International Organisations (Privileges and Immunities) Amendment Bill 2013

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Law and Bills Digest Section

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International Organisations (Privileges and Immunities) Amendment Bill 2013

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House: Senate

Portfolio: Foreign Affairs

Commencement: Sections 1 to 3 commence on Royal Assent. Schedule 1 commences on a day to be fixed by Proclamation or six months after Royal Assent, whichever is earliest.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through [http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation). When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at [http://www.comlaw.gov.au/](http://www.comlaw.gov.au/).

Purpose of the Bill

The purpose of the International Organisations (Privileges and Immunities) Amendment Bill 2013 (the Bill) is to amend the International Organisations (Privileges and Immunities) Act 1963 (the Act)\(^1\) to allow for certain privileges and immunities to be conferred on the International Criminal Court (ICC) and the International Committee of the Red Cross (ICRC). The Bill also provides for consequential amendments to ensure that the current provisions that apply with respect to international conferences also apply to the ICC and the ICRC.

Background

The concept of privileges and immunities

Since the establishment of the United Nations (the UN), the role of international organisations within the international community has greatly increased. Upon being recognised as having international legal personality, an organisation will be seen as capable of possessing international rights and duties.\(^2\) One such right includes the power to make treaties which confer certain privileges and immunities on the organisation and its personnel.\(^3\)

It has long been recognised that international organisations have a right to those privileges and immunities necessary for the fulfilment of the organisation’s purpose\(^4\):

3. Ibid.
4. For example, Article 105 of the United Nations Charter provides that ‘the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that
In order to function effectively, international organizations require a certain minimum of freedom and legal security for their assets, headquarters, and other establishments and for their personnel and representatives of member states accredited to the organizations. ¹

Common privileges and immunities that apply to international organisations include ‘immunities from jurisdiction and execution, the inviolability of premises and archives, currency and fiscal privileges, and freedom of communication’. ⁶

The Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character was adopted in 1975 ⁷ and ‘provides for the relations between state and intergovernmental international organisations of a universal character (those whose membership and responsibilities are on a worldwide scale) and to the representation of states at conferences convened by or under the auspices of such organisations’. ⁸ Due to not having met the required number of ratifications/signatures the Convention has yet to come into force. ⁹ As Australia has not ratified the Convention, and the Convention does not form part of customary international law, the provisions do not apply to Australia.

The operation of privileges and immunities in Australia

In Australia, the Act sets out which international organisations are able to be granted privileges and immunities, as well as specifying what privileges and immunities can be granted. ¹⁰ The actual conferral of privileges and immunities on an organisation occurs by way of regulations made by the Governor-General.

The following organisations are examples of those that have been granted various privileges and immunities:

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representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization’. The Convention on the Privileges and Immunities of the United Nations was subsequently adopted to reflect Article 105.

9. I Brownlie, Principles of public international law, op. cit., pp. 653–654. Article 89 of the Convention stipulates that it will not enter into force until the date of the deposit of the thirty-fifth instrument of ratification or accession. Currently only 24 states have ratified/acceded to the Convention. Significant host countries (those that host international organisations), such as the United States, have refused to ratify the Convention. According to Brownlie, this refusal stems from the view that under the Convention the interests of the host state receive insufficient protection: ibid.
10. Sections 5–9 of the Act set out the circumstances upon which privileges and immunities may be granted, while the Schedules to the Act set out which privileges and immunities may be conferred on organisations/individuals.
• United Nations\textsuperscript{11}
• World Trade Organization\textsuperscript{12}
• International Court of Justice\textsuperscript{13}
• International Sea-Bed Authority\textsuperscript{14}
• International Mobile Satellite Organization\textsuperscript{15} and the
• Organisation for Economic and Co-operation and Development.\textsuperscript{16}

The First Schedule of the Act provides for the various privileges and immunities that may be granted to organisations under the Act.

These include:

• immunity of the organisation and its property and assets
• exemption with regards to taxes
• inviolability of the organisation’s archives and the
• absence of censorship with regards to the organisation’s official correspondence and other official communications.

Schedules 2-5 set out the privileges and immunities that may apply to the various officers and representatives of an international organisation.

The International Criminal Court

The Role of the ICC

The ICC is the first permanent international criminal court with the jurisdiction to try individuals for the most serious crimes of concern to the international community.\textsuperscript{17} It was established by the \textit{Rome Statute of the International Criminal Court 1998} (the Rome Statute), which was adopted on 17 July 1998 and entered into force on 11 April 2002.\textsuperscript{18} Australia became a State Party to the Rome Statute on 1 September 2002, after a last-minute rush to pass legislation in order to ensure that Australia

\textsuperscript{13} International Court of Justice (Privileges and Immunities) Regulations 1967, accessed 18 May 2013.
\textsuperscript{17} Further information about the ICC is available on the Attorney-General’s website: Attorney-General’s Department (AGD), \textquote{Support for the International Criminal Court}, AGD website, accessed 16 May 2013.

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would form part of the inaugural Assembly of State Parties in February 2003, with the capacity to nominate the first judges and prosecutors for the ICC.\(^{19}\)

**The ICC privileges and immunities agreement**

In September 2002, the Assembly of State Parties adopted the *Agreement on Privileges and Immunities of the International Criminal Court* (the ICC Agreement).\(^{20}\)

The ICC Agreement differs from previous agreements concerning privileges and immunities due to its recognition of ‘amongst others, experts, witnesses, victims, and other persons required to be present at the seat of the Court’.\(^{21}\)

Amnesty International made the following comments about the ICC Agreement:

... the Agreement provides for privileges and immunities for the Court itself, the Court’s staff, and to a certain extent others such as defence counsel, victims and witnesses. Without such privileges and immunities it will be difficult, or even impossible, for the Court to function effectively and independently. In particular, the ability of court staff, investigators and witnesses to travel and transport evidence across and within national borders will be compromised. Widespread ratification and implementation of the Agreement will also ensure the protection of the Court’s buildings, communications, files, evidence in its possession and other matters essential to its independent and effective operation.\(^{22}\)

As the ICC is an independent organisation and therefore not part of the United Nations, the Court and its staff are unable to rely on the privileges and immunities ‘which have been well established in both treaties and practice over the last fifty years of the UN’s existence’.\(^{23}\)

While Australia became a party to the Rome Statute in 2002, it has yet to accede to the ICC Agreement.\(^{24}\) The provisions of the ICC Agreement mean that it is no longer possible for Australia to simply become a signatory to the ICC Agreement, and then subsequently ratify it; the only method now available is accession.\(^{25}\) In order to accede to the ICC Agreement, Australia will first have to

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24. Accession has the same effect as ratification in confirming a state’s intention to be bound to a treaty. Definitions of the relevant treaty terms are set out at Appendix 1.
25. Article 34(1) of the ICC Agreement provides that the Agreement was open for signature by all states from the 10 September 2002 to the 30 June 2004. Those states that signed the Agreement within that timeframe were then required to ratify, accept or approve the text of the Agreement. However, under Article 34(3), those states that failed to sign the Agreement within the specified time period are still able to accede to the Agreement.
implement the terms of the Agreement into domestic law. Once this is done, an instrument of accession can be deposited with the United Nations Secretary-General in New York.\textsuperscript{26}

International Committee of the Red Cross

The Role of the ICRC

In its submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, the ICRC set out a detailed explanation of its role and functions:

The International Committee of the Red Cross (ICRC) is an independent, neutral and impartial humanitarian organisation whose mission is to protect the lives and dignity of victims of armed conflict and other situations of violence, and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening the laws that protect victims of armed conflict (international humanitarian law) and universal humanitarian principles. The ICRC’s mandate to carry out this work is provided for in the universally ratified Geneva Conventions of 1949, the Additional Protocols to those Conventions of 1977, and in the Statutes of the International Red Cross and Red Crescent Movement. The ICRC currently operates in around 80 countries and deploys 12,000 staff worldwide. The Regional Delegation in the Pacific has its Headquarters in Fiji, and Missions in Papua New Guinea and Australia.\textsuperscript{27}

While the ICRC is often categorised as a non-governmental organisation (NGO), this is not actually correct.\textsuperscript{28} Nor does the ICRC fall under the strict classification of an international organisation.\textsuperscript{29} The Explanatory Memorandum refers to the ‘independent and non-intergovernmental character of the ICRC’.\textsuperscript{30}

The actual status of the ICRC is therefore in ‘a class of its own’:

The ICRC has a hybrid nature. As a private association formed under the Swiss Civil Code, its existence is not in itself mandated by governments. And yet its functions and activities - to provide protection and assistance to victims of conflict – are mandated by the international community of States and are founded on international law, specifically the Geneva Conventions, which are among the most widely ratified treaties in the world.

\textsuperscript{26} Article 34(3) of the ICC Agreement. Under Article 35(2), the Agreement will enter into force for Australia 30 days after the instrument of accession has been deposited with the Secretary-General.

\textsuperscript{27} The International Committee of the Red Cross (ICRC), Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, \textit{Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013}, accessed 18 May 2013.

\textsuperscript{28} An NGO is a private organisation that has not been established by a government/intergovernmental agreement. Examples include Amnesty International, Greenpeace, Oxfam, Doctors Without Borders and Human Rights Watch.

\textsuperscript{29} An international organisation (or intergovernmental organisation) is an organisation that has been established by a treaty or other international instrument. International organisations possess their own legal personality and a mandate for their existence and activities, and enjoy the benefit of privileges and immunities: G Rona, \textit{The ICRC’s status: in a class of its own}, International Committee of the Red Cross website, 17 February 2004, accessed 18 May 2013. Well known international organisations include United Nations, World Trade Organization and the International Monetary Fund.

Because of this the ICRC, like any intergovernmental organization, is recognized as having an “international legal personality” or status of its own. It enjoys working facilities (privileges and immunities) comparable to those of the United Nations, its agencies, and other intergovernmental organizations. Examples of these facilities include exemption from taxes and customs duties, inviolability of premises and documents, and immunity from judicial process.31

Memorandum of Understanding

In 2005 Australia signed a Memorandum of Understanding (MOU) with the ICRC, entitled the ‘Arrangement between the Government of Australia and the International Committee of the Red Cross on a Regional Headquarters in Australia’ (the ICRC Arrangement).32 Under international law, MOU are not generally considered to be legally enforceable.33 With respect to the ICRC Arrangement, under paragraph 17, the Arrangement will only come into effect when ‘the Government of Australia notifies the ICRC that legislation giving effect to the relevant provisions of this Arrangement has commenced’.34

The ICRC Arrangement provides for the following privileges and immunities:

- immunity of the ICRC, its property and assets
- inviolability of the ICRC premises, property and assets
- inviolability of ICRC archives
- immunity and confidentiality with respect to communications
- exemption from currency and exchange restrictions and
- exemption from customs duties.35

The ICRC Arrangement also provides for a range of privileges and immunities with regards to delegates of the ICRC.36

Committee consideration

Senate Foreign Affairs, Defence and Trade Legislation Committee

32. A copy of the ICRC Arrangement has been included in the Department of Foreign Affairs, Defence and Trade’s submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee: Department of Foreign Affairs and Trade (DFAT), Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, viewed 18 May 2013.
34. Department of Foreign Affairs and Trade (DFAT), Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit.
35. Ibid., paragraphs 3-8, 11.
36. Ibid., paragraph 9.
The Bill was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Foreign Affairs, Defence and Trade Committee) for inquiry and report by 25 June 2013. The reason behind the referral was that the Bill ‘involves changes to legal immunity of international organisations, which potentially raises complex legal issues’.

On 5 June 2013 the Committee handed down its report, which made the following recommendations:

1. The committee recommends that the regulations to be made under the Bill be drafted and circulated as soon as possible to allow certainty for the ICRC and the ICC.

2. The committee recommends that the Bill be passed.

In making these recommendations, the Committee examined the purpose of the Bill and reviewed the submissions that it had received. In particular, the Committee commented on the use of implementing regulations:

The committee notes that the regulations to be made under the Act (as proposed to be amended by the bill) are not yet available, and that, as mentioned by Professor Saul and the [Parliamentary Joint Committee on Human Rights] PJCHR, the absence of draft regulations means that it is difficult to be sure that the regulations adequately implement the Arrangement. The committee encourages [the Department of Foreign Affairs and Trade] DFAT to continue to work with the ICRC and the ICC, as well as any other relevant departments, to ensure that the regulations adequately implement the agreements to which Australia is a party.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills had no comment to make with respect to this Bill.

Parliamentary Joint Committee on Human Rights

Government’s Assessment of the Bill

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

37. Selection of Bills Committee, Report No. 4 of 2013, Senate, Canberra, 21 March 2013, accessed 23 March 2013. Details about the inquiry are available on the Committee’s homepage.
38. Ibid., Appendix 10.
40. The Foreign Affairs, Defence and Trade Committee did not raise any issues with the provisions of the Bill.
The Government stated that:

The Bill is compatible with human rights as it does not raise human rights issues, has no adverse implications for the Government’s compliance with its human rights obligations and does not adversely affect the human rights of individuals.\textsuperscript{44}

Furthermore, the Government commented that by enhancing Australia’s co-operation with both the ICC and ICRC, the Bill should also contribute to the advancement of human rights.\textsuperscript{45}

\textbf{Parliamentary Joint Committee’s Assessment of the Bill}

In determining whether the Bill sufficiently complied with the \textit{Human Rights (Parliamentary Scrutiny) Act 2011},\textsuperscript{46} the Parliamentary Joint Committee on Human Rights (Parliamentary Joint Committee) raised broader concerns.\textsuperscript{47} The Committee queried how the conferral of privileges and immunities would operate with regards to Australia’s obligations under the \textit{Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (the CAT)}.\textsuperscript{48}

The Parliamentary Joint Committee sought clarification from DFAT as to whether the obligation that exists under the CAT, requiring states to either prosecute or extradite persons alleged to have committed torture, extended to those officials who enjoyed immunity from criminal prosecution while in office.\textsuperscript{49} The Committee also wished to know whether such an obligation was already enshrined in domestic legislation, and if not, whether any legislative amendments were proposed to reflect this position.\textsuperscript{50}

While DFAT’s response to the Parliamentary Joint Committee was predominantly confined to the parameters of the Bill in question, the response did provide some insight into whether the Government is of the view that a ‘human rights exception has formed part of international law’:

\begin{quote}
\textit{The question of the application of immunities to serious international crimes remains unsettled under international law. There has been limited jurisprudence on point and such jurisprudence as there has been}
\end{quote}

\textsuperscript{44} Ibid., p. 5.
\textsuperscript{45} Ibid.
\textsuperscript{48} \textit{The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment}, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
\textsuperscript{50} Ibid., pp. 228–229.
is not determinative. For this reason it would be premature at this point to propose further legislative amendments addressing this issue in the context of the Act.\(^{51}\)

In its report, the Committee noted that DFAT’s response:

… specifically notes that the Pinochet case ‘has not determined the question as a matter of international law’, which may suggest that the government does not agree with the relevant findings in that case as to the scope of the obligations under the CAT, or with the authoritative statements to similar effect of the Committee against Torture and the International Court of Justice on this issue.\(^{52}\)

The Parliamentary Joint Committee stated that under the CAT, there is clearly an obligation to implement legislation ‘which permit[s] the investigation and prosecution or extradition of persons alleged to have committed torture, including persons who may enjoy immunity…in relation to acts performed as part of their official functions’.\(^{53}\)

Dr Ben Saul, Professor of International Law at the University of Sydney, agreed with the Committee’s view, but questioned the raising of such issues with respect to this Bill:

The human rights analysis of this Bill queries whether certain state immunities persist for acts of torture as a result of evolving international jurisprudence. We agree with that legal observation. However, we note that in practice it would be highly unlikely that an ICRC or ICC official would commit torture and claim immunity, and likely that immunity would be waived by the organisation.

More importantly, we do not think this Bill is the appropriate avenue by which to reconsider this wider controversy about the contemporary scope of state or international organisation immunities.\(^{54}\)

DFAT also took the view that this Bill was unlikely to give rise to situations where Australia’s obligations under the CAT were called into question:

For practical purposes, in the very unlikely event that a situation were to arise involving ICC or ICRC personnel who were accused of committing serious international crimes, it is important to underscore that it would be open to the Australian Government to request that the organisation in question waive the immunity of the individual concerned.\(^{55}\)

The Committee thanked the Minister for his response but noted that ‘that the response has not addressed the specific questions raised by the committee.’\(^{56}\) When granting immunities the question of how they should be curtailed may naturally arise. The Committee’s question about whether they

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53. Ibid., p. 232.
55. Department of Foreign Affairs and Trade, *Response to the Parliamentary Joint Committee on Human Rights on its request for further information concerning the International Organisations (Privileges and Immunities) Amendment Bill 2013*, op. cit.
are to be limited in the cases of serious international crimes may be thought incongruous in the circumstances of agencies devoted to ending such crimes, however it might be precisely the moment to establish the legislative principle that such privileges and immunities should be subject to general human rights principles. The Minister’s reliance on the courts to determine the issue in the future was regarded as inadequate by the Committee, since the judiciary are bound to observe the legislative provisions currently in place regarding immunities and privileges.\(^5\)

In its report, the Foreign Affairs, Defence and Trade Committee states that it:

... agreed with Professor Saul’s suggestion that the appropriate place to consider these issues is through a review of the Foreign States Immunities Act 1985 undertaken by a body such as the Australian Law Reform Commission.\(^6\)

The Parliamentary Joint Committee also commented on the availability of the ICRC Arrangement:

The committee thanks the Minister for providing it with a copy of the agreement and reiterates its recommendation that instruments of ‘less than treaty status’ such as this agreement and memoranda of understanding with other states and international bodies should be included as part of the Australian Treaties Library in AUSTLII in a separate section, in order to contribute to transparency in Australia’s conduct of its international relations.\(^7\)

### Position of major interest groups

#### International Committee of the Red Cross

In its submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee the ICRC stated that the Bill will provide privileges and immunities necessary for the organisation to ‘fulfil its mandate in full conformity with its fundamental principles and working methods and otherwise facilitate its work in Australia and the Pacific region’.\(^8\)

The ICRC specifically highlighted the protection in paragraph 11 of the ICRC Agreement, which involves an undertaking on behalf of the Government to respect the confidentiality of ICRC reports, correspondence and other communications:

This protection is crucial to the ICRC’s ability to perform its mandate of protecting the most vulnerable in conflict situations and is central to the ICRC’s modus operandi. The ICRC’s ability to engage with the parties to an armed conflict, to access conflict areas, civilian populations and persons in detention, and the security of its staff, depend on the preservation of the confidentiality of its dialogue and exchanges with all concerned. Formal recognition of this commitment in the ICRC Arrangement, to be brought into effect in

\(^5\) Ibid, pp. 231–232.
\(^6\) Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit., p. 10.
\(^7\) Parliamentary Joint Committee on Human Rights, Sixth Report of 2013, op. cit., p. 229.
\(^8\) The International Committee of the Red Cross, Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit.
Australia through the adoption of the above mentioned Bill, will support the ICRC’s work in this country, and around the world.  

Financial implications

The Explanatory Memorandum provided for the following financial impact:

The Department of the Treasury has advised that conferring privileges and immunities on the ICRC would have a minimal (not zero but rounded to zero) cost to revenue. The Department of Treasury has advised that conferring privileges and immunities on the ICC would have a minimal (negligible) cost to revenue over the forward estimates period.

The main financial implications arising out of the conferral of privileges and immunities relate to an organisation’s exemption from having to pay taxes.

In the time that has passed since the signing of the ICRC Arrangement, the ICRC has been recognised as a public benevolent institution (PBI) by the Australian Tax Office (ATO). A PBI ‘is a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community’.

The following exemptions are available to PBIs:

- income tax exemption
- goods and services tax (GST) charity concessions
- fringe benefits tax (FBT) exemption and
- deductible gift recipient status.

As these benefits now apply to the ICRC, it is unlikely that the organisation would pay a significant amount of tax (if any) and the loss of this amount will therefore ‘have a negligible cost to revenue over the forward estimates period’. The Government has stated that ‘these privileges and immunities are broadly consistent with corresponding concessions provided to other international organisations and their officials’. As the ICC does not have property or staff in Australia, it would currently pay no tax and any tax exemptions granted to it would not have an impact on the Federal Budget.

61. Ibid.
67. Ibid.

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Main issues

The delay in conferring privileges and immunities on the ICRC and the ICC

The ICC Agreement entered into force on 22 July 2004. While Australia had become a State Party to the Rome Statute on 1 September 2002, it had failed to sign the ICC Agreement within the relevant time period and has taken 10 years since the Agreement was first opened for signature to introduce legislation that will allow the Government to ratify the Agreement. It is unclear why Australia has taken so long to ratify this Agreement.

At the Review Conference of the Rome Statute in 2010, one of the Australia’s commitments was:

"To progress Australia’s consideration of accession to the International Criminal Court Privileges and Immunities Agreement, noting the importance of this Agreement to the functioning of an effective and independent Court." 68

It would appear that the detention of Australian lawyer Melinda Taylor in Libya in June 2012 was a driving cause behind Australia’s push to accede to the ICC Agreement. Ms Taylor, a staff member of the ICC, travelled with four other colleagues to meet with Saif al-Islam Gaddafi, the son of former Libyan leader Muammar Gaddafi. The visit was authorised by the Court and agreed to by Libya; however, upon meeting with Mr Gaddafi, Ms Taylor and a colleague were arrested on the grounds that they had handed Mr Gaddafi suspicious documents. They were detained in Libya for a month until their release on 2 July 2012.

Australia has condemned the Libyan Government for its refusal to extend privileges and immunities to Ms Taylor and her colleagues. At the 2012 Assembly of State Parties to the Rome Statute 69, DFAT officer David Sproule made the following statement on behalf of Canada, Australia and New Zealand (CANZ) 70:

"In order to carry out it functions effectively, the Court requires the co-operation of the international community. The detention of four staff members in June brought home the serious risks that Court staff can face when carrying out their duties and the need for appropriate privileges and immunities to be afforded to all those carrying out functions on behalf of the Court." 71

In its response to the Parliamentary Joint Committee DFAT commented that:

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69. Each year, the Assembly of State Parties to the Rome Statute meet to discuss issues concerning the Court. Other states who have also ratified the Rome Statute may attend as observers. Further information is available on the Coalition for the ICC’s website: Coalition for the International Criminal Court, ‘Assembly of State Parties’, website, accessed 29 May 2013.

70. ‘Canada, Australia and New Zealand work closely in the UN on issues ranging from security issues, human rights to cooperation on the environment. Often the three countries work together informally (known as the CANZ grouping) and sometimes with other likeminded nations.’ See the DFAT website: Department of Foreign Affairs and Trade, ‘Canada country brief’, DFAT website, September 2012, accessed 29 May 2013.

The importance of immunities to the ability of international organisations in the independent exercise of their functions and the fulfilment of their purposes, free from undue interference, was clearly demonstrated by Libya’s failure in 2012 to extend privileges and immunities to an ICC delegation comprising Australian citizen Melinda Taylor and three of her colleagues.\(^72\)

In acknowledging the importance of the ICC Agreement, and reprimanding Libya for its failure to implement and abide by the Agreement, Australia has placed itself in a position where it must now demonstrate that it intends to be bound by the same standards as those that it expects other states to uphold.

With regards to the ICRC Arrangement, it is also unclear why it has taken eight years for the Government to take steps to confer on the ICRC the privileges and immunities set out in the Arrangement.

The detail is in the regulations

While the Act sets out the circumstances in which privileges and immunities may be granted to international organisations, the actual conferral of privileges and immunities on an organisation occurs by way of regulations.

In his submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee Professor Saul acknowledged the difficulties in scrutinising the Bill in its current form:

> Whether this scheme will adequately achieve its purpose depends on the detail of the implementing regulations, which are presently unknown, thus making further comment difficult. We would urge that the regulations give effect to the full extent of privileges and immunities recognised in international treaty and customary law.\(^73\)

It is unclear what privileges and immunities will actually be conferred on the ICRC and the ICC.

In particular, the ICRC has placed significant emphasis on the Government complying with its obligation under the ICRC Arrangement to respect the confidentiality of ICRC reports, correspondence and other communications.\(^74\) While there is no express guarantee that the Government will confer upon the ICRC the same privileges and immunities as set out in the Arrangement, the importance placed by DFAT on the need for organisations to be immune from legal process indicates that such a protection will be conferred on the ICRC:

> In many instances, conferring privileges and immunities, such as immunity from legal process including the giving of evidence, serves the important function of protecting the confidential work and communications

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72. Department of Foreign Affairs and Trade, Response to the Parliamentary Joint Committee on Human Rights on its request for further information concerning the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit.

73. Professor Ben Saul, Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit.

74. The International Committee of the Red Cross, Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit.
of the organisation in question. The protection of confidentiality can be instrumental to an international organisation’s ability to perform its mandate, including by ensuring the access required to perform its functions and ensuring the security of its personnel.\(^7\)

Professor Saul has stated that the protection of confidentiality applied to ICRC reports, correspondence and communications has also ‘reached the status of international customary law’.\(^7\) In reaching this conclusion he notes that ‘the ICRC is accorded immunity from the ICC and 80 states have recognised its immunity through legislation and agreements’.\(^7\)

It would appear that the Government intends to confer on the ICC all privileges and immunities set out in the ICC Agreement:

The conferral of privileges and immunities on the ICC is crucial to supporting the Court in the exercise of its functions and the fulfilment of its purposes. By enabling the enactment of regulations conferring privileges and immunities on the ICC in accordance with the Agreement on Privileges and Immunities of the International Criminal Court, the Bill would place Australia in a position to take steps towards acceding to that Agreement.\(^7\)

### Key provisions

#### Conferral of privileges and immunities on the ICRC

Paragraph 1 of the ICRC Arrangement states that ‘the status of the ICRC in Australia will be comparable to that of an intergovernmental organisation’.\(^7\) Under the Act, privileges and immunities may be conferred on ‘international organisations’ and ‘overseas organisations’. However, due to the hybrid nature of the ICRC it will not fall under the existing definitions of ‘international organisations’ or ‘overseas organisations’. Rather than extend the existing definitions, the Government has instead chosen to insert **new section 9D** into the Act, which will allow for privileges and immunities to be conferred on the ICRC. **Proposed section 9D** will operate with respect to the ICRC only, which will ensure that ‘the amendment will not inadvertently encompass any other organisations’.\(^8\) Other organisations that have also not come under the general

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\(^7\) Department of Foreign Affairs and Trade, *Response to the Parliamentary Joint Committee on Human Rights on its request for further information concerning the International Organisations (Privileges and Immunities) Amendment Bill 2013*, op. cit.

\(^6\) Professor Ben Saul, Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit.

\(^7\) Ibid.

\(^8\) Department of Foreign Affairs and Trade (DFAT), Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013*, op. cit.

\(^9\) The International Committee of the Red Cross, Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013*, op. cit.

definitions of ‘international organisations’ and ‘overseas organisations’ include the International Court of Justice (ICJ) and the Investment Commission.\(^81\)

**Proposed subsection 9D(1)** provides that the regulations may confer on the ICRC and those personnel set out in the ICRC Arrangement such privileges and immunities that are required to give effect to that Arrangement. **Proposed subsection 9D(2)** further provides that the regulations may confer on the ICRC ‘juridical personality and such legal capacities as are necessary for the exercise of its powers and the performance of its functions’. This is necessary to give effect to paragraph 2 of the ICRC Arrangement, the language of which it reflects.\(^82\)

The Explanatory Memorandum provides that the introduction of **proposed section 9D** will ensure ‘that the privileges and immunities conferred on the ICRC will be limited to those set out in the ICRC Arrangement’.\(^83\) It does not clearly state whether all those privileges and immunities set out in the Arrangement will actually be conferred on the ICRC.

**Item 1** inserts a definition of the ICRC Arrangement into subsection 3(1) of the Act, while **item 13** clarifies that the trademark protections set out under section 12 of the Act do not apply to the ICRC, due to it not coming within the definition of an international organisation. Instead, the use of the emblem and designation of the ‘Red Cross’ is dealt with under section 15 of the *Geneva Conventions Act 1957*.\(^84\)

### Conferral of privileges and immunities on the ICC

**Proposed section 9C** will operate similarly to **proposed section 9D** by allowing privileges and immunities to be conferred on the ICC. While section 9B of the Act currently provides for privileges and immunities to be conferred by way of regulations on international tribunals, this would not sufficiently protect all the relevant persons set out in the ICC Agreement. In particular, the ICC is the only international court that allows victims to participate in the proceedings. As section 9B does not allow privileges and immunities to be conferred on victims appearing before an international tribunal, it is necessary to insert **proposed section 9C**.\(^85\)

**Proposed subsection 9C(1)** provides that the regulations may confer on the ICC and those personnel referred to in the ICC Agreement such privileges and immunities as required to give effect to that Agreement. **Proposed subsection 9C(2)** states that this new section and section 6 of the Act, which confers privileges and immunities on international organisations, do not limit each other.

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81. Section 9 and 9A of the Act.
82. Department of Foreign Affairs and Trade, Submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee, Inquiry into the International Organisations (Privileges and Immunities) Amendment Bill 2013, op. cit.
Item 4 inserts a definition of the International Criminal Court into subsection 3(1) of the Act, while Item 11 amends the definition of ‘international tribunal’ in section 9B to clarify that it does not apply to the ICC. The current definition already excludes the ICJ.\(^{86}\)

**International Conferences**

Section 7 of the Act provides for the making of regulations which apply the Act when an international conference is being held in Australia and is to be attended by missions from other countries, or from international or overseas organisations (as defined in the Act). This is to cover situations where the Act would otherwise not apply, but it is determined that it is desirable for it to apply in the circumstances of a particular conference or mission.

Items 2-3 amend the definition of ‘international conference’ set out under subsection 3(1) of the Act to include those organisations which are not classed as international organisations but have had privileges and immunities conferred on them under the regulations. This will not only encompass the ICRC and the ICC, but would also appear to include the International Court of Justice and the Investment Convention. Items 5-10 amend section 7 of the Act to allow for the passage of regulations conferring privileges and immunities on representatives of either the ICC or the ICRC where they are attending international conferences in Australia and are not offered adequate protection under the Act. As section 7 currently only provides for ‘international organisations’ it is necessary to amend the Act in order to include the ICRC and the ICC. Again, this would also appear to cover the International Court of Justice and the Investment Convention.

**Concluding comments**

The Bill recognises the important role performed by both the ICC and the ICRC by amending the Act to allow for privileges and immunities to be conferred on these organisations. However, it remains unclear whether the regulations will adequately implement the ICRC Arrangement and the ICC Agreement.

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86. Paragraph 8 of the Explanatory Memorandum incorrectly refers to this amendment being contained in item 20, rather than item 11.
Appendix 1: Glossary of important Treaty terms

The UN Treaty Collection provides for a ‘glossary of terms relating to Treaty actions’. The relevant terms with regards to this Bills Digest are reproduced in this glossary.

Acceptance and Approval: The instruments of "acceptance" or "approval" of a treaty have the same legal effect as ratification and consequently express the consent of a state to be bound by a treaty. In the practice of certain states acceptance and approval have been used instead of ratification when, at a national level, constitutional law does not require the treaty to be ratified by the head of state. [Arts.2 (1) (b) and 14 (2), Vienna Convention on the Law of Treaties 1969]

Accession: "Accession" is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force. The Secretary-General of the United Nations, in his function as depositary, has also accepted accessions to some conventions before their entry into force. The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. A treaty might provide for the accession of all other states or for a limited and defined number of states. In the absence of such a provision, accession can only occur where the negotiating states were agreed or subsequently agree on it in the case of the state in question. [Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969]

Act of Formal Confirmation: "Act of formal confirmation" is used as an equivalent for the term "ratification" when an international organization expresses its consent to be bound to a treaty. [Arts.2 (1) (b bis) and 14, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986]

Adoption: "Adoption" is the formal act by which the form and content of a proposed treaty text are established. As a general rule, the adoption of the text of a treaty takes place through the expression of the consent of the states participating in the treaty-making process. Treaties that are negotiated within an international organization will usually be adopted by a resolution of a representative organ of the organization whose membership more or less corresponds to the potential participation in the treaty in question. A treaty can also be adopted by an international conference which has specifically been convened for setting up the treaty, by a vote of two thirds of the states present and voting, unless, by the same majority, they have decided to apply a different rule. [Art.9, Vienna Convention of the Law of Treaties 1969]

Deposit: After a treaty has been concluded, the written instruments, which provide formal evidence of consent to be bound, and also reservations and declarations, are placed in the custody of a depositary. Unless the treaty provides otherwise, the deposit of the instruments of ratification, acceptance, approval or accession establishes the consent of a state to be bound by the treaty. For
treaties with a small number of parties, the depositary will usually be the government of the state on whose territory the treaty was signed. Sometimes various states are chosen as depositaries. Multilateral treaties usually designate an international organization or the Secretary-General of the United Nations as depositaries. The depositary must accept all notifications and documents related to the treaty, examine whether all formal requirements are met, deposit them, register the treaty and notify all relevant acts to the parties concerned. [Arts.16, 76 and 77, Vienna Convention on the Law of Treaties 1969]

**Entry into Force:** Typically, the provisions of the treaty determine the date on which the treaty enters into force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty. Bilateral treaties may provide for their entry into force on a particular date, upon the day of their last signature, upon exchange of the instruments of ratification or upon the exchange of notifications. In cases where multilateral treaties are involved, it is common to provide for a fixed number of states to express their consent for entry into force. Some treaties provide for additional conditions to be satisfied, e.g., by specifying that a certain category of states must be among the consenters. The treaty may also provide for an additional time period to elapse after the required number of countries have expressed their consent or the conditions have been satisfied. A treaty enters into force for those states which gave the required consent. A treaty may also provide that, upon certain conditions having been met, it shall come into force provisionally. [Art.24, Vienna Convention on the Law of Treaties 1969]

**Signature ad referendum:** A representative may sign a treaty "ad referendum", i.e., under the condition that the signature is confirmed by his state. In this case, the signature becomes definitive once it is confirmed by the responsible organ. [Art.12 (2) (b), Vienna Convention on the Law of Treaties 1969]

**Signature Subject to Ratification, Acceptance or Approval:** Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. [Arts.10 and 18, Vienna Convention on the Law of Treaties 1969]

**Ratification:** Ratification defines the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act. In the case of bilateral treaties, ratification is usually accomplished by exchanging the requisite instruments, while in the case of multilateral treaties the usual procedure is for the depositary to collect the ratifications of all states, keeping all parties informed of the situation. The institution of ratification grants states the necessary time-frame to seek the required approval for the treaty on the domestic level and to enact the necessary legislation to give domestic effect to that treaty. [Arts.2 (1) (b), 14 (1) and 16, Vienna Convention on the Law of Treaties 1969]