



Asian Development Bank (Privileges and Immunities) Amendment Regulations 2005 (No. 1)¹

Select Legislative Instrument 2005 No. 210

I, JOHN SANDERSON, Administrator of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *International Organisations (Privileges and Immunities) Act 1963*.

Dated 15 September 2005

JOHN SANDERSON
Administrator

By His Excellency's Command

ALEXANDER DOWNER
Minister for Foreign Affairs

1 Name of Regulations

These Regulations are the *Asian Development Bank (Privileges and Immunities) Amendment Regulations 2005 (No. 1)*.

2 Commencement

These Regulations commence on the day after they are registered.

3 Amendment of *Asian Development Bank (Privileges and Immunities) Regulations 1967*

Schedule 1 amends the *Asian Development Bank (Privileges and Immunities) Regulations 1967*.

4 Transitional

Despite the repeal by these Regulations of subregulation 6 (2) of the *Asian Development Bank (Privileges and Immunities) Regulations 1967*, that subregulation continues to apply to salary and emoluments received from the Bank by a person to the extent to which they are for services rendered in Australia before the commencement of these Regulations.

Schedule 1 Amendments

(regulation 3)

[1] Regulation 2, after definition of *member of the family*

insert

MOU:

- (a) means the document entitled ‘Arrangement between the Government of Australia and the Asian Development Bank regarding the Pacific Liaison and Coordination Office of the Asian Development Bank’, a copy of which is set out in Part 1 of Schedule 3; and
- (b) includes the Agreed Minutes relating to the document, a copy of which is set out in Part 2 of Schedule 3.

Resident Representative has the same meaning as in the MOU.

[2] Regulation 5

after

Agreement

insert

and the MOU

[3] Subregulation 6 (1)

substitute

- (1) A person who holds an office in the Bank has such of the privileges and immunities specified in Part I of the Fourth Schedule to the Act as are required by the Agreement and the MOU to be conferred on a person who holds that office.

[4] Subregulation 6 (2)

omit

[5] Paragraph 7C (a)

after

the President of the Bank

insert

or the Resident Representative

[6] Regulation 7D

after

the President of the Bank

insert

or the Resident Representative

[7] Regulation 10

omit

the First Schedule to these Regulations

insert

Schedule 1

[8] Regulation 11

omit

the Second Schedule to these Regulations,

insert

Schedule 2,

[9] Schedules*omit***The Schedules****[10] First Schedule, heading***substitute***Schedule 1 Official Emblem of the Bank**

(regulation 10)

[11] First Schedule*omit*

OFFICIAL EMBLEM OF THE BANK

[12] Second Schedule, heading*substitute***Schedule 2 Design of the Official Seal of
the Bank**

(regulation 10)

[13] Second Schedule*omit*

DESIGN OF THE OFFICIAL SEAL OF THE BANK

[14] After Second Schedule

insert

Schedule 3 MOU
(regulation 2)

Part 1 Arrangement between the Government of Australia and the Asian Development Bank regarding the Pacific Liaison and Coordination Office of the Asian Development Bank

The Government of Australia (hereinafter referred to as the Government) and the Asian Development Bank (hereinafter referred to as ADB),

DESIRING to conclude an arrangement regarding the establishment of the Pacific Liaison and Coordination Office of ADB in Australia,

HAVE MUTUALLY DETERMINED as follows:

1. DEFINITIONS

1.1 Wherever used in this Arrangement, unless the context otherwise requires, the following terms have the following meanings:

(a) "appropriate authorities of Australia" means such authorities in Australia as may be appropriate in the context and in accordance with the laws and customs of Australia;

(b) "archives of ADB" means all archives of ADB, including the archives of the Office, and includes all records, correspondence, documents, manuscripts, moving pictures, films, sound recordings, and other such materials belonging to ADB, or held by or on behalf of, ADB or the Office;

(c) "Charter" means the Agreement Establishing the Asian Development Bank, which came into force on 22 August 1966, Chapter VIII of which has been faithfully implemented in Australia, pursuant to Article 57 of the Charter;

(d) "families" means the following members of the families of Officers of the Office, who are part of the household of such Officers: (i) the spouse; (ii) an unmarried child who is under the age of 21 years; (iii) an unmarried child who is under the age of 25 years and is undertaking full-time studies at an Australian educational institution; and (iv) an unmarried child who is incapable of self support because of a physical or mental disability.

(e) "duty" means customs duties and all other duties imposed under the Laws of Australia;

(f) "Laws of Australia" means all Commonwealth, State and Territory laws and other legal acts which are applicable, or may become applicable, in Australia, and includes decrees, ordinances, regulations and orders;

(g) "meetings convened by ADB" means meetings of ADB or the Office, including any international conference or other gathering convened by ADB or the Office, and any commission, committee or sub-group of any of such meetings;

(h) "Member Country" means a country which is a member of ADB;

(i) "members of the household staffs" means persons, other than nationals of Australia, employed in the domestic staff of Officers of the Office;

(j) "Office" means the Pacific Liaison and Coordination Office of ADB;

(k) The term "Officers of ADB" means for the purpose of this Arrangement and consistent with Article 55 of the Charter all officers and employees of ADB and does not include persons locally engaged by ADB on an hourly rate.

(l) "Officers of the Office" means for the purpose of this Arrangement and consistent with Article 55 of the Charter, all Officers of ADB appointed by ADB to the Office;

(m) "Office Seat" means the premises occupied by the Office, including any buildings and the land ancillary thereto, as may be utilized for the purposes of the Office;

(n) "property of ADB" means all property and assets of ADB wheresoever located and by whomsoever held and includes funds, income and rights belonging to, or held or administered by, ADB;

(o) "Representatives of Member Countries" means accredited officials of delegations of Member Countries, and includes all alternates, advisers and technical experts assisting such officials; and

(p) "Resident Representative" means the Resident Representative or any other principal executive official of the Office appointed by ADB.

2. JURIDICAL PERSONALITY

2.1 ADB will possess full juridical personality and, in particular, full capacity:

(a) to contract;

(b) to acquire, and dispose of, immovable and movable property; and

(c) to institute legal proceedings.

2.2 Pursuant to Article 49 of the Charter and the provisions of paragraph 2.1 of this Arrangement, ADB may acquire by purchase or otherwise, land and other immovable property as may be required for the purposes of the Office Seat and for the accommodation of Officers of the Office and their families.

3. ADB IMMUNITIES

3.1 Subject to the provisions of Article 50 of the Charter, ADB and its property will enjoy immunity from every form of legal process.

3.2 The property of ADB will be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.

3.3 The archives of ADB, including the archives of the Office, will be inviolable, wherever located.

4. OFFICE SEAT

4.1 In accordance with paragraph 2 of Article 37 of the Charter, ADB may establish an Office in Australia to facilitate the efficient conduct of ADB operations in Australia and the Pacific region.

4.2 The Office will be headed by a Resident Representative and will be staffed with such other personnel as may be appointed thereto by ADB.

4.3 The Government will, if requested and in accordance with its practice and the Laws of Australia, assist ADB in securing premises necessary for the Office Seat and the facilities required for the establishment and operations of the Office.

5. INVIOABILITY OF THE OFFICE SEAT

5.1 The Office Seat will be inviolable and will be under the control and authority of ADB. No authorities of Australia will enter the Office Seat to perform any duties therein without the consent of, and under conditions agreed to by, ADB or the Office. Such consent will however be deemed to have been provided in the case of fire or other emergency requiring immediate protective action.

5.2 ADB will have the power to make rules and regulations operative within the Office Seat for the full and independent exercise of its operations and performance of its functions.

5.3 The Laws of Australia will apply within the Office Seat and the courts of Australia will have jurisdiction over acts done in the Office Seat, except as otherwise provided in this Arrangement and in the Charter. The ADB will endeavour to comply with the Laws of Australia where in its opinion this does not unduly interfere with the independent exercise of its operations and the performance of its functions.

6. PROTECTION OF THE OFFICE SEAT

6.1 The appropriate authorities of Australia will take all appropriate steps to prevent any disturbance of the peace of the Office Seat or unauthorized entry onto its premises.

7. PROPERTY OF ADB AND TAXATION

7.1 ADB, its assets, property, income and its operations and transactions will be:

- (a) exempt from or allowed a refund of all taxation, including any indirect tax;
- (b) exempt from any obligation for the payment, withholding or collection of any tax or duty;
- (c) exempt from any currency and exchange restrictions;
- (d) exempt from all duties on the importation and exportation of:
 - (i) goods, including motor vehicles, spare parts and other articles, imported or exported by the Office for its official use; and
 - (ii) publications of ADB.

(e) exempt from all prohibitions and restrictions, on terms not less favourable than that accorded by the Government to any other international organization or diplomatic mission, on the importation and exportation of:

- (i) goods, including motor vehicles, spare parts and other articles, for the official use of the Office; and
- (ii) publications of ADB.

7.2 Any goods imported under the exemption set out in paragraph 7.1(d) may be disposed of locally, subject to such terms as may be agreed upon with the Government which will not be less favorable than those applicable to any other international organization in Australia.

7.3 Whenever ADB and/or the Office incur an indirect tax on goods and services, which have been purchased by ADB for the purpose of meeting its requirements in performing the activities laid down in the Charter, the Government will refund to ADB or the Office in full the amount of any such indirect taxes. The procedure regarding such refund will not be less favorable than that applicable to any diplomatic mission or international organization in Australia.

7.4 Nothing in this Arrangement shall be deemed to affect the application of any law of the Commonwealth or of a Territory of the Commonwealth relating to quarantine, or prohibiting or restricting the importation into, or the exportation from, Australia or that Territory, as the case may be, of any animals, plants or goods. However, this clause does not prejudice the immunity from suit and every form of legal process conferred to ADB and ADB officers by the Charter and this Arrangement. Moreover, ADB will be accorded a treatment which will not be less favorable than that applicable to any diplomatic mission or international organization in Australia.

8. FINANCIAL FACILITIES

8.1 Notwithstanding financial controls, regulations or moratoria of any kind, ADB may, in Australia, freely:

- (a) purchase, hold and dispose of any funds, currencies, financial instruments and securities, operate

accounts in any currency, engage in financial transactions and conclude financial contracts; and

(b) transfer its funds, currencies, financial instruments, and securities, to or from Australia, from or to any other country or within Australia and convert any currency held by it into any other currency.

8.2. For the purposes of meeting local currency expenditures in Australia for the establishment and maintenance of the Office Seat and for the effective discharge of the functions of the Office and the operations of ADB, ADB may utilize any portion of the subscriptions of Australia to the capital stock of ADB which have been paid in the national currency of Australia in accordance with paragraph 2(b) of Article 6 of the Charter.

9. FREEDOM OF ASSEMBLY

9.1 ADB will have the right to convene meetings within the Office Seat, or with the concurrence of the appropriate authorities of Australia, elsewhere in Australia.

9.2 At meetings convened by ADB, the Government will ensure that no impediment is placed in the way of full freedom of discussion and decision.

10. COMMUNICATIONS

10.1 ADB will enjoy in Australia for its official communications treatment not less favorable than that accorded by the Government to any other international organization or diplomatic mission in Australia, in the matter of priorities, rates and surcharges on mail, cables, telegrams, telexes, radiograms, telefax, telephone and other means of communications, and press rates for information to the press and radio.

10.2 ADB will enjoy in Australia for its official correspondence and official communications to or from ADB or the Office, Governors of ADB, representatives of members, President, Directors, alternates, Officers of ADB or the Office, or experts performing missions for ADB, treatment not less favourable than that accorded by the Government to any other

international organisation or diplomatic mission in Australia. All official correspondence and other official communications to and from the Office by whatever means or in whatever form transmitted will be immune from censorship.

10.3 ADB will have the right in Australia to use codes and to dispatch and receive correspondence and other communications either by courier or in sealed bags which will have immunities and privileges not less favorable than those accorded to diplomatic couriers and bags.

10.4 Subject to compliance with applicable technical standards and requirements under the Laws of Australia, ADB will have the right to operate a corporate network between its offices within and outside Australia for voice and data services and may install and operate in Australia point-to-point telecommunication facilities and other communication and transmission facilities as may be necessary to facilitate communications with the Office both from within and outside Australia.

11. TRANSIT AND RESIDENCE

11.1 The Government will, pursuant to the Laws of Australia, and on terms no less favorable than in respect of representatives, officials and employees of comparable rank of other Member Countries, facilitate the entry into, residence in, and departure from Australia, and freedom of movement in Australia, of the following persons:

- (a) Representatives of Member Countries and their spouses;
- (b) Governors, Directors, alternates and officers of ADB, including experts performing missions for ADB, and their families;
- (c) Officers of the Office and their families and members of their household staffs; and
- (d) Other persons invited by ADB or the Office on official business. ADB will communicate the names of such persons to the Government.

12. PRIVILEGES AND IMMUNITIES OF OFFICERS, EXPERTS AND OTHERS

12.1 Governors, Directors, alternates, and Officers of ADB and the Office, will enjoy within and with respect to Australia the following privileges and immunities:

(a) immunity from suit and from every form of legal process with respect to words spoken or written and all acts performed by them in their official capacity, except when ADB waives the immunity;

(b) exemption from taxation on or in respect of the salaries and emoluments received from ADB;

(c) exemption in respect of exchange restrictions no less favorable than that accorded to officials of comparable rank of diplomatic missions;

(d) the same repatriation facilities in time of international crises that are accorded to a diplomatic agent;

(e) the right to import, free of duty, their furniture and effects, including motor vehicles, when first taking up a post in Australia, on terms not less favourable than those applicable to other international organizations and diplomatic missions in Australia; and

(f) exemption from national service obligations in Australia. Such exemption will not, however, apply to nationals of Australia. Should Officers who are nationals of Australia be called for national service, the Government will endeavor to grant deferment when, in the opinion of ADB, serious disruption to essential ADB operations may occur.

12.2 Experts performing missions for ADB, will enjoy within and with respect to Australia the privileges and immunities set forth in Article 55 and 56.2 of the Charter, except as provided by paragraph 12.4 of this Arrangement.

12.3 Persons, other than Officers and experts performing missions for ADB, who are serving on a committee, or participating in the work of ADB and are invited to the Office Seat by ADB on official business, will enjoy:

(a) immunity from suit and every form of legal process in respect of acts performed by them in an official capacity and/or activities related to their participation in the work of ADB;

(b) exemption from taxation on salaries and emoluments received from ADB, except as provided by paragraph 12.4 of this Arrangement; and

(c) exemption from currency or exchange restrictions to such extent as is accorded to a representative of a foreign government on a temporary mission on behalf of that government.

12.4 The salary and emoluments received from ADB by a person on whom privileges and immunities are conferred by paragraphs 12.2 and 12.3, being a resident of Australia within the meaning of the *Income Tax Assessment Act 1936*, are not, to the extent to which they are for services rendered in Australia, exempt from taxation unless the person is not a citizen or national of Australia and came to Australia solely for the purpose of serving on a committee, or participating in the work of ADB, or performing a mission on behalf of ADB.

12.5 ADB will communicate to the Government the names of Officers of the Office, and, as appropriate, the names of other persons, to whom privileges and immunities apply.

12.6 Officers of the Office, and, at the request of ADB, experts performing missions for ADB, will be provided by the Government with an identity card which will serve to identify the holder to the appropriate authorities of Australia and to certify that the holder enjoys the privileges and immunities specified in the Charter and this Arrangement.

12.7 The privileges, immunities, exemptions and facilities accorded in this Arrangement are granted in the interest of ADB and not for the personal benefit of the individuals themselves. ADB will waive the immunity accorded to any person if, in its opinion, such immunity would impede the course of justice and the waiver is not necessary for the

effective performance of the functions of ADB and/or the persons granted such privileges, immunities, exemptions and facilities.

12.8 ADB will take every measure to ensure that the privileges, immunities, exemptions and facilities conferred by this Arrangement are not abused. There will be consultation between the Government and ADB, should the Government consider that an abuse has occurred or ADB consider that its privileges, immunities, exemptions or facilities have not been respected by the Government.

13. SETTLEMENT OF DISPUTES

13.1 Any dispute between the Government and ADB concerning the interpretation or application of this Arrangement or any supplementary arrangements, or any question affecting the Office Seat or the relationship between the Government and ADB, is to be settled amicably.

14. OTHER PROVISIONS

14.1 Wherever this Arrangement imposes requirements on the authorities of Australia other than the Government, the Government will use its best endeavors to ensure the fulfillment of such requirements.

14.2 None of the provisions of this Arrangement will be deemed to modify or amend the Charter, or impair or limit the rights, immunities, privileges or exemptions provided for and specified in the Charter.

14.3 As soon as possible after the date of signature of this Arrangement, the Government will implement appropriate changes to the Laws of Australia to give effect to the provisions of this Arrangement, pending conclusion of an international agreement between Australia and ADB regarding the establishment of a Resident Mission.

14.4 The Government and ADB may enter into such supplementary arrangements as may be necessary within the scope of this Arrangement.

14.5 This Arrangement will commence upon signature by the parties thereto.

IN WITNESS WHEREOF, the respective representatives duly authorized thereto, have signed this Arrangement.

SIGNED at Manila, Philippines this 16th day of May 2005.

For and on behalf of the
the
GOVERNMENT OF AUSTRALIA
DEVELOPMENT BANK

For and on behalf of
ASIAN

By
Authorized Representative

By
President

**Part 2 Agreed minutes relating to the
Arrangement between the Government of
Australia and the Asian Development
Bank regarding the Pacific Liaison and
Coordination Office of the Asian
Development Bank**

AGREED MINUTES

Arrangement between the Government of Australia
and the Asian Development Bank

regarding the Pacific Liaison and Coordination Office of the Asian Development Bank.

1. Negotiations in respect of the Arrangement between the Government of Australia (the Government) and the Asian Development Bank (ADB) regarding the Pacific Liaison and Coordination Office of ADB in Australia took place between representatives of the Government (Government Team) and ADB (ADB Team) at meetings and through correspondence held intermittently since June 2003. These minutes record certain clarifications and interpretations agreed upon between the parties in connection with the implementation and application of the Arrangement. These minutes are deemed to be an integral part of the Arrangement and have the same effect as if they were incorporated therein.

Paragraphs 5.2 and 5.3

2. The Government Team emphasized the importance it attached to compliance by ADB and ADB staff with the Laws of Australia. In this context, the Government Team referred to, by way of an example, building codes and fire regulations and similar types of legislation and stated that ADB and ADB staff were required to comply with such codes and regulations. However, the Government Team stated that it was not the intention of the Government to interfere into ADB's internal affairs; and that the provisions in paragraphs 5.2 and 5.3 are without prejudice to the immunity from legal process which ADB and ADB officers enjoy under the Charter and the Arrangement. The ADB Team recognized the importance which this matter has for Australia and stated that it had no problem in recognizing ADB's compliance with building codes, fire regulations and similar types of legislation. However, it was not possible for ADB to be subject in its internal affairs (e.g. in employment matters) to the laws of all its member countries, as this would not allow the effective functioning of ADB. The ADB Team further clarified that the Board of Directors of ADB has established an independent Administrative Tribunal composed of five judges. The Statute of Administrative Tribunal requires that such persons must be of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence. Thus, ADB guarantees due process in employment matters. Moreover, it is the practice of ADB to include arbitration clauses into contracts with consultants, suppliers and contractors.

Paragraph 11.1

3. The Government Team clarified that paragraph 11.1 of the Arrangement places Officers of ADB and experts performing missions for ADB as a matter of practice and law in the same position as officers of comparable rank of other Member Countries, while remaining consistent with the Laws of Australia and international obligations. The preceding notwithstanding, the Government Team emphasized that the Australian Government reserves the right to determine the manner in which the Laws of Australia give effect to discharging its undertakings, and while advice provided to the ADB Team was correct as of June 2004, the Government Team noted that visa classes and application procedures may change over time.

4. The ADB Team expressed its satisfaction regarding the clarifications provided by the Government Team. In this context, the ADB Team mentioned that a Member Country of ADB does not entertain diplomatic relations with Australia. The Government stated that this fact would not prejudice participation of officials, citizens or nationals of that Member Country, or any other Member Country in a similar situation, to participate in meetings convened by ADB in Australia.

Paragraph 12.2

5. The Government Team confirmed that the privileges, immunities, exemptions and facilities granted to the Resident Representative in the Arrangement will be the same as those granted to the heads of office/resident representatives of the World Bank Group or the International Monetary Fund in Australia. The Government Team also indicated that with respect to personal privileges and immunities, they viewed the position of the ADB Resident Representative as on par with the heads of office/resident representatives of the World Bank and International Monetary Fund.

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See www.frli.gov.au.