

THE SWORD OF DAMOCLES: IMPLICATIONS OF THE FOREIGN ARRANGEMENTS SCHEME FOR THE ACADEMIC FREEDOM OF AUSTRALIAN PUBLIC UNIVERSITIES

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ABSTRACT

This article examines the legal and practical implications of the recently enacted Australia's Foreign Relations (State and Territory Arrangements) Act 2020 (Cth) for Australian public universities. The broad and unchecked powers vested in the Minister for Foreign Affairs by the Act to block, cancel or terminate foreign arrangements of public universities has the potential to seriously undermine the capacity of public universities to engage in international initiatives with confidence and certainty. The legislation's capacity to politicise research and educational activities and increase regulatory burden risks undermining the core academic mission of public universities. Accordingly, this article offers a principled critique of the legislative scheme from the perspective of academic freedom. Drawing on theories of university institutional autonomy and the rule of law, this article calls for reform of the legislation to adequately safeguard academic freedom, and provide for more robust checks and balances against the Minister's powers.

I INTRODUCTION

On 3 December 2020, the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020 (Cth)* ('the Act') received Royal Assent. As of 10 March 2021, all provisions are in force.¹ The legislation marks the Commonwealth government's latest attempt to centralise its foreign affairs power, and to control the international activities of sub-national entities. The Act requires State/Territory entities including governments, local councils, and universities established by State/Territory law (public universities)² to notify the Minister for Foreign Affairs of any arrangements entered,³ proposed to be entered, or under negotiation⁴ with foreign entities including foreign governments, agencies, and universities lacking institutional autonomy.⁵ For 'core foreign arrangements' involving State/Territory governments and foreign

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¹ *Australia's Foreign Relations (State and Territory Arrangements) Act 2020 (Cth)* s 2 ('*Foreign Relations Act*').

² *Ibid* s 7(e).

³ *Ibid* sch 1 s 2.

⁴ *Ibid* ss 16, 23, 34, 38.

⁵ *Ibid* s 8.

governments,⁶ Ministerial approval is required before commencement of negotiations.⁷ For less critical ‘non-core foreign arrangements’,⁸ the Minister is empowered at any time to prohibit the negotiation of, or entry into such arrangement, if the Minister is satisfied that the arrangement would adversely affect or be inconsistent with Australia’s foreign relations or policy.⁹ Further, the Minister may at any time vary, invalidate or terminate foreign arrangements already in force on the same grounds.¹⁰ The suite of powers has been described as ministerial ‘veto’ over international activities.¹¹ All notifiable foreign arrangements are to be published in a Public Register.¹² The regime is collectively known as the Foreign Arrangements Scheme (‘FAS’).¹³

The inclusion of public universities under the FAS, however, creates significant additional implications. Unlike sub-national political entities such as States and local councils, public universities are institutions of research and learning that are traditionally independent of the government and politics of the day.¹⁴ Subjecting public universities to the wide-ranging ministerial discretion under the FAS creates far reaching consequences for one of the fundamental principles of the academy, namely, academic freedom.

This article explores this predicament by examining how the FAS interfaces with academic freedom, and drawing out the implications of the ministerial powers for Australian public universities. The exposition progresses as follows. Part II outlines the legislative framework of the FAS as it applies to public universities, explores the legislative history and background, and reviews the decisions made by the Minister under the FAS so far. Part III analyses the key ways in which the FAS negatively impacts public universities, taking into account the concerns publicly raised by universities, experts and industry groups. Part IV explains the concept and history of academic freedom, and examines to what extent is academic freedom an effective prism through which to critique the problems posed by the FAS. First, it is submitted that academic freedom as a principle articulates the encroachment by the FAS on the institutional autonomy of higher education institutions. Second, viewing the FAS through the lens of academic freedom accentuates how the FAS undermines the social benefits which academic freedom seeks to cultivate. Part V in turn explores law reform options to better balance the policy objective of the FAS with the preservation of academic freedom of Australian public universities.

⁶ Ibid s 10(2).

⁷ Ibid s 15.

⁸ Ibid s 4 (definition of ‘non-core foreign arrangement’).

⁹ Ibid ss 35–6.

¹⁰ Ibid ss 40–1.

¹¹ Daniel Hurst, ‘Foreign veto laws could affect tens of thousands of research projects, Australian universities warn’, *The Guardian* (online at 5 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/05/foreign-veto-laws-could-affect-tens-of-thousands-of-research-projects-australian-universities-warn>>.

¹² *Foreign Relations Act* (n 1) s 53.

¹³ ‘Foreign Arrangements Scheme’, *Foreign Arrangements Scheme* (Web Page) <<https://www.foreignarrangements.gov.au>>.

¹⁴ Carolyn Evans and Adrienne Stone, *Open Minds: Academic Freedom and Freedom of Speech in Australia* (La Trobe University Press in conjunction with Black Inc, 2021) 9.

II THE FOREIGN ARRANGEMENTS SCHEME

A *The Foreign Arrangements Scheme And Public Universities*

The first notable feature of the FAS is that it captures a wide range of international activities conducted by Australian public universities.

The broad statutory concept of ‘foreign arrangement’ defined by section 6(2) refers to an arrangement between a State/Territory entity and a foreign entity, whether or not other entities are also party to the arrangement. An ‘arrangement’ defined by section 9(1) refers to ‘any written arrangement, agreement, contract, understanding or undertaking’, whether or not it is legally binding.

The Act further defines ‘foreign entities’ under section 8 as any of a foreign country, the national government of a foreign country, a department or agency of a foreign country/government, and a foreign university that does not have institutional autonomy. A foreign university lacks institutional autonomy if a foreign government is in a position to ‘exercise substantial control over the university’, such as when members of the university’s governing body are required to be members of the governing political party, or that the research and education of the university is dictated by political doctrines.¹⁵

Functionally, the statutory definitions would subject a wide range of public universities’ international operations to the ministerial veto. The content and effect-neutral definition of ‘arrangement’ would capture any written document, binding or non-binding, executed by public universities which governs or outlines any kind of relationship between the universities and foreign entities, regardless of discipline, industry or subject matter. Whilst the definition of ‘foreign entity’ narrows the scope of the FAS by excluding purely private or commercial entities and foreign universities that enjoy institutional autonomy, likely those hosted by democracies, it nonetheless embodies a sizable range of education and research counterparties. For example, foreign government education or scientific departments, state-sponsored research institutes, and foreign military training or research institutions would all likely be subject to the FAS.¹⁶ Notably, the definition of foreign universities lacking in institutional autonomy would capture almost all universities in countries such as China or Vietnam,¹⁷ where the ruling party maintains firm control over university administrations.

The operational effect of the statutory definition is that universities would be required to report a plethora of otherwise business as usual arrangements to the Department of Foreign Affairs and Trade (‘DFAT’), and then be subject to a ministerial declaration. Examples of such arrangements would include student or staff exchange agreements with Chinese universities, research agreements with foreign government agencies or research institutes, and non-binding memoranda of understanding with foreign entities

¹⁵ *Foreign Relations Act* (n 1) s 8(3).

¹⁶ Melissa Conley Tyler, ‘What is the effect of Australia’s new foreign relations law?’ *East Asia Forum* (online at 12 December 2020) <<https://www.eastasiaforum.org/2020/12/12/what-is-the-effect-of-australias-new-foreign-relations-law/>>.

¹⁷ *Ibid.*

expressing mere intention to cooperate.¹⁸ Furthermore, the ministerial powers extend to ‘subsidiary arrangements’ entered ‘under the auspices’ of a foreign arrangement, defined under section 12 of the Act as arrangements entered into ‘for the purpose of implementing the foreign arrangement, in any way and to any extent’.¹⁹ The FAS would thus also capture activities otherwise falling outside the definition of ‘foreign arrangement’, such as commercial or employment contracts giving effect to a university’s foreign arrangements.

Whilst foreign arrangements of public universities are categorised as ‘non-core arrangements’ under the Act, the relevant ministerial powers are substantially the same as those of core arrangements. Even though the negotiation or entry into non-core arrangements do not require prior ministerial approval, they remain subject to ministerial declaration at all relevant times.²⁰ That is, at any point in the non-core arrangement’s lifecycle, the Minister may make a declaration, including retrospectively, to prohibit negotiation or entry, or to vary or terminate the arrangement, provided the minister is satisfied that the arrangement is or is likely to adversely affect Australia’s foreign relations, or is or is likely to be inconsistent with Australia’s foreign policy.²¹ ‘Australia’s foreign policy’ defined under section 5(2) ‘includes policy that the Minister is satisfied is the Commonwealth’s policy on matters’ in relation to Australia’s foreign relations and things outside Australia, whether or not the policy is written or publicly available, or formulated or approved by any member or body of the Commonwealth. The inclusive, expansive and subjective definition of foreign policy neither restricts the scope of the minister’s powers, nor offers any meaningful guidance to State/Territory entities, including public universities, on the basis on which the Minister may exercise his or her powers. The implications of the statutory concepts of ‘foreign policy’ and ‘foreign relations’ will be further examined in Part III.

Presently, it suffices to say that the FAS and its ministerial powers resemble the ‘Sword of Damocles’ hanging over universities, having the capacity and potential at any time to disrupt a broad range of otherwise lawful and staple activities in modern globalised academic life.

B *The Express Purpose: Federal External Affairs Imperative*

Having showcased the broad scope of the FAS ministerial powers, it is necessary to examine *how* the Minister may exercise the suite of powers, in order to discern how those powers may impact public universities.

An instructive starting point would be the extrinsic legislative materials outlining the government’s policy rationale, and the mischief to be remedied. In the Second Reading Speech delivered in September 2020, the Attorney-General stressed that it is the

¹⁸ ‘Australia’s Foreign Relations (State and Territory Arrangements) Act 2020 Frequently Asked Questions – Australian Public Universities’, *Foreign Arrangements Scheme* (Web Page) <<https://www.foreignarrangements.gov.au/sites/default/files/2021-04/FAQs%20-%20Australian%20Public%20Universities.pdf>>.

¹⁹ *Foreign Relations Act* (n 1) s 12, pt 4.

²⁰ *Ibid* s 40.

²¹ *Ibid* ss 40–1.

Commonwealth's constitutional 'exclusive responsibility for setting Australia's foreign policy'.²² The mischief identified is that the Commonwealth lacks visibility of the foreign arrangements of State/Territory entities, including public universities, and that the Commonwealth is not required to be consulted for such arrangements. The FAS is therefore enacted to close the gap in Commonwealth oversight, as to ensure the arrangements 'are consistent with [the] national approach to foreign relations'.²³ The Explanatory Memorandum similarly emphasises that the aim of the FAS is to establish a legislative mechanism for the Minister to 'assess and manage the effect of [foreign] arrangements on Australia's foreign relations and foreign policy'.²⁴ Furthermore, both the Second Reading Speech and Explanatory Memorandum contend the FAS is 'country agnostic', and does not 'target one particular type of arrangement or any specific country'.²⁵ Instead, all arrangements are to be considered by the Minister on a 'case-by-case basis'.²⁶ The Act does not prescribe specific countries as probative to the Minister's discretion.

The legislative materials suggest that at least one policy aim of the FAS is to consolidate the Commonwealth's supervision over the external affairs of State/Territory entities, as mandated by the Australian Constitution and the federal imperative. Additionally, the creation of the foreign arrangements Public Register facilitates transparency.²⁷

Yet both the extrinsic materials and the legislative design of the powers suggest the aim of the FAS goes beyond that of registration and stewardship of foreign arrangements. Rather, the FAS is designed as an active tool in the making and implementation of Australian foreign policy. Section 5 of the Act provides that the statutory object is to enable the Commonwealth to 'protect and manage Australia's foreign relations' by ensuring State/Territory foreign arrangements are not inconsistent with or adversely affect Australia's foreign relations'. The Second Reading Speech further suggests that the powers are granted to the Minister to first mitigate the 'very real and significant risk' that the arrangements would 'undermine Australia's broader foreign policy objectives', and second to 'leverage [State/Territory entities' foreign] relationships to further [Australia's] national objectives in [its] international engagements'.²⁸

Those remarks indicate that the FAS not only aims to provide the Minister with visibility over foreign arrangements, but it also expects the Minister to actively exercise his or her powers for the purpose of positively advancing and achieving Australia's foreign relations objectives. That is, the arrangements, including those of public universities, are to be simultaneously regarded as risks to be mitigated, and stakes to be leveraged for the purposes of foreign policy. Further to the inclusive statutory definition of 'foreign policy', Australia's 'foreign relations' is undefined. The Explanatory Memorandum provides that the Act 'recognise[s] that foreign policy is dynamic' and

²² Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2020, 6489 (Christian Porter, Attorney-General) ('Second Reading Speech').

²³ *Ibid.*

²⁴ Revised Explanatory Memorandum, Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 (Cth) 2 ('Explanatory Memorandum').

²⁵ *Ibid.*; Second Reading Speech (n 22) 6490.

²⁶ Explanatory Memorandum (n 24) 2–3.

²⁷ *Ibid.* 6; Second Reading Speech (n 22) 6491.

²⁸ Second Reading Speech (n 22) 6489.

need not be written, publicly available, or formally approved,²⁹ and that they are of ‘high political content’ encompassing national security.³⁰ Examples mentioned include ‘Australia’s foreign policy or position in relation to particular issues’ and ‘Australia’s position in international forums or negotiations’.³¹

Analysed as a whole, the Second Reading Speech, the Explanatory Memorandum, and the legislation itself suggest that the FAS will likely serve a political purpose beyond routine administration and oversight. The Minister’s discretion in relation to foreign arrangements will likely be guided by political and national security considerations material to Australia’s foreign policy/relations. The fate of foreign arrangements, whether they are to be prohibited, varied or terminated, will therefore depend on Australia’s position in international politics at any given time, as adjudged by the Minister and the Commonwealth government.

C Elephant In The Room: Geopolitics, China, And The Universities

Given the political undertone of the FAS, to further explore how the Minister may practically exercise his or her powers in relation to public universities, it is necessary to examine the socio-political context beyond official legislative materials.

Critically, the FAS is devised at a time of heightened geopolitical tension with China. Throughout recent years, Australia became involved in a number of high profile confrontations with China on various issues including the militarisation of South China Sea, human rights conditions of Uyghurs in Xinjiang, cybersecurity and espionage, the origin of COVID-19, and the apparent attempts by China to interfere in Australian politics in contrary to Australia’s sovereignty.³² The current scale of foreign interference against Australian interests has been described by ASIO as ‘unprecedented’.³³ Directly relevant to State/Territory foreign arrangements, the Victorian government entered into a non-binding memorandum of understanding (MOU) with the Chinese government for the ‘Belt and Road Initiative’ in October 2018.³⁴ The MOU was criticised by then Prime Minister Scott Morrison, and then US Secretary of State Mike Pompeo, who warned

²⁹ Explanatory Memorandum (n 24) 31–2.

³⁰ Ibid 11–12.

³¹ Ibid.

³² Daniel Hurst, ‘Culture Clash: has Australia miscalculated in its feud with China?’ *The Guardian* (online at 13 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/13/culture-clash-has-australia-miscalculated-in-its-feud-with-china>>.

³³ Mike Burgess, ‘Director-General’s Annual Threat Assessment’ (Speech, ASIO, 17 March 2021).

³⁴ Michelle Grattan, ‘Morrison government set to target Victorian ‘belt and road’ agreement under sweeping new legislation’, *The Conversation* (on at August 2020) <<https://theconversation.com/morrison-government-set-to-target-victorian-belt-and-road-agreement-under-sweeping-new-legislation-145124>>; Daniel Hurst, ‘Inside the Coalition’s foreign veto laws over states and territories: what is included and why’, *The Guardian* (online at 3 September 2020) <<https://www.theguardian.com/australia-news/2020/sep/03/inside-the-coalitions-foreign-veto-laws-over-states-and-territories-whats-included-and-why>>; Michelle Grattan, ‘Morrison Government quashes Victorian BRI deal with China’, *Australian Strategic Policy Institute: The Strategist* (online at 22 April 2021) <<https://www.aspistrategist.org.au/morrison-government-quashes-victorias-bri-deal-with-china/>>.

that the US could suspend certain information sharing with Australia should the deal proceed.³⁵

Against the political tensions, Australian universities have been regarded as key battlegrounds for perceived interference, amidst concerns that China and other countries are engaging in technological espionage through research agreements, and effecting censorship on teaching content critical of those regimes.³⁶ The Parliamentary Joint Committee on Intelligence and Security on 11 March 2021 heard testimonies from senior Commonwealth public servants, technology experts, academics, and security officials, on national security risks affecting the Australian higher education and research sector. The hearing revealed that foreign influence in the form of critical technology theft and political influence on campus has been a longstanding issue of concern.³⁷ The most prominent example is the hosting of the Chinese government affiliated Confucius Institutes by Australian universities. Officially established for teaching Chinese language and culture, the Confucius Institutes have been criticised by various commentators including government backbenchers as ‘propaganda tools’.³⁸ In response, the Commonwealth implemented various measures including the Foreign Influence Transparency Scheme in 2018, and the University Foreign Interference Taskforce in 2019 to safeguard national security at universities.³⁹

Both the Belt and Road MOU and the Confucius Institutes agreements have been expected by the media to face ‘tough scrutiny’ under the FAS. Following the passage of the *Foreign Relations Bill* in December 2020, the ABC observed that it is ‘no secret the bill has its genesis in a small number of agreements signed by state governments and universities’, mostly involving China.⁴⁰

Hence, whilst the legislation and the extrinsic materials represent the FAS as a country-blind regime and suggest that the Minister will exercise his or her discretion on a case-by-case basis, decisions under the Act will unlikely be country blind in practice. Former prime ministerial legal adviser Daniel Ward, who was a key drafting contributor of the *Foreign Relations Act*, implicitly suggested that the FAS was in fact targeted at China, and the government’s emphasis on it being country-agnostic is ‘misguided’ as applied to universities.⁴¹ The idea that the FAS is substantially driven by concerns for China is

³⁵ Katharine Murphy and Daniel Hurst, ‘Coalition to pursue power to block deals such as Victoria’s bent and road agreement with China’, *The Guardian* (online at 26 August 2020) <<https://www.theguardian.com/australia-news/2020/aug/26/coalition-to-pursue-power-to-block-deals-such-as-victorias-belt-and-road-agreement-with-china>>.

³⁶ Stephen Dziedzic, ‘The Federal Government’s new foreign relations laws have passed Parliament. Here’s what that means’, *ABC News* (online at 8 December 2020) <<https://www.abc.net.au/news/2020-12-08/what-are-the-governments-new-foreign-relations-laws-about/12947590>>.

³⁷ Evidence to Parliamentary Joint Committee on Intelligence and, Parliament of Australia, Canberra, 11 March 2021, 26–7 (Mike Burgess, Director General of Security, ASIO).

³⁸ Dziedzic (n 36).

³⁹ ‘Guidelines to counter foreign interference in the Australian university sector’, *Department of Education, Skills and Employment* (Web Page) <<https://www.dese.gov.au/guidelines-counter-foreign-interference-australian-university-sector>>.

⁴⁰ Dziedzic (n 36).

⁴¹ Lisa Visentin, ‘Architect of government’s foreign veto laws says they’re too complex for universities’, *The Sydney Morning Herald* (online at 26 July 2021) <<https://www.smh.com.au/politics/federal/architect-of-government-s-foreign-veto-laws-says-they-re-too-complex-for-universities-20210722-p58c1s.html>>.

also echoed by Michelle Grattan of the Australian Strategic Policy Institute.⁴² Indeed, considering Australia's traditional foreign policy position as a US and western ally, it is disingenuous to suggest that all foreign arrangements regardless of country will be treated impartially and face the same level of ministerial scrutiny.

This socio-political context is instructive as to how the Minister may exercise their powers in practice. First, the decisions will likely be swayed by the agenda of powerful allies such as the US, particularly in light of Secretary Pompeo's comments on the Belt and Road initiative. Further, despite the official legislative neutrality, the Minister's assessment and decisions will likely be biased against China and possibly other non-western liberal democracies in reality.⁴³ Moreover, given the FAS is part of a suite of policy measures against the apparently prevalent foreign interference, actual or perceived threats to sovereignty and national security will likely be a material, if not determinative, consideration in the exercise of ministerial powers. The overarching point is that the Minister's powers will likely become an active component of Australia's foreign policy toolbox. The relatively unfettered nature of the powers leaves open the possibility that the powers will be utilised to achieve policy objectives determined by contemporaneous political forces.

D Ministerial Decisions So Far

The decisions made so far by the Minister under the FAS supports the proposition that the veto powers are inherently political in nature. On 21 April 2021, the then Minister for Foreign Affairs, Senator the Hon Marise Payne released the first round of decisions under the FAS. Following review and consideration, the Minister announced that the following arrangements will be cancelled:⁴⁴

- Memorandum of Understanding between the Victorian Department of Education and Training and the Technical and Vocational Training Organisation, Iranian Ministry of Labour and Social Affairs (25 November 2004);
- Protocol of Scientific Cooperation between the Syrian Ministry of Higher Education and the Victorian Ministry of Tertiary Education and Training (31 March 1999);
- Memorandum of Understanding (8 October 2018) and Framework Agreement (23 October 2019) between the Victorian Government and the Chinese Government for the Belt and Road Initiative.

In contrast, the Minister approved a proposed MOU on Human Resources Development in the Energy and Mineral Resources Sector between the Western Australian state government and the Indonesian government.

⁴² Grattan (n 34).

⁴³ Ibid.

⁴⁴ Minister for Foreign Affairs, 'Decisions under Australia's Foreign Arrangements Scheme' (Media Release, 21 April 2021) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/decisions-under-australias-foreign-arrangements-scheme>> ('FAS Decisions').

At a high level, and subject to the limited sample size, several observations may be made. First, the ministerial veto is likely not country-blind in practice. The cancellation of the Belt and Road MOU and Framework Agreement between the Victorian and Chinese governments crystallised the speculation that concern for China is a key motivation behind the establishment of the FAS. Similarly, the cancellation of arrangements with Iran and Syria suggest arrangements with states that are deemed not to be Australia's strategic or political allies are more susceptible to the ministerial veto. The cancellations are contrasted with the approval of Western Australia's arrangement with Indonesia, a State considered to be Australia's regional partner.

Second, the content of the agreements did not appear to have much bearing on the exercise of ministerial power. In particular, the cancelled arrangements with Iran and Syria appeared to concern education and scientific exchange at the state level. The Victorian government revealed that the Iranian MOU was entered 'to encourage teacher professional development, exchange programs and scholarships; co-operation on curriculum development, and promoting links between education providers'.⁴⁵ Similarly, the Syrian MOU was entered to promote exchange, scholarship, research and conferences.⁴⁶ Those purposes do not reveal tangible adversity to foreign policy/relations, and indeed appear to confer benefits by way of educational, cultural and civil-society exchange between Australia and the counterparties.

Furthermore, the actual effect of the agreements on Australia did not appear relevant either. Neither the Belt and Road MOU nor the Framework Agreement created any binding or substantive obligations between China and Victoria.⁴⁷ They merely expressed both parties' intention to cooperate on the initiative. As such, the arrangements had no tangible impact thus far. Similarly, the Victorian government revealed that since the signing of the Iranian and Syrian MOUs, no initiatives were ever undertaken from either arrangement.⁴⁸ Indeed, few Victorians even knew they existed.

Finally, the Minister did not provide any reasons for her decisions, other than that she 'consider[s] these four arrangements to be inconsistent with Australia's foreign policy or adverse to our foreign relations in line with the relevant test in the [*Foreign Relations Act*]'.⁴⁹ The Act does not require the Minister to provide reasons. The announcement revealed little about the decision making process or motive of the Minister. Nor is there evidence suggesting any prior public or parliamentary consultation took place.

The observations above suggest that a foreign arrangement need not give rise to tangible political, economic or national security harm or threat to attract ministerial veto. Nor is

⁴⁵ Rohan Smith, 'Iran, Syrian Memorandum of Understanding Explained', *News.com.au* (online at 22 April 2021) <<https://www.news.com.au/national/victoria/politics/iran-syria-memorandum-of-understanding-explained/news-story/b6a8a59e1aae04027dbf7638e7999a36>>.

⁴⁶ Ibid.

⁴⁷ *Memorandum of Understanding on Cooperation in the Development and Implementation of Public-Private Partnerships in Infrastructure Fields between the State Government of Victoria and the National Development and Reform Commission of the People's Republic of China*, signed 24 March 2017 <<https://www.vic.gov.au/public-private-partnerships-infrastructure-fields-mou>>; Premier of Victoria, 'Victoria and China Take Partnership To the Next Level' (Media Release, 23 October 2019) <<https://www.premier.vic.gov.au/victoria-and-china-take-partnership-next-level>>.

⁴⁸ Smith (n 45).

⁴⁹ Minister for Foreign Affairs, 'FAS Decisions' (n 44).

it relevant that the nature or content of the arrangement appears beneficial. Instead, it may be inferred that in making FAS decisions, the Minister may be motivated by purely subjective political factors such as ideology, country bias, and public perception, as opposed to objective administrative or good governance considerations clearly prescribed by statute. The foreign policy/relations test is sufficiently unconstrained as to permit the Minister to rely entirely on his or her political judgement. Whilst the Minister has yet to make any decisions concerning public universities, those observations remain relevant to future decisions.

III IMPACT OF THE FOREIGN ARRANGEMENTS SCHEME ON PUBLIC UNIVERSITIES

The highly discretionary, political and opaque nature of the ministerial veto, as discussed in Part II, has profound consequences for public universities. Considering the legal structure of the FAS, and broader concerns raised by universities, this article submits that the FAS has four negative ramifications, namely: (1) politicisation of universities, (2) chilling of international research and collaboration, (3) denial of legal recourse and accountability mechanisms, and (4) diversion of university resources.

A *Politicisation of Universities*

The FAS imposes a political overlay on the international pursuits of public universities. The statutorily prescribed object of many public universities is to serve the public interest, and the object is otherwise politically neutral. For example, the key objects provided for by the constituting legislations of Victorian public universities include to ‘undertake scholarship...of international standing and to apply those matters to the advancement of knowledge to the well-being of the Victorian, Australian and international communities,’ and to ‘serve the...public interest by...elevating public awareness of educational, scientific and artistic developments’.⁵⁰ The FAS effectively imposes an additional overarching requirement that any arrangements with foreign entities must satisfy the Minister to be consistent with Australia’s foreign policy/relations, which the government reiterates is a matter of political judgement.⁵¹ The fact that the Minister is empowered at any time to terminate a university’s international academic activities, upon his or her satisfaction of an arrangement’s inconsistency with Australia’s foreign policy/relations, further enables the Minister to co-opt universities as stakes in diplomatic bargaining. As Pt. II(B) highlights, using university activities as foreign policy leverage could well have been the legislative intention.

Indeed, the foreign policy overlay may well be exposing Australian universities to foreign manipulation. As the cancellation of the Victorian government’s Belt and Road MOUs suggests, the agenda of Australia’s powerful foreign allies could materially

⁵⁰ *University of Melbourne Act 2009* (Vic) s 5; *Monash University Act 2009* (Vic) s 5; *Victoria University Act 2010* (Vic) s 5.

⁵¹ Explanatory Memorandum (n 24) 11–12.

influence the Minister. The power structure enabled by the FAS could see universities' international operations being shaped by unaccountable foreign actors, as opposed to their own scholarly communities.

B Chilling Effect on International Research and Collaboration

The FAS raises well publicised concerns regarding the capacity of public universities to participate in international research and collaboration. In as early as October 2020, when the FAS was still undergoing parliamentary debate, the then Labor Opposition expressed concerns that once enacted, the law could have a chilling effect on international collaboration.⁵² Those concerns were echoed by various university and industry body submissions on the FAS bill to the Senate Foreign Affairs, Defence and Trade Committee. Broadly, stakeholders expressed concerns that the FAS could undermine international research and collaboration in two ways.

First, the Minister's power to invalidate proposed or existing arrangements falling within the scheme creates sovereign risks that deter foreign partners from engaging with Australian universities. The Go8 in its submissions stressed that the retrospective power to cancel standing arrangements at any indeterminate point in the future at the 'stroke of a Minister's pen' diminishes the confidence of foreign parties in Australian universities' capacity to commit to joint enterprise.⁵³ The 'significant uncertainty' the ministerial power creates,⁵⁴ argued Universities Australia,⁵⁵ Monash University,⁵⁶ RMIT University,⁵⁷ UNSW,⁵⁸ and the University of Melbourne,⁵⁹ disincentivises

⁵² Daniel Hurst, 'Foreign veto laws: Labor warns of 'unprecedented power' and lack of oversight', *The Guardian* (online at 15 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/15/foreign-veto-laws-labor-warns-of-unprecedented-power-and-lack-of-oversight>>.

⁵³ Group of Eight Australia, Submission No 30 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Parliament of Australia, *Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020* (25 September 2020) 2 ('Submission No 30').

⁵⁴ Universities Australia, Submission No 20 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Parliament of Australia, *Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020* (25 September 2020) 3 ('Submission No 20').

⁵⁵ Ibid.

⁵⁶ Monash University, Submission No 36 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Parliament of Australia, *Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020* (25 September 2020) 1 ('Submission No 36').

⁵⁷ RMIT University, Submission No 35 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Parliament of Australia, *Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020* (25 September 2020) 4 [22] ('Submission No 35').

⁵⁸ University of New South Wales, Submission No 18 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Parliament of Australia, *Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020* (25 September 2020) 1 ('Submission No 18').

⁵⁹ University of Melbourne, Submission No 41 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Parliament of Australia, *Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020* (September 2020) 2-3 ('Submission No 41').

international partners from pursuing collaborative arrangements or funding commitments with Australian universities. The Australian tertiary education sector's concerns were matched by foreign counterparts. Submitting on behalf of the UK Russell Group of Universities, Chief Executive Dr Tim Bradshaw described the proposal as 'unfortunate', and that the bill 'introduced significant uncertainty, unpredictability and indeed risk, into any engagement Russell Group members might undertake with an Australian university partner'.⁶⁰

Second, the uncertainties the FAS creates could discourage Australian universities from pursuing international engagements, especially with or in 'high risk' countries. Citing the retrospectivity and indeterminate criteria of the ministerial power to cancel arrangements, RMIT submits the FAS creates deep uncertainties for Australian universities themselves.⁶¹ The prospect of having entire research or exchange arrangements cancelled due to a change in foreign policy that could be near impossible to know in advance instils little confidence in internationally-minded academics or university leaders to sponsor proposals.⁶² Further, as Pt. II(D) highlights, the academic merits of the arrangement does not preclude the Minister from making a declaration, if the foreign counterparty is deemed politically undesirable. Accordingly, the FAS country risks could cause universities to view their own existing or proposed international initiatives with suspicion. Indeed, several public universities now require foreign arrangement proposals to be submitted through an internal vetting portal.⁶³ As Melissa Conley Tyler and Siew Fang Law of the University of Melbourne observe, the administrative burden could further discourage international engagements,⁶⁴ particularly with countries out of favour with the Commonwealth, such as China and other non-allies. As UNSW submits, the complications 'will act as a major disincentive to academics, other staff and universities as a whole from engaging in overseas activities'.⁶⁵

C Lack of Meaningful Legal Recourse

Furthermore, due to the nature and design of the FAS powers, administrative law will unlikely offer any meaningful recourse to adverse ministerial decisions. Under section 58 of the Act, a Minister making a declaration is not required to observe any requirements of procedural fairness.⁶⁶ Not only does this section deny a university the basic opportunity to put forward its case before being subject to an adverse decision, it also removes one of the most common grounds for judicial review. Furthermore, merits

⁶⁰ Group of Eight Australia, 'Submission No 30' (n 53) 2.

⁶¹ RMIT University, 'Submission No 35' (n 57) 4 [24].

⁶² University of New South Wales, 'Submission No 18' (n 58) 6.

⁶³ 'Foreign Arrangements Scheme', *Western Sydney University* (Web Page)

<https://www.westernsydney.edu.au/research/researchers/foreign_arrangements_scheme>; 'Foreign Arrangements Scheme (FAS', *Southern Cross University* (Web Page)

<<https://www.scu.edu.au/staff/legal-office/legal-advice-and-agreements/foreign-arrangements-scheme-fas/>>.

⁶⁴ Melissa Conley Tyler and Siew Fang Law, 'Australia's Universities Need to be Free to Engage Globally', *Pursuit (The University of Melbourne)* (online at 27 November 2020)

<<https://pursuit.unimelb.edu.au/articles/australia-s-universities-need-to-be-free-to-engage-globally>>.

⁶⁵ University of New South Wales, 'Submission No 18' (n 58) 6.

⁶⁶ *Foreign Relations Act* (n 1) s 58.

review is not available under the Act. As the Explanatory Memorandum states, the highly discretionary nature of foreign policy/relations renders merits review unsuitable.⁶⁷ Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is also expressly ousted by a separate amendment Act.⁶⁸ Whilst entrenched judicial review is nominally available under section 75(v) of the Constitution,⁶⁹ there is a strong likelihood that the High Court will consider foreign policy and relations, the subject matters concerning the Minister's subjective satisfaction, not to be justiciable.⁷⁰ Given the highly political and rapidly changing nature of foreign policy, and its traditional characterization as an executive prerogative,⁷¹ the High Court may prove reluctant to deviate from the Minister's judgement, particularly given the deference the courts have shown in judicial review matters concerning the 'public interest' test.⁷²

Accordingly, faced with an ill-advised FAS decision, an university may be left with no viable legal avenue to challenge the decision. In addition to being inherently unfair, the lack of legal remedies in any event further exacerbates the disincentive for universities to enter into foreign arrangements considered to be high risk, regardless of their academic merit. Moreover, the prospect of acting with legal impunity may well encourage the Minister to liberally exercise his or her powers, to the detriment of universities' confidence to freely engage in international endeavours.

D Diversion of University Resources

Finally, the FAS imposes an onerous regulatory burden on universities, which diverts resources from core activities such as teaching, learning and research. The requirement to notify DFAT of any reportable foreign arrangement means that universities would have to deploy significant time, effort and resources on compliance and due diligence activities, such as reviewing existing and prospective international arrangements. The Go8 stressed that some member universities had to review as many as 75 agreements for every one agreement notified under the FAS.⁷³

Consequently, the core academic activities are negatively impacted. University of Melbourne Deputy Vice-Chancellor Michael Wesley stated that as a result of diversion of university resources to FAS compliance activities, 'crucial work on improving student experience ... and building new research and commercialisation partnerships [had been] delayed or deferred'.⁷⁴ Indeed, government legal adviser and FAS drafter

⁶⁷ Explanatory Memorandum (n 24) 11–12.

⁶⁸ *Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Act 2020* (Cth).

⁶⁹ Explanatory Memorandum (n 24) 11.

⁷⁰ Chris Finn, 'The concept of 'justiciability' in administrative law' in Matthew Groves and H.P. Lee (eds), *Australian Administrative Law* (Cambridge University Press, 2012) 143, 151–2.

⁷¹ *Ibid* 152.

⁷² Jason Donnelly, 'Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?' (2017) 7(1) *Victoria University Law and Justice Journal* 94, 96; Gabrielle Appleby and Alexander Reilly, 'Unveiling the Public Interest: The Parameters of Executive Discretion in Migration Legislation' (2017) 28 *Public Law Review* 293, 298–300.

⁷³ Lisa Visentin, 'Universities' confusion over foreign veto scheme', *The Sydney Morning Herald* (online at 5 July 2021) <<https://www.smh.com.au/politics/federal/universities-confusion-over-foreign-veto-scheme-20210624-p583vo.html>>.

⁷⁴ *Ibid*.

Daniel Ward concurred that the regulatory framework diverts valuable resources that ‘should instead be devoted to meeting the needs of Australian university students’.⁷⁵

Evidently, the FAS represents a regulatory obstacle to already under-resourced universities, and another unwelcome distraction to the universities’ academic mission.

IV ACADEMIC FREEDOM AS A PRISM OF CRITIQUE

The analysis thus far explicated the broad, discretionary and highly political nature of the Minister’s powers, and the various negative implications of this power for public universities. However, there is an absence of a values-based critique of the FAS in the public discourse which encapsulates individual ramifications, and strengthens constructive arguments against FAS powers with respect to public universities. Given their nature as independent institutions of higher education and research, and the functions they serve in a liberal democracy, universities are entitled to unique rights and protection by way of academic freedom. Accordingly, this part of the article seeks to employ academic freedom as a unifying thematic prism for grounding critique of the FAS as applied to public universities.

A *The Idea of Academic Freedom*

First, it is necessary to examine the meaning and scope of the concept of academic freedom. Fundamentally, academic freedom refers to the right of educational institutions to pursue their scholarly inquiries without fear or favour. As noted by the Full Federal Court in *James Cook University v Ridd*, the concept of academic freedom can be traced back to Socrates’ defence in Plato’s *Apology*, although Socrates regarded his teaching to be ‘constrained by, and served, his belief in God’.⁷⁶ The secularisation of education in Europe eventually cemented the principle that ‘science and its teachings shall be free’.⁷⁷ In the contemporary context, Jennifer Lackey in *Academic Freedom* defines the term as the ‘ability of members of higher learning to engage in intellectual pursuits without fear or censorship or retaliation’, which ‘lies at the heart of the mission of the university’.⁷⁸ Glyn Davis describes the concept as ‘the right to carry out research, teaching and public comment without intrusion’.⁷⁹ Carolyn Evans and Adrienne Stone further describe the distinct purpose of academic freedom as to ‘[protect] the pursuit and dissemination of knowledge through free inquiry and [ensure] that university research and teaching is authoritative and unbiased’.⁸⁰

⁷⁵ Visentin (n 41).

⁷⁶ *James Cook University v Ridd* [2020] FCAFC 123 [91].

⁷⁷ Ibid.

⁷⁸ Jennifer Lackey, ‘Academic Freedom’ in Jennifer Lackey (ed) *Academic Freedom* (Oxford Scholarship Online, 2018) 1, 1.

⁷⁹ Glyn Davis, ‘Special Pleading: free speech and Australian universities’, *The Conversation* (online at 5 December 2018) <<https://theconversation.com/special-pleading-free-speech-and-australian-universities-108170>>.

⁸⁰ Evans and Stone (n 14) 73; Adrienne Stone, ‘An author interview with Professor Adrienne Stone’ (July 2021) *Centre for Comparative Constitutional Studies Newsletter* 8.

B Law and Institutional Autonomy

Academic freedom, however, is not limited to the right of individual academics to engage in scholarly pursuits, but extends to the relationship between academic institutions, such as universities, and other powerful actors, such as the government.⁸¹ Indeed, it is widely recognised that upholding academic freedom in practice requires the right-holder to enjoy a degree of ‘institutional autonomy’.⁸² That is, academic institutions must be entitled to engage in intellectual activities such as teaching, research, and publication without the control, interference or censorship of political, economic or other vested interests such as governments and businesses.⁸³ Ronald Dworkin specifically argues that academic freedom requires two levels of autonomy.⁸⁴ At an individual level, each scholar should be insulated from the university administrators. Whilst university officials may appoint faculty, set budget, and maintain general oversight over the curriculum, they cannot dictate how each academic must conduct their teaching.⁸⁵ At an organisational level, universities and other institutions of higher education must be insulated from political and economic powers such as the government and large corporations and industries. Whilst the legislature may legislate to establish a public university, and to prescribe the structure and character of that university and possibly to appoint its officials, it must not dictate what is to be taught at the university, and how it may be taught once the university is established.⁸⁶

The idea of institutional autonomy illuminates the important relationship between the academic institution and the laws that govern its activities. That is, the laws which regulate university operation must respect the universities’ prerogative to set their own academic agenda, and afford the universities adequate protection from external interference. Indeed, Nandini Ramanujam posits that academic freedom would not be possible without ‘the minimal guarantee of the rule of law’.⁸⁷ The rule of law serves as a check on arbitrary state power, which is a significant threat to academic freedom.⁸⁸ In turn, academic freedom, as protected by the rule of law, enables the informed debate and critical inquiry which serve the public good to flourish.⁸⁹ As a law which expressly seeks to control the activities of Australian public universities, the FAS is inconsistent with the principle of institutional autonomy.

First, the FAS empowers the Commonwealth government to directly interfere with the pursuit of bona fide academic activities. As discussed in Part II, the Minister is entitled under the FAS to prohibit or terminate broadly defined foreign arrangements at the stroke of the ministerial pen. Those arrangements extend to, by DFAT’s own admission,

⁸¹ Davis (n 79).

⁸² Evans and Stone (n 14) Foreword by Glyn Davis vii–viii.

⁸³ Ibid; Edwina MacDonald and George Williams, ‘Banned Books and Seditious Speech: Anti-Terrorism Laws and Other Threats to Academic Freedom’ (2007) 12(1) *Australia & New Zealand Journal of Law & Education* 29, 31.

⁸⁴ Lackey (n 78) 9; Ronald Dworkin, ‘We Need a New Interpretation of Academic Freedom’ in Louis Menand (ed) *The Future of Academic Freedom* (The University of Chicago Press, 1996) 183.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ ‘Academic Freedom and the Rule of Law’, *RevDem Podcast* (CEU Democracy Institute, 8 March 2021) <<https://democracyinstitute.ceu.edu/articles/academic-freedom-and-rule-law>>.

⁸⁸ Ibid.

⁸⁹ Ibid.

routine activities in academic life such as research collaborations, cultural activities, exchange and scholarship programs and academic conferences. The power extends beyond ordinary governance or regulation of universities contemplated by Dworkin, such as mandating the general structure and character of the university. Instead, the FAS is a conferral of power on the Minister as a non-academic actor to interfere with the core academic activities of educational institutions. Here, the FAS constitutes a direct infringement of institutional autonomy at the organisational level. Furthermore, the FAS may also constitute an indirect infringement of institutional autonomy at an individual level. This may occur when university administrators are compelled to block or discourage specific arrangements considered to be high risk. In this case, the FAS has the potential to pressure university administrators to interfere with core teaching and research activities on non-academic grounds to ensure compliance, to the detriment of individual academics' freedom to set their own scholarly agenda. Additionally, the FAS regulatory burden arguably indirectly limits the capacity of universities to properly advance knowledge, by way of diverting resources that could otherwise be spent on teaching and research.

Second, the criteria which condition the exercise of the Minister's powers under the FAS unacceptably expose the activities of public universities to domestic and foreign political influence. As Evans and Stone argue, universities will not be free to pursue and disseminate knowledge according to academic merit if they are beholden to the political priorities of the government of the day.⁹⁰ Yet the FAS paves the exact legislative pathway to ensure the precedence of the government's political priorities over the universities' choice of international academic agenda. As discussed in Part II, the idea of foreign policy and relations is widely defined and nebulous, and extends to subjective thoughts entirely in the Minister's mind. Empowering the Minister to apply political judgement to determine the propriety of a university's foreign arrangement signals that any arrangement must pass a political or ideological test regardless of its academic merit or benefits. In an example raised by the University of Melbourne in its parliamentary submission, the University is party to the Healthy Soils for Sustainable Food Production and Environmental Quality Joint Research Centre, which is partially funded by the Chinese government. The project aims to deliver tangible economic, environmental and social benefits by developing food sustainability and security practices.⁹¹ This arrangement would be susceptible to ministerial termination under the FAS at any time, if the Minister becomes satisfied that the arrangement is inconsistent with or adverse to Australia's foreign policy or relations. As Part II demonstrates, the academic or practical benefits may have little bearing if the Minister adjudges the counterparty to be not desirable. The prospect of meaningful arrangements being cancelled on political grounds is fundamentally inconsistent with the universities' autonomy to pursue scholarly endeavours free from external influence.

A counter-argument may be raised that the capacity of the FAS to undermine the institutional autonomy of universities may be speculative and overblown, such that criticism of the scheme on the ground of academic freedom may not be entirely warranted. Indeed, it may be argued that given the lack of FAS decisions concerning

⁹⁰ Evans and Stone (n 14) 88.

⁹¹ University of Melbourne, 'Submission No 41' (n 59) 9.

universities so far, and the much more obvious objective to counter foreign arrangements with significant political and economic ramifications such as the Belt and Road initiative, universities may not be the true target of the FAS.

Several points may be raised in response to demonstrate why academic freedom remains a relevant prism of critique. First, the lack of decisions concerning universities so far does not mean universities would not be targeted in the future. The presence of Confucius Institute on campuses being recognised by public commentary as a key driver of the FAS suggests the academic activities of universities would unlikely be free from scrutiny. Second, the structure and character of the Minister's powers are repugnant to the rule of law as a necessary condition of academic freedom. Proponents of the rule of law invariably accept that the law should be clear, accessible, predictable, and capable of guiding the behaviour of its subjects in advance.⁹² Legal rights and liabilities should also be resolved by settled legal rules as opposed to arbitrary discretion.⁹³ Whilst it may be accepted that the executive should be afforded greater discretion on matters of foreign policy and national security, applying the broad, unpredictable, and practically unreviewable discretion of the FAS to routine activities of public universities remains disproportionate and oppressive. In any event, the institutional autonomy of universities should not depend on the goodwill of the Minister to refrain from excessive interference. The legislature and executive should bear the onus of clearly promulgating in advance concrete circumstances, as opposed to subjective political whim, which may trigger a declaration adverse to the rights and liberties of universities. Indeed, the practical manifestation of the FAS's inconsistency with the rule of law is the inability of universities to conduct their academic activities with confidence and certainty, to the detriment of academic pursuits. As Universities Australia submits, 'if every interaction is subject to disallowance or amendment, this is highly likely to limit the ability of Australia's researchers and students to engage effectively in the ways that are essential for both researchers' and students' development'.⁹⁴ Having the Sword of Damocles hanging over their heads offers universities little by way of reassurance that their extensive international network would be protected from capricious political power-play in the name of foreign policy.

In brief, academic freedom offers a principled critique of the FAS by accentuating the inconsistency between the powers reposed in the Minister and the institutional autonomy necessary for universities to freely and independently pursue and disseminate knowledge according to academic merit.

C Why Academic Freedom Matters

Having showcased the unwelcome implications of the FAS for the academic freedom of public universities, one may ask what is the significance of legislative impairment of academic freedom. After all, is the advancement and protection of Australian foreign policy and relations not a legitimate purpose which justifies inconveniencing public universities as but one segment of society? This section therefore seeks to highlight that

⁹² Donnelly (n 72) 97–8.

⁹³ Ibid.

⁹⁴ Universities Australia, 'Submission No 20' (n 54) 3.

academic freedom delivers various indispensable social goods, specifically, the advancement of society, and the promotion of democratic governance. In impairing academic freedom, the FAS is capable of causing wider socio-political detriment beyond the academy.

An obvious justification of academic freedom is that the free advancement and dissemination of knowledge produces tangible benefit for society at large.⁹⁵ Encouraging free intellectual inquiry and exchange by universities, including transnationally,⁹⁶ is conducive to the generation of knowledge, which in turn produces public benefits by way of the invention of new technologies, tools and practices. By undermining the autonomy of public universities to enter into foreign arrangements with certainty, and heightening the risk of engaging with institutions based in certain countries, the FAS risks curtailing universities' capacity to bring about tangible benefits through international collaboration. As the Go8 stresses, by creating 'embarrassing sovereign risk issues', the FAS negatively impacts the Australian economy and citizenry as a whole.⁹⁷ That is, universities would be held back from participating in the sharing of pivotal technologies in fields such as AI and space, and other critical international engagements which deliver direct benefits.⁹⁸ Monash University similarly submits that the FAS risks stifling Australia's global standing in innovation.⁹⁹ In addition to economic and technological benefits, free scholarly exchange is conducive to an active and engaged citizenry. The free exchange of ideas, knowledge and skills enriches culture and civil society generally. In the context of globalisation, Conley Tyler and Law of the University of Melbourne argue that international engagement allows students and academics to work across cultures, and encourages collaboration and the sharing of global best practice to solve the world's most pressing problems.¹⁰⁰ By undermining the certainty of exchange programs with certain world leading institutions, and creating a suspicious 'fortress Australia' mentality,¹⁰¹ the FAS risks limiting the academic and cultural horizon of Australian students and researchers to the detriment of an informed public.

More importantly, academic freedom is often regarded as a key element of democratic governance. On one hand, the knowledge generated by free intellectual inquiry supports good governance by supplying the government with subject matter expertise and information. In the context of Howard-era anti-terrorism laws, Edwina MacDonald and George Williams raised concerns that laws potentially criminalising the academic study of terrorism could discourage investigations on the causes and solutions to radicalisation.¹⁰² Similarly, the FAS indirectly discourages the creation of arrangements with certain foreign governments and institutions in the name of foreign policy. In stigmatising genuine academic research with respect to those nations, the Australian

⁹⁵ Evans and Stone (n 14) 74.

⁹⁶ Conley Tyler and Law (n 64).

⁹⁷ Group of Eight Australia, 'Submission No 30' (n 53) 2.

⁹⁸ *Ibid.*

⁹⁹ Monash University, 'Submission No 36' (n 56) 1.

¹⁰⁰ Conley Tyler and Law (n 64).

¹⁰¹ *Ibid.*

¹⁰² Macdonald and Williams (n 83) 41.

government risks losing knowledge and expertise which may in fact assist in managing and improving Australia's foreign policy and relations.

On the other hand, and more critically, academic freedom enables the provision of expert commentary to the general public, which promotes political accountability by supplying the information, knowledge and critique that citizens and the legislature may utilise to scrutinise government actions.¹⁰³ Academic expertise may also assist in fact-checking government pronouncements for veracity. Those functions are vital in giving effect to the principles of representative and responsible government in Australia's constitutional democracy. The role of academic institutions in holding government to account is well recognised. MacDonald and Williams describe academics as 'routinely involved in scrutinising and criticising government action'.¹⁰⁴ The European Court of Human Rights in *Mustafa Erdogan v Turkey* stressed that '[t]here is no Chinese wall between science and a democratic society', and that 'there can be no democratic society without free science and free scholars'.¹⁰⁵ The relationship is particularly pertinent 'in the context of social science and law, where scholarly discourse informs public discourse on public matters including those directly related to government and politics'.¹⁰⁶

A problematic implication of the politicisation of universities by the FAS, by way of introducing consistency with foreign policy/relations as criteria for decision making, is the risk of the FAS being used by governments to block academic inquiries on foreign policy matters potentially embarrassing to the government. For example, the Minister may block a proposed arrangement between an Australian public university with East Timorese government bodies or affiliated entities to research the alleged spying activities of the Howard Government during the Timor Gap natural resource negotiations, on the ground that such research is inconsistent with the Australia's ongoing diplomatic efforts and foreign policy interests. The requirement of consistency with Australia's foreign policy/relations inherently discourages critical inquiry, which in turn prevents the production of expert commentary that may assist the public or the legislature to hold the executive to account. Effectively, the FAS powers have the capacity to suppress the generation of knowledge adverse to the executive branch. Indeed, the legislative aim to ensure uniformity of international agenda across State/Territory entities as directed by the Commonwealth has been criticised by Conley Tyler as 'authoritarian-sounding'.¹⁰⁷ As Allan Gyngell further emphasises in relation to the expansive powers of the FAS, 'debates about the national interest and foreign policy are central to any liberal democracy like Australia'.¹⁰⁸ The risk of FAS powers being adversely exercised against politically contentious academic initiatives further raises the risk of self-censorship, where academics are discouraged by themselves or their institutions from critically analysing Australian foreign policy or relations in partnership with foreign entities. If those risks materialise, the FAS would represent an abrogation

¹⁰³ Evans and Stone (n 14) 83–4.

¹⁰⁴ Macdonald and Williams (n 83) 38.

¹⁰⁵ *Mustafa Erdogan and Others v Turkey* (European Court of Human Rights, Grand Chamber, Application Nos 346/04 and 39779/04, 27 August 2014) [6].

¹⁰⁶ *Ibid* [6].

¹⁰⁷ Conley Tyler (n 15).

¹⁰⁸ Dziedzic (n 36).

of a critical democratic accountability mechanism, being the critical interrogation of, and contribution to the Australian foreign policy debate under the auspices of academic freedom.

V LAW REFORM

So far, in examining its scope, structure and socio-legal impact, this article has argued that the FAS represents a disproportionate and unacceptable abrogation of the academic freedom and institutional autonomy of Australian public universities. Such abrogation gives rise to a range of negative socio-political ramifications. Notwithstanding the criticisms, it should be acknowledged that the principal objects and purpose of the FAS remain legitimate. That is, the Commonwealth government has a constitutionally recognised mandate to supervise external affairs and mitigate national security threats. Expert testimonies from national intelligence agencies such as ASIO confirm that international arrangements of public universities can be a source of security risks such as espionage, critical technology theft and covert political influence.¹⁰⁹ Indeed, such foreign risks can themselves be a threat to the academic freedom of Australian public universities. The difficulty is to strike an appropriate balance between foreign policy imperatives and the protection of academic freedom. As ASIO Director-General Mike Burgess emphasises, '[a]ddressing national security risks doesn't need to come at the expense of academic freedom, which forms a core pillar of our universities and research institutions'.¹¹⁰ Therefore, it is important to identify law and policy reform options to remediate features of the FAS most detrimental to academic freedom.

A Legal and Policy Certainty

First, the Commonwealth should provide greater certainty by way of concrete policy guidelines on the circumstances which may trigger an adverse declaration.¹¹¹ The inability of universities to discern the meaning of Australian foreign policy and relations, and be assured that foreign arrangements would not be interfered with at will are key drivers of potential chilling of international collaboration, and self-censorship on politically sensitive inquiries. To address such concerns, the government should enact policy to the effect that in making a FAS assessment, the foreign policy/relations risks will be proportionately balanced against the academic merits of the arrangement. Such policy should assure that prohibition, cancellation or invalidation of an arrangement will only be declared sparingly, as suggested by former ASIO head Duncan

¹⁰⁹ Evidence to Parliamentary Joint Committee on Intelligence and, Parliament of Australia, Canberra, 11 March 2021; Lisa Visentin, 'Ex-ASIO boss says foreign veto powers are 'necessary' but should be used carefully', *The Sydney Morning Herald* (online at 7 July 2021) <<https://www.smh.com.au/politics/federal/ex-asio-boss-says-foreign-veto-powers-are-necessary-but-should-be-used-carefully-20210706-p5876q.html>>.

¹¹⁰ *Ibid* 26.

¹¹¹ Law Council Australia, Submission No 16 to Senate Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Parliament of Australia, *Inquiry into Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020* (24 September 2020) 5, 7 ('Submission No 16').

Lewis,¹¹² preferably as a last resort where there is imminent harm to Australian foreign policy/relations. Further, the policy should affirm that a foreign arrangement concerning bona fide academic inquiry will not be prohibited or terminated merely because it may uncover information or knowledge embarrassing to the government. Such policy commitment should aim to alleviate concerns of the Minister exercising power to avoid accountability, or to politically manipulate universities at the expense of academic freedom. The reassurance that arrangements will not be cancelled at will for political convenience will further ease counterparties' concerns about Australian sovereign risk.

B Greater Government Assistance on Risk Mitigation

Second, at the front end of the FAS, the government should provide greater expert assistance to universities in identifying foreign policy risks in foreign arrangements, and formulating mitigation strategies. The government should proactively work with universities on high risk arrangements, with the aim of maximising the academic benefits while minimising foreign policy risks. Many universities already implement policies and processes to conduct due diligence on foreign counterparts and mitigate security risks, pursuant to the University Foreign Interference Taskforce guidelines or internal initiatives.¹¹³ Greater governmental assistance would not only ease the regulatory burden on universities and limit the diversion of resources from core academic activities, but also provide greater reassurance to universities that well-monitored foreign arrangements would not be subject to arbitrary interference.

C Procedural Fairness and Merits Review

Third, as a matter of administration, the FAS should afford public universities procedural fairness and merits review when faced with an adverse decision.¹¹⁴ The justification for the removal of procedural fairness, being it would compromise sensitive information or decision-making processes, is not entirely satisfactory.¹¹⁵ Indeed, it is difficult to see how affording public universities the opportunity to put forward a case defending the academic merits of their arrangement, and explaining why the arrangement is not inconsistent with Australia's foreign policy/relations, undermines the national interest. To invite such response from universities, it is not always necessary for the government to disclose sensitive information. Further, as suggested by the Law Council of Australia and the University of Melbourne, decisions made by delegates of the Minister should be subject to merits review.¹¹⁶ Foreign policy decisions should not preclude merits review, for sensitive decisions concerning national security are no stranger to the Security Appeals Division of the Administrative Appeals Tribunal.¹¹⁷

¹¹² Visentin (n 109).

¹¹³ University of Melbourne, 'Submission No 41' (n 59) 3; RMIT University, 'Submission No 35' (n 57) 1–3.

¹¹⁴ Law Council Australia, 'Submission No 16' (n 111) 8–9; University of Melbourne, Submission No (n 59) 8.

¹¹⁵ Explanatory Memorandum (n 24) 10–11.

¹¹⁶ Law Council Australia, 'Submission No 16' (n 109) 8–9; University of Melbourne, 'Submission No 41' (n 59) 8.

¹¹⁷ University of Melbourne, 'Submission No 41' (n 59) 8.

Allowing those administrative checks should reduce the risk of foreign arrangements being subject to arbitrary or capricious interference.

D *More Robust Parliamentary Scrutiny*

Furthermore, the FAS should be amended to involve greater parliamentary scrutiny for decisions made by the Minister personally. Due to the dynamic nature of foreign policy, it may be inevitable that the Minister will need to act drastically within a short timeframe. Executive imperatives, however, should not excuse avoiding parliamentary and public scrutiny. Under s 54A of the current legislation,¹¹⁸ the Minister is required to table in Parliament an annual report detailing the exercise of powers under the FAS. However, the Minister is not required to provide reasons for decisions, and redactions may be made where the Minister considers necessary in order to avoid prejudice to defence or security.¹¹⁹ Nor does the report afford entities subject to adverse decisions the opportunity to table any objections. Further, Parliament has no power to intervene in any of the Minister's decisions. It is submitted that given the breadth of the powers, the annual reporting requirement is an inadequate accountability mechanism. In light of the potential of the FAS to undermine academic freedom, and the associated negative social impacts, Parliament should be vested with more substantive supervisory functions. For example, in making an adverse declaration against a public university's foreign arrangement, the Minister should be required to table in Parliament his or her justifications for the decision (subject to national security redactions) alongside the university's response for a short period before the decision comes into effect. Parliament should then be vested with the power to disallow the decision with a simple majority. Additional checks and balances should ensure the power is not unfettered, and that abrogation of universities' institutional autonomy and liberty is subject to meaningful democratic scrutiny.

E *Academic Freedom as Key Value*

Most importantly, as MacDonald and Williams argue, academic freedom should be elevated to a core principle in Australian democratic discourse.¹²⁰ The role of academic freedom in securing societal advancement and enabling democratic governance ought to be afforded the same recognition as the independence of the public service to provide frank and fearless advice to the government of the day.¹²¹ Recognising academic freedom as a fundamental civil liberty would not only act as a check on present executive overreach or abuse of power, but also caution future governments before enacting laws or policies inconsistent with the role of public universities in civil society.

¹¹⁸ *Foreign Relations Act* (n 1) s 54A(1)–(3).

¹¹⁹ *Ibid* s 54A(5).

¹²⁰ Macdonald and Williams (n 83) 43.

¹²¹ *Ibid*.

VI CONCLUSION

This article began with a survey of the purpose, scope, structure, and operation of the FAS as applied to Australian public universities. It was revealed that a broad range of international pursuits of those universities are now subject to wide ministerial discretion to be varied, prohibited or terminated on illusive foreign policy grounds. The legislative ‘Sword of Damocles’ undermines the capacity of Australian universities to engage and collaborate with foreign entities with certainty and confidence. An examination of the public discourse precipitating the FAS suggests the scheme is inherently an instrument of foreign policy, through which the Commonwealth government may leverage the activities of universities to achieve political objectives. By adopting the analytical framework of academic freedom and institutional autonomy, this article offers a principled critique of the detrimental socio-political, economic, and administrative implications of the FAS for public universities, the Australian society, and democracy at large. In its quest to safeguard Australian national interest, the Commonwealth government regrettably overlooked the important benefits of free academic pursuits in the international sphere. The FAS therefore represents a flawed and disproportionate policy response. Accordingly, the FAS should be reformed to better balance foreign policy and national security interests on one hand, and the protection of academic freedom and free intellectual pursuit on the other. More importantly, academic freedom ought to be regarded as a fundamental right and liberty which guides future political actions toward public universities.

In his address to the UN General Assembly at the conclusion of World War II, US President Harry Truman notably remarked, ‘[i]f we do not want to die together in war, we must learn to live together in peace’.¹²² The Commonwealth government’s desire to safeguard Australia’s national interest, whilst commendable, must not obscure the fact that security and foreign policies are but the means to an end, that is, to enable Australia to participate and prosper in the international community. Australian society must be vigilant not to permit the means to usurp the end.

¹²² Harry S. Truman, ‘Address by President Harry S. Truman to the UN General Assembly’ (Speech, *The United Nations*, 25 April 1945) <<https://2009-2017.state.gov/p/io/potusunga/207325.htm>>.

