



Australian Government
Department of Foreign Affairs and Trade

SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE LEGISLATION COMMITTEE

INQUIRY INTO INTERNATIONAL ORGANISATIONS (PRIVILEGES AND IMMUNITIES) AMENDMENT BILL 2023

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE SUBMISSION

14 August 2023

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The Department of Foreign Affairs and Trade (DFAT) welcomes the opportunity to provide this submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee), as part of the Committee's inquiry into the *International Organisations (Privileges and Immunities) Bill 2023* (the Bill).

BACKGROUND

It is well recognised in Australia and the international community that international organisations require privileges and immunities to function effectively. The freedoms and protections provided by States to international organisations allow those organisations to operate independently without fear of coercion or interference. They ensure that no individual member or host State is in a position to take advantage of, or draw undue benefits from, activities that are jointly funded by member States and in their mutual interest.

In 1963, Australia introduced the *International Organisations (Privileges and Immunities) Act* (the Act). The purpose of the Act was to confer privileges and immunities on international organisations, their personnel and representatives of States attending conferences convened by such organisations in accordance with Australia's international obligations. The introduction of these principles into Australia's domestic legislation in 1963 was recognised as vital to Australia's engagement with the international community. This Bill will update the Act to ensure it continues to support the Australian Government's active and constructive participation in the multilateral system.

Under the Act, conferral of privileges and immunities on an international organisation and its officials occurs by way of regulations made by the Governor-General. The Bill retains this process. This means that regulations implementing the Bill will be required to be tabled in Parliament and will be disallowable in each case.

EXISTING REGIME

The Act sets out the criteria for international organisations to be granted privileges and immunities, as well as specifying the types of privileges and immunities which can be granted to those organisations and related persons.

The Act currently provides for the conferral of privileges and immunities on international organisations of which Australia is a member, such as the United Nations. It also enables Australia to accord privileges and immunities to organisations whose members are countries in a particular geographic region, such as the European Space Agency.

The common types of privileges and immunities granted to international organisations include immunity of the organisation and its property from suit and legal process; inviolability of property and assets; taxation exemptions; inviolability of archives; and absence of censorship of official correspondence and communications. It is also common for their representatives to enjoy immunity from suit and legal process in respect of things said and acts done as part of their official functions.

At present, there are less than 70 accredited officials residing in Australia, representing 14 international organisations. It is not anticipated these numbers will greatly increase as a result of the proposed amendments.

These organisations are:

- Secretariat to the Meeting of the Parties to the Agreement on the Conservation of Albatrosses and Petrels;
- Asian Development Bank;
- Commission for the Conservation of Antarctic Marine Living Resources;
- Commission for the Conservation of Southern Bluefin Tuna;
- International Committee of the Red Cross;
- International Institute for Democracy and Electoral Assistance;
- International Organization for Migration;
- Pacific Trade and Invest Australia;
- Square Kilometre Array Observatory;
- International Finance Corporation; and
- United Nations Specialized Agencies:
 - World Bank;
 - The United Nations Educational, Scientific and Cultural Organization; and
 - UN Information Centres.

Under the present Act, persons visiting Australia for the purpose of attending conferences, or otherwise performing or participating in the work of an international organisation are also provided privileges and immunities. This is desirable to ensure the functionality of international organisations functions in Australia. The amendments will not affect the operation of this aspect of the Act.

In practice, the majority of personnel of international organisations are accorded functional immunities under the Act. This means that they only have immunities from legal process for acts done and things said in the exercise of their official functions. The scope of a person's official functions is limited by reference to the functions of the international organisation in question, which are generally set out in the relevant treaty.

In a very limited number of cases, full personal immunity (immunity for acts performed in a personal as well as an official capacity) is accorded to the most senior officers of an international organisation, for example the Secretary-General of the United Nations. There are currently only three people accredited as such in Australia – the Executive Secretaries of three organisations headquartered here:

- Commission for the Conservation of Southern Bluefin Tuna, headquartered in Canberra;
- Secretariat to the Meeting of the Parties to the Agreement on the Conservation of Albatrosses and Petrels, headquartered in Hobart; and
- Commission for the Conservation of Antarctic Marine Living Resources, headquartered in Hobart.

Other international organisations with a presence in Australia which are granted privileges and immunities do not have officers of sufficiently high rank to be accredited as 'high officers'.

As a matter of practice, privileges and immunities are only accorded where Australia has agreed to do so. International agreements requiring Australia to accord privileges and immunities are subject to the treaty making process, which includes Parliamentary scrutiny (by the Joint Standing Committee on Treaties) of the proposed treaty.

PROPOSED CHANGES

Types of organisations on which privileges and immunities may be conferred

Treaties establishing international organisations and relevant hosting agreements generally require member/host States to confer privileges and immunities on the organisation and connected persons to enable the performance of their functions vis-à-vis that State, including for the purpose of supporting in-country visits, missions and implementing programs. The granting of privileges and immunities to international organisations is a commonly accepted practice in international law, and reflected in many international treaties, including:

- Headquarters Agreement between the Government of Australia and the Secretariat to the Agreement on the Conservation of Albatrosses and Petrels [2008] ATS 19
- Headquarters Agreement between the Government of Australia and the Commission for the Conservation of Southern Bluefin Tuna [1999] ATS 6
- Headquarters Agreement between the Government of Australia and the commission for the conservation of Antarctic Marine Living Resources [1986] ATS 21
- Convention Establishing the Square Kilometre Array Observatory [2021] ATS 4.

The Act provides the domestic legal framework for Australia to implement its international obligations. However, Australia is currently unable to declare an organisation to be an ‘international organisation’ under the Act in order to confer privileges and immunities on it unless Australia is a member of, or has a person representing Australia in, the organisation. While the Act currently provides for an organisation of which Australia is not a member be an ‘overseas organisation’, the privileges and immunities that can be granted to such an organisation are more limited, as they only apply to persons connected to the organisation – not the organisation itself. The provisions in Schedule 1 to the Bill will remedy this deficiency in the Act to expand the category of organisations which can be declared an International organisation to include organisations of which Australia is not a member.

Australia may not be a member of an international organisation for a range of geographic, technical, financial or other policy reasons. Nonetheless, engagement with such organisations in connection with a range of commercial, defence related, scientific or other shared interests may be strongly in Australia’s interests. Many international organisations today have regional, rather than universal membership, and there are a range of options for non-member States such as Australia to participate. This Bill will enhance Australia’s ability to do so.

For example, the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en matière d’Armement) (OCCAR) is a European inter-governmental organisation that manages cooperative arms procurement and support. Its Member States are Belgium, France, Germany, Italy, Spain, and the United Kingdom. Australia is a non-Member Participating State and participates in relevant OCCAR programmes, which includes hosting OCCAR related meetings to support Australian Defence capability projects. On this basis, OCCAR does not satisfy the requirements of section 5 of the Act for the purpose of declaring it to be an international organisation to which the Act applies.

The *Framework Agreement between the Government of Australia and the Organisation for Joint Armament Cooperation (Organisation Conjointe de Coopération en matière d’Armement (OCCAR)) for the Participation of Australia in OCCAR-Managed Programmes* (the Framework Agreement) was signed on 5 February 2021 and entered into force on 25 January 2022.

As Australia is not a member of OCCAR, under the current regulations OCCAR is only declared as an overseas organisation to which the Act applies. This limits the privileges and immunities that can be conferred on the organisation and the types of personnel of the organisation on which they can be conferred. The amendments will allow OCCAR to be declared as an international organisation to which the Act applies despite Australia not being a member, allowing for conferral of a broader suite of privileges and immunities on a broader range of persons. In addition, the amendments will allow the combinations of privileges and immunities to be conferred on personnel of the organisation to be tailored in accordance with Australia's agreement with the organisation. The amendments proposed in this Bill will allow regulations to be made to give full effect to the Framework Agreement by extending the full range of privileges and immunities provided for in the Agreement to the organisation and connected persons in order for Australia to host meetings and receive program benefits.

Types of representatives and the privileges and immunities which may be conferred

The Act prescribes which officials can be granted privileges and immunities, and which privileges and immunities they can receive. At present, to be conferred privileges and immunities a person connected to an international organisation must fall within one of the narrowly defined categories of 'officials' in the Act. The applicable category of officials determines which privileges and immunities can be granted to the person.

In practice, there are many variations in the types and designations of officials connected with international organisations and the privileges and immunities that may apply to each. This means that the privileges and immunities to which officials working with international organisations are entitled cannot always be conferred under the Act.

This issue has arisen in the context of the tax concessions accorded to the officials of international organisations, whereby a very small number of officials have not received the concessions Australia has agreed by treaty to grant. For example, in *Commissioner of Taxation v Jayasinghe (2017) 260 CLR 400*, the High Court of Australia considered whether Mr Jayasinghe, an Australian resident and civil engineer engaged by the United Nations to perform work in Sudan as a project manager, was a person who held an 'office' within the meaning of the Act. While Mr Jayasinghe was an 'expert on mission' under the Specialized Agencies Convention (to which Australia is a party), and therefore entitled to tax concessions, the High Court found that he did not hold an 'office' within the meaning of the Act, and the Commissioner of Taxation was not bound to accord tax concessions.

Similarly, in *Stuart Hamilton and the Commission of Taxation 2018/6843*, the Administrative Appeals Tribunal (AAT) considered whether the Applicant was entitled to exemption from income tax available to officeholders in the International Monetary Fund (IMF). While it was accepted that the Applicant was categorised by the IMF as an official with the privileges and immunities afforded to UN officials and those of specialised agencies, the AAT found that the Applicant did not hold an 'office' within an international organisation for the purpose of the Act. In both cases, the decisions were contrary to Australia's international obligations.

To remedy this issue, the amendments will enable future regulations to use the same terminology to describe the categories of officials receiving privileges and immunities as the relevant treaty. This will reduce the gaps between Australia's international obligations and implementation.

Further, the proposed amendments will enable the Government to determine which of the existing privileges and immunities available under the Act are appropriate in an individual case, rather than being tied to a particular schedule of immunities in the Act. This will enable Australia to confer on officials precisely those privileges and immunities which the particular class of officials are owed under treaties to which Australia is a party.

For example, some organisations under the *Convention on the Privileges and Immunities of the Specialised Agencies* [1988] ATS 41 (Specialized Agencies Convention) distinguish between 'officials' and those engaged as 'representatives' and therefore the privileges and immunities granted to them. Under Article V, Section 18(e) of the *Convention on the Privileges and Immunities of the United Nations 1946*, to which Australia is a party, "officials of the United Nations" are to "be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned". As the Act currently stands, it is not possible for UN officials to be provided with this privilege as the Act only allows conferral of a particular set of privileges and immunities by reference to the applicable schedule – e.g., only the privileges and immunities set out for officials in the fourth schedule. To give effect to Australia's international obligations in the Specialized Agencies Convention, UN Officials also need to be conferred some of the privileges and immunities set out in the third schedule of the Act.

These amendments will enable Australia to more simply and efficiently implement its international obligations. It provides flexibility for Australia to define persons connected to international organisations that can be granted privileges and immunities. It also enables Australia to match a category of officials and their functions more accurately to the appropriate privileges and immunities under the Act. Importantly, the Bill will not increase the scope of privileges and immunities capable of being conferred under the Act.

ANTICIPATED BENEFITS

Whilst the changes proposed to the Act through this Bill are minor, they are anticipated to provide a range of benefits to Australia.

By increasing flexibility in the conferral of privileges and immunities to organisations, the Bill will adapt Australia's domestic legal framework to facilitate Australia more effectively meeting its international obligations.

The proposed changes to the Act will help broaden and deepen Australia's engagement with the international community. Particularly, on the occasions when it is in Australia's interests to deepen cooperation with international organisations of which Australia is not a member. This will provide benefits with respect to Australia's engagements in, among other things, commercial, defence, humanitarian and scientific fields. It will also open up opportunities for industry engagement, attracting international expertise, and promoting the exchange of information, knowledge and ideas.

For example, the ability to declare OCCAR to be an international organisation will fulfil Australia's obligations under the Framework Agreement, which entered into force on 25 January 2022. This would lift limitations on Australian participation in OCCAR Programmes, including to allow the recruitment of Australian nationals into, and the engagement of Australian prime contractors by OCCAR Programmes. It will also enable the hosting of OCCAR Programme meetings in Australia.

Australia is currently participating in the OCCAR Light Weight Torpedo Programme, and is an Observer in the OCCAR Tiger Helicopter and Boxer Armoured Vehicle Programmes. A further Defence capability project is exploring synergies with the OCCAR Maritime Mine Countermeasures Programme, within commercial constraints arising from a related tender process. This will allow the active involvement of Australians in the management of Programmes in which Defence is participating. It will also provide greater visibility and understanding of OCCAR's programme management practices. Further, the hosting of OCCAR Programme Committee meetings in Australia provides an opportunity for Australia to demonstrate our commitment to collaboration and interoperability with allied armed forces, and potentially showcase relevant Australian defence industry partners.

Finally, and as described above, the Bill will rectify operational issues arising in the implementation of the Act, including taxation issues, improving the functionality of the Act and efficient administration of privileges and immunities in Australia.

IMPACTS OF THE BILL

The impacts of this Bill beyond its direct policy aims are negligible.

Office of Impact Assessment (OIA)

The OIA considers the Bill is unlikely to have a more than minor impact. As such, the OIA advised the preparation of an impact analysis would not be required.

Financial Impact

Revenue costing would occur at the time when new subsidiary regulations are made or amended under the Act.

Human Rights Impact

A Statement of Compatibility with Human Rights has been completed in relation to the Bill and assesses that the Bill is compatible with Australia's human rights obligations.