

What type of Foreign Entity is involved in your Foreign Arrangement?



Overview of the Foreign Arrangements Scheme and how it applies to University made arrangements

What is the Foreign Arrangements Scheme (FAS)? The [Foreign Arrangements Scheme](#) establishes a formal notification process that applies to all Australian public universities. The Scheme is established by the [Australia's Foreign Relations \(State and Territory Arrangements\) Act 2020](#) (Cth) (the Act). Public universities are included in the definition of "State/Territory entities" along with all Australian State, Territory and local governments.

What is the purpose of FAS? The purpose of the Act is to protect and manage Australia's foreign relations. The FAS is the statutory notification and assessment process managed by the Department of Foreign Affairs and Trade (DFAT) to support compliance with the Act.

What is a foreign arrangement? A foreign arrangement is a written agreement, contract, understanding or undertaking between an Australian State/Territory entity and a **foreign entity**, whether or not there are any other parties to the arrangement or whether it is legally binding or not.

What is a foreign entity? A foreign entity is defined by the Act to include foreign governments at national and local levels and their departments and agencies, including universities. A full description is provided in the table on the next page.

What does the University have to do? The University must notify the Minister of Foreign Affairs that it: 1. proposes to enter and 2. has entered into an arrangement with a **foreign entity**. This means that the University must generally make two notifications: 1. When an arrangement is certain but before it has been finalised (e.g., terms are being agreed); and 2. once the arrangement has been finalised (e.g., an agreement has been signed by the parties). An arrangement that has been finalised must be notified within 14 days.

An arrangement between the University and a **foreign entity** is defined under the Scheme as a "non-core" foreign arrangement. This is different from a "core" foreign arrangement, which involves an Australian government entity and a **foreign entity**. It is possible that the University could be involved in a "core" foreign arrangement if, for example, the SA Government is a party. You should seek [further advice](#) about the obligations that may apply to core foreign arrangements. The University has decided that if it is involved in a multi-party foreign arrangement, it will notify the Minister of Foreign Affairs, even though another party might also make the notification.

Who is authorised to make a notification for the University? [Research Services and Global Engagement](#), as applicable are authorised to make notifications on behalf of the University.

What happens after a notification is made? Once lodged, an arrangement will be listed on a public register. The Act also authorises the Minister for Foreign Affairs to determine whether an arrangement is compatible with Australia's foreign relations and policy. The Minister may declare an arrangement invalid and unenforceable or that it must be altered or terminated. The Minister will write to the University if such a declaration is made. If an entity fails to notify an arrangement, a court injunction may be sought to stop the arrangement.

Given the possibility that an arrangement may be disallowed, special contract clauses should be included in relevant agreements. [Standard form contracts have been](#) updated with relevant clauses. Should a negative declaration be made, the consequences for any *subsidiary* (secondary) arrangements made under the auspices of the foreign arrangement will need to be considered. An arrangement is *subsidiary* to a foreign arrangement if it is not itself a foreign arrangement and has been anticipated by, or supports the implementation of, that arrangement.

When did the Scheme start? From Wednesday **10 March 2021**, all new foreign arrangements must be notified. A 14-day notification deadline applies once an arrangement has been finalised.

What do I need to do? To determine whether your arrangement will need to be notified, you must conduct and document a due diligence assessment based on the legislated definition of a foreign entity. This definition includes foreign governments, public agencies established by foreign governments and foreign universities substantially controlled by foreign governments.

The Table on the following page sets out the legislative criteria and should be referred to in completing your assessment. If the foreign entity meets any of the criteria listed, your arrangement must be notified.

Where can I get further advice? If you have a foreign arrangement, contact the [Legal Services Branch](#) for support and further details about the University's notification procedures.

NB – FAS is one of several compliance obligations that may apply to University arrangements with foreign entities or individuals – for more information about other requirements you may need to observe, refer to <https://www.adelaide.edu.au/legalandrisk/integrity-and-accountability>

If any of the following entities are involved, your arrangement is with a Foreign Entity and must be notified:

Section ref:	A foreign entity can be:	Consider whether these characteristics apply to the entity:	Some qualifying features to note:
s8(1)			
a.	A foreign country	Any type of jurisdiction that is outside of Australia (and its Territories).	FAS does not apply to Australian subsidiaries of foreign entities.
b.	A National government	This is the governing entity of a foreign country regardless of how the political system is structured.	A foreign entity can be located in a foreign country or be a part of another (parent) foreign entity located in another country.
c.	A Department or agency of a. or b.	These may be described in terms such as offices, bureaus, commissions, or the executive of a national government – their purpose is to determine and deliver government functions and/or services.	A corporation owned by a foreign government is not a foreign entity if it operates on a commercial basis, but it will be if it is established for public purposes.
d.	A State / Territory / Provincial government	These are 2 nd tier governments within a foreign country and may vary according to political system.	
e.	A Local government / Municipality / District or City Council / Counties / Districts	These are 3 rd tier governments within a foreign country.	
f.	A Government subdivision set out in d. and e.	These may include executive councils or other bodies that oversee state or local government activities.	
g.	A Department or agency of d. e. or f.	These will include departments established by state or local governments to deliver government functions or services – they may be described in terms such as public authorities, statutory authorities, bureaus, ministries, or commissions.	
h.	Established by a foreign country for a public purpose <u>NB - other than a university</u>	These are other types of entities that can be established to carry out a government function. They may have legal independence from the government and still be subject to government control – for example, law enforcement agencies, public health services, education institutions, or bodies established to meet foreign relations or foreign policy objectives.	
i.	A university located in a foreign country that <i>lacks institutional autonomy</i>		
s8(2)	A foreign university does not have institutional autonomy if a foreign government is in a position to exercise <i>substantial control</i> over the foreign university.		Control may be exercised from another jurisdiction to the one where the university is located.
s8(3)	A foreign government exercises “substantial control” only if any <u>law</u> or the <u>governing documents</u> of the university impose any of the following requirements: <ul style="list-style-type: none"> ➢ 50%+ of the university board appointees must be members of the political party that forms the government. ➢ Education provided or research conducted must adhere to political principles/doctrines set by the government or ruling political party. ➢ Academic staff are required to adhere in their teaching, research, discussions, publication or public commentary to the political principles/doctrines set by the government or ruling party. 		
s8(4)	<u>Governing documents</u> are the constitution, rules or other official documents which constitute or determine the university's operation.		

Some useful examples:

- International Organisations such as the United Nations, the European Union and the World Health Organisation are not foreign entities.
- If a foreign university is aligned with the military, such as military colleges, they may be FAS notifiable even in a country that normally provides autonomy for its universities. For example, École nationale supérieure de techniques avancées Bretagne (ENSTA) is a university in France. Usually, French universities have autonomy BUT ENSTA is a part of the Ministry of Defence and not the Ministry of Education, and it was FAS notifiable.
- Companies wholly owned by a foreign government (national or local) will not be FAS notifiable if they were established as commercial entities. For example, Aramco Overseas Company B.V. is a wholly owned subsidiary of the Saudi Arabian Government but was not FAS notifiable.