to terminate the arrangement pursuant to subclause 5(2), as discussed below.

1309. Subclause 5(2) provides that the core State/Territory entity must:

a. within 14 days (or such longer period, if any, that is prescribed by the rules):

    i. notify the core foreign entity that this clause applies to the arrangement, and

    ii. take steps to terminate the arrangement in accordance with the foreign law under which the arrangement is binding, and

b. as soon as practicable after it has complied with either of the above requirements, notify the Minister in writing of its compliance with that requirement.

1310. This subclause requires the State/Territory to take the actions prescribed under paragraph 5(2)(a) within 14 days of the contravention (that is, after the three month period has expired with no notice being given).

1311. The Minister will be able to prescribe a longer period in the rules within which a core State/Territory entity must notify the core foreign entity in compliance with

paragraph 5(2)(a). This will provide the Minister with the flexibility to extend the period for notification if circumstances warrant this.

1312. The requirement under subparagraph 5(2)(a)(i) to notify the core foreign entity that is a party to the arrangement will ensure that the core foreign entity is made aware of the application of this provision to the arrangement, and the fact that the core State/Territory entity is required to terminate it in accordance with the foreign law. This is necessary given that the core foreign entity is prohibited from giving effect to the arrangement in Australia by subclause 5(4) (discussed further below).

1313. Subparagraph 5(2)(a)(ii) requires the core State/Territory entity to take steps to commence the termination process for the arrangement, whatever that process might be under the relevant foreign law. The core State/Territory entity must take these steps within 14 days of contravening the requirement to notify the Minister of the arrangement under paragraph 2(3)(a) (as above, this will be 14 days after failing to notify within the three month period prescribed). As this Act does not purport to invalidate an arrangement that is binding under foreign law, this paragraph requires the relevant Australian party (that is, the core State/Territory entity) to terminate the arrangement so that it is no longer in operation. As with the policy underpinning subclause 4(2), termination of the arrangement is an essential part of the enforcement of this Act, where a core State/Territory entity has contravened the notice requirements in Schedule 1 and thereby deprived the Minister of the opportunity to assess the arrangement under the scheme.

1314. The core State/Territory entity is only required to take steps to terminate the arrangement in accordance with the foreign law within the 14 day time period. This recognises that the termination of the arrangement may not be able to be achieved within that timeframe, depending on the requirements and process under the relevant foreign law, but that steps must be taken to commence that process.

1315. A period longer than 14 days can be prescribed in the rules, providing a longer period within which a core State/Territory entity must take steps to commence the termination process. This will provide the Minister with the flexibility to extend the period if circumstances warrant this.

1316. Paragraph 5(2)(b) requires the core State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 5(2)(a) to notify the core foreign entity and take steps to terminate the arrangement in accordance with the foreign law. This notice must be provided to the Minister in writing.

1317. This requirement is necessary to ensure the Minister is informed of when the core foreign entity has been advised about the operation of the Act and that the core State/Territory entity has taken steps to commence the process of terminating the arrangement. A failure to provide the Minister with a notice under this paragraph will allow the Minister to seek an injunction against the core State/Territory entity to force it to notify the core foreign entity (as per paragraph 52(1)(0)).

1318. Subclause 5(3) prohibits the core State/Territory entity from:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

1319. Due to the operation of section 59, this section prohibits the core State/Territory entity, from engaging in such conduct both within and outside of Australia.

1320. This is necessary to ensure that the core State/Territory entity does not rely on, give effect to or hold out the arrangement as still in effect in any way, despite the requirement for them to terminate it under subparagraph 5(2)(a)(ii). This ensures that core State/Territory entities are not able to informally give effect to the arrangement, despite the entity being required to terminate it. This is a necessary enforcement mechanism for contraventions of the Act, which deprive the Minister of the opportunity to assess arrangements for any adverse impact they might have on Australia's foreign relations and for their consistency with Australia's foreign policy.

1321. Paragraph 5(3)(a) prohibits the core State/Territory entity from giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

1322. For example, in relation to an infrastructure arrangement that is a pre-existing core foreign arrangement that is binding under foreign law that was not notified to the Minister as required by paragraph 2(3)(a), under this paragraph, the core State/Territory entity would be prohibited from continuing projects covered by the arrangement or continuing to give financial effect to the arrangement, amongst other things.

1323. Paragraph 5(3)(b) prohibits the core State/Territory entity from holding out, or conducting itself on the basis, that it can give effect to the arrangement.

1324. This prohibition ensures that a core State/Territory cannot represent publicly or to other parties that the relevant arrangement is not affected by this provision.

1325. For example, under this paragraph, a core State/Territory entity would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to or continuing to publish the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

1326. Subclause 5(4) provides that the core foreign entity, from the time it is notified by the core State/Territory entity, is prohibited from doing the following in Australia:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that it can give effect to the arrangement.

1327. This is necessary to ensure that the core foreign entity does not rely on, give effect to or hold out the arrangement as still in effect in any way in Australia, given the requirement under subparagraph 5(2)(a)(ii) that the core State/Territory entity take steps to terminate it. This is a corresponding restriction on the core foreign entity that is party to the arrangement, complementing the prohibition in subclause 5(3).

1328. This subsection only prohibits the core foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

1329. The Minister will be able seek an injunction against the core State/Territory entity to enforce compliance with the requirements of subclauses 5(2), (3) or (4) (as per paragraph 52(1)(o)). For example, if a core State/Territory entity had failed to notify the foreign entity or to take steps to terminate an arrangement within the relevant period, the Minister could seek an injunction in the High Court or Federal Court to force the core State/Territory entity to do so.

1330. Part 4, Division 3 enables the Minister to make declarations in relation to any subsidiary arrangements that were entered under the auspices of a core foreign arrangement to which this clause applies. As such, the Minister will be able to consider any subsidiary arrangements under core foreign arrangements that are required to be terminated by operation of clause 5, on a case-by-case basis, to determine if they should be similarly deemed to be invalid and unenforceable, not in operation or required to be varied or terminated, as relevant.

Subdivision B—Pre-existing foreign arrangements that are not legally binding

Clause 6 Arrangements that are not legally binding

1331. Clause 6 sets out the consequences that apply to pre-existing core foreign arrangements that are not legally binding where there has been a contravention of paragraph 2(3)(a), which requires a core State/Territory entity to notify the Minister, within a three month period, of each pre-existing foreign arrangement with a core foreign entity.

1332. Subclause 6(1) applies to arrangements if:

a. a core State/Territory entity contravenes paragraph 2(3)(a) in relation to a pre-existing foreign arrangement between the core State/Territory entity and a core foreign entity, and

b. the arrangement is not legally binding.

1333. This means that clause 6 will apply where a core State/Territory entity is a party to a pre-existing foreign arrangement with a core foreign entity and had not given a notice to the Minister (in accordance with subclause 2(4)) within the three month period specified in paragraphs 2(3)(c) and (d)).

1334. The core State/Territory entity is required to provide the notice in accordance with the requirements of subclause 2(4). This only requires the provision of the written notice specifying the arrangement, accompanied by a copy of the arrangement. This limited requirement ensures that a pre-existing core foreign arrangement is not deemed to be not in operation by reason of clause 6 if the core State/Territory entity fails to provide the more detailed information required by subclause 2(5) within the three month period. As long as the core State/Territory entity provides the minimum information required by subclause 2(4), this will be sufficient to satisfy the notice requirement and avoid the arrangement being deemed to be not in operation under clause 6.

1335. Subclause 6(2) provides that the effect on the arrangement of the core State/Territory entity's contravention is that the arrangement is not in operation after the contravention (that is, after the three month period has expired with no notice being given).

1336. Given the arrangement is not legally binding, it is appropriate to describe it as no longer in operation, rather than being invalidated or unenforceable. Accordingly, by virtue of this section, a non-legally binding arrangement is not in effect, in force or having any other operation.

1337. For example, a memorandum of understanding that expresses the parties' commitment to undertaking certain research and training activities would no longer be in operation, and the parties could not undertake those activities in accordance with subclause 6(4) (as discussed below).

1338. As such, arrangements covered by this section will not be in operation if a notice consistent with the requirements of subclause 2(4) has not been provided when the three month period set out in paragraphs 2(3)(c) and (d) expires. This provision renders the arrangement to be not in operation by operation of this Act; there is no requirement for the Minister to issue a declaration or take any other steps in order to render the arrangement to be not in operation under this clause.

1339. This provision is necessary to enforce this Act to and to ensure that pre-existing core foreign arrangements between core State/Territory entities and core foreign entities which have not been notified to the Minister are not allowed to continue in force. The failure to provide the notice deprives the Minister of an opportunity to assess the impact on Australia's foreign relations and foreign policy.

1340. Pre-existing core foreign arrangements, by their nature, have an impact on Australia's foreign relations. Therefore, although such arrangements have not been assessed against the criteria in paragraph 40(1)(a) (in Part 4 of this Act), it is appropriate to provide that they are not in operation due to their inherent impact on Australia's foreign relations and the fact that they have not been notified to the Minister in accordance with this Act, which has the object of protecting and managing Australia's foreign relations.

1341. This reasoning stands notwithstanding the fact that the arrangements this provision regulates are not legally binding. These non-binding arrangements still impact upon Australia's foreign relations and represent a commitment between a core State/Territory entity and a core foreign entity.

1342. Subclause 6(3) provides that the core State/Territory entity must take certain steps within a specified or prescribed period of having contravened the requirement to provide notice of the arrangement to the Minister under paragraph 2(3)(a).

1343. Paragraph 6(3)(a) requires the core State/Territory entity to notify the core foreign entity within 14 days (or such longer period that may be prescribed by the rules) that:

a. this clause applies to the arrangement, and

b. the arrangement is not in operation.

1344. This requirement will ensure that the core foreign entity that would, but for the operation of this clause, be a party to the arrangement with the core State/Territory entity is made aware that the arrangement is not in operation by virtue of the operation of this clause. This requirement is necessary given that the core foreign entity is prohibited from giving effect to the arrangement in Australia by subclause 6(5) (discussed further below).

1345. Under paragraph 6(3)(a), a period longer than 14 days can be prescribed in the rules to provide a longer period within which a core State/Territory entity must notify the core foreign entity. This provides flexibility to extend the period for notification if circumstances warrant this.

1346. Paragraph 6(3)(b) requires the core State/Territory entity to notify the Minister as soon as practicable after it has complied with the requirement in paragraph 6(3)(a) to notify the core foreign entity of the Act's application to, and effect on, the arrangement. This notice must be provided to the Minister in writing.

1347. This requirement is necessary to ensure the Minister is informed when the core foreign entity has been put on notice about the operation of the Act on the relevant arrangement. A failure to provide the Minister with a notice under this paragraph will allow the Minister to seek an injunction against the core State/Territory entity to force it to notify the core foreign entity (as per paragraph 52(1)(o)).

1348. Subclause 6(4) provides that the core State/Territory entity is prohibited from doing the following:

a. giving effect to the arrangement, or

b. holding out, or conducting itself on the basis, that:

    i. it can give effect to the arrangement, or

    ii. the arrangement is in operation.

1349. Due to the operation of section 59, this section prohibits the core State/Territory entity, from engaging in such conduct both within and outside of Australia.

1350. This prohibition is necessary to ensure that the core State/Territory entity does not rely upon, give effect to or hold out the arrangement as still in effect in any way, despite the arrangement being deemed to not be in operation by operation of subclause 6(2). This ensures that arrangements that have not been notified to the Minister cannot be informally given effect. This is a necessary enforcement mechanism for contraventions of the Act, which deprive the Minister of the opportunity to assess arrangements for any adverse effect they might have on Australia's foreign relations and their consistency with Australia's foreign policy.

1351. Paragraph 6(4)(a) prohibits the core State/Territory entity from giving effect to the arrangement. Section 4 defines when a party ***gives effect to*** an arrangement, and includes giving direct or indirect effect to an arrangement and taking action for the purposes of implementing the arrangement.

1352. For example, in relation to an infrastructure arrangement with a core foreign entity that is not legally binding and was not notified to the Minister in contravention of this Schedule, under this paragraph, the core State/Territory entity would be prohibited from continuing projects covered by the arrangement or continuing to giving financial effect to the arrangement, amongst other things.

1353. Paragraph 6(4)(b) prohibits the core State/Territory entity from holding out, or conducting itself on the basis, that it can give effect to the arrangement or that the arrangement is in operation.

1354. This prohibition ensures that a State/Territory cannot represent publicly or to other parties that the relevant arrangement is not affected by this provision. This also ensures that other parties are not induced to take action, such as entering subsidiary arrangements, on the basis of such misrepresentations.

1355. For example, under this paragraph, a core State/Territory entity would be prohibited from representing itself as being able to give effect to the arrangement, such as continuing to refer to itself as a party to or continuing to publish the relevant arrangement (unless there was an appropriate disclaimer about the effect of this Act).

1356. Subclause 6(5) provides that the core foreign entity, from the time it is notified by the core State/Territory entity, is prohibited from doing the following in Australia:

a. giving effect to the arrangement; or

b. holding out, or conducting itself on the basis, that:

    i. it can give effect to the arrangement; or

    ii. the arrangement is in operation.

1357. This prohibition is necessary to ensure that the core foreign entity does not rely upon, give effect to or hold out the arrangement as still in operation in any way in Australia, despite the arrangement being rendered to not be in operation by virtue of subclause 6(2). This is a corresponding restriction on the core foreign entity that is party to the arrangement, complementing the prohibition in subclause 6(4).

1358. This subclause only prohibits the core foreign entity from engaging in the relevant conduct in Australia, and does not cover conduct that takes place outside Australia. As such, this modifies the effect of the extraterritorial application provision in section 59, which would otherwise mean that the Act applies within and outside Australia.

1359. The Minister will be able seek an injunction against the core State/Territory entity to enforce compliance with the requirements of subclauses 6(3), (4) or (5) (as per paragraph 52(1)(o)). For example, if a core State/Territory entity was giving effect to an arrangement that was not in operation due to subclause 6(2) then the Minister could seek an injunction in the High Court or Federal Court to force the State/Territory entity to stop doing so.

1360. Part 4, Division 3 enables the Minister to make declarations in relation to any subsidiary arrangements that were entered under the auspices of a core foreign arrangement

to which this clause applies. As such, the Minister will be able to consider any subsidiary arrangements under core foreign arrangements that have been deemed not to be in operation by operation of clause 6, on a case-by-case basis, to determine if they should be similarly deemed to be invalid and unenforceable, not in operation or required to be varied or terminated, as relevant.