

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Select Legislative Instrument No. 175, 2015

Asian Infrastructure Investment Bank Act 2015

Asian Infrastructure Investment Bank (Privileges and Immunities) Regulation 2015

Section 9 of the *Asian Infrastructure Investment Bank Act 2015* (AIIB Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the AIIB Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the AIIB Act.

Section 13 of the *International Organisations (Privileges and Immunities) Act 1963* (IOPI Act) also provides that the Governor-General may make regulations, not inconsistent with the IOPI Act, prescribing all matters required or permitted by the IOPI Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the IOPI Act.

In order to convey those privileges and immunities that Australia is obligated to provide to the Asian Infrastructure Investment Bank (AIIB) and its staff, including experts and consultants performing missions or services for the AIIB, as outlined in the AIIB's Articles of Agreement (Articles) as per Section 8 of the AIIB Act, regulations under both the AIIB Act and the IOPI Act must be made.

The *Asian Infrastructure Investment Bank (Privileges and Immunities) Regulation 2015* (the Regulation) and a regulation under the *International Organisations (Privileges and Immunities) Act 1963* (IOPI Act) will together enable Australia to submit an instrument of ratification to the AIIB's Depository certifying that Australia has undertaken all domestic legislative processes required to give effect to the Articles, and therefore become a founding member of the AIIB. The Minister for Foreign Affairs administers regulations under the IOPI Act.

The AIIB is an international financial institution proposed by the Chinese Government to assist in funding major infrastructure projects throughout Asia. The then Treasurer, on behalf of Australia, signed the Articles in Beijing, China, on 29 June 2015.

There is an estimated infrastructure financing gap of US\$8 trillion in the Asian region this decade, and the AIIB will be part of the solution to closing this gap. Joining the AIIB presents Australia with opportunities to work with our neighbours and our largest trading partner to drive economic growth and jobs. Working closely with the private sector, the AIIB paves the way for Australian businesses to take advantage of and contribute to the growth in infrastructure in our region.

Australia's total capital subscription will be US\$3.7 billion. The AIIB's total authorised capital is US\$100 billion, and is expected to become operational by December 2015.

Accordingly, the Governor-General has approved this Regulation. The specific effects of this Regulation are set out as follows.

Chapter IX (Status, Immunities, Privileges and Exemptions) of the Articles outlines the privileges and immunities that Australia, as a signatory to the Articles, is obligated to provide. These privileges and immunities are very similar to those extended to other international financial institutions and are almost identical to those provided to the Asian Development Bank, of which Australia has been a founding member since 1966. They can be thought of as akin to, but are not the same as, privileges and immunities that are extended to Chanceries and diplomats.

Chapter IX can be summarised as conferring legal personality on, and extending certain privileges to, the AIIB, such as the inviolability of records and documents and the immunity of the AIIB's property and assets from all forms of seizure. Chapter IX also conveys privileges and immunities to certain office holders and staff of the AIIB including Governors, Directors, their Alternates, the President, Vice-Presidents, other officers and employees, including experts and consultants performing missions or services for the AIIB.

Australia, as a signatory to the Articles, is obligated to provide these privileges and immunities which are very similar to those extended to other international financial institutions, and are almost identical to those provided to the Asian Development Bank, of which Australia joined as a founding member in 1966.

Sections 4 and 5 of the Regulation, by reference to Schedules 1 and 2, bestow the relevant privileges and immunities upon the AIIB itself and relevant officers and staff of the AIIB respectively.

Schedule 1 of the Regulation outlines the privileges and immunities bestowed upon the AIIB by section 4 of the Regulation, including: immunity of the AIIB from suit and from other legal processes; immunity of the AIIB's property and assets from search, confiscation etc by executive or legislative action; inviolability of the AIIB's archives and all documents; and the right to send and receive correspondence in sealed bags which are to be treated as diplomatic bags.

Schedule 2(1) of the Regulation outlines the privileges and immunities bestowed upon the AIIB's officers and staff including experts and consultants performing services for the AIIB. These could be summarised as: exemption from laws relating to immigration (making it easier to enter Australia); exemption from currency or exchange restrictions. Schedule 2(2) of the Regulation conveys an exemption from taxation on salaries, emoluments and expenses received from the AIIB.

Subsection 5(3) gives effect to Article 51(2), which provides for member countries to retain the right to tax salaries, emoluments and expenses of their citizens received from the AIIB. Consistent with practice at the other international financial institutions, upon depositing its instrument of ratification, Australia intends to make such a declaration. Section 5(3) does not apply to Australian residents within the meaning of the *Income Tax Assessment Act 1997* who are not Australian citizens and have come to Australia solely for the purpose of participating in the work of the AIIB or performing a mission or services for the AIIB (paragraphs 5(3)(c) and (d) refers).

Section 6 of the Regulation enables the AIIB to waive any privileges and immunity conferred upon it or their officers and employees including experts and consultants performing services for the AIIB. Consistent with established convention at the other

international organisations, Australia expects that the AIIB would waive any relevant privilege and immunity in the event of serious misconduct or criminal activity.

Article 22(1) enables member countries to appoint one Governor and one Alternate Governor to represent the country at the Board of Governors. Section 7 of the Regulation clarifies that a member country's Alternate Governor is taken to be a Governor of the Bank. This enables Alternate Governors to be accorded the status of Governor when they are representing the Governor.

For reference, the *International Organisations (Privileges and Immunities) (Asian Infrastructure Investment Bank) Regulation 2015* made under the IOPI Act applies, among other things, juridical personality and the existing indirect tax concession scheme to the AIIB. The explanatory memorandum for the *International Organisations (Privileges and Immunities) (Asian Infrastructure Investment Bank) Regulation 2015* provides further details.

The Department of Foreign Affairs and Trade were consulted in the preparation of this Regulation.

The Regulation will commence when sections 3 to 8 of the AIIB Act commence; namely, the later of either the day the AIIB is established, or Australia becomes a member of the AIIB.

Article 58(2) of the AIIB Articles of Agreement (Articles) outlines when Australia will become a founding member of the AIIB, and Article 59 outlines when the AIIB will be established.

Therefore, the commencement provisions set out in the AIIB Act address the possibility of the Act and the Regulation having received the Royal Assent and the AIIB not yet having been established.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Asian Infrastructure Investment Bank (Privileges and Immunities) Regulation 2015

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Asian Infrastructure Investment Bank (Privileges and Immunities) Regulation 2015* is to convey those privileges and immunities that Australia is obligated to provide to the Asian Infrastructure Investment Bank (AIIB) and its staff, including experts and consultants performing missions or services for the AIIB, as authorised by the *Asian Infrastructure Investment Bank Act 2015*.

Human rights implications

This Legislative Instrument does not place new limitations on any human rights.

Australia's membership of the AIIB is consistent with Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This Article requires that states take steps, including through international assistance and co-operation, to

assist in the progressive realisation of the economic, social and cultural rights recognised by ICESCR.

To give effect to Article 50 of the AIIB Articles of Agreement, regulations may engage human rights on the freedom of movement by conferring an exemption from the application of laws relating to immigration and registration of aliens on experts and consultants performing missions or services for the AIIB.

Article 50 of the AIIB Articles of Agreement provides that all Governors, Directors, Alternates, the President, Vice Presidents, other officers and employees of the AIIB including experts and consultants performing missions or services for the AIIB:

- be immune from legal process with respect to acts performed by them in their official capacity, except when the Bank waives the immunity and shall enjoy inviolability of all their official papers, documents and records;
- where they are not local citizens or nationals, shall be accorded the same immunities from immigration restrictions, alien registration requirements and national service obligations, and the same facilities as regards exchange regulations, as are accorded by members to the representatives, officials and employees of comparable rank of other members; and
- shall be granted the same treatment in respect of travelling facilities as is accorded by members to representatives, officials and employees of comparable rank of other members.

The right to freedom of movement as per Articles 12 and 13 of the International Covenant on Civil and Political Rights consist of three elements:

- the right to freedom of movement within a country, which includes the right to choose where to live within the country;
- the right to leave any country, regardless of the person's citizenship; and
- the right to enter a country of which the person is a citizen.

Conclusion

This Legislative Instrument is compatible with human rights as, to the extent that it may engage human rights (if any), that engagement expands those rights.