



## Foreign States Immunities Amendment Bill 2009

Paula Pyburne and Elibritt Karlsen  
Law and Bills Digest Section

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## Foreign States Immunities Amendment Bill 2009

**Date introduced:** 19 August 2009

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The day after the Royal Assent

**Links:** The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

### Purpose

The purpose of the Foreign States Immunities Amendment Bill 2009 (the Bill) is to amend the *Foreign States Immunities Act 1985* (FSIA) so that a foreign State and its emergency management personnel are immune in tort proceedings for acts or omissions that occur in the course of the foreign state providing emergency management assistance to Australia.

### Background

#### Foreign state immunity

According to a general principle of public international law, foreign states are entitled to be granted immunity from the jurisdiction of another state. This is known as the principle of ‘foreign state immunity’ or ‘sovereign immunity’. The doctrine of foreign state immunity grew, in part, out of the protection granted to diplomatic agents and consuls from foreign prosecution.<sup>1</sup>

Foreign states are granted immunity from jurisdiction in Australian courts under the FSIA which commenced operation on 1 April 1986. The FSIA implemented the recommendations of the Australian Law Reform Commission (ALRC).<sup>2</sup> Pointing out the importance of such legislation to Australia, the ALRC stated:

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1. R Garnett, ‘Should Foreign State Immunity be Abolished?’, *Australian Yearbook of International Law*, Vol. 20, 1988, pp. 175–190 at p. 176.
  2. The Law Reform Commission, ‘Foreign State Immunity’, *Report no. 24*, Australian Government Publishing Service, Canberra, 1984, viewed 27 August 2009, <http://www.austlii.edu.au/au/other/alrc/publications/reports/24/>

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The topic of state immunity seems to be becoming a contentious issue at the United Nations, in part because of the issues raised by the work of the International Law Commission... There are, it seems, three distinct factors to be considered. The first is that a considerable number of countries have already legislated in this field. To legislate now would not involve Australia stepping out of line with other common law jurisdictions similarly situated. Secondly ... the enactment of moderate well-drafted Australian legislation, adopted now on the basis that it could if necessary be modified to bring it into line with any emerging international consensus, may well be a better position for Australia than the present situation. Thirdly, such legislation, adopted after careful consultation with experienced lawyers from other jurisdictions, may in some respects at least contribute to the development of the law in desirable ways. As things stand, the Commission does not believe that international considerations require Australian legislation to be delayed or deferred.<sup>3</sup>

### Operation of the Foreign States Immunities Act 1985

As the Attorney-General's information paper on the operation of the FSIA explains:

The Attorney-General is responsible for the administration of the *Foreign States Immunities Act 1985 (Cth)*, which applies in relation to all litigation in Australian courts involving 'foreign states' as defined in the Act. The Act provides a general immunity for foreign states from the jurisdiction of the courts of Australia in civil proceedings (section 9), with limited and generally accepted exceptions (sections 10-21) (notes omitted).<sup>4</sup>

'Foreign States' are defined in the FSIA to include a reference to the executive government; or part of the executive government or a political subdivision of a foreign state.<sup>5</sup> 'Thus it can include the heads of state, heads of government, ministers and certain government officials at both the national and sub-national level'.<sup>6</sup>

The FSIA contains a number of exceptions to the general principle of immunity.

The general rule is that Foreign States are immune from the jurisdiction of Australian courts **except** in proceedings concerning transactions, tort resulting in death, physical

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3. The Law Reform Commission, 'Foreign State Immunity', p. 30.
  4. Attorney-General's Department, 'Operation of the Foreign States Immunities Act 1985', information paper, Office of International Law, 4 December 2007, viewed 24 August 2009, [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~j000Information+Paper+-+operation+of+the+Foreign+States+Immunities+Act+1985+-+Office+of+International+Law+-+December+2007.pdf/\\$file/j000Information+Paper+-+operation+of+the+Foreign+States+Immunities+Act+1985+-+Office+of+International+Law+-+December+2007.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~j000Information+Paper+-+operation+of+the+Foreign+States+Immunities+Act+1985+-+Office+of+International+Law+-+December+2007.pdf/$file/j000Information+Paper+-+operation+of+the+Foreign+States+Immunities+Act+1985+-+Office+of+International+Law+-+December+2007.pdf)
  5. *Foreign States Immunities Act 1985* paragraph 3(3)(c).
  6. Attorney-General's Department, 'Operation of the Foreign States Immunities Act 1985'.

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injury or damage to tangible property, employment contracts with locally recruited staff, real property disputes, the supervisory jurisdiction of a court where the parties have agreed to submit a dispute to arbitration, and membership of a Body Corporate.<sup>7</sup>

The ALRC, in recommending that the proposed legislation contain a provision removing immunity for actions in tort stated:

Where a foreign state wrongfully causes death or personal injury or damages property within the forum state, the forum's interest in asserting jurisdiction over the wrongful act seems clear. There is no merit in such cases in requiring the plaintiff to litigate in the defendant state's courts when the forum's courts provide the obvious and convenient local remedy. This argument applies to all torts properly within the jurisdiction...<sup>8</sup>

The Explanatory Memorandum to the FSIA stated that the immunity:

Extends to motor vehicle accidents (where the foreign State is vicariously liable for the negligent driver's acts) and other torts. It does not cover purely 'economic' torts or torts such as defamation.<sup>9</sup>

## Firefighters

In November 2000, Australia, New Zealand and the United States of America (USA) entered into an international agreement to facilitate mutual assistance in 'wildland firefighting' in each of those countries.<sup>10</sup> Since signing that agreement, 'Australia has sent firefighters and managers to the USA in 2002, 2003, 2006 and 2008. The USA sent firefighters and managers to Australia in 2003 and 2007'.<sup>11</sup>

According to the Second Reading speech of the Bill:

Negotiations are currently underway to finalise a new agreement with the USA to ensure the continued success of the exchange program ...

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7. M Pryles, 'International Dispute Resolution and Litigation in Australia', *International Business Lawyer*, vol. 16, 1988, pp. 454–459, at p. 456. See also *Foreign States Immunities Act 1985* Part II.

8. The Law Reform Commission, *op. cit.* p. 66.

9. Explanatory Memorandum, 'Foreign States Immunities Bill 1985', p. 12.

10. Food and Agriculture Organization of the United Nations, *Fire management – existing international agreements*, viewed 24 August 2009, <http://www.fao.org/forestry/6712/en/>

11. US Department of the Interior, 'Secretary Salazar: Interior deploys firefighters to assist Australia with raging wildland fires', news release, 13 February 2009, viewed 24 August 2009, [http://www.doi.gov/news/09\\_News\\_Releases/021309a.html](http://www.doi.gov/news/09_News_Releases/021309a.html)

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One aspect of the new agreement which remains outstanding is the status of the United States and its fire fighters in legal proceedings that may be brought in Australia. Due to their domestic legal requirements, the United States cannot finalise the agreement unless immunity from tort proceedings is provided concerning the actions of their fire fighters in the course of their duties.<sup>12</sup>

The Attorney-General has been reported as stating that ‘the agreement under negotiation provides for reciprocal immunity to be granted to Australia and its firefighters under US law’.<sup>13</sup>

### Committee consideration

At its meeting of 20 August 2009, the Selection of Bills Committee resolved that the Bill not be referred to Committee.<sup>14</sup>

### Financial implications

According to the Explanatory Memorandum, the proposed amendments will not have any budgetary implications for the Government.<sup>15</sup>

### Main provisions

#### Extension of immunities—emergency prevention and management

Existing section 9 of the FSIA provides a general immunity to foreign States from the jurisdiction of Australian courts in proceedings.<sup>16</sup>

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12. R McClelland, (Attorney-General), ‘Second reading speech: Foreign States Immunities Amendment Bill 2009’, *House Hansard*, 19 August 2009, p. 9, viewed 24 August 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2009-08-19%2F0033%22>
  13. No author, ‘Immunity for fireys’, *Daily Telegraph*, 20 August 2009, p. 24, viewed 25 August 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FQ6GU6%22>
  14. Selection of Bills Committee, *Report No. 12 of 2009*, 20 August 2009, viewed 24 August 2009, [http://www.aph.gov.au/Senate/committee/selectionbills\\_ctte/reports/2009/rep1209.pdf](http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2009/rep1209.pdf)
  15. Explanatory Memorandum, ‘Foreign States Immunities Amendment Bill 2009’, p. 1.
  16. The term ‘*foreign State*’ is defined in section 3 of the *Foreign States Immunities Act 1985* as a country the territory of which is outside Australia, being a country that is either an independent sovereign state, or a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state.

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An exception to that general rule is contained in existing section 13 of the FSIA, **so that the immunity does not extend to** a proceeding which concerns the death of, or personal injury to, a person; or loss of or damage to tangible property which has been caused by an act or omission done or omitted to be done in Australia. Under existing section 22 of the FSIA, the exception in section 13 is extended to include a *‘separate entity’* of a foreign State. This term is defined in section 3 of the FSIA to include a person or body corporate (not being an Australia national or corporation) acting as an agency or instrumentality of the foreign State and which is not part of the executive of the foreign state.

**Item 2** inserts **proposed section 42A** into the FSIA. Under **proposed subsection 42A(1)**, **proposed section 42A** applies only if the Minister is satisfied that:

- a foreign State (or a separate entity of a foreign State) is to provide assistance or facilities to the Australian Government, or the government of a State or Territory, and
- the assistance or facilities are provided for the purpose of preparing for, preventing or managing emergencies or disasters (whether natural or otherwise) in Australia.

If the Minister is so satisfied, **proposed subsection 42A(2)** enables the Governor-General to make regulations which will exclude or modify the application of the exemption in section 13 of the FSIA (as discussed above) in relation to acts or omissions done or omitted to be done by the foreign State (or the separate entity thereof) in the course of providing the emergency assistance or facilities.

The regulation making power applies only to acts or omissions done or omitted to be done by the foreign state (or the separate entity thereof) in the course of providing assistance or facilities whilst preparing for, preventing or managing emergencies or disasters (whether natural or otherwise) in Australia. However, as the term ‘emergencies’ is not expressly defined in the FSIA, it is arguable that this regulatory making power could have a broad application as it could potentially apply to non-natural emergencies, such as circumstances involving civil unrest. Of course, a regulation made by the Governor-General would be disallowable by Parliament in the normal manner.

## Drafting amendment

**Item 1** makes a minor amendment to existing subsections 42(1) and (2) ‘to align the provisions with current Commonwealth drafting policy’.<sup>17</sup> It proposes to substitute the first reference to the ‘Governor-General’ in each of those subsections with a reference to ‘the Minister’. The effect of the proposed amendment is that:

- the Minister must form the view that an immunity or privilege conferred by the FSIA in relation to a foreign State is to be modified in particular circumstances, and

17. Explanatory Memorandum, p. 2.

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- the Governor-General may then exercise the power to make regulations under the FSIA reflecting that modification.

Under subsection 19A(1) of the *Acts Interpretation Act 1901*, a reference to ‘the Minister’ in the Bill may be interpreted as a reference to the Attorney-General.

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