

## **EXPLANATORY STATEMENT**

Issued by the authority of the Attorney-General

*Foreign States Immunities (Emergency Prevention and Management) Regulations 2018*

*Foreign States Immunities (Taxation) Regulations 2018*

### Operation of the instruments

1. Under international law, states and their agencies are generally entitled, as a matter of customary international law, to immunity from the jurisdiction of the courts of other countries. This principle is known as ‘foreign state immunity’. The *Foreign States Immunities Act 1985* (Cth) (the Act) implements Australia’s obligations under international law with respect to foreign state immunity. The Act implements the ‘restrictive doctrine’ of foreign state immunity, in that it provides for the immunity of foreign states from the jurisdiction of Australian courts with a number of exceptions allowing foreign states to be sued in Australia for certain types of commercial and other activities.

2. Section 43 of the Act provides that the Governor-General may make regulations that are required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed under the Act. The *Foreign States Immunities (Emergency Prevention and Management) Regulations 2018* (the Emergency Prevention and Management Regulations) and the *Foreign States Immunities (Taxation) Regulations 2018* (the Taxation Regulations) (together the Regulations) are made under section 43 of the Act.

### *The Emergency Prevention and Management Regulations*

3. As per the ‘restrictive doctrine’ of foreign state immunity, foreign states are not immune from proceedings relating to personal injury or death, or property damage or loss. Accordingly, section 13 of the Act provides that a foreign state is not immune in a proceeding in so far as the proceeding concerns the death of or personal injury to a person, or loss of or damage to tangible property, caused by an act or omission done or omitted to be done in Australia.

4. Section 42A of the Act provides that the Governor-General may make regulations excluding or modifying the application of section 13 in relation to acts or omissions of a foreign state (or its separate entity) done in the course of providing assistance or facilities to the Australian Government, or a state or territory government, for the purposes of preparing for, preventing or managing emergencies or disasters in Australia.

5. Section 42A of the Act provides that for the Governor-General to lawfully exercise his power to make regulations that exclude or modify the application of section 13, the Attorney-General must be satisfied that a foreign state (or its separate entity) is providing, or is to provide, assistance or facilities to the Australian Government, or a state or territory government, for the purposes of preparing for, preventing or managing emergencies or disasters in Australia. With respect to the USA, emergency prevention and management assistance is provided under the *Arrangement between the Department of Agriculture and the Department of the Interior of the United States, on the one side, and Emergency Management Australia on the other side, concerning the exchange of wildland fire management resources*

(the Arrangement), and Operating Plans that are made from time to time under the Arrangement. Under these instruments, Australia committed to indemnify the USA and its personnel from tort actions arising out of wildland fire management assistance it provides to Australia.

6. The effect of the Emergency Management Regulations is that the USA (and its separate entities) are immune from suit for acts or omissions carried out for the purpose of emergency prevention and management activities in Australia.

7. Details of the Emergency Management Regulations are set out in Attachment A.

#### *The Taxation Regulations*

8. As per the ‘restrictive doctrine’ of foreign state immunity, states are not immune from proceedings in foreign courts concerning their commercial activities. This exception to foreign state immunity generally includes proceedings concerning taxes relating to that state’s commercial activities. Accordingly, section 20 of the Act contains an exception to the immunity of foreign states for proceedings concerning certain taxation obligations. Section 20 of the Act provides that a foreign state is not immune in a proceeding that relates to an obligation imposed on it by a tax law that is prescribed for the purposes of that section. The Taxation Regulations prescribe provisions of the Commonwealth, State and Territory laws that are with respect to taxation for the purposes of section 20 of the Act.

9. The effect of the Taxation Regulations is that foreign states are not immune from the jurisdiction of Australian courts in proceedings concerning taxation provisions of the prescribed laws. Accordingly, the Taxation Regulations enable relevant Australian Commonwealth, State and Territory agencies to enforce tax laws against foreign states by bringing a civil action in the event that a foreign state does not fulfil its obligations under a prescribed tax provision. The Taxation Regulations do not require civil enforcement action to be taken against foreign states; rather they remove the immunity that would otherwise be a procedural bar to taking such civil enforcement action.

10. The Taxation Regulations would repeal the *Foreign States Immunities Regulations 1987* (Cth) (the sunseting Regulations). This repeal does not preclude relevant Australian Commonwealth, State and Territory agencies from bringing a civil action against a foreign state relating to a tax law prescribed in the sunseting Regulations. The interpretation of the sunseting Regulations is governed by subsection 7(2)(c) of the *Acts Interpretation Act 1901* (Cth), which provides that the repeal of an Act (in this case the sunseting Regulations, consistent with subsection 13(1)(a) of the *Legislation Act 2003* (Cth)) does not affect any right, privilege, obligation or liability acquired under that Act.

11. Details of the Taxation Regulations are set out in Attachment B.

#### Review

12. The purpose of the Regulations is to replace the sunseting Regulations, which are scheduled to sunset on 1 April 2019. In 2018 the Office of International Law in the Attorney-General’s Department conducted a review of the sunseting Regulations to determine whether they were still necessary and fit-for-purpose. The review found that the

sunsetting Regulations were still required to implement Australia's ongoing political commitments concerning bushfire management activities with the USA, and to enable Australia to enforce taxation laws consistent with its international legal obligations. The review recommended that the sunsetting Regulations be remade, with necessary amendments to ensure that prescribed tax provisions reflect current Australian legislation. The review also found that the Regulations should be remade as two instruments to enable the regulation relating to immunity of the USA to be exempted from the sunsetting regime in the future. A copy of the sunsetting review may be accessed by contacting the Office of International Law in the Attorney-General's Department.

13. Emergency Management Australia in the Department of Home Affairs was consulted on the review of the sunsetting Regulations, and on the drafting of the Emergency Prevention and Management Regulations. The Commonwealth Treasury and State and Territory Departments of Treasury, the Department of Infrastructure, Regional Development and Cities (as the department with portfolio responsibility for the laws applicable to Norfolk Island) were consulted on the review of the sunsetting Regulations, and on the drafting of the Taxation Regulations.

#### Other matters

14. The Regulations commence the day after the Taxation Regulations is registered on the Federal Register of Legislation.

15. The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required for the Regulations.

16. The Regulations are legislative instruments for the purposes of the *Legislation Act 2003* (Cth).

17. The statement of compatibility with human rights for the Emergency Prevention and Management Regulations is at Attachment C.

18. The statement of compatibility with human rights for the Taxation Regulations is at Attachment D.

Authority: Section 43 of the *Foreign States Immunities Act 1985*

## **Attachment A: Operation of the Emergency Prevention and Management Regulations**

### Regulation 1 - Name

This regulation provides that the title of the Emergency Management Regulations is the *Foreign States Immunities (Emergency Prevention and Management) Regulations 2018*.

### Regulation 2 - Commencement

This regulation provides for the Emergency Management Regulations to commence at the same time as Schedule 1 to the *Foreign States Immunities (Taxation) Regulations 2018*, ie the day after the *Foreign States Immunities (Taxation) Regulations 2018* is registered on the Federal Register of Legislation.

### Regulation 3 - Authority

This regulation provides that the Emergency Management Regulations is made under the *Foreign States Immunities Act 1985* (Cth).

### Regulation 4 - Definitions

This regulation provides that for the purposes of the Emergency Management Regulations ‘Act’ means the *Foreign States Immunities Act 1985* (Cth), and notes that a number of expressions including ‘Australia’ and ‘separate entity’ are defined in the Act.

### Regulation 5 - Bushfires

This regulation provides that the USA (or a separate entity of the USA) is immune in proceedings relating to acts or omissions done or omitted to be done in the course of providing facilities or assistance to the Australian Government, or the government of a state or territory, for the purpose of preparing for, preventing or managing bushfires in Australia. This regulation replaces regulation 2A of the sunseting Regulations. Its operation is the same as regulation 2A of the sunseting Regulations, with minor amendments to update the regulation in line with current drafting practices of the Office of Parliamentary Counsel.

## **Attachment B: Operation of the Taxation Regulations**

### Regulation 1 - Name

This regulation provides that the title of the Taxation Regulations is the *Foreign States Immunities (Taxation) Regulations 2018*.

### Regulation 2 - Commencement

This regulation provides for the Taxation Regulations to commence the day after the instrument is registered on the Federal Register of Legislation.

### Regulation 3 - Authority

This regulation provides that the Taxation Regulations are made under the *Foreign States Immunities Act 1985* (Cth).

### Regulation 4 - Schedules

This regulation provides that each instrument that is specified in a Schedule to the Taxation Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Taxation Regulations has effect according to its terms.

### Regulation 5 - Definitions

This regulation provides that for the purposes of the proposed Taxation Regulations ‘Act’ means the *Foreign States Immunities Act 1985* (Cth), and notes that a number of expressions including ‘law of Australia’ are defined in the Act.

### Regulation 6 - No immunity in relation to certain tax laws of the Commonwealth

This regulation provides that the provisions of the Commonwealth laws with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

### Regulation 7 - No immunity in relation to certain tax laws of New South Wales

This regulation provides that the provisions of the laws of New South Wales with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

### Regulation 8 - No immunity in relation to certain tax laws of Victoria

This regulation provides that the provisions of the laws of Victoria with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Regulation 9 - No immunity in relation to certain tax laws of Queensland

This regulation provides that the provisions of the laws of Queensland with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Regulation 10 - No immunity in relation to certain tax laws of Western Australia

This regulation provides that the provisions of the laws of Western Australia with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Regulation 11 - No immunity in relation to certain tax laws of South Australia

This regulation provides that the provisions of the laws of South Australia with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Regulation 12 - No immunity in relation to certain tax laws of Tasmania

This regulation provides that the provisions of the laws of Tasmania with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Regulation 13 - No immunity in relation to certain tax laws of the Australian Capital Territory

This regulation provides that the provisions of the laws of the Australian Capital Territory with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Regulation 14 - No immunity in relation to certain tax laws of the Northern Territory

This regulation provides that the provisions of the laws of the Northern Territory with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Regulation 15 - No immunity in relation to certain tax laws of Norfolk Island

This regulation provides that the provisions of the laws of Norfolk Island with respect to taxation set out in the table are prescribed for the purposes of section 20 of the Act.

#### Schedule 1 - Repeals

##### **Item [1] – The whole of the instrument**

Item 1 repeals the *Foreign States Immunities Regulations 1987*.

## **Attachment C: Emergency Prevention and Management Regulations statement of compatibility with human rights**

### **Statement of Compatibility with Human Rights**

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

#### **Foreign States Immunities (Emergency Prevention and Management) Regulations 2018**

This disallowable 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 instrument**

Under international law, states and their agencies are generally entitled, as a matter of customary international law, to immunity from the jurisdiction of the courts of other countries. This principle is known as ‘foreign state immunity’. The *Foreign States Immunities Act 1985* (Cth) (the Act) implements Australia’s obligations under international law with respect to foreign state immunity.

The Act implements the ‘restrictive doctrine’ of foreign state immunity. Accordingly, section 9 of the Act provides for the immunity of foreign states from the jurisdiction of Australian courts, subject to a number of exceptions in the Act.

Section 13 of the Act provides that foreign states are not immune in proceedings concerning personal injury or death, or property damage or loss. Section 42A of the Act provides that the Governor-General may make regulations excluding or modifying the application of section 13 with respect to a foreign state (or its separate entity) in relation to acts or omissions done in the course of providing assistance or facilities to the Australian Government, or a state or territory government, for the purposes of preparing for, preventing or managing emergencies or disasters in Australia.

The *Foreign States Immunities (Emergency Prevention and Management) Regulations 2018* (the Regulations) are made under section 43 of the Act. The Regulations exclude the application of section 13 of the Act to the United States of America (USA) and its separate entities in respect of tort proceedings relating to acts or omissions done in the course of providing emergency prevention and management assistance to Australia.

The Regulations implement commitments made in a non-binding intergovernmental arrangement between Australia and the USA — the *Arrangement between the Department of Agriculture and the Department of the Interior of the United States, on the one side, and Emergency Management Australia on the other side, concerning the exchange of wildland fire management resources* (the Arrangement), and Operating Plans that are made from time to time under the Arrangement. Under these instruments, Australia committed to indemnify the USA and its personnel from tort actions arising out of wildland fire management assistance it provides to Australia.

The effect of the Regulations is that the USA (and separate entities thereof) are immune from civil proceedings in Australian courts in respect of acts or omissions done or omitted to be

done in the course of providing facilities or assistance to the Australian Government, or to a state or territory government, for the purpose of preparing for, preventing or managing bushfires in Australia. This immunity extends to acts or omissions of the foreign state or its separate entities done in the course of official duties. Any proceedings relating to actions or omissions that fall outside the course of official duties remain subject to the jurisdiction of Australian courts. The immunity does not apply in respect of any criminal proceedings.

### **Human rights implications**

The Regulations engage the following right:

- Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 14(1) of the ICCPR provides that every person shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law for the determination of their rights and obligations. The Human Rights Committee, in their General Comment No. 32 at paragraph 9, expressed the view that this includes a right of access to courts in respect of civil proceedings. Australia seeks to ensure that no individual is deprived, in procedural terms, of his or her right to claim justice in a civil proceeding.

The Regulations may *prima facie* engage the right of access to courts under Article 14(1) of the ICCPR to the extent that they would preclude a person from bringing a suit against the USA or its separate entities concerning personal injury or death, or property damage or loss caused in the course of bushfire management activities it carries out in Australia.

However the right of access to a court does not include a right to bring a suit against a particular person. As a matter of practice, the Regulations would not preclude a person from bringing a civil tort action in respect of damage they incur against entities other than the USA. Pursuant to the Arrangement and Operating Plans, the Commonwealth of Australia is deemed to be the employer of employees and other agents of the USA for the purposes of tort liability. Further, under the Arrangement and Operating Plans, the Commonwealth agrees to assume any and all liability for tortious acts or omissions of the USA and its separate entities. As such, while an aggrieved person may not be able to bring a civil suit against the USA or its separate entities directly, the Regulations do not limit an individual's rights under Article 14(1) of the ICCPR to access the courts to have their rights and obligations determined.

The immunity in the Regulations only relates to civil proceedings, so does not engage the right to a fair trial in the context of criminal proceedings.

### **Conclusion**

The Regulations are compatible with human rights because they do not limit the right to access justice through a fair and public hearing of a civil claim.



## **Attachment D: Taxation Regulations, Statement of Compatibility with Human Rights**

### **Statement of Compatibility with Human Rights**

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

#### **Foreign States Immunities (Taxation) Regulations 2018**

This disallowable 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 instrument**

Under international law, states and their agencies are generally entitled, as a matter of customary international law, to immunity from the jurisdiction of the courts of other countries. This principle is known as ‘foreign state immunity’. The *Foreign States Immunities Act 1985* (Cth) (the Act) implements Australia’s obligations under international law with respect to foreign state immunity.

The Act implements the ‘restrictive doctrine’ of foreign state immunity. Section 9 provides for the immunity of foreign states from the jurisdiction of Australian courts, subject to a number of exceptions in the Act.

Section 20 of the Act provides that a foreign state is not immune in a proceeding in so far as the proceeding concerns an obligation imposed on it by or under a provision of a law that is prescribed for the purposes of that section.

The *Foreign States Immunities (Taxation) Regulations 2018* (the Regulations) are made under section 43 of the Act. The Regulations prescribe the provisions of Commonwealth, State and Territory laws with respect to taxation for the purposes of section 20 of the Act.

The effect of the Regulations is that foreign states are not immune from the jurisdiction of Australian courts in proceedings concerning prescribed tax laws. Accordingly, the Regulations enable relevant Australian Commonwealth, State and Territory agencies to enforce tax laws against foreign states by bringing a civil action in the event that a foreign state does not fulfil its obligations under a prescribed tax law. The Regulations do not require civil enforcement action to be taken against foreign states; rather they remove the immunity that would otherwise be a procedural bar to taking such civil enforcement action.

#### **Human rights implications**

The Regulations do not engage any of the applicable rights or freedoms.

#### **Conclusion**

The Regulations are compatible with human rights as they do not raise any human rights issues.