

The Australia's Foreign Relations Act and Australia's Relationship with International Law

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Abstract

This article examines the consequences of the Australia's Foreign Relations (State and Territory Arrangements) Act 2020 (Cth) ('Foreign Relations Act') for international law. It argues that the arrangements entered into by state, territory and local governments to which the Foreign Relations Act applies can be relevant to international law in three ways. First, they may relate indirectly to Australia's international legal obligations. Second, they may be a means by which Australian subnational governments claim a role for themselves in governance on global issues. Third, as an exercise of diplomacy, they influence the relations Australia maintains with other nations and the way in which it participates in the international system. As the states and territories in particular become more assertive, including on international issues such as climate change, giving the Commonwealth complete control over such arrangements may impact Australia's relationship with international law.

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I Introduction

In April 2021, the Commonwealth government cancelled two memoranda of understanding between the Victorian state government and the Chinese government with respect to China's 'Belt and Road initiative' (the 'Belt and Road agreements').¹ The decision was not unexpected and, in at least some ways, not especially controversial. The Commonwealth government is responsible for managing Australia's foreign policy and foreign relations. The Belt and Road initiative has caused controversy both within Australia and globally, and the Victorian

1. 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>>.

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government is the only Australian government to have signed on to the program.² Australia's relationship with China is one of its most important, and has become a particular source of difficulty for the Commonwealth since early 2020.³ A decision about whether Australia should participate in a scheme such as the Belt and Road initiative might reasonably be one expected to be made at the national level. Nonetheless, the decision was significant in at least one respect. It was the first exercise of the Commonwealth's power to cancel agreements between Australian subnational governments and foreign governments, as conferred by the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) ('*Foreign Relations Act*').

Australian subnational governments, state and territory governments in particular, have long maintained relations of their own with foreign governments. The *Foreign Relations Act* gives the Commonwealth, for the first time, comprehensive control over those relations. The *Foreign Relations Act* has attracted a good amount of attention, much of it specifically about Australia's relationship with China.⁴ Other commentary has focused on the *Foreign Relations Act's* impact on the balance of power between the Commonwealth and the states and territories.⁵ It was introduced in the midst of Australia's COVID-19 pandemic response, which has both caused and exposed tensions in the relationship between the Commonwealth government and state and territory governments. For some, the *Foreign Relations Act* was a clear response to the Commonwealth's relative powerlessness in the face of state and territory assertiveness: one that gives it a 'weapon to politically bludgeon state premiers [it] doesn't like.'⁶

The aim of this article is to consider instead the consequences of the *Foreign Relations Act* for international law and Australia's relationship with the international legal system. A connection between the *Foreign Relations Act* and international law has not been considered in any detail to date, and is perhaps better demonstrated by another incident. In November 2021, it was reported that the Department of Foreign Affairs and Trade ('DFAT'), acting under the *Foreign Relations Act*, had instructed five state and territory governments to withdraw their signatures to a memorandum of understanding authored by the 'Under2 coalition' (the 'Under2 memorandum').⁷ The Under2 coalition is a global network of subnational governments committed to action on climate change. The Under2 memorandum states the intention of these governments to 'accelerate the world's response to climate change and provide a model for broader international cooperation

2. See Scott Moore, 'Competition with China Goes Subnational', *The Diplomat* (Blog Post, 14 March 2020) <<https://thediplomat.com/2020/03/competition-with-china-goes-subnational/>>; Michael Clarke, 'Why Scrap Victoria's "Meaningless" Belt and Road Deal? Because it Sends a Powerful Message to Beijing', *The Conversation* (Blog Post, 22 April 2021) <<https://theconversation.com/why-scrap-victorias-meaningless-belt-and-road-deal-because-it-sends-a-powerful-message-to-beijing-159536>>.

3. See, eg, Linda Jaivin, 'Middle-Power Might: A Plan for Dealing with China' (2021) 11 (February) *Australian Foreign Affairs* 71; Natasha Kassam, 'Great Expectations: The Unraveling of the Australia-China Relationship', *Brookings* (Article, 20 July 2020) <<https://www.brookings.edu/articles/great-expectations-the-unraveling-of-the-australia-china-relationship/>>.

4. See, eg, Michelle Grattan, 'Morrison Government Quashes Victoria's Belt and Road Deal with China', *The Conversation* (Blog Post, 21 April 2021) <<https://theconversation.com/morrison-government-quashes-victorias-belt-and-road-deal-with-china-159480>>.

5. See, eg, Paul Kelly, 'Sovereignty Rules with Flex of Constitutional Muscle' *The Australian* (online, 29 August 2020) <<https://www.theaustralian.com.au/inquirer/china-deal-sovereignty-rules-with-the-flex-of-constitutional-muscle/news-story/62d74e738265f519b80b236b9b7d115e>>.

6. Commonwealth, *Parliamentary Debates*, Senate, 30 November 2020, 6337 (Penny Wong, Shadow Minister for Foreign Affairs).

7. Peter Hannam, "'Vandals': Victoria, Queensland Fume over Federal Climate Intervention', *The Guardian* (online, 29 November 2021) <<https://www.theguardian.com/australia-news/2021/nov/29/vandals-victoria-queensland-fume-over-federal-climate-intervention>>.

among nations'.⁸ It affirms support of international instruments and regimes on climate change, including the temperature goals of the *Paris Agreement*.⁹ Unlike the Belt and Road agreements, it relates explicitly to international legal norms.

In some respects, the relationship between the Australian states and international law has received a great deal of attention, most notably following a series of High Court decisions, culminating in the *Tasmanian Dam* case,¹⁰ that confirmed the ability of the Commonwealth to implement Australia's international legal obligations without the consent of the states.¹¹ However, the focus of most work on the subject has been the appropriate allocation of rights and responsibilities between the Commonwealth and the states within Australia's federal system.¹² Considerably less attention has been given to the consequences of those roles from the perspective of international law.¹³ In the United States, where work of this nature is more established, one longstanding view is that a federal constitutional structure is antithetical to international cooperation and participation in the international legal system.¹⁴ This resonates in Australia. For example, the 11 year delay between Australia's ratification of the *International Covenant on Civil and Political Rights*¹⁵ and its accession to the treaty's First Optional Protocol was due to disagreement between the states and the Commonwealth.¹⁶ Some more recent work in the United States considers instead how international law can empower states in their own domestic law and policy-making.¹⁷ A number of Australian states now have climate change policies that refer explicitly to the aims of international agreements,

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8. Climate Group, *Under2 Memorandum of Understanding* (Web Page) <<https://www.theclimategroup.org/under2-memorandum-understanding>> [I](d).
 9. *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).
 10. *Commonwealth v Tasmania* (1983) 158 CLR 1.
 11. See also Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties* (Report, November 1995).
 12. Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 426–7. See, eg, Brian Galligan and Ben Rimmer, 'The Political Dimensions of International Law in Australia' in Brian R Opeskin and Donald R Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 306; Gary A Rumble, 'Federalism, External Affairs and Treaties: Recent Developments in Australia' (1985) 17(1) *Case Western Reserve Journal of International Law* 1.
 13. As exceptions, see Andrew Byrnes and Hilary Charlesworth, 'Federalism and the International Legal Order: Recent Developments in Australia' (1985) 79(3) *American Journal of International Law* 622; Madelaine Chiam, 'Tasmanian Dams and Australia's Relationship with International Law' (2015) 24 *Griffith Law Review* 89; Henry Burmester, 'The Australian States and Participation in the Foreign Policy Process' (1978) 9(3) *Federal Law Review* 257; Brian R Opeskin, 'The Role of Government in the Conduct of Australia's Foreign Affairs' (1994) 15(1) *Australian Yearbook of International Law* 129.
 14. See, eg, Kenneth Wheare, *Federal Government* (Oxford University Press, 1947) 178–96; Max Sorensen, 'Federal States and the International Protection of Human Rights' (1952) 46(2) *American Journal of International Law* 195; Harold W Stoke, *The Foreign Relations of the Federal State* (John Hopkins Press, 1931) 231.
 15. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
 16. Brian R Opeskin, 'Federal States in the International Legal Order' (1996) 46(3) *Netherlands International Law Review* 353, 359.
 17. Robert B Ahdieh, 'Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination' (2008) 73(4) *Missouri Law Review* 1185, 1188–9.

to which they are themselves not parties.¹⁸ However, there is very little work in Australia that explains this phenomenon as a matter of constitutional or international law.

Subnational governments generally have limited, if any, formal role in international law. For the most part, international law recognises the national government alone as the relevant international subject and assimilates subnational governments to their national government, including for the purposes of international responsibility.¹⁹ Some subnational governments in federal countries, such as German Länder and Swiss cantons, are given the constitutional capacity to enter into treaties.²⁰ It is unsettled whether the conferral of such powers creates for those subnational governments a measure of international legal personality.²¹ In any case, Australian subnational governments have not been given such powers. Nonetheless, for some international lawyers, whether or not subnational governments possess formal international legal subjectivity, they have the potential to make a real contribution to the international legal system as more flexible actors better positioned to cooperate and to provide a more democratic mode of engagement with international law.²² Cities and local governments have been a major focus of such work.²³ To account for this role, international lawyers point to nuanced ways in which subnational governments play a role in the system despite their formal exclusion: for example, by lobbying national governments and influencing lawmaking processes,²⁴ or by using international norms and standards as the basis for their own policies, potentially even as a tool of opposition to the national government.²⁵

This article considers how the *Foreign Relations Act* impacts Australia's relationship with international law by controlling or limiting the activities of subnational governments. Part II introduces the *Foreign Relations Act*. It first explains the constitutional law on the subject, and describes how, in the absence of an express prohibition or authorisation, Australian subnational governments have maintained their own foreign relations, even since prior to federation. It then sets out the context to the *Foreign Relations Act's* enactment, and explains how the legislation creates a markedly different approach to the management of subnational foreign relations than has been adopted in the past. Part III explains two ways in which the *Foreign Relations Act* is relevant to international law. First, it can apply to arrangements between subnational governments and foreign

18. See, eg, New South Wales Government, 'NSW Climate Change Policy Framework' (1 October 2016) <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Climate-change/nsw-climate-change-policy-framework-160618.pdf>> 4; Queensland Government, 'Pathways to a Climate Resilient Queensland: Queensland Climate Adaptation Strategy 2017–2030' (2017) <<https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Climate-change/nsw-climate-change-policy-framework-160618.pdf>> 10.

19. Opeskin (n 16) 384.

20. John Trone, *Federal Constitutions and International Relations* (University of Queensland Press, 2001) 52–8.

21. Opeskin (n 16) 365–6.

22. See Katherine Schroeder, 'Cities in International Law: The New Landscape of Global Governance' (2021) 61(2) *Virginia Journal of International Law* 363, 381–2; Jean-Bernard Auby, 'Mega-Cities, Globalisation and the Law of the Future' in Sam Muller et al (eds), *The Law of the Future and the Future of Law* (Torkel, 2011) 203, 209.

23. See, eg, Janne Nijman, 'The Future of the City and the International Law of the Future' in Sam Muller et al (eds), *The Law of the Future and the Future of Law* (Torkel, 2011) 213; Janne E Nijman, 'Renaissance of the City as a Global Actor' in Gunther Hellmann, Andreas Fahrmeir and Miloš Vec (eds), *The Transformation of Foreign Policy: Drawing and Managing Boundaries from Antiquity to the Present* (Oxford University Press, 2016) 209; Helmut Philipp Aust, 'Shining Cities on the Hill? The Global City, Climate Change and International Law' (2015) 26(1) *European Journal of International Law* 255.

24. See Section III(B).

25. For example, both San Francisco and Los Angeles have implemented elements of the *Convention on the Elimination of Discrimination against Women*, despite the United States not being a party: see Heidi Nichols Haddad, 'When Global Becomes Municipal: US Cities Localizing Unratified International Human Rights Law' (2020) 31(4) *European Journal of International Law* 1379.

governments that relate to Australia's international legal obligations. This is significant given that the Commonwealth government is internationally legally responsible for the conduct of subnational governments. Secondly, it can apply to arrangements by which subnational governments 'sign-up', in an informal sense, to international norms and standards, which they might in turn use as the basis for their own policies. Part IV considers how the *Foreign Relations Act* might affect Australia's relationship with international law in a more general way, by limiting the ability of subnational governments to maintain relations with other governments, and 'closing off' the nation from the rest of the world.

II Australia's Foreign Relations Act

Australian constitutional law places some clear limitations on the ability of the Australian states to play a role in foreign affairs, such as prohibiting their entry into treaties. However, the precise outer limits of their ability to conduct relations of other kinds with foreign governments have never been determined. The states and territories have stepped into this space, conducting their own foreign relations in furtherance of their interests, largely without any Commonwealth involvement. It is against this backdrop that the provisions of the *Foreign Relations Act* should be understood, as a marked shift from existing practice, which brings control of nearly all such activity into the Commonwealth.

A The States and Territories in International Relations

Australia's Constitution does not provide an express power for either the Commonwealth or the states to manage Australia's foreign affairs, enter into treaties or conduct diplomatic relations. This is because, at the time of federation in 1901, Australia was not an independent nation. The power to conduct Australia's external affairs remained with the British imperial government, which, it was assumed, would manage those affairs on behalf of Australia.²⁶ Over time, the imperial government devolved its power to manage Australia's foreign affairs to the Commonwealth, taking the position that the Commonwealth government was entitled to speak on behalf of the states. As Leslie Zines has explained, this was a policy decision on the part of the British government, which chose to 'use the analogy of a fully sovereign state and rely on the central government for all communication'.²⁷ Nonetheless, it was 'consistent with the political understandings, at the time of the calling of the constitutional conventions, that the colonies should be able to speak with one voice'.²⁸

By at least the 1940s, it was settled that Australia had international legal personality and that the Commonwealth government could conduct Australia's foreign affairs, including by entering into treaties, and sending and receiving diplomatic representatives.²⁹ The basis of the Commonwealth government's ability to do so is the executive power conferred by section 61 of the Constitution.³⁰ Some have claimed that, at the time of federation, the colonies had accrued some amount of legal personality and prerogative power to manage their own external affairs and enter into treaties, which

26. Galligan and Rimmer (n 12) 306.

27. Leslie Zines, 'The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 1, 18.

28. *Ibid.*

29. Stephen Donaghue, 'International Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 237, 237. Some place the date decades earlier: see Galligan and Rimmer (n 12) 307.

30. *Ibid.* 238.

were subsequently retained by the states.³¹ Others have doubted that the states ever had legal personality.³² In any case, it now seems clear at least that only the Commonwealth has the power to enter into treaties and to conduct formal diplomatic relations, as recognised by international law.³³ Some comments from the High Court go further, and appear to suggest that the states have no power to deal with other countries at all.³⁴ However, the point has never been expressly determined.

In practice, the states and territories have long conducted their own foreign relations. The states have maintained representatives in the United Kingdom, in the form of Agents-General, since federation, as a continuation of earlier colonial practice.³⁵ They have also increasingly appointed representatives to other countries.³⁶ Many now have dozens of overseas offices run by agencies such as Global Victoria, Trade and Investment Queensland, and Invest NSW.³⁷ Their primary remit is the promotion of trade and investment ties with their major economic partners. All states and territories have international and regional engagement strategies focussed on the promotion of key industries, and cooperation on other matters such as tourism, education, and cultural exchange.³⁸ To further these strategies, they often enter into written arrangements with foreign government partners. Some of these arrangements are expressed in broad terms as umbrella agreements to cooperate on a range of matters and deepen ties between the two respective governments. In the parliamentary debates about the *Foreign Relations Act*, one member of Parliament referred to such an arrangement as coming ‘disturbingly close to constituting a separate ongoing foreign policy.’³⁹ Speaking about Queensland specifically, international relations expert and former Australian diplomat Carl Ungerer has suggested that the states should expressly develop their own foreign policies, in the face of the Commonwealth’s failure to adequately prosecute their interests overseas.⁴⁰

While state and territory governments clearly have the ability to enter into contracts and contract-like arrangements in the exercise of their functions, including with other governments, no court has considered how those arrangements sit with the Commonwealth’s general responsibility for

31. See Burmester (n 13).

32. See *Bonser v La Macchia* (1969) 122 CLR 177, 185 (Barwick CJ): ‘the colonies were never at any stage international personae nor sovereign and the States still are not.’

33. Burmester (n 13) 262. See *New South Wales v Commonwealth* (1975) 135 CLR 337, 373–4 (Barwick CJ) (*‘Seas and Submerged Lands Case’*).

34. See, eg, *ibid* 506 (Murphy J): ‘The States have no international personality, no capacity to negotiate or enter into treaties, no power to exchange or send representatives to other international persons and *no right to deal with other countries, through agents or otherwise*’ (emphasis added).

35. See Burmester (n 13) 273. All Australian states except for New South Wales have maintained the position of Agent-General to the United Kingdom, although they now generally operate out of Australia House in London. In 2019, the NSW government announced its intention to reintroduce the position after abolishing it in the 1990s; see Alexandra Smith, ‘NSW Open for Business: In London, Mumbai, New York, Shanghai, Singapore and Tokyo’, *Sydney Morning Herald* (online, 4 December 2019) <<https://www.smh.com.au/politics/nsw/nsw-open-for-business-in-london-mumbai-new-york-shanghai-singapore-and-tokyo-20191204-p53grl.html>>.

36. For example, in August 2021 Victoria appointed two new Commissioners to lead the state’s trade and investment activities in the United States, Canada and Latin America: see ‘New Victorian Commissioners Appointed to USA, Canada and Latin America’, *Invest Victoria* (Web Page, 2 August 2021) <<https://www.invest.vic.gov.au/news-and-events/news/2021/august/new-commissioners-appointed-to-americas>>.

37. See ‘All Offices’, *Global Victoria* (Web Page) <<https://global.vic.gov.au/all-offices>>; ‘International Representation’, *Trade and Investment Queensland* (Web Page) <<https://www.tiq.qld.gov.au/connect/about-us/international-representation/>>; ‘International Contacts’, *Invest NSW* (Web Page) <<https://invest.nsw.gov.au/contact-us/international>>.

38. See, eg, Government of Western Australia, *Western Australia’s Asian Engagement Strategy 2019–2030* (Report, August 2019) <<https://www.wa.gov.au/sites/default/files/2020-11/asian-engagement-strategy-2019-2030.pdf>>.

39. Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 2020, 9450 (Andrew Wallace, 9450).

40. Carl Ungerer, ‘Does Queensland Need a Foreign Policy?’ (Seminar, Australian Institute for International Affairs, 16 June 2020).

Australia's external affairs. Moreover, such activities have gone largely uncontested by the Commonwealth. While these international activities are extensive, they rarely openly challenge the Commonwealth's constitutional responsibility for conducting Australia's external affairs or its foreign policy objectives. There have been some examples of disagreements between the Commonwealth and the states and territories on matters of foreign policy. For example, in 2021, the premier of Western Australia criticised the Commonwealth government's handling of its diplomatic relationship with China, a country with which Western Australia has extensive trading ties.⁴¹ However, for the most part, the international activities of the states and territories are conducted in parallel to those of the Commonwealth government and concern the interests of the relevant state or territory specifically.⁴² Until very recently there has been no requirement that the Commonwealth approve these activities or the arrangements entered into by states and territories with foreign governments. That has now changed with the introduction of the *Foreign Relations Act*.

B Background to the Foreign Relations Act

The Commonwealth government announced its intention to enact legislation regulating arrangements between Australian subnational governments and public universities, and foreign governments and foreign universities, in August 2020.⁴³ The overarching purpose of the legislation, as described by the Prime Minister at the time of its introduction into the Commonwealth Parliament, is to ensure that arrangements entered into by states, territories, local governments, and universities, are consistent with Australia's foreign policy.⁴⁴ The Australia's Foreign Relations (State and Territory Arrangements) Bill (the 'Bill')⁴⁵ was introduced into the Parliament on 3 September 2020, was passed by both houses on 3 December 2020, and commenced on 10 December 2020.⁴⁶

The legislation was influenced by a number of contemporary Australian political and geopolitical factors. In one sense, it is the latest in a series of legislative and administrative measures taken since 2017 to address foreign interference and improper foreign influence in Australian politics and

41. Peter de Kruijff, "'Acting Against Our Own Interests': WA Premier Fires Up on Australia-China Relationship', *Sydney Morning Herald* (online, 10 June 2021) <<https://www.smh.com.au/politics/federal/acting-against-our-own-interests-wa-premier-fires-up-on-australia-china-relationship-20210610-p57zuz.html>>.

42. Anne Twomey, 'Commonwealth of Australia' in Hans Michelmann (ed), *Foreign Relations in Federal Countries* (McGill-Queen's University Press, 2009) 37, 37.

43. Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 2020, 56 (Scott Morrison, Prime Minister); Commonwealth, *Parliamentary Debates*, Senate, 27 August 2020, 53 (Marise Payne, Minister for Foreign Affairs).

44. Scott Morrison, 'Ensuring A Consistent Australian Foreign Policy' (Media Release, 27 August 2020, Prime Minister of Australia) <<https://www.pm.gov.au/media/ensuring-consistent-australian-foreign-policy>>.

45. Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 (Cth) (the 'Bill').

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

society. These measures include the Foreign Influence Transparency Scheme (the ‘FITS’),⁴⁷ the *Security of Critical Infrastructure Act 2018* (Cth), and amendments to the foreign investment review framework requiring the assessment of certain proposed investments on national security grounds.⁴⁸ Both government and non-government members of Parliament and senators described the *Foreign Relations Act* as part of a suite of legislation designed to protect Australia’s ‘national security and sovereignty’ by targeting foreign interference and improper foreign influence.⁴⁹ The particular kind of foreign interference that it targets is that ‘of any nation that would seek to undermine Australian foreign affairs position by dealing with subnational governments’.⁵⁰ One government member of Parliament described the *Act* as necessary to counter the ‘divide and conquer tactics of foreign powers’, to ensure that ‘our own people don’t recklessly or naively give foreign governments the keys to the country’.⁵¹

The legislation must also be understood in the context of Australia’s relationship with China. The subject of China dominated debate in Parliament,⁵² has been a feature of most media and expert commentary on the legislation,⁵³ and was a central topic of the Senate Foreign Affairs, Defence and Trade Legislation Committee’s (‘Senate Foreign Affairs Committee’) inquiry into the Bill.⁵⁴ Despite the Commonwealth government’s claim that the *Act* is ‘country agnostic’ and ‘agreement agnostic’,⁵⁵ the Belt and Road agreements were widely assumed to be its intended targets.⁵⁶ The FITS was established following sustained media coverage of alleged instances of Chinese

47. On the constitutional validity of the FITS, see *Libertyworks Inc v Commonwealth* [2021] HCA 18.

48. See Australian Government, The Treasury, ‘Major Reforms to the Foreign Investment Review Framework’ (Web Page) <<https://treasury.gov.au/consultation/c2020-99761>>.

49. Commonwealth, *Parliamentary Debates*, Senate, 1 December 2020, 6384 (Marise Payne, Foreign Minister). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2020, 9256 (Richard Marles); Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 2020, 9453 (Tony Zappia); Commonwealth, *Parliamentary Debates*, Senate, 30 November 2020, 6346 (Sarah Henderson), 6357 (Concetta Fierravanti-Wells). Some non-government politicians (particularly members of the Australian Greens) were critical of the Bill’s approach to the regulation of foreign interference, but did not contest that foreign influence and interference were issues that the legislation was intended to address; see, eg, Commonwealth, *Parliamentary Debates*, Senate, 30 November 2020, 6345 (Janet Rice).

50. Commonwealth, *Parliamentary Debates*, House of Representatives, 27 August 2020, 56 (Scott Morrison, Prime Minister).

51. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2020, 9338–9 (Julian Leeser). See also at 9323 (Tim Wilson); ‘We shouldn’t have states negotiating with foreign governments agreements that undermine our trade agreements, our defence pacts or our national security arrangements; or that provide back doors for foreign interference, influence or economic engagement.’

52. See Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2020, 9253–6, 9321–48; Commonwealth, *Parliamentary Debates*, House of Representatives, 11 November 2020, 9451–8; Commonwealth, *Parliamentary Debates*, Senate, 30 November 2020, 6337–50; Commonwealth, *Parliamentary Debates*, Senate, 1 December 2020, 6868–85.

53. See, eg, Stephen Dziedzic, ‘The Federal Government’s New Foreign Relations Laws Have Passed Parliament. Here’s What That Means’, *ABC News* (online, 8 December 2020) <<https://www.abc.net.au/news/2020-12-08/what-are-the-governments-new-foreign-relations-laws-about/12947590>>.

54. See Senate Foreign Affairs, Defence and Trade Legislation Committee, *Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia’s Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]* (Report, November 2020).

55. Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2020, 6490 (Christian Porter, Attorney-General). See also Revised Explanatory Memorandum, *Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 (Cth) 2 [7]* (‘Explanatory Memorandum’): ‘The framework in this Act is country neutral and does not target any particular foreign state ...’.

56. See, eg, Grant Wyeth, ‘New Australian Foreign Policy Legislation Stresses Consistency’, *The Diplomat* (Blog Post, 31 August 2020) <<https://thediplomat.com/2020/08/new-australian-foreign-policy-legislation-stresses-consistency/>>.

interference in Australian politics,⁵⁷ and a report commissioned by the Commonwealth government into Chinese influence activities in Australia.⁵⁸ Prime Minister Malcolm Turnbull said that the measures were not targeted solely at China.⁵⁹ Nonetheless, both the Australian government and others drew a clear link between the scheme and allegations of Chinese interference.⁶⁰

The Bill was also introduced into the Parliament in the midst of the COVID-19 pandemic, the response to which in Australia has concentrated attention on relations between the Commonwealth and state and territory governments. On one view, Australia's response to the pandemic has been characterised by a relatively high level of coordination between the Commonwealth and state and territory governments.⁶¹ However, it also created and exposed tensions in inter-governmental relations. Some notable examples were the decision of some state and territory leaders to impose border closures in respect of their own states and territories despite Commonwealth opposition;⁶² the Commonwealth government's sustained criticism of the lockdown measures imposed by particular states;⁶³ and state government criticism of the Commonwealth's management of its vaccination program.⁶⁴ State and territory governments and leaders attained a level of political and popular relevance that has challenged traditional federal dynamics, as power ostensibly shifted away from the centre.⁶⁵ At the same time, despite its early leadership, the Commonwealth was either forced, or chose, to adopt a relatively passive role in managing the crisis.⁶⁶ The *Foreign Relations*

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57. See John Fitzgerald, 'Media Scrutiny of China is Critical for Australia', *The Interpreter* (Blog Post, 27 June 2017) <<https://www.lowyinstitute.org/the-interpreter/media-scrutiny-china-critical-australia>>; Anne-Marie Brady, 'Resisting China's Magic Weapon', *The Interpreter* (Blog Post, 27 September 2017) <<https://www.lowyinstitute.org/the-interpreter/resisting-china-s-magic-weapon>>.
58. Amy Searight, *Countering China's Influence Activities: Lessons from Australia* (Centre for Strategic and International Studies Research Report, 1 July 2020) 34.
59. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13146 (Malcolm Turnbull, Prime Minister).
60. Yee-Fui Ng, 'Regulating the Influencers: The Evolution of Lobbying Regulation in Australia' (2020) 41(2) *Adelaide Law Review* 507, 532. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13146 (Malcolm Turnbull, Prime Minister); 'Media reports have suggested that the Chinese Communist Party has been working to covertly interfere with our media, our universities and even the decisions of elected representatives right here in this building. We take these reports very seriously.'
61. Cheryl Saunders, *A New Federalism? The Role and Future of the National Cabinet* (Governing During Crises, Policy Brief No 2, Melbourne School of Government, 1 July 2020) 3. See also Jarrod Ball, *Australia's Federation: Post-Pandemic Playbook* (Committee for Economic Development of Australia Report, August 2020); Mike Baird and Jay Weatherill, 'As Former Premiers, We Have Seen the Benefits of States Cooperating. Let's Extend National Cabinet', *The Guardian* (online, 27 May 2020) <<https://www.theguardian.com/commentisfree/2020/may/27/as-former-premiers-we-have-seen-the-benefits-of-states-cooperating-lets-extend-national-cabinet>>.
62. See Damien Cave, 'Australia's States Are Feuding Like Siblings. What Else to Do But Laugh?', *New York Times* (online, 14 January 2021) <<https://www.nytimes.com/2021/01/14/world/australia/state-border-restrictions-coronavirus.html>>. See also *Palmer v Western Australia* [2021] HCA 5.
63. See, eg, Melissa Clarke, 'Daniel Andrews' Roadmap Announcement "Hard and Crushing" News for Victorians, Federal Government Says', *ABC News* (online, 6 September 2020) <<https://www.abc.net.au/news/2020-09-06/federal-government-responds-to-victorian-coronavirus-roadmap/12635002>>.
64. See, eg, Emilie Gramenz, 'COVID-19 Vaccine Rollout Dependent on Federal Government Supply, Says Queensland Deputy Premier After Criticism over Delays', *ABC News* (online, 31 March 2021) <<https://www.abc.net.au/news/2021-03-31/qld-covid-brisbane-vaccine-rollout-commonwealth/100040912>>.
65. See Casey Briggs, 'Despite the Turmoil of 2020, Australians' Trust in Political Leaders Has Surged. Can it Last?', *ABC News* (online, 28 December 2020) <<https://www.abc.net.au/news/2020-12-28/turmoil-2020-covid-australians-trust-surge-politicians-will-last/12997830>>; Katharine Murphy, 'The End of Certainty: Scott Morrison and Pandemic Politics' *Quarterly Essay* No 79 (1 September 2020) 63.
66. Nicholas Aroney and Michael Boyce, 'Australia and the COVID-19 Pandemic: Federal, State and Local Responses' (11 November 2020) 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3728488>.

Act, introduced only 6 months into the pandemic response, gave the Commonwealth the ability to assert itself on subject matter fairly firmly within its constitutional and political remit.

The *Act* also applies to arrangements entered into by Australian public universities. The Commonwealth government has demonstrated particular concern about the risk of foreign interference in the university sector. However, the justification that has been given for the *Foreign Relations Act* as an addition to existing schemes targeting foreign influence is a separate need to ensure consistency of foreign policy across all levels of government.⁶⁷ While public universities are constituted under the laws of the states and territories, they are not governmental entities. There was some suggestion in the testimony heard by the Senate Foreign Affairs Committee that the decision to include public universities in the ambit of the *Foreign Relations Act* was made after the scheme, originally meant to regulate subnational entities, was first conceived. While DFAT met with state and territory governments in the lead up to the Bill's introduction to Parliament to discuss arrangements of concern, no consultation occurred with universities.⁶⁸ During questioning in Senate Estimates, DFAT representatives said that, when they were first advised of the Bill, its scope envisaged subnational government entities.⁶⁹ They were unable to give a precise date at which the decision to include universities within the scope of the Bill was made.⁷⁰ In any case, while the *Foreign Relations Act's* application to universities raises a number of particular issues, relating, for example, to academic freedom and the relationship between the government and the higher education sector, it will not be the focus of this article.

C Overview of the *Foreign Relations Act*

The *Foreign Relations Act* creates a legislative regime that applies to all written arrangements between, on the one hand, Australian state, territory and local governments, and public universities ('state and territory entities'), and, on the other, foreign governments — both national and subnational — and foreign universities lacking 'institutional autonomy' ('foreign arrangements').⁷¹ It has three main areas of operation. First, it requires all state and territory entities to notify the Commonwealth Minister for Foreign Affairs and Trade ('the Minister') before they enter into a foreign arrangement. In the case of arrangements between state and territory governments and foreign national governments specifically ('core foreign arrangements'), the state or territory government must also notify the Minister before it commences negotiating such an arrangement.⁷² The Minister must give approval before a state or territory government can commence negotiating a

67. Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 13 October 2020 68 (Simon Newnham). 'I would note that there are other schemes in Australia that do protect our interests in dealing with foreign entities but they are established for different purposes and serve different policy intent ... this bill is aimed at ensuring consistency with foreign policy and foreign relations at all levels of government.'

68. See George Williams, 'This Expensive Bill Will Undermine Our Universities' Global Status', *The Australian* (online, 2 October 2020): 'universities appear to have been added as an afterthought given the lack of consultation and attention to the costs of compliance.'

69. Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 28 October 2020, 157 (Simon Newnham).

70. Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 29 October 2020, 143 (Frances Adamson). The Shadow Foreign Affairs Minister responded that, 'if [universities] were in there from the beginning, you'd give me the date.'

71. *Foreign Relations Act* (n 46) ss 23(1), 34(1). See s 8(2) for the definition of 'institutional autonomy'.

72. *Ibid* ss 10, 16(1).

‘core foreign arrangement’,⁷³ and again before it can enter into the arrangement.⁷⁴ In all other cases, the Minister does not have to give express approval, but can prohibit negotiation of, or entry into, an arrangement.⁷⁵ Second, it required all state and territory entities to notify the Minister of any foreign arrangements already in effect at the time that the *Act* entered into force by a prescribed deadline in 2021.⁷⁶ The Minister is required to list all arrangements of which they have been notified on a public register.⁷⁷ At the time of writing, that register listed nearly 3800 arrangements. Third, the Minister can make a declaration in respect of any arrangement that is already in force, rendering the arrangement invalid, not in operation, or requiring its termination.⁷⁸ The Minister can exercise this power even if they have previously approved the arrangement, or decided not to prohibit it.⁷⁹ This was the power used to declare the Belt and Road agreements to be no longer in operation.

The *Foreign Relations Act* does not prohibit any particular type of foreign arrangements. In fact, there was some indication in the parliamentary debates about the Bill that the legislation is intended to facilitate, rather than limit, the cultivation by subnational governments of relations with foreign governments. The Second Reading Speech refers to the ‘important contributions that state, territory and local government entities make to advancing Australia’s foreign policy’, which are a ‘useful and productive part of Australia’s huge breadth of international engagement’.⁸⁰ It refers to the potential for the Commonwealth to ‘leverage these relationships to further our national objectives in our international engagements’.⁸¹ According to the Explanatory Memorandum, the *Foreign Relations Act* is not intended to ‘prohibit, restrict or discourage State/Territory entities from engaging with foreign governments’, but is actually designed to ‘support the States and Territories in undertaking effective, appropriate and informed international engagement’.⁸² It describes the *Foreign Relations Act* principally as a ‘legislative scheme for Commonwealth engagement’ with state and territory foreign arrangements.⁸³

Nonetheless, if the aim of the *Foreign Relations Act* is to ensure collaboration between national and subnational entities, it is unclear that it has been drafted in a way that will necessarily achieve this. Although the Minister must report annually on steps taken to engage with subnational entities⁸⁴ — a provision added to the Bill by amendment proposed by the opposition⁸⁵ — there is no requirement or process established in the *Foreign Relations Act* for regular consultation between subnational governments and the Commonwealth. In particular, there is no specific obligation for the Minister to engage with a state or territory entity before making a decision in respect of an arrangement to which it is a party. A dedicated taskforce has been established within DFAT to

73. *Ibid* s 15(1).

74. *Ibid* s 22(1).

75. *Ibid* ss 35, 36.

76. *Ibid* sch 1.

77. *Ibid* s 53. See <<https://www.foreignarrangements.gov.au/public-register>> (‘Public Register’).

78. *Ibid* s 40(1). See also ss 41–3 on the effect of such a declaration.

79. *Ibid* s 40(2).

80. Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2020, 6490 (Christian Porter, Attorney-General).

81. *Ibid*.

82. Explanatory Memorandum (n 55) 7 [25].

83. *Ibid* 2 [1].

84. *Foreign Relations Act* (n 46) s 53A(2)(c).

85. Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 (Cth) (amendment to be moved by Senator Wong) [sheet 1112].

oversee the scheme, including to engage with the entities to which the *Foreign Relations Act* applies.⁸⁶ However, the level of engagement to be conducted remains formally within the discretion of the Minister under the provisions of the *Foreign Relations Act*.

Some proposals for the management of subnational foreign relations in other jurisdictions have adopted a more institutionalised approach to consultation. For example, a Bill introduced into the United States Congress in 2019 proposed the establishment of an Office of Subnational Diplomacy, to support the states in undertaking foreign relations of their own in a way compatible with national foreign policy objectives.⁸⁷ Although part of the Office's role would be to align subnational priorities with foreign policy goals, it would not have a federal veto right over subnational arrangements. Instead, the Bill establishes an institutional framework within which consultation on such matters can occur. The proposal does not deny the security concerns created by the decentralisation of diplomacy, including with respect to subnational engagement with China.⁸⁸ In fact, as with the Australian legislation, there is a strong indication that the Bill is intended above all to deal with Chinese influence at the subnational level.⁸⁹ However, the proposed solution is to increase the capacity of subnational governments to confront these concerns, including by embedding federal experts within those subnational entities to advise them on such issues.⁹⁰ While the Bill is still before Congress, in October 2022, the United States Department of State appointed its first Special Representative for Subnational Diplomacy to integrate local concerns into national foreign policy and foster the diplomatic activities of subnational governments.⁹¹

There are other aspects of the *Foreign Relations Act* that state and territory entities have suggested are more likely to limit than facilitate subnational foreign relations. First, the *Foreign Relations Act* applies to any written arrangement between the relevant entities, whether or not it is legally binding, and whatever its subject matter.⁹² This could include memoranda of understanding, strategic partnerships, and even email exchanges,⁹³ meaning the requirements of the legislation will apply to virtually all conduct involving state and territory entities and foreign governments. Second, the test against which the Minister is to consider each arrangement asks whether the arrangement would adversely affect Australia's foreign relations or be inconsistent with Australia's foreign policy.⁹⁴ The term 'Australia's foreign relations' is not defined, and the term 'Australia's foreign

86. See Department of Foreign Affairs and Trade, *Foreign Arrangements Scheme* (Web Page) <<https://www.foreignarrangements.gov.au>>.

87. City and State Diplomacy Act, HR 3571, 116th Congress (2019); City and State Diplomacy Act, S 4426, 116th Congress (2020).

88. Anthony F Pipa and Max Bouchet, 'Partnership Among Cities, States, and the Federal Government: Creating An Office of Subnational Diplomacy at the US Department of State' (Report, Brookings, 17 February 2021) <<https://www.brookings.edu/research/partnership-among-cities-states-and-the-federal-government-creating-an-office-of-subnational-diplomacy-at-the-us-department-of-state/>>.

89. Catherine Putz, 'A Discussion with US Senator Chris Murphy About Subnational Diplomacy and China', *The Diplomat* (online, 9 September 2020) <<https://thediplomat.com/2020/09/a-discussion-with-us-senator-chris-murphy-about-subnational-diplomacy-and-china/>>.

90. Pipa and Bouchet (n 88).

91. Anthony J Blinken, 'Naming Ambassador Nina Hachigan as Special Representative for Subnational Diplomacy' (Press Statement, 3 October 2022) <<https://www.state.gov/naming-ambassador-nina-hachigan-as-special-representative-for-subnational-diplomacy/>>.

92. *Foreign Relations Act* (n 46) s 9.

93. See Explanatory Memorandum (n 55) 42 [277]; Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 13 October 2020, 15 (George Williams).

94. *Foreign Relations Act* (n 46) ss 17, 24, 35, 36, 40.

policy' is defined so broadly that, according to one Senate committee, it essentially gives the Minister an 'unfettered discretionary power.'⁹⁵ The only requirement is that the Minister be satisfied that the relevant policy is the Commonwealth's policy on Australia's foreign relations or things outside Australia.⁹⁶ The policy does not need to be written or publicly available, and does not need to be formulated, decided upon or approved by any member or body of the Commonwealth.⁹⁷ Some state and territory entities have pointed out that this definition gives the Minister a wide-ranging discretion in their assessment of foreign arrangements that cannot be tested against any meaningful criteria.⁹⁸

Finally, the *Foreign Relations Act* does not provide for merits review of any decisions made under it, and such decisions are excluded from judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).⁹⁹ While certain constitutionally-entrenched rights to judicial review are preserved,¹⁰⁰ the Minister is not required to observe any requirements of procedural fairness in making decisions under the *Foreign Relations Act*.¹⁰¹ This means that there is no requirement that the Minister put to the relevant state and territory entity any matter they propose to rely on in making their decision, or provide reasons for their decision.¹⁰² In practice, this might significantly curtail the ability of a person or entity subject to an adverse decision to seek judicial review of that decision, or to learn about factors likely to influence the exercise of the Minister's powers under the *Foreign Relations Act*.

III Foreign Arrangements and International Norms

The term 'foreign arrangement' is defined broadly in the legislation to refer to any written arrangement, agreement, contract, understanding or undertaking between (relevantly) a state, territory, or local government and a foreign government.¹⁰³ The definition is not limited in any way by reference to the content of the arrangement. It does not specify whether the arrangement can or should deal with international law concepts, standards or norms. The only guidance provided on this point in any of the legislative materials is found in the Explanatory Memorandum to the Bill:¹⁰⁴

95. Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 14 of 2020, 16 October 2020) 3 [1.9]. For the definition of 'Australia's foreign policy' see *Foreign Relations Act* (n 46) s 5(2). There are still limitations on the exercise of a statutory discretionary power: see, eg, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40.

96. *Foreign Relations Act* (n 46) s 5(2).

97. *Ibid.*

98. Northern Territory Government, Submission No 72 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions] 2*; Tasmanian Government, Submission No 97 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions] 3*.

99. *Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Act 2020* (Cth) sch 1 cl 1.

100. Explanatory Memorandum (n 55) 12.

101. *Foreign Relations Act* (n 46) s 58.

102. Explanatory Memorandum (n 55) 10 [47].

103. *Foreign Relations Act* (n 46) ss 4, 6–9.

104. Explanatory Memorandum (n 55) [279].

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.

As a matter of constitutional law this statement is correct, and was not contested by any member of Parliament, any submission to the Senate Foreign Affairs Committee inquiry into the legislation or in any of the commentary. While there was some debate about the extent to which state and territory governments are constitutionally permitted to engage in foreign relations activity of other kinds¹⁰⁵ — a point on which, as described above, there is little constitutional doctrine — it is settled that only the Commonwealth has the power to enter into treaties, being legally binding agreements governed by public international law. Treaties are not the only type of agreement or arrangement that might deal with, or be relevant to, international law. Yet none of the *Foreign Relations Act*, the Explanatory Memorandum, or the parliamentary debates and inquiries mentions the term ‘international law’ in any other context. This section considers how the foreign arrangements to which the *Foreign Relations Act* applies might nonetheless be relevant to Australia’s international legal obligations or otherwise engage with international legal norms and standards.

A The Trade and Investment Activities of States and Territories

The Commonwealth parliamentary debates make clear that the activities of subnational governments most expected to attract the exercise of the Minister’s powers under the *Act* are those relating to the protection and fulfilment of their economic interests. By reference predominantly to the Belt and Road agreements, the debates demonstrate that an overarching purpose of the legislation is to ensure that the foreign trade and investment activities of states and territories do not invite foreign interference, or affect Australia’s strategic concerns and interests.¹⁰⁶ A number of politicians drew a distinction between the economic interests of states and territories and the sovereign interests of Australia as a nation, and argued that the justification for the legislation lay in the fact that ‘sovereignty can and should outweigh money’.¹⁰⁷ These comments cast the activities of the states and territories as those of private economic actors. One opposition member of Parliament likened the global activities of subnational governments to those of ‘tech companies’, the ‘*Fortune 500*’ and ‘independent entrepreneurs’, comparing subnational governments such as states and territories to corporations such as Apple.¹⁰⁸ The limited contribution that subnational governments made to the debate similarly indicates that their trade and investment activities were front of mind when considering the *Foreign Relations Act*’s application. In its submission to the Senate Foreign Affairs Committee inquiry into the legislation, the New South Wales government supported the general intent of the legislation, but called for some amendments to reflect the fact that international

105. See, eg, Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 13 October 2020, 2 (George Williams).

106. See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2020, 9322 (Tim Wilson); 9327–8 (Katrina Allen); 9337 (Julian Leeser); Commonwealth, *Parliamentary Debates*, Senate, 30 November 2020, 6347 (Sarah Henderson); 6360 (Concetta Fierravanti-Wells).

107. Commonwealth, *Parliamentary Debates*, Senate, 30 November 2020, 6357 (David Van).

108. Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2020, 9330 (Luke Gosling).

arrangements are key to securing its economic prosperity, and should not produce unintended economic consequences.¹⁰⁹ The submission of the government of the Northern Territory also described its foreign arrangements as a ‘bedrock to advancing trade and investment opportunities for Territory businesses’.¹¹⁰ The Victorian government’s response to the declaration made in respect of the Belt and Road agreements stated simply that ‘Victoria will continue to work hard to deliver jobs, trade and economic opportunities for our state’.¹¹¹

Even if the application of the *Foreign Relations Act* was limited to agreements of this kind, it is artificial to imagine that a clear distinction can be drawn between the trade and investment activities of state and territory governments and the nation’s international law obligations. As the range of matters subject to international legal regulation expands, so too does the potential for their overlap with matters traditionally within the domain of subnational governments. Moreover, some work considers explicitly the possibility that subnational governments, particularly cities, will act contrary to international norms and standards in their quest to establish overseas commercial ties and attract investment in the form of foreign capital: a regulatory ‘race to the bottom’ occasioned by jurisdictional competition.¹¹² This is particularly important given that subnational governments, unlike private economic actors, are assimilated to the central government for the purposes of state responsibility.¹¹³ If a state or territory government acts contrary to international law, it is Australia that will be held internationally responsible.¹¹⁴ For example, in 2013 the World Trade Organization (‘WTO’) Appellate Body upheld an earlier Panel ruling that the government of Ontario’s renewable energy feed-in-tariff program breached Canada’s obligations under certain of the WTO agreements.¹¹⁵ State and territory governments have caused Australia to breach its international obligations in the past by their legislation.¹¹⁶

Where a state’s legislation places Australia in breach of international law, section 109 of the Constitution ensures that legislation enacted by the Commonwealth on the relevant subject will prevail over the state legislation to the extent of any inconsistency.¹¹⁷ However, no equivalent constitutional provision ensures the ability of the Commonwealth to take similar steps with respect to unlegislated state arrangements with foreign governments that might similarly implicate

109. NSW Government, Submission No 19 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia’s Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]* 3.

110. Northern Territory Government, Submission No 72 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia’s Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]* 1.

111. Stephen Dziedzic, ‘Federal Government Tears Up Four Victorian Government Deals with Foreign Nations Leading to Rebuke from Chinese Embassy’, *ABC News* (online, 21 April 2021) <<https://www.abc.net.au/news/2021-04-21/federal-government-tears-up-four-victorian-government-deals/100085676>>.

112. Yishai Blank, ‘Localism in the New Global Legal Order’ (2006) 47(1) *Harvard International Law Journal* 263, 271.

113. ‘Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries’ [2001] *Yearbook of the International Law Commission* II(2) 31, art 4, [8]–[9]. See also Katja Creutz, ‘Responsibility’ in Helmut Philipp Aust and Janne E Nijman (eds), *Research Handbook on International Law and Cities* (Elgar, 2021) 135.

114. See *LaGrand Case (Germany v United States of America) (Provision Measures)* [1999] ICJ Rep 9, [28]: ‘... the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be ... the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States.’

115. *Canada — Measures Relating to the Feed-In Tariff Program*, WTO Doc WT/DS412/AB/R (6 May 2013) (Appellate Body Report).

116. See, eg, Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (31 March 1994) (‘*Toonen v Australia*’).

117. *Commonwealth Constitution* s 109.

Australia's international obligations. It was unclear in debates about the *Foreign Relations Act* whether such a use was envisaged for the legislation. One submission to the Senate Foreign Affairs Committee's inquiry into the legislation raised the possibility that a Commonwealth government committed to a zero emissions target could use the legislation to prohibit any arrangement that might contribute to increased greenhouse gas emissions.¹¹⁸ This might be significant given that many of the foreign activities of at least certain states relate to the promotion and development of their resources sectors. For instance, the Public Register lists a 2011 arrangement between the Western Australian government and China, the first memorandum of cooperation signed by China's National Development and Reform Commission with a subnational government, committing the governments to, among other things, encouraging Chinese companies to engage in resource exploration and development in Western Australia and investing in infrastructure required for resource development.¹¹⁹ The arrangement was expressly identified by the Western Australian government as one that might be subject to a declaration under the *Foreign Relations Act*.¹²⁰ Another example of such an agreement is a 2011 memorandum of understanding between the government of Queensland and the Japan Bank for International Cooperation ('JBIC') intended to facilitate JBIC support of the business activities of Japanese companies in Queensland's resource sector.¹²¹

There is nothing in either of these arrangements that contravenes Australia's international obligations. However, the Commonwealth government made a net zero emissions commitment as part of Australia's 'nationally determined contribution' to the aims of the *Paris Agreement* in 2021.¹²² There is growing doubt that continuing exploitation of fossil fuel resources is consistent with the achievement of such an outcome.¹²³ The assessment of 'Australia's foreign policy' and 'Australia's foreign relations' under the *Foreign Relations Act* may involve consideration of Australia's international legal obligations, but the legislation itself does not require that it do so. Without more extensive definitions of the term, more substantial advice from the Minister, and more transparent information about the operation of the *Foreign Relations Act*, it is not possible to know.

B Transnational Governance Networks

The provisions of the *Foreign Relations Act* may also apply to foreign arrangements by which state and territory governments engage directly with international norms and international legal regimes.

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118. Yun Jiang and Adam Ni, Submission No 10 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions] 2*.
119. *Memorandum of Understanding Between the Government of the State of Western Australia of the Commonwealth of Australia and the National Development and Reform Commission of the People's Republic of China on Promotion of Investment Cooperation*, signed 16 September 2011 <[https://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3813884a5e693982278ef55348257911005af567/\\$file/3884.pdf](https://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3813884a5e693982278ef55348257911005af567/$file/3884.pdf)>. See also Premier of Western Australia, 'New WA-China Agreement' (Media Statement, 16 September 2011) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2011/09/New-WA-China-agreement.aspx>>.
120. See Nicolas Perpetch and Alisha O'Flaherty, 'WA-China Deal at Risk under "Appalling" Federal Government Move to Regulate Foreign Relations' *ABC News* (online, 27 August 2020) <<https://www.abc.net.au/news/2020-08-27/wa-china-deal-at-risk-under-proposed-new-foreign-relations-laws/12601514>>.
121. 'JBIC Signs MOU on Comprehensive Strategic Partnership with the State of Queensland through its Department of Employment, Economic Development and Innovation', *Japan Bank for International Cooperation* (Web Page, 7 December 2011) <<https://www.jbic.go.jp/en/information/press/press-2011/1207-6561.html>>.
122. 'International Climate Change Commitments', *Australian Government, Department of Industry, Science, Energy and Resources* (Web Page, 4 January 2022).
123. See International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (Report, 2021) 21.

One example of such an arrangement is the Under2 memorandum described earlier. The basis for the Minister's decision with respect to the Under2 memorandum was apparently a failure to notify the Commonwealth of the arrangement, to which the state and territory governments were already signatories at the time of the *Foreign Relations Act's* entry into force, rather than a ruling on its content. It appears from the Public Register that approval was subsequently given for at least some states to re-enter the arrangement.¹²⁴ Nonetheless, the incident demonstrates that the *Foreign Relations Act* applies to arrangements that allow subnational governments to engage explicitly with international law norms and standards, potentially in ways that challenge or openly oppose the position of the Commonwealth government. In contrast to the Victorian government's muted response to the cancellation of the Belt and Road agreements, the Victorian Minister for Energy, Environment and Climate Change labelled the decision with respect to the Under2 memorandum 'egregious' and called those responsible 'vandals.'¹²⁵

Networks such as the Under2 coalition give subnational governments the opportunity to play a role in global governance and engage directly with international norms. The number of such networks is rapidly growing. The most studied of these are city networks, which Michele Acuto and Steve Rayner have defined as 'formalized organizations with cities as their main members and characterized by reciprocal and established patterns of communication, policy-making and exchange.'¹²⁶ One estimation in 2016 suggested that there might be 200 city networks globally.¹²⁷ Another in 2018 put the number at over 300.¹²⁸ They range in size from small local or regional networks to global networks with thousands of members.¹²⁹ Australian local governments, for example, are members of the World Organization of Cities and Local Governments ('UCLG'), ICLEI — Local Governments for Sustainability, and the C40 Cities Climate Leadership Group. City networks have gained prominence most notably due to their activism on climate change, but they deal with a range of subjects, including sustainability, migration, poverty, gender and inequality, energy, economic issues, public health and peacebuilding.¹³⁰ Some are specialised, but many work across a variety of topics, functioning as a general forum for policy development.¹³¹ Such networks can provide practical assistance to subnational law and policymakers, in the sense of information and expertise sharing. However, they can also play a policy development or regime building role. Their output often takes the form of non-legally binding written instruments, such as declarations, action plans and compacts.¹³² Such arrangements, as is now apparent, would fall under the *Foreign Relations Act*.

Subnational governance networks can directly influence international institutions and the development of international law. For example, the UCLG successfully lobbied for the inclusion of sustainable development goal 11 on 'Sustainable Cities and Human Settlements'.¹³³ The UCLG also influenced the drafting of the Global Compact on Migration adopted by the United Nations General

124. At the time of writing, the Public Register indicated that Victoria, New South Wales and South Australia had been given such approval: at Public Register (n 77).

125. Hannam (n 7).

126. Michele Acuto and Steve Rayner, 'City Networks: Breaking Gridlocks or Forging (New) Lock-In?' (2016) 92(5) *International Affairs* 1147, 1148–9.

127. *Ibid* 1148.

128. Sheila Foster and Chrystie Swiney, 'City Networks and the Glocalization of Urban Governance' in Helmut Philipp Aust and Janne E. Nijman (eds), *Research Handbook on International Law and Cities* (Edward Elgar, 2021) 368, 373.

129. Acuto and Rayner (n 126) 1152.

130. *Ibid* 1153; Foster and Swiney (n 128) 373.

131. *Ibid*.

132. Foster and Swiney (n 128) 376.

133. United Cities and Local Governments, 'The 2030 Agenda for Sustainable Development' (Web Page) <<https://www.uclg.org/en/issues/2030-agenda-sustainable-development>>.

Assembly in 2018.¹³⁴ Michele Acuto has described how this influence is the result of both top-down processes and subnational governments' own initiative.¹³⁵ International organisations such as the United Nations and the World Bank, and regional organisations such as the European Union, increasingly address themselves to subnational governments, on occasion making room at the table for their participation in traditionally nation state-centric fora.¹³⁶ For example, the United Nations has partnered with ICLEI — Local Governments for Sustainability in its work on sustainability issues.¹³⁷ Helmut Aust has argued that, by entering into non-binding agreements with the World Bank, the C40 Cities Climate Leadership Group is able to influence the standards that are adopted by the World Bank in its agreements with other entities.¹³⁸ At the same time, subnational governments actively seek to assert their role by adopting policy frameworks meant to influence existing international regimes.¹³⁹ Governance networks are often the vehicle by which such a role is established.

Governance networks can also shape international law and policy-making indirectly, by allowing for the development of norms and standards on a range of global issues from the 'bottom-up'.¹⁴⁰ Janet Levin and Hari Osofsky have described the process of bottom-up lawmaking as one in which a community of diverse actors 'coalesce around shared, on-the-ground experiences and perceived self-interests', that, over time, assume normative significance and harden into law.¹⁴¹ Governance networks provide a forum for these norms and standards to be diffused horizontally, amongst their members.¹⁴² Through the networks' interactions with national governments, international organisations and other entities, those norms can then ultimately be diffused upwards, to influence international policy-making.¹⁴³ In this way, governance networks not only provide a forum for the sharing of information and expertise, and a vehicle for lobbying and the exertion of influence, but they also play a 'jurisgenerative role',¹⁴⁴ allowing subnational governments to function as part of a 'norm-generating community'.¹⁴⁵ They provide a space for the concretisation of standards developing at the subnational level, and facilitate their translation to the international level. Such an understanding of the role of governance networks is consistent with theoretical approaches to international law and lawmaking that consider more generally how non-state, sub-state and supra-state actors make normative contributions to the corpus of international law even while acting outside international law's formal structures and processes.¹⁴⁶

134. Foster and Swiney (n 128) 374.

135. Michele Acuto, 'City Leadership in Global Governance' (2013) 19(3) *Global Governance* 481, 485.

136. *Ibid.*

137. *Ibid.*

138. Helmut Philipp Aust, 'The Shifting Role of Cities in the Global Climate Change Debate: From Paris to Pittsburgh and Back?' (2018) 28(1) *Review of European, Comparative and International Environmental Law* 57, 4.

139. Acuto (n 135) 485.

140. See Janet Koven Levit, 'A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments' (2005) 30(1) *Yale Journal of International Law* 125.

141. Hari M Osofsky and Janet Koven Levit, 'The Scale of Networks: Local Climate Change Coalitions' (2008) 8(2) *Chicago Journal of International Law* 409.

142. Foster and Swiney (n 128) 378.

143. *Ibid.*

144. See Barbara Oomen, 'Decoupling and Teaming Up: The Rise and Proliferation of Transnational Municipal Networks in the Field of Migration' (2020) 54(3) *International Migration Review* 913, 931.

145. Elif Durmus, 'A Typology of Local Governments' Engagement with Human Rights: Legal Pluralist Contributions to International Law and Human Rights' (2020) 38(1) *Netherlands Quarterly of Human Rights* 30, 54.

146. See, eg, Joost Pauwelyn, Ramses Wessel and Jan Wouters, *Informal International Lawmaking* (Oxford University Press, 2012); Christine Chinkin, 'Normative Development in the International Legal System' in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2003) 21.

While most contemporary work on the subject of governance networks is about cities and local governments, the same principles can be applied to networks involving regional or sub-federal governments. Australian states and territories are part of governance networks, such as the Under2 coalition, and the Network of Regional Governments for Sustainable Development.¹⁴⁷ Moreover, they are active participants in these networks. For example, a number of Australian states and territories sit on the Under2 coalition steering group.¹⁴⁸ New South Wales, South Australia and the Australian Capital Territory have announced the formation of a net zero emissions policy forum for subnational governments, an initiative supported by the Under2 coalition, which is intended to attract a global membership.¹⁴⁹ If the states and territories continue to seek a more pronounced role in governance on issues such as climate change, engaging with other governments and with international institutions may become an essential tool by which they do so. Notably, state and territory governments signed a series of instruments and declarations concluded in connection with the 26th Conference of the Parties to the United Nations Framework Convention on Climate Change¹⁵⁰ ('COP26') in 2021. These included a 'Declaration on Accelerating the Transition to 100% Emission Cars and Vans' signed by the governments of Victoria, New South Wales, Tasmania,¹⁵¹ South Australia and the ACT,¹⁵² a 'Global Coal to Clean Power Transition Statement' signed by the ACT government,¹⁵³ and the 'Further, Faster, Together: Under2 Leaders Action' declaration, signed by the NSW government.¹⁵⁴ At the time of writing, the latter two were listed as 'not in operation' on the Public Register.

It is unclear the extent to which the *Foreign Relations Act* will limit subnational foreign activity, and thereby the opportunities for such engagement. The *Foreign Relations Act* does not prohibit foreign arrangements of any particular kind. However, subnational governments have raised concerns that the broad nature of the Minister's discretion under the *Foreign Relations Act*, the vague definitions of its operative provisions, the lack of any review rights, and the administrative burden created by the scheme may have a chilling effect on subnational foreign engagement.¹⁵⁵ If

147. Network of Regional Governments for Sustainable Development (NRG4SD) (Web Page) <<https://sustainabledevelopment.un.org/partnership/?p=1585>>.

148. 'Under2 Coalition', *Climate Initiatives Platform* (Web Page) <https://climateinitiativesplatform.org/index.php/Under_2_Coalition>.

149. NSW Government, 'NSW, ACT and SA to Be Founding Members of Net Zero Emissions Policy Forum at Glasgow' (Media Release, 8 November 2021) <<https://www.environment.nsw.gov.au/news/nsw-act-and-sa-to-be-founding-members-of-net-zero-emissions-policy-forum-at-glasgow>>.

150. Opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 4(1)(a).

151. The declaration website itself does not list Tasmania as a signatory, but the Public Register to the *Foreign Relations Act* says that the Tasmanian Government has been given approval to sign the declaration.

152. 'COP26 Declaration on Accelerating the Transition to 100% Zero Emission Cars and Vans', *United Kingdom Government* (Policy Paper, updated 6 December 2021) <<https://www.gov.uk/government/publications/cop26-declaration-zero-emission-cars-and-vans/cop26-declaration-on-accelerating-the-transition-to-100-zero-emission-cars-and-vans>>.

153. 'Global Coal to Clean Power Transition Statement', *UN Climate Change Conference UK 2021* (Web Page, 4 November 2021) <<https://ukcop26.org/global-coal-to-clean-power-transition-statement/>>.

154. 'Further, Faster, Together: Under2 Leaders Actions at COP26', *The Climate Group* (Web Page) <<https://www.theclimategroup.org/further-faster-together-under2-leaders-actions-cop26#:~:text=Purpose,actiontowardsthe2030agenda>>.

155. See Northern Territory Government, Submission No 72 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]* 2; Tasmanian Government, Submission No 97 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia's Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia's Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]* 3; Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 12 October 2020, 3 (Adrian Beresford-Wylie).

this proves true, the *Foreign Relations Act* could become, whether deliberately or inadvertently, a means of limiting the ability of Australian subnational governments to engage with international law.

IV Subnational Diplomacy and International Cooperation

The diplomatic activities of state and territory governments play a role in Australia's relationship with international law in another sense: by constituting Australia as an international actor and influencing the way in which it interacts with the outside world, including with the international legal system. One of the fundamental purposes of the international system is to ensure cooperation between States.¹⁵⁶ This purpose is enshrined in numerous international legal duties of cooperation. In the *MOX Plant* case, Judge Wolfrum concluded that the 'duty to cooperate denotes an important shift in the general orientation of the international legal order ... it balances the principles of sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests.'¹⁵⁷ Duties of cooperation generally require States to have regard to, or at least demonstrate an awareness of, the interests and concerns of other States.¹⁵⁸ However, other actors, including subnational governments, can play a role in creating and maintaining the underlying conditions for inter-State cooperation — and, at times, in complicating prospects of such cooperation.

The 'law of cooperation' adopts a regulatory approach that prioritises communication and coordination between States.¹⁵⁹ It requires the establishment of international institutions and treaty frameworks to facilitate the ongoing engagement between States necessary to ensure effective governance.¹⁶⁰ These processes ensure that States understand their relations with one another in terms of their relative global interdependence. The 'law of cooperation' therefore depends on robust relations and exchange, to create an 'international community' whose members are 'imbued with a collective consciousness which subsumes individual awareness'.¹⁶¹ This is especially the case to the extent that international law purports to regulate matters of 'common interest' or 'common concern' to the international community as a whole: matters in which all States have an interest, but which none can effectively address alone,¹⁶² such as climate change and the protection of biodiversity. They are borne of 'a consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individual or inter se but is recognized and sanctioned by international law as a matter of concern to all States'.¹⁶³ Common interest issues have their origins in the individual interests of the relevant States, but their protection relies on the agreement and coordination of the States concerned.¹⁶⁴

156. See, eg, *Charter of the United Nations* art 1(3).

157. *MOX Plant (Ireland v United Kingdom) (Provisional Measures)* [2001] ITLOS Rep 95, 135 (Judge Wolfrum).

158. See, eg, Neil Craik, 'The Duty to Cooperate in the Customary Law of Environmental Impact Assessment' (2020) 69(1) *International and Comparative Law Quarterly* 239, 247–8.

159. See Wolfgang Friedmann, *Law in a Changing Society* (University of California Press, 1959) 61.

160. See Jutta Brunnée, 'International Environmental Law and Community Interests' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press, 2018) 152, 166–74.

161. See Santiago Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law' (2010) 21(2) *European Journal of International Law* 387, 392.

162. Georges Abi-Saab, 'Whither the International Community?' (1998) 9(2) *European Journal of International Law* 248, 251.

163. Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Collected Courses of the Hague Academy of International Law* 217, 233.

164. See Jutta Brunnée, '"Common Interest" — Echoes from an Empty Shell?' (1989) 49 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 791, 793.

In this sense, diplomacy — the maintenance of channels of communication and contact between political communities generally — is fundamental to the ‘law of cooperation’. It is essential in both ensuring order and stability in international relations,¹⁶⁵ and in facilitating an awareness of common interests and common values.¹⁶⁶ Entities other than States can and do engage in diplomacy, in the general sense of the maintenance of relations between political communities. Diplomacy as an institution long pre-dated the modern, State-based international system. Even as the term has come most commonly to describe the formal relations between State governments governed by international law, subunits within those States have continued their own diplomatic practices. Scholars such as Ivo Duchacek and Panayotis Soldatos have considered those practices specifically in the context of subunits in federal States.¹⁶⁷ Duchacek has described how the diplomacy conducted by regional governments has traditionally been spurred by the need for cooperation between political communities sharing borders, but that it has evolved into further-reaching practices of ‘global micro-diplomacy’ out of an ‘awareness of universal interdependence’.¹⁶⁸ City diplomacy too has been the subject of much contemporary work, as cities look beyond their borders to establish connections that might form the basis of information sharing and policy collaboration, and allow for them to work together to influence national governments and international organisations.¹⁶⁹ There is now work on the diplomatic practices of subnational governments in a number of countries, including, for example, China,¹⁷⁰ South Africa,¹⁷¹ India¹⁷² and Belgium.¹⁷³

The diplomatic activities of subnational governments can help bridge gaps between States, creating conditions for improved international cooperation. They can enhance the international position of the State, by giving ‘density and intensity’ to its foreign policy, and drawing on the relative flexibility and pragmatism of subnational governments.¹⁷⁴ In many cases, subnational governments can act more freely in their relations with foreign governments, as they are only partially ‘sovereignty bound’.¹⁷⁵ Their diplomacy is usually characterised by relative informality, and the voluntary pursuit of political and economic ties.¹⁷⁶ Moreover, in situations where a lack of

165. Yolanda Kemp Spies, *Global Diplomacy and International Society* (Palgrave Macmillan, 2019) 16.

166. Christer Jönsson and Martin Hall, *Essence of Diplomacy* (Palgrave Macmillan, 2005) 28.

167. See Ivo D Duchacek, ‘Perforated Sovereignities: Towards a Typology of New Actors in International Relations’ in Hans J Michelmann and Panayotis Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Clarendon Press, 1990) 1; Panayotis Soldatos, ‘An Explanatory Framework for the Study of Federated States as Foreign-Policy Actors’ in Hans J Michelmann and Panayotis Soldatos (eds), *Federalism and International Relations: The Role of Subnational Units* (Clarendon Press, 1990) 34.

168. Ivo D Duchacek, ‘The International Dimension of Subnational Self-Government’ (1984) 141(4) *Publius* 5, 13.

169. See Acuto (n 135).

170. Eric C Ip, ‘Comparative Subnational Foreign Relations Law in the Chinese Special Administrative Regions’ (2016) 65 *International and Comparative Law Quarterly* 953; Chen Zhimin and Jian Junbo, *Chinese Provinces as Foreign Policy Actors in Africa* (Occasional Paper No 22, South African Institute of International Affairs, January 2009).

171. Fritz Nganje, ‘Paradiplomacy and the Democratisation of Foreign Policy in South Africa’ (2014) 21(1) *South African Journal of International Affairs* 89,

172. Aishwarya Natarajan, ‘Democratization of Foreign Policy: India’s Experience with Paradiplomacy’ (2019) 12(3) *Law and Development Review* 797; Anamika Asthana and Happyymon Jacob, ‘Federalism and Foreign Affairs in India’ in *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019) 315.

173. Benjamin Puybureau and Renaud Takam Talom, ‘Sub-State Diplomacies: Regions, Parliaments, and Local Authorities’ in Thierry Balzacq, Frédéric Charillon and Frédéric Ramel (eds), *Global Diplomacy: An Introduction to Theory and Practice* (Palgrave Macmillan, 2020) 167.

174. Nganje (n 171) 94.

175. Stéphane Paquin, ‘Paradiplomacy’ in Thierry Balzacq, Frédéric Charillon and Frédéric Ramel (eds), *Global Diplomacy: An Introduction to Theory and Practice* (Palgrave Macmillan, 2020) 49, 57.

176. Puybureau and Takam Talom (n 173) 172.

understanding of other countries acts a barrier to cooperation, subnational diplomacy can provide the basis for the development of cultural exchange and awareness that can form the basis for higher-level ties.¹⁷⁷ In the United States, for example, legislators have recognised the potential for subnational diplomacy to ‘advance international cooperation’, and suggested a role for the federal government in ‘empower[ing] subnational diplomacy to work with competitors where diplomatic tensions and disagreements might otherwise hamper cooperation.’¹⁷⁸

The diplomatic activities of Australia’s states and territories can play a role in sustaining Australia’s ties with foreign governments and its international position. This point was raised in various submissions to the Senate Foreign Affairs Committee inquiry. The Connected Cities Lab at the University of Melbourne argued that subnational diplomacy can be used by national executives to ‘leverage foreign influence and cooperation beyond the national government level’, and is ‘fundamental to a modern, multilayered diplomatic strategy’.¹⁷⁹ Several reports in recent decades have described the weakening of Australia’s diplomatic corps, as a result of funding cuts and underinvestment in DFAT.¹⁸⁰ The weakening of Australia’s diplomatic capacity, and its failure to invest particularly in regional multilateralism, was raised in the parliamentary debates about the *Foreign Relations Act*.¹⁸¹ Of course, not all subnational diplomatic activity is conducted in aid of, or in alignment with, the foreign policy goals of the national government. But even where this is the case, subnational governments function as part of a diplomatic ‘web’,¹⁸² helping to maintain ties even where those at the national level falter: providing ‘ballast in a relationship to ride out the diplomatic storms’.¹⁸³ Notably, as at March 2022, 2406 of the 3791 arrangements listed on the Public Register involved counterparties in China,¹⁸⁴ a government with which Australia has had difficult diplomatic relations for several years.¹⁸⁵

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177. See Matt Abbott, ‘Engaging North Korea via Subnational Diplomacy’, *The Diplomat* (Blog Post, 8 October 2021) <<https://thediplomat.com/2021/10/engaging-north-korea-via-subnational-diplomacy/>>.
178. Ted Lieu, ‘Rep Lieu’s Subnational Diplomacy Bill Advances Out of Committee’ (Press Release, 29 July 2021) <<https://lieu.house.gov/media-center/press-releases/rep-lieu-subnational-diplomacy-bill-advances-out-committee>>. See also Neelima Jain, ‘Subnational Diplomacy A Pivotal Boon for Biden’s India Strategy’, *Center for Strategic & International Studies* (Blog Post, 11 February 2021) <<https://www.csis.org/blogs/adapt-advance-refreshed-agenda-us-india-relations/subnational-diplomacy-pivotal-tool-bidens>>.
179. Connected Cities Lab, University of Melbourne, Submission No 14 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia’s Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]* 4.
180. Lowy Institute, *Australia’s Diplomatic Deficit* (Blue Ribbon Panel Report, 2009) 17–27; Melissa Conley Tyler and Mitchell Vanderwerdt-Holman, ‘Australia’s Incredible Shrinking Department of Foreign Affairs and Trade’, *Pursuit* (Blog Post, 18 October 2019) <<https://pursuit.unimelb.edu.au/articles/australia-s-incredible-shrinking-department-of-foreign-affairs-and-trade>>.
181. See Commonwealth, *Parliamentary Debates*, Senate, 30 November 2020, 6350 (Tim Ayres).
182. Brian Hocking, ‘Bridging Boundaries: Creating Linkages. Non-Central Governments and Multilayered Policy Environments’ (1996) 11 *WeltTrends* 36, 39.
183. Melissa Conley Tyler, Submission No 57 to Senate Foreign Affairs, Trade and Defence Legislation Committee, *Australia’s Foreign Relations (State and Territory Arrangements) Bill 2020 [Provisions] and Australia’s Foreign Relations (State and Territory Arrangements) (Consequential Amendments) Bill 2020 [Provisions]* 2.
184. See Public Register (n 77).
185. ‘Simon Birmingham Says China Not Returning His Calls Amid Deepening Rift Over Trade’, *SBS News* (online, 17 May 2020) <<https://www.sbs.com.au/news/simon-birmingham-says-china-not-returning-his-calls-amid-deepening-rift-over-trade/bece1357-2be2-455c-a87f-68bcd4e8f6d0>>; Matthew Doran, ‘Scott Morrison Rules Out Meeting with Chinese Ambassador Until Beijing’s Diplomatic Freeze Starts to Thaw’, *ABC News* (online, 26 March 2022) <<https://www.abc.net.au/news/2022-03-26/scott-morrison-refuses-to-meet-with-chinese-ambassador/100942242>>.

The diplomatic activities of subnational governments can also complicate relations between states. Tom Ginsburg has argued that the relationship between a constitution and the outside world lies in its 'international signalling function': presenting the State to the international community and designating who is entitled to speak on its behalf.¹⁸⁶ This facilitates international cooperation by making clear who is entitled to bind the State to legal obligations.¹⁸⁷ This is ostensibly an issue to which the *Foreign Relations Act* is addressed, by ensuring that 'Australia speaks as one nation, with one voice', something that the explanatory material to the legislation identified as particularly important given the challenges and complexity of the contemporary global environment.¹⁸⁸ Ginsburg argues that, to the extent that constitutions can be understood as devices facilitating the creation of public goods, ensuring that they allow for international cooperation must be a normative goal of constitutional design, given that some public goods cannot be produced without such cooperation.¹⁸⁹ While the Australian constitution is largely silent on the conduct of Australia's foreign relations, judicial authority on the subject designates the Commonwealth as the government responsible for ensuring the overall consistency of those relations with Australia's national and international interests. The interests implicated by the states and territories in their dealings with other governments are — by their own admission — considerably more limited. They have neither the constitutional responsibility, nor, in most cases, the political impetus, to ensure that those dealings fit within a coherent whole.

Nonetheless, in some ways, the *Foreign Relations Act* mirrors approaches observed by Helmut Aust to the interpretation or use of constitutional law in other countries in ways that 'close' the country off, acting as a 'bulwark against unwanted outside interference'.¹⁹⁰ In a series of foreign policy speeches in 2019 and 2020, then-Prime Minister Scott Morrison repeatedly disclaimed 'negative globalism', committing Australia instead to 'positive globalism, where nations like Australia engage directly with other, as equal, sovereign nations'.¹⁹¹ It was a tone that one former Australian diplomat described as 'anxious and inward-looking'.¹⁹² Australia's relationship with international law has itself been described as one influenced by particular 'anxieties' about the latter's influence on the domestic legal system.¹⁹³ It is a relationship that shifts over time, 'respond [ing] to pressures including those produced by the globalisation process and the domestic debate that surrounds international law and international and domestic institutions'.¹⁹⁴ At times, each of the executive, legislature and judiciary demonstrate openness to the international system.¹⁹⁵ For instance, the Albanese government, which came to power in May 2022, has so far appeared to

186. Tom Ginsburg, 'Comparative Foreign Relations Law: A National Constitutions Perspective' in Curtis A Bradley (ed), *Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019) 63, 66.

187. *Ibid.*

188. Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2020, 6492 (Christian Porter, Attorney-General).

189. Ginsburg (n 186) 74.

190. Helmut Philipp Aust, 'The Democratic Challenge to Foreign Relations Law in Transatlantic Perspective' in Jacco Bomhoff, David Dyzenhaus and Thomas Poole (eds), *The Double-Facing Constitution* (Cambridge University Press, 2020) 345, 353.

191. Scott Morrison, 'The 2019 Lowy Lecture' (Speech, Lowy Institute, 4 October 2019) <<https://www.lowyinstitute.org/publications/2019-lowy-lecture-prime-minister-scott-morrison>>; Scott Morrison, 'Tomorrow in the Indo-Pacific' (Speech, Aspen Security Forum, 5 August 2020) <<https://www.pm.gov.au/media/address-aspen-security-forum-tomorrow-indo-pacific>>.

192. Allan Gyngell, 'Scott Morrison Strikes an Anxious and Inward-Looking Tone', *The Interpreter* (Blog Post, 4 October 2019) <<https://www.lowyinstitute.org/the-interpreter/scott-morrison-lowy-lecture>>.

193. See Charlesworth et al (n 12).

194. *Ibid.* 464.

195. Charlesworth et al (n 12).

prioritise international engagement considerably more than its predecessor.¹⁹⁶ At others, they exhibit a fundamental wariness of the outside world.¹⁹⁷ The *Foreign Relations Act*, itself influenced heavily by the domestic debate and politics of the era in which it was enacted, tends towards the latter approach. In doing so, it may have ramifications for the way that Australia engages with the rest of the world, and with an international system that depends on cooperation and exchange between States.

V Conclusion

This article has argued that the *Foreign Relations Act* might have consequences for Australia's relationship with international law by limiting or affecting the ability of state, territory and local governments to develop and manage their own relations with foreign governments. At least in one sense, the *Foreign Relations Act* could enhance the ability of the Commonwealth to act in compliance with its international legal obligations by giving it control over sub-national foreign arrangements that might be substantively inconsistent with those obligations. However, it also gives the Commonwealth the power to limit the ability of state, territory and local governments to engage with other subnational and national governments on issues of both local and global significance. As international lawyers increasingly look to actors other than the central State government for solutions to multilateral 'gridlock',¹⁹⁸ they are beginning to construct a more complete account of the ways in which subnational governments might be relevant to international law. Many of these operate outside the formal structures of international law, but they nonetheless have the potential to influence its development and to uphold and further the aims of the international system.

If Australian subnational governments, particularly the states and territories, continue to assert themselves in opposition to the Commonwealth, the powers conferred on the Commonwealth by the *Foreign Relations Act* could become of particular significance. The conflict between the Commonwealth and the states and territories that has been a hallmark of the pandemic era may be an anomaly, but it may also become a more lasting phenomenon. Where divisions between the Commonwealth and the states and territories exist on matters in which governments around the world similarly have an interest, such as climate change, the states and territories may continue to look beyond their borders to form partnerships and find support for their policies. The *Foreign Relations Act* places control over such arrangements squarely in the hands of the Commonwealth.

There is another, secondary, sense in which the *Foreign Relations Act* might impact Australia's relationship with international law. The foreign activities of subnational governments give the nation multiple points of contact to the rest of the world. They can play a role in establishing and maintaining ties with foreign governments and other international actors. Such ties can be important in enabling and facilitating relations between States, and in keeping channels of communication open. They can also undermine national foreign policy and complicate the pursuit of normative goals of the international system. For better or for worse, the *Foreign Relations Act* centralises control over such activities in the Commonwealth government. This might impose some measure of discipline on Australia's international engagement in a difficult geopolitical climate, but it also risks

196. Melissa Conley Tyler, 'Foreign Policy and the Albanese Government's First 100 Days', *The Conversation* (Blog Post, 29 August 2022) <<https://theconversation.com/foreign-policy-and-the-albanese-governments-first-100-days-189460>>.

197. Charlesworth et al (n 12).

198. See Thomas Hale, David Held and Kevin Young, *Gridlock: Why Global Cooperation Is Failing When We Need It Most* (Polity Press, 2013) 307.

closing the nation off from the rest of the world. It might have consequences for Australia's relationship with an international legal system that relies, at least in part, on the contributions and ambitions of actors such as subnational governments.

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