



INFORMATION PAPER

Foreign States Immunities Act 1985

The principle of foreign state immunity

Under international law, foreign states and their agencies are generally entitled to immunity from the jurisdiction of the courts of other countries. This principle is known as 'foreign state immunity'. In Australia, foreign state immunity is governed by the *Foreign States Immunities Act 1985 (Cth)* (FSI Act).¹ The FSI Act was enacted in 1985 following the Australian Law Reform Commission's report on *Foreign State Immunity* (Report No 24), which recommended that the law of foreign state immunity be put on a legislative footing.² The Act is based directly on the recommendations of the Report.

Application of the FSI Act

The Attorney-General is responsible for the administration of the FSI Act, which applies in relation to all civil litigation in Australian courts involving 'foreign states' as defined in the Act. The FSI Act provides a general immunity for foreign states from the jurisdiction of the courts of Australia in civil proceedings (section 9), with a limited number of defined exceptions (sections 10-21).

Under the FSI Act, a reference to a foreign state includes a reference to the executive government or part of the executive government of a foreign state or a political subdivision of a foreign state (subsection 3(3)(c)). Thus the requirements of the Act can apply to proceedings involving local diplomatic missions, heads of state, heads of government, ministers and foreign government officials at both the national and sub-national level.

Service of initiating process on a foreign state

Part III of the FSI Act sets out the legislative requirements for the service of initiating process on a foreign state. These service provisions apply whether or not the claim in fact relates to a matter in relation to which the foreign state enjoys immunity.

Section 23 of the FSI Act provides that service of initiating process on a foreign state may be effected in accordance with an agreement to which the foreign State is a party. Alternatively, Subsection 24(1) provides that service of initiating process on a foreign state may be effected by delivering the documents that are to be served to the Attorney-General. These are then transmitted by the Department of Foreign Affairs

¹ The FSI Act can be accessed on ComLaw (www.comlaw.gov.au) or at URL <http://www.comlaw.gov.au/ComLaw/Management.nsf/current/bytitle/F985FB0BD8450B31CA256F710006F2CC?OpenDocument&mostrecent=1>.

² The Report can be accessed at URL <http://www.austlii.edu.au/au/other/alrc/publications/reports/24/>.

and Trade to the equivalent body in the foreign state (service through the ‘diplomatic channel’). This is the most commonly used method of service on a foreign state. Subsection 24(2) sets out further documentation that must accompany the initiating process. Section 25 provides that service on a foreign state which is not in accordance with these provisions is ineffective.

The purpose of these provisions was described in the Australian Law Reform Commission’s Report. Paragraph 150 states: ‘To avoid the risk of plaintiffs attempting private service in Australia and thereby harassing diplomats or visiting State representatives, all other local service should be excluded’.

Procedures for service through the diplomatic channel

All documents presented for service through the diplomatic channel must also comply with the rules of the issuing court for service outside the jurisdiction, and the plaintiff or applicant is required to make a statutory declaration confirming this (as set out in section 24(2)(b)).

For service under section 24, the initiating process must be accompanied by:

- (a) a request in accordance with Form 1 in the Schedule to the FSI Act (for ease of reference, a copy of Form 1 is attached below)
- (b) a statutory declaration of the plaintiff or applicant in the proceeding stating that the rules of court or other laws (if any) in respect of service outside the jurisdiction of the court concerned have been complied with, and
- (c) If English is not an official language of the foreign state:
 - (i) a translation of the initiating process into the official language of the foreign State, and
 - (ii) a certificate in that language, signed by the translator, setting out particulars of his/her qualifications as a translator and stating that the translation of the initiating process is an accurate translation.

In order to avoid delays in the service of initiating process, plaintiffs/applicants should ensure that the accompanying documents fulfil these statutory requirements.

Procedures following service

Once the initiating process has been served through the diplomatic channel, the Department of Foreign Affairs and Trade will issue a certificate under section 40 of the FSI Act, confirming the date on which service was effected. The certificate will be forwarded to the plaintiff/applicant, and a copy sent to the relevant court.

Section 24(7) of the FSI Act provides that the time for a foreign state to enter an appearance begins to run at the expiration of two months after the date on which service of initiating process was effected. This has the effect of delaying by two months the commencement of the period within which a foreign state must enter an appearance pursuant to the relevant court rules. In issuing initiating process and

setting hearing dates, and in procedures following service, plaintiffs/applicants and courts would need to have regard to section 24(7).

The time period set under section 24(7) is also relevant to section 27 of the FSI Act. Section 27 provides that a default judgment must not be entered against a foreign state unless it is proved that service of initiating process was effected in accordance with the FSI Act, the time for appearance has expired and the court is satisfied that the foreign state is not immune in the proceeding.

The FSI Act includes a mechanism for foreign states to enter an appearance and assert immunity without submitting to the jurisdiction of the court. Section 10(7) provides that a foreign state is not taken to have submitted to the jurisdiction of the court in a proceeding only because it has made an application for costs, or has intervened for the purpose of asserting immunity.

If a judgment in default of appearance is obtained against a foreign state under the FSI Act, it can only be enforced in accordance with the relevant provisions of the Act. Section 28 sets out the procedures that must be followed for service and enforcement of such judgments.

Contact details

An application for service through the diplomatic channel should be sent to the Attorney-General, Parliament House, Canberra ACT 2600 (in accordance with section 24(1) of the FSI Act). However, a copy of the application and enclosures also could be sent to the following address in order to facilitate service:

Assistant Secretary
International Law, Trade and Security Branch
Office of International Law
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Summary of key issues

A short summary setting out the key aspects of the FSI Act that should be considered in commencing proceedings against a foreign State in an Australian court is at **Attachment A**. This is an indicative guide only, and in all cases reference should be made to the FSI Act itself.

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Form 1

Section 24

Request For Service Of Originating Process On A Foreign State

TO: The Attorney-General of the Commonwealth

A proceeding has been commenced in (*name of court, tribunal, etc.*) against (*here insert name of foreign State*).

The proceeding concerns (*short particulars of the claim against the foreign State*).

In accordance with section 24 of the *Foreign States Immunities Act 1985*, enclosed are:

- (a) the initiating process in the proceeding;
- (b) a statutory declaration;
- (c) *a translation of the initiating process into (*name of language*), an official language of the foreign State; and
- (d) *a certificate signed by the translator,

and it is requested that the initiating process, *the translation and the certificate be transmitted by the Department of Foreign Affairs to the department or organ of the foreign State that is equivalent to that Department.

It is further requested that, when service of the initiating process and other documents has been effected on the foreign State in accordance with that Act, the Minister for Foreign Affairs certify accordingly under section 40 of that Act, and forward the certificate to (*name and address of person to whom certificate of service should be forwarded*).

DATED this day of 19

(signature of plaintiff or applicant)

* delete if not applicable.

ATTACHMENT A

Commencing proceedings against a foreign state – a summary

- This is a summary of the key aspects of commencing proceedings against a foreign State in an Australian court under the *Foreign States Immunities Act 1985* (the Act). It is important that you refer also to the detailed requirements set out in the provisions of the Act itself.
- All proceedings in Australian courts involving ‘foreign states’ must comply with the requirements of the Act.
 - If a civil proceeding involves a local diplomatic mission, the head of a foreign state, the head of government of a foreign state, ministers or government officials of a foreign state, then the Act will likely apply.
 - Service on a foreign State not in accordance with the Act is ineffective.
- In practice, service on a foreign State must be carried out through the diplomatic channel in accordance with section 24 of the Act. This means that the initiating process must be sent to the Attorney-General, for transmission by the Department of Foreign Affairs and Trade to the foreign State.
- To expedite service, a copy of the documents can also be sent to:
Assistant Secretary, International Law and Trade Branch
Attorney-General's Department, 3-5 National Circuit, Barton ACT 2600.
- The initiating process must be accompanied by all the documents specified in section 24(2) of the Act:
 - a request for service in accordance with Form 1 of the Act
 - a statutory declaration that the rules of court for service outside jurisdiction have been complied with, and
 - if English is not the official language of the foreign State, a translation of the initiating process into the official language of the foreign State, and a certificate in that language signed by the translator, setting out the particulars of his or her qualifications, and stating that the translation is accurate.
- The Department of Foreign Affairs and Trade will issue a certificate confirming the date on which service was effected. The certificate will be forwarded to the plaintiff or applicant, and a copy sent to the relevant court.
- The time for the foreign State to enter an appearance under the relevant court rules does not begin to run until two months after service was effected. For example, if the court rules provide that a defendant has 28 days to enter an appearance, then the 28 day period does not begin to run until two months after the date that the initiating process was served.
- Default judgment must not be entered against a foreign State unless it is proved that service of initiating process was effected in accordance with the Act, the time for appearance has expired and the court is satisfied that the foreign State is not immune in the proceeding.
- A foreign State is immune in a proceeding unless the proceeding relates to one of the exceptions set out in sections 10 to 21 of the Act.
- A judgment obtained against a foreign State under the Act can only be enforced in accordance with the relevant provisions of the Act.