

EXPOSURE DRAFT

2008-2009

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

EXPOSURE DRAFT

Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2009

No. , 2009

(Home Affairs)

**A Bill for an Act to amend the law relating to
extradition and mutual assistance in criminal
matters, and for related purposes**

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Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day after the day on which this Act receives the Royal Assent.	
2. Schedules 1 to 3	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	

1 Note: This table relates only to the provisions of this Act as originally
2 passed by both Houses of the Parliament and assented to. It will not be
3 expanded to deal with provisions inserted in this Act after assent.

4 (2) Column 3 of the table contains additional information that is not
5 part of this Act. Information in this column may be added to or
6 edited in any published version of this Act.

7 **3 Schedule(s)**

8 Each Act that is specified in a Schedule to this Act is amended or
9 repealed as set out in the applicable items in the Schedule
10 concerned, and any other item in a Schedule to this Act has effect
11 according to its terms.
12

EXPOSURE DRAFT

General amendments relating to extradition and mutual assistance in criminal matters

Schedule 1

Amendments relating to Federal Magistrates Part 1

Schedule 1—General amendments relating to extradition and mutual assistance in criminal matters

Part 1—Amendments relating to Federal Magistrates

Extradition Act 1988

1 Section 5

Insert:

Federal Magistrate, other than in section 45A, means a Federal Magistrate in relation to whom a consent under subsection 45A(1) and a nomination under subsection 45A(2) are in force.

2 Section 5 (before paragraph (a) of the definition of *magistrate*)

Insert:

(aa) a Federal Magistrate; or

3 Subsection 21(1)

Omit “of a State or Territory”.

4 Subsection 35(1)

Omit “of a State or Territory”.

5 After section 45

Insert:

45A Federal Magistrates—consent to nomination

(1) A Federal Magistrate may, by writing, consent to be nominated by the Attorney-General under subsection (2).

(2) The Attorney-General may, by writing, nominate a Federal Magistrate in relation to whom a consent is in force under subsection (1) to be a magistrate for the purposes of this Act.

(3) A nomination under subsection (2) is not a legislative instrument.

EXPOSURE DRAFT

Schedule 1 General amendments relating to extradition and mutual assistance in criminal matters

Part 1 Amendments relating to Federal Magistrates

1 **45B Magistrates—personal capacity**

2 (1) A function or power conferred on a magistrate by this Act is
3 conferred on the magistrate:

4 (a) in a personal capacity; and

5 (b) not as a court or a member of a court.

6 (2) A magistrate (other than a Federal Magistrate) need not accept a
7 function or power conferred.

8 (3) A magistrate has, in relation to the performance or exercise of a
9 function or power conferred on the magistrate by this Act, the same
10 protection and immunity as if he or she were exercising that
11 function or power as, or as a member of, the court of which the
12 magistrate is a member.

13 **6 Subparagraph 55(c)(vii)**

14 Omit “of magistrates,”.

15 ***Mutual Assistance in Criminal Matters Act 1987***

16 **7 Subsection 3(1)**

17 Insert:

18 *Federal Magistrate*, other than in section 38ZC, means a Federal
19 Magistrate in relation to whom a consent under subsection
20 38ZC(1) and a nomination under subsection 38ZC(2) are in force.

21 **8 Subsection 3(1) (before paragraph (a) of the definition of**
22 ***Magistrate*)**

23 Insert:

24 (aa) except in Division 2 of Part VI—a Federal Magistrate; or

25 **9 At the end of section 38C**

26 Add:

27 (8) To avoid doubt, subsections (6) and (7) do not apply if the
28 Magistrate is a Federal Magistrate.

29 **10 Before section 39**

30 Insert:

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General amendments relating to extradition and mutual assistance in criminal matters

Schedule 1

Amendments relating to Federal Magistrates **Part 1**

1 **38ZC Federal Magistrates—consent to nomination**

2 (1) A Federal Magistrate may, by writing, consent to be nominated by
3 the Attorney-General under subsection (2).

4 (2) The Attorney-General may, by writing, nominate a Federal
5 Magistrate in relation to whom a consent is in force under
6 subsection (1) to be a Magistrate for the purposes of this Act.

7 (3) A nomination under subsection (2) is not a legislative instrument.

8 **38ZD Magistrates—personal capacity**

9 (1) A function or power conferred on a Magistrate by this Act is
10 conferred on the Magistrate:

11 (a) in a personal capacity; and

12 (b) not as a court or a member of a court.

13 (2) A Magistrate (other than a Federal Magistrate) need not accept a
14 function or power conferred.

15 (3) A Magistrate has, in relation to the performance or exercise of a
16 function or power conferred on the Magistrate by this Act, the
17 same protection and immunity as if he or she were exercising that
18 function or power as, or as a member of, the court of which the
19 Magistrate is a member.

20 **11 Paragraph 44(c)**

21 Omit “of Magistrates,”.

22

EXPOSURE DRAFT

Schedule 1 General amendments relating to extradition and mutual assistance in criminal matters

Part 2 Amendments relating to information sharing

1 **Part 2—Amendments relating to information sharing**

2 ***Extradition Act 1988***

3 **12 After section 54**

4 Insert:

5 **54A Collection, use or disclosure of personal information for**
6 **extradition purposes—the *Privacy Act 1988***

7 (1) The collection, use or disclosure of personal information about an
8 individual is taken to be authorised by law for the purposes of the
9 *Privacy Act 1988* if the collection, use or disclosure is reasonably
10 necessary for the purposes of, or for purposes relating to, the
11 extradition of one or more persons to or from Australia, including
12 making, or considering whether to make, an extradition request.

13 (2) In this section:

14 *personal information* has the same meaning as in the *Privacy Act*
15 *1988*.

16 ***Migration Act 1958***

17 **13 After paragraph 336E(2)(ga)**

18 Insert:

19 (gb) is for a purpose relating to the extradition of persons to or
20 from Australia, including the making of, or the consideration
21 of whether to make, a request for extradition; or

22 (gc) is for a purpose relating to:

23 (i) the provision, or proposed provision, by Australia to a
24 foreign country of international assistance in criminal
25 matters; or

26 (ii) the obtaining, or proposed obtaining, by Australia from
27 a foreign country of international assistance in criminal
28 matters; or

29 ***Mutual Assistance in Criminal Matters Act 1987***

30 **14 After section 43C**

EXPOSURE DRAFT

General amendments relating to extradition and mutual assistance in criminal matters

Schedule 1

Amendments relating to information sharing Part 2

1

Insert:

2

**43D Collection, use or disclosure of personal information for
international assistance purposes—the *Privacy Act 1988***

3

4

(1) The collection, use or disclosure of personal information about an individual is taken to be authorised by law for the purposes of the *Privacy Act 1988* if the collection, use or disclosure is reasonably necessary for the purposes of, or for purposes relating to:

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(a) the provision, or proposed provision, by Australia to a foreign country of international assistance in criminal matters; or

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13

(b) the obtaining, or proposed obtaining, by Australia from a foreign country of international assistance in criminal matters.

14

(2) In this section:

15

16

17

personal information has the same meaning as in the *Privacy Act 1988*.

EXPOSURE DRAFT

Schedule 1 General amendments relating to extradition and mutual assistance in criminal matters

Part 3 Amendments relating to foreign evidence

1 **Part 3—Amendments relating to foreign evidence**

2 ***Foreign Evidence Act 1994***

3 **15 Subsection 3(1)**

4 Insert:

5 *foreign law enforcement agency* means:

- 6 (a) a police force (however described) of a foreign country; or
7 (b) any other authority or person responsible for the enforcement
8 of the laws of the foreign country.

9 **16 After section 26**

10 Insert:

11 **26A Certificates relating to foreign material obtained by a foreign**
12 **law enforcement agency**

- 13 (1) If foreign material is obtained by a foreign law enforcement agency
14 as a result of a request made to a foreign country by or on behalf of
15 the Attorney-General, the senior officer in charge of obtaining the
16 foreign material for the agency may, by signed writing, certify:
17 (a) that the foreign material was obtained under a warrant or
18 other instrument, in accordance with the law of the foreign
19 country; and
20 (b) the date on which, and time and place at which, the foreign
21 material was obtained under the warrant or other instrument;
22 and
23 (c) the procedure followed in executing the warrant or other
24 instrument.
- 25 (2) It is presumed (unless evidence sufficient to raise doubt is adduced
26 to the contrary) that the foreign material specified in the certificate
27 was obtained under a warrant or other instrument, in accordance
28 with the law of the foreign country.
- 29 (3) However, if:
30 (a) a certificate is not provided; or
31 (b) a certificate is provided, but does not certify all of the matters
32 mentioned in paragraphs (1)(a), (b) and (c);
-

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Schedule 2 Amendments relating to extradition

Part 1 Deferral and consolidation of judicial review and statutory appeal of extradition decisions

1 **Schedule 2—Amendments relating to**
2 **extradition**

3 **Part 1—Deferral and consolidation of judicial review**
4 **and statutory appeal of extradition**
5 **decisions**

6 **Division 1—Amendments**

7 *Extradition Act 1988*

8 **1 Subsection 21(1)**

9 Omit “, or to the Supreme Court of the State or Territory,”.

10 **2 Subsection 21(2)**

11 Before “Court”, insert “Federal”.

12 **3 Subsections 21(3) and (4)**

13 Omit “or the Supreme Court”.

14 **4 At the end of paragraph 21(6)(a)**

15 Add “or”.

16 **5 After section 21**

17 Insert:

18 **21A Deferral of section 21 applications and appeals**

19 *Scope*

20 (1) This section applies if a person whose surrender is sought by an
21 extradition country:

22 (a) applies under subsection 21(1) for a review of an order; or

23 (b) appeals under subsection 21(3) against an order made on that
24 review; or

25 (c) appeals to the High Court against an order made on that
26 appeal.

EXPOSURE DRAFT

Amendments relating to extradition **Schedule 2**
Deferral and consolidation of judicial review and statutory appeal of extradition
decisions **Part 1**

1

Court may notify Attorney-General of intention to defer

2

- (2) The court to which the application or appeal is made (the **designated court**) may give written notice to the Attorney-General that the designated court intends to defer conducting proceedings (the **section 21 proceedings**) in relation to the review or appeal until after the Attorney-General has made a section 22 determination in relation to the person.

3

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Court may defer unless Attorney-General notifies of intention to defer section 22 determination

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- (3) The designated court may, after giving the notice, defer the section 21 proceedings, unless the Attorney-General notifies the designated court under paragraph 22(2A)(c) that the Attorney-General intends to defer making a section 22 determination in relation to the person until all review proceedings have been completed.

11

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Definitions

17

- (4) In this section:

18

section 22 determination, in relation to a person, means a determination under subsection 22(2) that the person is, or is not, to be surrendered to an extradition country.

19

20

21

6 Subsection 22(1) (paragraph (b) of the definition of eligible person)

22

23

Omit “, being an order in relation to which no proceedings under section 21 are being conducted or available”.

24

25

7 Subsection 22(1)

26

Insert:

27

review proceedings, in relation to a decision, means any of the following proceedings:

28

29

- (a) a proceeding for review of the decision under section 21;

30

- (b) a proceeding in the Federal Court seeking the exercise of the court’s original jurisdiction in relation to the decision;

31

32

- (c) a proceeding in the High Court seeking the exercise of the court’s original jurisdiction in relation to the decision;

33

EXPOSURE DRAFT

Schedule 2 Amendments relating to extradition

Part 1 Deferral and consolidation of judicial review and statutory appeal of extradition decisions

1 and includes any appeal to a court in relation to the proceedings.

2 **8 After subsection 22(2)**

3 Insert:

4 (2A) If:

5 (a) review proceedings in relation to one or more decisions under
6 this Part in relation to the eligible person have been instituted
7 but have not been completed; and

8 (b) the court concerned has notified the Attorney-General under
9 subsection 21A(2) or paragraph 27A(2)(a) that the court
10 intends to defer conducting those proceedings;

11 the Attorney-General must either:

12 (c) give a written notice to the court that the Attorney-General
13 has decided to defer making a determination under
14 subsection (2) of this section in relation to the person until
15 after all review proceedings are completed; or

16 (d) make such a determination before all review proceedings are
17 completed.

18 (2B) If the Attorney-General gives a written notice under
19 paragraph (2A)(c), the Attorney-General must defer making the
20 determination concerned until after all review proceedings are
21 completed.

22 (2C) If, before the review proceedings have been completed, the
23 Attorney-General determines in accordance with paragraph (2A)(d)
24 that the eligible person is to be surrendered, the operation of the
25 determination is stayed until the review proceedings are completed.

26 **9 At the end of paragraphs 22(3)(a), (b), (c) and (d)**

27 Add “and”.

28 **10 Paragraph 26(5)(c)**

29 Omit “or the Supreme Court of the State or Territory in which the
30 person is in custody”.

31 **11 Subsections 26(5) and (6)**

32 Omit “the Court” (wherever occurring), substitute “the Federal Court”.

33 **12 At the end of Part II**

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Amendments relating to extradition **Schedule 2**
Deferral and consolidation of judicial review and statutory appeal of extradition
decisions **Part 1**

1 Add:

2 **27A Court may defer proceedings**

3 *Scope*

4 (1) This section applies if a person institutes proceedings in the High
5 Court or the Federal Court seeking the exercise of the court's
6 original jurisdiction in relation to a decision under this Part in
7 relation to the person.

8 *Deferral of judicial review*

- 9 (2) The High Court or the Federal Court:
- 10 (a) may give written notice to the Attorney-General that the
11 court intends to defer conducting the proceedings until after
12 the Attorney-General has made a determination under
13 subsection 15B(2) or 22(2) in relation to the person; and
14 (b) unless the Attorney-General notifies the court as mentioned
15 in paragraph 22(2A)(c) in relation to the person—may defer
16 conducting the proceedings until after the Attorney-General
17 makes a determination under subsection 15B(2) or 22(2) in
18 relation to the person.

19 **27B Court may consolidate proceedings**

20 If several proceedings under this Part in respect of a person are
21 pending in a court, the court may, if it considers it reasonable in all
22 the circumstances to do so, do one or more of the following:

- 23 (a) order the proceedings to be consolidated;
24 (b) order the proceedings to be tried at the same time or one
25 immediately after another;
26 (c) order the proceedings to be stayed until after the completion
27 of any of them.

28 **27C Sections 21A, 27A and 27B do not affect other powers**

29 To avoid doubt, sections 21A, 27A and 27B do not affect the
30 powers of the High Court or the Federal Court under any other law.

31 **13 Subsection 35(1)**

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Schedule 2 Amendments relating to extradition

Part 1 Deferral and consolidation of judicial review and statutory appeal of extradition decisions

1 Omit “, or to the Supreme Court of the State or Territory,”.

2 **14 Subsection 35(2)**

3 Before “Court”, insert “Federal”.

4 **15 Subsections 35(3) and (4)**

5 Omit “or the Supreme Court”.

6 **16 Paragraph 38(7)(c)**

7 Omit “or the Supreme Court of the State or Territory in which the
8 person is in custody”.

9 **17 Subsection 51(1)**

10 Repeal the subsection.

11 Note: The heading to section 51 is replaced by the heading “**Application of section 38 of the**
12 ***Judiciary Act 1903***”.

13 **18 Subsection 51(2)**

14 Omit “(2)”.

15 **Division 2—Application and transitional provisions**

16 **19 Application of amendments made by items 1, 3 and 17**

17 (1) The amendments made by items 1, 3 and 17 of this Schedule apply in
18 relation to an order made after commencement under subsection 19(9)
19 or (10) of the *Extradition Act 1988*.

20 (2) Section 21 and subsection 51(1) of the *Extradition Act 1988*, as in force
21 immediately before commencement, continue to apply in relation to an
22 order made before commencement under subsection 19(9) or (10) of
23 that Act as if those amendments had not happened.

24 **20 Application of item 8—subsection 22(2A) of the** 25 ***Extradition Act 1988***

26 The amendment made by item 8 of this Schedule applies in relation to a
27 determination made after commencement under subsection 22(2) of the
28 *Extradition Act 1988* that a person is, or is not, to be surrendered to an
29 extradition country, whether or not review proceedings in relation to
30 one or more decisions under Part II of that Act in respect of the eligible
31 person were instituted before or after commencement.

EXPOSURE DRAFT

Amendments relating to extradition **Schedule 2**
Deferral and consolidation of judicial review and statutory appeal of extradition
decisions **Part 1**

1 **21 Application of amendment made by item 10**

2 (1) The amendment made by item 10 of this Schedule applies in relation to
3 a surrender warrant or a temporary surrender warrant issued after
4 commencement under Part II of the *Extradition Act 1988*.

5 (2) Section 26 of the *Extradition Act 1988*, as in force immediately before
6 commencement, continues to apply in relation to a surrender warrant or
7 a temporary surrender warrant issued before commencement under
8 Part II of that Act as if that amendment had not happened.

9 **22 Application of item 12—sections 27A and 27B of the**
10 ***Extradition Act 1988***

11 (1) Section 27A of the *Extradition Act 1988*, as inserted by this Schedule,
12 applies to an application made after commencement to the High Court
13 or the Federal Court.

14 (2) Section 27B of the *Extradition Act 1988*, as inserted by this Schedule,
15 applies to proceedings instituted before or after commencement.

16 **23 Application of amendments made by items 13, 15 and 17**

17 (1) The amendments made by items 13, 15 and 17 of this Schedule apply in
18 relation to an order made after commencement under section 34 of the
19 *Extradition Act 1988*.

20 (2) Section 35 and subsection 51(1) of the *Extradition Act 1988*, as in force
21 immediately before commencement, continue to apply in relation to an
22 order made before commencement under section 34 of that Act as if
23 those amendments had not happened.

24 **24 Application of amendment made by item 16**

25 (1) The amendment made by item 16 of this Schedule applies in relation to
26 a surrender warrant or a temporary surrender warrant issued after
27 commencement under Part III of the *Extradition Act 1988*.

28 (2) Section 38 of the *Extradition Act 1988*, as in force immediately before
29 commencement, continues to apply in relation to a surrender warrant or
30 a temporary surrender warrant issued after commencement under
31 Part III of that Act as if that amendment had not happened.

32 **25 Definitions**

EXPOSURE DRAFT

Schedule 2 Amendments relating to extradition

Part 1 Deferral and consolidation of judicial review and statutory appeal of extradition decisions

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In this Division:

commencement means the commencement of this item.

EXPOSURE DRAFT

Amendments relating to extradition **Schedule 2**
Waiver of extradition **Part 2**

1 **Part 2—Waiver of extradition**

2 *Extradition Act 1988*

3 **26 Section 5 (definition of *surrender offence*)**

4 Before “22(2)”, insert “15B(2) or”.

5 **27 Section 5 (paragraph (b) of the definition of *surrender***
6 ***offence*)**

7 Before “any”, insert “in the case of a determination under subsection
8 22(2)—”.

9 **28 Section 5 (before subparagraph (b)(i) of the definition of**
10 ***surrender warrant*)**

11 Insert:

12 (ia) a warrant issued, or required to be issued, under
13 subparagraph 33A(2)(b)(i); or

14 **29 Section 5 (at the end of subparagraph (b)(i) of the**
15 **definition of *surrender warrant*)**

16 Add “or”.

17 **30 Subsection 15(2)**

18 Omit “section 18 or 19, or both,”, substitute “one or more of
19 sections 15A, 18 and 19”.

20 **31 Subsection 15(4)**

21 Omit “section 18”, substitute “section 15A, 18”.

22 **32 Subsection 15(5)**

23 Omit “section 18 or 19, or both,”, substitute “one or more of
24 sections 15A, 18 and 19”.

25 **33 After section 15**

26 Insert:

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Schedule 2 Amendments relating to extradition

Part 2 Waiver of extradition

1 **15A Waiver of extradition**

2 *Application of section—before decision has been made as to*
3 *whether or not to give section 16 notice*

4 (1) This section applies to a person who is on remand under section 15
5 at a particular time (the *waiver time*) if, as at the waiver time, the
6 Attorney-General has not yet made a decision as to whether or not
7 to give a notice in relation to the person under subsection 16(1) in
8 relation to one or more extradition offences.

9 *Application of section—after section 16 notice given*

10 (2) This section also applies to a person who is on remand under
11 section 15 at a particular time (the *waiver time*) if:
12 (a) before the waiver time, the Attorney-General gave a notice in
13 relation to the person under subsection 16(1) in relation to
14 one or more extradition offences; and
15 (b) as at the waiver time, a magistrate has not done either of the
16 following:
17 (i) advised the Attorney-General under subparagraph
18 18(2)(b)(ii) that the person has consented to be
19 surrendered in relation to the extradition offence or all
20 of the extradition offences;
21 (ii) determined under subsection 19(1) that the person is
22 eligible for surrender in relation to any of the extradition
23 offences.

24 *Person may inform a magistrate that he or she wishes to waive*
25 *extradition*

26 (3) The person may inform a magistrate that he or she wishes to waive
27 extradition in relation to:
28 (a) if an extradition request has not been made for the surrender
29 of the person—the extradition offence or all of the extradition
30 offences specified in the extradition arrest warrant to which
31 the remand relates; or
32 (b) if an extradition request has been made for the surrender of
33 the person—the extradition offence or all of the extradition
34 offences for which surrender of the person is sought.

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Amendments relating to extradition **Schedule 2**
Waiver of extradition **Part 2**

1 (4) The magistrate must, after being informed under subsection (3),
2 advise the Attorney-General in writing of the offence or offences in
3 relation to which the person wishes to waive extradition.

4 *Magistrate must make order etc. if satisfied of matters*

5 (5) If a magistrate is satisfied of the matters in subsection (6) in
6 relation to the person, the magistrate must:

- 7 (a) by warrant in the statutory form, order that the person be
8 committed to prison pending a determination by the
9 Attorney-General under subsection 15B(2) that the person be
10 surrendered, or not be surrendered, in relation to the
11 extradition offence or extradition offences mentioned in
12 paragraph (3)(a) or (b), as the case may be; and
13 (b) advise the Attorney-General in writing that the person wishes
14 to waive extradition for those offences.

15 (6) Before making an order under paragraph (5)(a) in relation to a
16 person, the magistrate must be satisfied that:

- 17 (a) the person voluntarily informed a magistrate under
18 subsection (3); and
19 (b) the person understands the following:
20 (i) that, once the order is made, the person cannot apply for
21 the order to be revoked;
22 (ii) the consequences of the fact that the extradition country
23 concerned may not have given, and if the order is made
24 will not be required to give, a speciality assurance (of a
25 kind mentioned in subsection 22(4)) in relation to the
26 person;
27 (iii) that certain requirements in this Act that would
28 otherwise apply in respect of the person will not apply if
29 the order is made (including, but not limited to,
30 requirements relating to extradition objections);
31 (iv) that, after the order is made, the person will be
32 surrendered to the extradition country concerned if the
33 Attorney-General determines under subsection 15B(2)
34 that the person is to be so surrendered; and
35 (c) the person is legally represented, or was given an adequate
36 opportunity to be legally represented, in the proceedings
37 before the magistrate.
-

EXPOSURE DRAFT

Schedule 2 Amendments relating to extradition

Part 2 Waiver of extradition

1

Rules that apply until magistrate decides not to make an order

2

(7) After a person informs a magistrate under subsection (3) that the person wishes to waive extradition in relation to an extradition offence or extradition offences, the following rules apply unless and until a magistrate decides not to make an order under paragraph (5)(a) in relation to the person:

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(a) if a decision as to whether or not to give a notice under subsection 16(1) had not, as at the waiver time, been made in relation to the person in relation to the extradition offence or extradition offences—the Attorney-General must not decide whether or not to issue such a notice;

(b) if, before the waiver time, a notice under subsection 16(1) had been given in relation to the person in relation to the extradition offence or extradition offences:

(i) sections 18, 19 and 20 do not apply to the person in relation to the extradition offence or extradition offences; and

(ii) any proceedings that were on foot as at the waiver time under section 18, 19 or 20 in relation to the person in relation to the extradition offence or extradition offences are stayed.

22

Magistrate must advise Attorney-General if not satisfied of matters

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(8) If a magistrate is not satisfied of the matters in subsection (6) in relation to the person, the magistrate must advise the Attorney-General in writing that the magistrate has decided not to make an order under paragraph (5)(a) in relation to the person.

27

15B Attorney-General must make surrender determination

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(1) This section applies if a magistrate has advised the Attorney-General under paragraph 15A(5)(b) that a person wishes to waive extradition in relation to one or more extradition offences.

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(2) The Attorney-General must, as soon as is reasonably practicable, having regard to all the circumstances, determine whether or not the person is to be surrendered to the extradition country concerned in relation to the extradition offences.

35

36

(3) The Attorney-General may only determine that the person be surrendered to the extradition country concerned if:

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Amendments relating to extradition **Schedule 2**
Waiver of extradition **Part 2**

- 1 (a) the Attorney-General is satisfied that, on surrender to the
2 extradition country, there is no real risk that the person will
3 be subjected to torture; and
4 (b) the Attorney-General is satisfied that, on surrender to the
5 extradition country, there is no real risk that the death penalty
6 will be carried out upon the person in relation to any offence.
- 7 (4) If the Attorney-General determines that the person is not to be
8 surrendered, the Attorney-General must, by notice in writing in the
9 statutory form, direct a magistrate to order the release of the person
10 from custody.

34 At the end of section 17

11 Add:

- 12 (4) Subsection (2) does not apply to a person at any time after the
13 person has informed a magistrate under subsection 15A(3) that the
14 person wishes to waive extradition, unless and until a magistrate
15 decides not to make an order under paragraph 15A(5)(a) in relation
16 to the person.
17
- 18 (5) If:
- 19 (a) a person informs a magistrate under subsection 15A(3) that
20 the person wishes to waive extradition; and
21 (b) a magistrate decides not to make an order under paragraph
22 15A(5)(a) in relation to the person;
- 23 then, for the purposes of applying subsection (2) of this section to
24 the person, the period of days referred to in paragraph (2)(a) of this
25 section is to be calculated exclusive of the period:
- 26 (c) beginning on the day on which the person informs the
27 magistrate that the person wishes to waive extradition; and
28 (d) ending on the day on which the Attorney-General receives
29 the magistrate's advice under subsection 15A(8) that the
30 magistrate has decided not to make an order under paragraph
31 15A(5)(a) in relation to the person.

35 Section 23

32 After "subsection", insert "15B(2) or".

36 Paragraph 24(1)(a)

33 After "subsection", insert "15B(2) or".

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Schedule 2 Amendments relating to extradition

Part 2 Waiver of extradition

1 **37 Subsection 25(2)**

2 Omit “The”, substitute “If the temporary surrender warrant referred to
3 in paragraph (1)(a) was issued after the Attorney-General determined
4 under subsection 22(2) that the person was to be surrendered, the”.

5 **38 At the end of section 25**

6 Add:

7 (3) If the temporary surrender warrant referred to in paragraph (1)(a)
8 was issued after the Attorney-General determined under subsection
9 15B(2) that the person was to be surrendered, the Attorney-General
10 must not issue a surrender warrant under subsection (1) unless:

11 (a) the Attorney-General is satisfied that, on surrender to the
12 extradition country, there is no real risk that the person will
13 be subjected to torture; and

14 (b) the Attorney-General is satisfied that, on surrender to the
15 extradition country, there is no real risk that the death penalty
16 will be carried out upon the person in relation to any offence.

17 **39 Paragraph 45(4)(b)**

18 After “section”, insert “15B or”.

19 **40 Application of amendments made by this Part**

20 The amendments made by this Part apply to a person who, on or after
21 the commencement of this item, is on remand under section 15 of the
22 *Extradition Act 1988*.
23

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Amendments relating to extradition **Schedule 2**
Other amendments **Part 3**

1 **Part 3—Other amendments**

2 **Division 1—Amendments relating to political offences**

3 *Extradition Act 1988*

4 **41 Section 5 (paragraphs (a) and (b) of the definition of**
5 ***political offence*)**

6 Repeal the paragraphs, substitute:

- 7 (a) an offence prescribed by regulations for the purposes of this
8 paragraph to be an extraditable offence in relation to the
9 country or all countries; or
10 (b) an offence prescribed by regulations for the purposes of this
11 paragraph not to be a political offence in relation to the
12 country or all countries.

13 **42 Section 5 (paragraphs (c) and (d) of the definition of**
14 ***political offence*)**

15 Repeal the paragraphs.

16 **43 Paragraph 7(a)**

17 Repeal the paragraph.

18 **44 Paragraph 7(b)**

19 Omit “or for a political offence in relation to the extradition country”.

20 **45 At the end of paragraphs 7(b) and (c)**

21 Add “or”.

22 **46 Before subsection 16(3)**

23 Insert:

24 *Political offences*

25 (2B) The Attorney-General may refuse to give the notice if:

- 26 (a) the extradition offence, or all of the extradition offences, for
27 which the surrender of the person is sought by the extradition
28 country are political offences in relation to the extradition
29 country; or

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Part 3 Other amendments

1 (b) the surrender of the person, in so far as it purports to be
2 sought for the extradition offence, or all of the extradition
3 offences, is actually sought for the purpose of prosecuting or
4 punishing the person for a political offence in relation to the
5 extradition country.

6 **47 After subsection 22(4)**

7 Insert:

8 (4A) For the purposes of paragraph (3)(f), the Attorney-General must, in
9 exercising his or her discretion, consider whether the qualifying
10 extradition offence is a political offence.

11 ***Migration Act 1958***

12 **48 Subsection 91T(3)**

13 Omit “paragraph (a), (b), (c) or (d)”, substitute “paragraph (a) or (b)”.

14 **49 Application**

15 The amendments made by this Division apply in respect of requests
16 made by a foreign country on or after the commencement of this item.

17 **Division 2—Extradition objection on the grounds of sex**

18 ***Extradition Act 1988***

19 **50 Paragraphs 7(b) and (c)**

20 After “race,”, insert “sex,”.

21 **51 Application of item 50**

22 The amendment made by item 50 applies in relation to an extradition
23 request from an extradition country that is made on or after the
24 commencement of this item.

25 **Division 3—Dual criminality etc.**

26 ***Extradition Act 1988***

27 **52 Subsection 10(3)**

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Amendments relating to extradition **Schedule 2**
Other amendments **Part 3**

1 Omit “subparagraph 16(2)(a)(ii) or paragraph”, substitute “16(2)(b) or”.

2 **53 Subparagraph 12(3)(c)(i)**

3 Omit “issue”, substitute “give”.

4 **54 Subsection 16(2)**

5 Repeal the subsection, substitute:

6 *Dual criminality etc.*

7 (2) The Attorney-General must not give the notice unless the
8 Attorney-General is of the opinion that:

- 9 (a) the person is an extraditable person in relation to the
10 extradition country; and
11 (b) it is likely that, if the conduct of the person constituting the
12 extradition offence, or any of the extradition offences, for
13 which surrender of the person is sought, or equivalent
14 conduct, had taken place in Australia at the time at which the
15 extradition request was received, the conduct or the
16 equivalent conduct would have constituted an extradition
17 offence in relation to Australia.

18 *Extradition objection*

19 (2A) The Attorney-General must not give the notice if the
20 Attorney-General is of the opinion that there is an extradition
21 objection in relation to the extradition offence, or all of the
22 extradition offences, for which surrender of the person is sought.

23 **55 Subsection 16(3)**

24 Omit “issued”, substitute “given”.

25 **Division 4—Consent to accessory extradition**

26 *Extradition Act 1988*

27 **56 After section 19**

28 Insert:

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Schedule 2 Amendments relating to extradition

Part 3 Other amendments

1 **19A Consent to accessory extradition—extradition offences not**
2 **specified in subsection 16(1) notice etc.**

3 *Scope*

4 (1) This section applies if:

5 (a) a notice under subsection 16(1) has been given in relation to
6 a person in respect of whom an extradition request has been
7 made by an extradition country; and

8 (b) either:

9 (i) in proceedings under section 18, the person consents in
10 accordance with that section to being surrendered to the
11 extradition country in relation to the extradition offence
12 or all of the extradition offences to which the notice
13 relates; or

14 (ii) in proceedings under subsection 19(1), a magistrate
15 determines that the person is eligible for surrender to the
16 extradition country in relation to one or more of the
17 extradition offences to which the notice relates; and

18 (c) the extradition country requested in the extradition request
19 that the person be surrendered for one or more extradition
20 offences (the *additional extradition offences*) that are not
21 specified in the notice; and

22 (d) the additional extradition offences were not specified in the
23 notice because the requirement referred to in paragraph
24 16(2)(b) (which deals with dual criminality) was not satisfied
25 in relation to the additional extradition offences.

26 *Consent to being surrendered in respect of the additional*
27 *extradition offences*

28 (2) If the magistrate is satisfied that there is no extradition objection in
29 relation to any of the additional extradition offences, the magistrate
30 must, in those proceedings, ask the person whether he or she
31 consents to being surrendered to the extradition country in respect
32 of the additional extradition offences.

33 (3) Before asking the person whether he or she consents to being
34 surrendered in respect of the additional extradition offences, the
35 magistrate must:

36 (a) either:

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Amendments relating to extradition **Schedule 2**
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- 1 (i) be satisfied that the person is legally represented; or
2 (ii) if the magistrate is not so satisfied—give the person an
3 adequate opportunity to be legally represented; and
4 (b) inform the person that, if the person is surrendered, the
5 person may be tried and sentenced in the extradition country
6 for any additional extradition offence in relation to which the
7 person gives consent; and
8 (c) inform the person that the person may be tried and sentenced
9 in the extradition country even though, had the conduct of the
10 person constituting the additional extradition offences, or
11 equivalent conduct, taken place in Australia at the time the
12 extradition request concerned was received, that conduct may
13 not have constituted an extradition offence in relation to
14 Australia.

15 *Magistrate to advise Attorney-General of consent*

- 16 (4) If the person gives his or her consent to being so surrendered, the
17 magistrate must, unless he or she considers that the consent was
18 not given voluntarily, advise the Attorney-General in writing of the
19 additional extradition offences in respect of which the person has
20 so consented.

21 Note: The heading to section 20 is altered by adding at the end “—offences that are not
22 extradition offences”.

23 **57 Subsection 22(1) (definition of *qualifying extradition* 24 *offence*)**

25 Repeal the definition, substitute:

26 *qualifying extradition offence*, in relation to an eligible person,
27 means the following:

- 28 (a) if paragraph (a) of the definition of *eligible person* applies—
29 any extradition offence in relation to which the person
30 consented in accordance with section 18;
31 (b) if paragraph (b) of the definition of *eligible person* applies—
32 any extradition offence in relation to which:
33 (i) the magistrate referred to in that paragraph; or
34 (ii) the court that conducted the final proceedings under
35 section 21;
36 determined that the person was eligible for surrender within
37 the meaning of subsection 19(2);
-

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1 (c) in any case—any extradition offence in relation to which the
2 person has consented in accordance with section 19A.

3 **Division 5—Extradition to Australia from other countries**

4 *Extradition Act 1988*

5 **58 At the end of Part IV**

6 Add:

7 **44A Persons permanently surrendered to Australia**

8 (1) This section applies if:

9 (a) a person is surrendered by a country to Australia; and

10 (b) before the person is surrendered to Australia, the
11 Attorney-General of Australia gives an undertaking to the
12 country:

13 (i) that life imprisonment will not be imposed on the
14 person; or

15 (ii) specifying the maximum period of imprisonment that
16 may be imposed on the person;

17 in the event that the person is found to have committed a
18 particular offence or offences punishable by Australian law.

19 (2) The person must not, under a law of the Commonwealth, a State or
20 Territory, be sentenced to:

21 (a) if subparagraph (1)(b)(i) applies—life imprisonment; or

22 (b) if subparagraph (1)(b)(ii) applies—a period of imprisonment
23 that is more than the period specified in the
24 Attorney-General's undertaking.

25 (3) If the undertaking mentioned in subsection (1) is given in writing,
26 the undertaking is not a legislative instrument.

27 (4) To avoid doubt, the undertaking mentioned in subsection (1) must
28 not specify a period that is longer than:

29 (a) in the event that the person is found to have committed a
30 particular offence—the maximum period of imprisonment
31 that applies to the offence; or

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1 (b) in the event that the person is found to have committed
2 particular offences—the total of each maximum period of
3 imprisonment that applies to each offence.

4 **Division 6—Prosecution in lieu of extradition**

5 *Extradition Act 1988*

6 **59 Paragraph 45(1)(a)**

7 Omit “who is an Australian citizen”.

8 Note: The heading to section 45 is replaced by the heading “**Prosecution of persons instead**
9 **of extradition**”.

10 **60 At the end of paragraph 45(4)(a)**

11 Add “and”.

12 **61 Paragraph 45(4)(b)**

13 Omit “country; and”, substitute “country.”.

14 **62 Paragraph 45(4)(c)**

15 Repeal the paragraph.

16 **63 Application of item 62**

17 The amendment made by item 62 applies in respect of an extradition
18 request made by an extradition country, regardless of whether the
19 request is made before, on or after the commencement of this item.

20 **Division 7—Technical amendments relating to notices**

21 *Extradition Act 1988*

22 **64 After section 16**

23 Insert:

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Schedule 2 Amendments relating to extradition

Part 3 Other amendments

1 **16A Attorney-General may give an amended notice**

2 *Scope*

3 (1) This section applies if the Attorney-General has given a notice (the
4 ***original notice***) under subsection 16(1) in relation to a person.

5 *Attorney-General may give an amended notice*

6 (2) Subject to subsection (4), the Attorney-General may, in his or her
7 discretion, give an amended notice at any time before:

8 (a) the person has consented in accordance with section 18 to
9 being surrendered to the extradition country concerned in
10 relation to the extradition offence or extradition offences
11 specified in the original notice; or

12 (b) a magistrate has determined in accordance with section 19
13 that the person is eligible for surrender in relation to the
14 extradition offence or extradition offences specified in the
15 original notice.

16 (3) The amended notice must be in writing in the statutory form
17 expressed to be directed to any magistrate.

18 (4) The Attorney-General must not give an amended notice under
19 subsection (2) that specifies one or more extradition offences that
20 were not specified in the original notice unless the
21 Attorney-General is satisfied that he or she could give a notice
22 under subsection 16(1) in the same form as the amended notice.

23 (5) For the purposes of this Act, a reference to a notice given under
24 subsection 16(1) includes a reference to an amended notice given
25 under subsection (2) of this section.

26 (6) An amended notice given under subsection (2) is not a legislative
27 instrument.

28 *Copies of amended notice and documents to be given to the person*

29 (7) As soon as practicable after the person is remanded under
30 section 15, or an amended notice is given under subsection (2) of
31 this section, whichever is the later:

32 (a) a copy of the amended notice; and

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Other amendments **Part 3**

- 1 (b) if the amended notice specifies one or more extradition
2 offences that were not specified in the original notice—the
3 copies of the documents referred to in:
4 (i) paragraph 19(2)(a); and
5 (ii) if applicable—paragraph 19(2)(b);
6 to the extent that those documents relate to those extradition
7 offences;
8 must be given to the person.

9 *Revocation in accordance with the Acts Interpretation Act 1901*

- 10 (8) This section does not limit the power of the Attorney-General to
11 revoke the original notice in accordance with subsection 33(3) of
12 the *Acts Interpretation Act 1901*.

13 **65 Paragraph 17(1)(a)**

14 Omit “issue”, substitute “give”.

15 **66 Subsection 17(2)**

16 Omit “such a notice is likely to be given”, substitute “the
17 Attorney-General is likely to make a decision to give, or not to give,
18 such a notice”.

19 **67 Paragraph 17(3)(a)**

20 Omit “a notice under subsection 16(1) was likely to be given”,
21 substitute “the Attorney General was likely to make a decision to give,
22 or not to give, a notice under subsection 16(1)”.

23 **68 Paragraph 17(3)(b)**

24 Omit “notice is not given”, substitute “Attorney-General does not make
25 such a decision”.

26 **69 At the end of section 18**

27 Add:

- 28 (3) If:
29 (a) the Attorney-General has given a notice (the *original notice*)
30 under subsection 16(1) in relation to a person; and

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Part 3 Other amendments

- 1 (b) during proceedings conducted in relation to the person under
2 this section, the Attorney-General gives an amended notice
3 under subsection 16A(2) in relation to the person; and
4 (c) the amended notice specifies one or more extradition
5 offences that were not specified in the original notice; and
6 (d) the magistrate considers it necessary to give the person time
7 to inform the magistrate whether the person consents to being
8 surrendered to the extradition country in relation to any of
9 those extradition offences;
10 the magistrate may adjourn the proceedings for such period as the
11 magistrate considers reasonable to allow the person to so inform
12 the magistrate.

70 After subsection 19(4)

13 Insert:

14 (4A) If:

- 15 (a) the Attorney-General has given a notice (the *original notice*)
16 under subsection 16(1) in relation to a person; and
17 (b) during proceedings conducted in relation to the person under
18 this section, the Attorney-General gives an amended notice
19 under subsection 16A(2) in relation to the person; and
20 (c) the amended notice specifies one or more extradition
21 offences that were not specified in the original notice; and
22 (d) the magistrate considers it necessary to give the person and
23 the extradition country time to prepare for the conduct of
24 proceedings under this section in relation to any of those
25 extradition offences;
26 the magistrate may adjourn the proceedings for such period as the
27 magistrate considers reasonable to allow the person and the
28 extradition country to prepare for the conduct of those proceedings.
29

71 Subsection 43(1)

30 After “statutory form”, insert “expressed to be directed to any
31 magistrate”.

72 After section 46

32 Insert:

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Amendments relating to extradition **Schedule 2**
Other amendments **Part 3**

1 **46A Giving notices to magistrates etc.**

2 *Scope*

- 3 (1) This section applies if:
4 (a) the Attorney-General decides to give a notice under
5 subsection 16(1), 16A(2) or 43(1) directed to a magistrate; or
6 (b) the Attorney-General is required to give a notice under
7 subsection 12(3), 15B(4) or 17(1) directing a magistrate.

8 *Giving the notice to a magistrate*

- 9 (2) The notice, or a copy of the notice, may be handed to a magistrate
10 or sent to a magistrate by post, fax, email or other electronic
11 means.

12 *When the notice is taken to be given*

- 13 (3) The notice is taken, for the purposes of this Act, to be given:
14 (a) if the notice, or a copy of the notice, is handed to a
15 magistrate—when the notice or copy is handed to the
16 magistrate; or
17 (b) if the notice, or a copy of the notice, is sent to a magistrate by
18 post—at the time at which the notice or copy would be
19 delivered in the ordinary course of post; or
20 (c) if the notice, or a copy of the notice, is sent to a magistrate by
21 fax, email or other electronic means—at the time when the
22 notice or copy is sent to the magistrate.

23 **73 Application—section 16A of the *Extradition Act 1988***

24 Section 16A of the *Extradition Act 1988*, as inserted by this Schedule,
25 applies in relation to a notice given under subsection 16(1) of that Act
26 after the commencement of this item.

27 **74 Application—subsections 17(2) and (3) of the *Extradition***
28 ***Act 1988***

29 The amendments of subsections 17(2) and (3) of the *Extradition Act*
30 *1988* made by this Schedule apply in relation to a person remanded
31 under section 15 of that Act whether the person is remanded before or
32 after the commencement of this item.

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Schedule 2 Amendments relating to extradition

Part 3 Other amendments

1 **75 Application—section 46A of the *Extradition Act 1988***

2 (1) Section 46A of the *Extradition Act 1988*, as inserted by this Schedule,
3 applies to a notice under subsection 16(1), 16A(2) or 43(1) of that Act if
4 the Attorney-General decides to give the notice after the
5 commencement of this item.

6 (2) Section 46A of the *Extradition Act 1988*, as inserted by this Schedule,
7 applies to a notice under subsection 12(3) or 17(1) of that Act if the
8 Attorney-General is required to give the notice after the commencement
9 of this item.

10 **Division 8—Other minor technical amendments**

11 ***Extradition Act 1988***

12 **76 Section 5**

13 Insert:

14 *extraditable person* has the meaning given by section 6.

15 **77 Section 5**

16 Insert:

17 *extradition arrest warrant* means a warrant issued under
18 section 12.

19 **78 Section 5 (at the end of paragraph (a) of the definition of**
20 ***extradition country*)**

21 Add “or”.

22 **79 Section 5 (subparagraph (b)(ii) of the definition of**
23 ***extradition country*)**

24 Omit “responsible; and”, substitute “responsible; or”.

25 **80 Section 5**

26 Insert:

27 *extradition objection* has the meaning given by section 7.

28 **81 Section 5 (definition of *provisional arrest warrant*)**

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Amendments relating to extradition **Schedule 2**
Other amendments **Part 3**

1 Repeal the definition, substitute:

2 *provisional arrest warrant* means a warrant issued under
3 section 29.

4 **82 At the end of section 12**

5 Add:

6 (4) A notice given under subsection (3) is not a legislative instrument.

7 Note: The heading to section 12 is replaced by the heading “**Extradition arrest warrants**”.

8 **83 Paragraphs 13(1)(a) and (2)(a)**

9 Omit “a provisional arrest warrant”, substitute “an extradition arrest
10 warrant”.

11 **84 At the end of section 13**

12 Add:

13 (8) If a direction under subsection (5) is given in writing, the direction
14 is not a legislative instrument.

15 **85 Paragraph 14(1)(a)**

16 Omit “a provisional arrest warrant”, substitute “an extradition arrest
17 warrant”.

18 **86 After subsection 14(5)**

19 Insert:

20 (5A) If a direction under subsection (5) is given in writing, the direction
21 is not a legislative instrument.

22 **87 Subsection 15(1)**

23 Omit “a provisional arrest warrant”, substitute “an extradition arrest
24 warrant”.

25 **88 At the end of section 16**

26 Add:

27 (4) A notice given under subsection (1) is not a legislative instrument.

28 **89 At the end of section 17**

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Schedule 2 Amendments relating to extradition

Part 3 Other amendments

1 Add:

2 (6) A notice given under subsection (1) is not a legislative instrument.

3 **90 Paragraph 21(6)(d)**

4 Before “the court”, insert “subject to section 21B,”.

5 **91 Before section 22**

6 Insert:

7 **21B Admission of evidence etc. on review or appeal**

8 *Scope*

- 9 (1) This section applies if a person or extradition country:
- 10 (a) applies under subsection 21(1) for a review of an order made
- 11 by a magistrate under subsection 19(9) or (10); or
- 12 (b) appeals under subsection 21(3) against an order made on that
- 13 review; or
- 14 (c) appeals to the High Court against an order made on that
- 15 appeal.

16 *Admission of evidence*

- 17 (2) If:
- 18 (a) a party to the relevant proceedings under section 19 was
- 19 prevented from adducing evidence (the *excluded evidence*) in
- 20 the proceedings; and
- 21 (b) the review court considers that the party should have been
- 22 permitted to adduce the excluded evidence in those
- 23 proceedings;
- 24 the court may receive:
- 25 (c) the excluded evidence; and
- 26 (d) further evidence, or submissions, that directly relate to the
- 27 excluded evidence.

28 *Documents containing deficiencies*

- 29 (3) If:
- 30 (a) a document is:
-

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Other amendments **Part 3**

- 1 (i) a document to which the review court must have regard
2 under paragraph 21(6)(d); or
3 (ii) a document that is received by the review court under
4 subsection (2) of this section; and
5 (b) the document contains a deficiency of relevance to the review
6 or appeal; and
7 (c) the court considers the deficiency to be of a minor nature;
8 the court must adjourn the proceedings for such period as is
9 necessary to allow the deficiency to be remedied.
- 10 (4) This section does not entitle the person to whom the proceedings
11 relate to adduce, or the court to receive, evidence to contradict an
12 allegation that the person has engaged in conduct constituting an
13 extradition offence for which the surrender of the person is sought.

14 *Definition*

- 15 (5) In this section:

16 *review court* means the court to which the application or appeal
17 was made.

18 **92 At the end of paragraph 22(4)(a)**

19 Add “or”.

20 **93 At the end of subparagraphs 22(4)(d)(i) and (ii)**

21 Add “or”.

22 **94 At the end of section 22**

23 Add:

24 (6) If a determination under subsection (2) is made in writing, the
25 determination is not a legislative instrument.

26 (7) An order made under subsection (5) is not a legislative instrument.

27 **95 At the end of paragraphs 24(1)(a) and (b)**

28 Add “and”.

29 **96 At the end of subparagraph 24(3)(b)(i)**

30 Add “or”.

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Part 3 Other amendments

1 **97 At the end of section 24**

2 Add:

3 (6) If:

4 (a) the Attorney-General informs an extradition country as
5 mentioned in subsection (4); and

6 (b) the Attorney-General does so in writing;
7 the written instrument is not a legislative instrument.

8 **98 At the end of subparagraph 25(2)(a)(i)**

9 Add “or”.

10 **99 Paragraph 26(1)(d)**

11 Omit “(in this subsection called the *foreign escort officer*)”, substitute
12 “or a person included in a specified class (in this subsection called the
13 *escort officer*)”.

14 **100 Paragraph 26(1)(e)**

15 Omit “foreign”.

16 **101 Section 27**

17 Before “Where:”, insert “(1)”.

18 **102 At the end of section 27**

19 Add:

20 (2) A notice given under subsection (1) is not a legislative instrument.

21 **103 At the end of section 30**

22 Add:

23 (8) If a direction under subsection (5) is given in writing, the direction
24 is not a legislative instrument.

25 **104 After subsection 31(5)**

26 Insert:

27 (5A) If a direction under subsection (5) is given in writing, the direction
28 is not a legislative instrument.

EXPOSURE DRAFT

Amendments relating to extradition **Schedule 2**
Other amendments **Part 3**

1 **105 Paragraph 38(1)(a)**

2 Omit “(in this subsection called the *New Zealand escort officer*)”,
3 substitute “or a person included in a specified class (in this subsection
4 called the *escort officer*)”.

5 **106 Paragraph 38(1)(b)**

6 Omit “New Zealand” (first occurring).

7 **107 Section 39**

8 Before “Where:”, insert “(1)”.

9 **108 At the end of section 39**

10 Add:

11 (2) A notice given under subsection (1) is not a legislative instrument.

12 **109 At the end of section 43**

13 Add:

14 (4) A notice given under subsection (1) is not a legislative instrument.

15 **110 At the end of section 44**

16 Add:

17 (3) If the undertaking mentioned in subsection (1) is given in writing,
18 the undertaking is not a legislative instrument.

19 (4) An order made under paragraph (1)(d) is not a legislative
20 instrument.

21 (5) If an order under subsection (2) is made in writing, the order is not
22 a legislative instrument.

23 **111 At the end of section 45**

24 Add:

25 (6) A consent given under subsection (3) is not a legislative
26 instrument.

27 **112 Section 47**

EXPOSURE DRAFT

Schedule 2 Amendments relating to extradition

Part 3 Other amendments

1 Omit “A provisional arrest warrant, within the meaning of Part II or
2 III,” substitute “An extradition arrest warrant, a provisional arrest
3 warrant”.

4 **113 At the end of section 48**

5 Add:

6 (3) An authorisation given under subparagraph (1)(b)(iv) is not a
7 legislative instrument.

8 (4) If a direction under subparagraph (1)(b)(v) is given in writing, the
9 direction is not a legislative instrument.

10 **114 Application of item 91—section 21B of the *Extradition*** 11 ***Act 1988* etc.**

12 Section 21B of the *Extradition Act 1988*, as inserted by this Schedule,
13 applies in relation to an application for review or appeal referred to in
14 subsection 21B(1) that is made on or after the commencement of this
15 item, whether or not the relevant proceedings under section 19 were
16 instituted before or after that commencement.
17

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Grounds of refusal **Part 1**

1 **Schedule 3—Amendments relating to**
2 **providing mutual assistance in**
3 **criminal matters**

4 **Part 1—Grounds of refusal**

5 *Mutual Assistance in Criminal Matters Act 1987*

6 **1 Paragraphs 8(1)(a) and (b)**

7 Repeal the paragraphs.

8 **2 Paragraph 8(1)(c)**

9 After “for the purpose of”, insert “investigating.”.

10 **3 After paragraph 8(1)(c)**

11 Insert:

12 (ca) there are substantial grounds for believing that the granting of
13 the request would result in a person being subjected to
14 torture; or

15 **4 Paragraph 8(1)(d)**

16 After “relates to the”, insert “investigation.”.

17 **5 After paragraph 8(1)(d)**

18 Insert:

19 (da) both of the following subparagraphs are satisfied:

20 (i) the request relates to the confiscation, or restraining, of
21 the proceeds or an instrument of an offence;

22 (ii) an act or omission constituting the offence, had the act
23 or omission occurred in Australia, would have
24 constituted an offence under the military law of
25 Australia but not also under the ordinary criminal law of
26 Australia; or

27 **6 Paragraph 8(1)(e)**

28 Omit “Territory; or”, substitute “Territory.”.

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 1 Grounds of refusal

1 **7 Paragraph 8(1)(f)**

2 Repeal the paragraph.

3 **8 Subsection 8(1A)**

4 Repeal the subsection, substitute:

5 (1A) A request by a foreign country for assistance under this Act must
6 be refused if:

7 (a) the request relates to the investigation, prosecution or
8 punishment of:

9 (i) a person arrested or detained on suspicion of having
10 committed an offence; or

11 (ii) a person charged with, or convicted of, an offence; and

12 (b) the offence is one in respect of which the death penalty may
13 be imposed in the foreign country;

14 unless the Attorney-General is of the opinion, having regard to the
15 special circumstances of the case, that the assistance requested
16 should be granted.

17 **9 Paragraph 8(2)(a)**

18 After “relates to the”, insert “investigation,”.

19 **10 Paragraph 8(2)(a)**

20 After “Australian law”, insert “at the time at which the request was
21 received”.

22 **11 Paragraphs 8(2)(b) and (c)**

23 Repeal the paragraphs, substitute:

24 (b) both of the following subparagraphs are satisfied:

25 (i) the request relates to the confiscation, or restraining, of
26 the proceeds or an instrument of an offence;

27 (ii) an act or omission constituting the offence, had the act
28 or omission occurred in Australia, would not have
29 constituted an offence against Australian law at the time
30 at which the request was received; or

31 (c) the request relates to the investigation or prosecution of a
32 person for an offence in a case where:

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Grounds of refusal **Part 1**

- 1 (i) the person has been acquitted or pardoned by a
2 competent tribunal or authority in the foreign country,
3 or in Australia or another country; or
4 (ii) the person has undergone the punishment provided by
5 the law of the foreign country, or of Australia or another
6 country;
7 in respect of that offence or of another offence constituted by
8 the same act or omission as that offence; or
9 (ca) the request relates to the investigation, prosecution or
10 punishment of a person for an offence that is, or is by reason
11 of the circumstances in which it is alleged to have been
12 committed or was committed, a political offence; or
13 (cb) there are substantial grounds for believing that the request
14 has been made with a view to investigating, prosecuting or
15 punishing a person for a political offence; or
16 (cc) the request relates to the confiscation, or restraining, of the
17 proceeds or an instrument of an offence that is, or is by
18 reason of the circumstances in which it is alleged to have
19 been committed or was committed, a political offence; or

20 **12 Application**

21 The amendments made by this Part apply in relation to a request by a
22 foreign country that is under consideration on or after the day on which
23 this Act receives the Royal Assent, whether the request was made
24 before or after that day.
25

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters
Part 2 Video link evidence

1 **Part 2—Video link evidence**

2 ***Mutual Assistance in Criminal Matters Act 1987***

3 **13 Subsection 3(1)**

4 Insert:

5 *tape recording* means audio recording, video recording or
6 recording by other electronic means.

7 **14 Before section 12**

8 Insert:

9 **Division 1—Requests by Australia**

10 **15 Subparagraphs 12(1)(a)(i) and (ii)**

11 Omit “in accordance with the law of that country”.

12 **16 After paragraph 12(1)(a)**

13 Insert:

14 (aa) if subparagraph (a)(i) applies—to arrange for a tape
15 recording to be made of the evidence to be taken; and

16 **17 Paragraph 12(1)(b)**

17 After “evidence”, insert “(and if paragraph (aa) applies, the tape
18 recording or a copy of it)”.

19 **18 After section 12**

20 Insert:

21 **Division 2—Requests by foreign countries**

22 **19 Subsection 13(1)**

23 Repeal the subsection, substitute:

24 (1) This section applies if a foreign country (the *requesting country*)
25 requests:

26 (a) any of the following:

27 (i) that evidence be taken in Australia;

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Video link evidence **Part 2**

- 1 (ii) that evidence be taken in Australia and a tape recording
2 be made of the evidence taken;
- 3 (iii) that evidence be taken in Australia for live transmission
4 by means of video link to a courtroom or other place in
5 the requesting country; or
- 6 (b) that documents or other articles in Australia be produced;
7 for the purposes of a proceeding in relation to a criminal matter in
8 that country or another foreign country (the *foreign proceeding*).
- 9 (1A) The Attorney-General may, by writing in accordance with the
10 approved form, authorise:
- 11 (a) the taking of the evidence and its transmission to the
12 requesting country; or
- 13 (b) the production of the documents or other articles and their
14 transmission to the requesting country.

20 Subsection 13(2)

15 Omit all the words before paragraph (b), substitute:

- 16 (2) If the Attorney-General gives an authorisation under
17 subsection (1A):
- 18 (a) in the case of the taking of evidence for live transmission by
19 means of video link to a courtroom or other place in the
20 requesting country—a Magistrate may do all or any of the
21 following:
- 22 (i) take evidence on oath or affirmation of the witness
23 appearing before the Magistrate to give evidence in
24 relation to the matter;
- 25 (ii) at the request of the foreign court, assist with the
26 administering by the foreign court of an oath or
27 affirmation;
- 28 (iii) at the request of the foreign court, direct that all or part
29 of the proceeding be conducted in private;
- 30 (iv) at the request of the foreign court, require a person to
31 leave the place in Australia where the giving of
32 evidence is taking place or going to take place;
- 33 (v) at the request of the foreign court, prohibit or restrict the
34 publication of evidence given in the proceeding or of
35 the name of a party to, or a witness in, the foreign
36 proceeding;
37

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 2 Video link evidence

- 1 (vi) subject to subsections 13AB(1) and (2) (as the case
2 requires), require the production of documents or other
3 articles;
- 4 (vii) take any action necessary to safeguard the rights of the
5 witness while the witness is giving evidence;
- 6 (viii) take such action as the Magistrate considers appropriate
7 to facilitate the foreign proceeding;
- 8 (ix) perform any other function required by the regulations;
9 or
- 10 (ab) in any other case of the taking of evidence—a Magistrate
11 may take evidence on oath of each witness appearing before
12 the Magistrate to give evidence in relation to the matter, and
13 a Magistrate who takes any such evidence must:
- 14 (i) if the requesting country requests that a tape recording
15 be made of the evidence taken—cause a tape recording
16 to be made of the evidence, certify that the evidence on
17 the tape recording was taken by the Magistrate and
18 cause the tape recording, or a copy of it, to be sent to the
19 Attorney-General; and
- 20 (ii) in any other case—cause the evidence to be put in
21 writing, certify that the evidence was taken by the
22 Magistrate and cause the writing so certified to be sent
23 to the Attorney-General; or

24 **21 Paragraph 13(2)(b)**

25 Omit “subsection (6)”, substitute “subsections 13AB(1) and (2) (as the
26 case requires)”.

27 **22 Subsection 13(4A)**

28 Omit “, through a video link, from the requesting country”, substitute
29 “in person, or through a video link from the requesting country,”.

30 **23 After subsection 13(4A)**

31 Insert:

32 (4B) For the purposes of Part III of the *Crimes Act 1914*:

- 33 (a) the proceeding before the Magistrate is a federal judicial
34 proceeding; and
- 35 (b) evidence taken from a witness on oath or affirmation is
36 testimony given in a federal judicial proceeding.

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Video link evidence **Part 2**

1 **24 Subsections 13(6) to (10)**

2 Repeal the subsections.

3 **25 After section 13**

4 Insert:

5 **13AA Enforcement of orders**

6 (1) If a Magistrate is conducting a proceeding under subsection 13(2)
7 and makes an order relating to the conduct of the proceeding, the
8 order must be complied with.

9 (2) If the Magistrate is a Federal Magistrate, subject to the Rules of
10 Court made under the *Federal Magistrates Act 1999*, the order may
11 be enforced as if the order were an order of the Federal Magistrates
12 Court.

13 (3) In any other case, subject to the rules of the court of which the
14 Magistrate is a member, the order may be enforced as if the order
15 were an order of that court.

16 **13AB Commonwealth and State and Territory laws apply in**
17 **relation to taking evidence and producing documents etc.**

18 (1) Subject to subsection (3), the following laws of the Commonwealth
19 apply, so far as they are capable of application, for the purposes of
20 section 13:

21 (a) laws with respect to the compelling of persons to attend
22 before a Federal Magistrate;

23 (b) upon the hearing of a charge against a person for an offence
24 against the law of the Commonwealth—laws with respect to
25 giving evidence, answering questions and producing
26 documents or other articles.

27 (2) Subject to subsection (3), the laws of each State or Territory with
28 respect to:

29 (a) the compelling of persons to attend before a Magistrate (other
30 than a Federal Magistrate); and

31 (b) giving evidence, answering questions and producing
32 documents or other articles;

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 2 Video link evidence

1 upon the hearing of a charge against a person for an offence against
2 the law of that State or Territory apply, so far as they are capable
3 of application, for the purposes of section 13.

4 (3) For the purposes of section 13:

5 (a) the person to whom the proceeding in the requesting country
6 relates is competent but not compellable to give evidence;
7 and

8 (b) a person who is required to give evidence, or produce
9 documents or other articles, for the purposes of a proceeding
10 in relation to a criminal matter in the requesting country or
11 another foreign country, is not compellable to answer a
12 question, or produce a document or article, that the person is
13 not compellable to answer or produce, as the case may be, in
14 the proceeding in that country.

15 (4) Paragraph (3)(b) does not apply if its application would be
16 inconsistent with a provision of a mutual assistance treaty between
17 Australia and the requesting country concerned.

18 (5) A duly authenticated foreign law immunity certificate is admissible
19 in proceedings under section 13 as prima facie evidence of the
20 matters stated in the certificate.

21 **26 Application**

22 The amendments made by this Part apply:

23 (a) if an authorisation has not been given, before the day on
24 which this Act receives the Royal Assent, by the
25 Attorney-General under subsection 13(1) of the *Mutual*
26 *Assistance in Criminal Matters Act 1987* in relation to a
27 request made by a foreign country—in relation to that
28 request; and

29 (b) in relation to a request made by a foreign country on or after
30 the day on which this Act receives the Royal Assent.
31

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

1 **Part 3—Telecommunications and surveillance**
2 **devices**

3 **Division 1—Provision of certain lawfully obtained**
4 **material**

5 *Mutual Assistance in Criminal Matters Act 1987*

6 **27 Subsection 3(1)**

7 Insert:

8 *interception warrant information* has the same meaning as in the
9 *Telecommunications (Interception and Access) Act 1979*.

10 **28 Subsection 3(1)**

11 Insert:

12 *lawfully accessed information* has the same meaning as in the
13 *Telecommunications (Interception and Access) Act 1979*.

14 **29 Subsection 3(1)**

15 Insert:

16 *lawfully intercepted information* has the same meaning as in the
17 *Telecommunications (Interception and Access) Act 1979*.

18 **30 Subsection 3(1)**

19 Insert:

20 *protected information* means information that is protected
21 information within the meaning of paragraph 44(1)(a), (b) or (c) of
22 the *Surveillance Devices Act 2004*.

23 **31 Subsection 3(1)**

24 Insert:

25 *stored communications warrant information* has the same
26 meaning as in the *Telecommunications (Interception and Access)*
27 *Act 1979*.

28 **32 Subsection 13A(2)**

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 3 Telecommunications and surveillance devices

1 Repeal the subsection, substitute:

2 (2) The Attorney-General may only authorise the provision to the
3 requesting country of material specified in column 1 of the
4 following table if the request relates to a serious offence against the
5 laws of that country specified in column 2 of the table:
6

Offences for which provision of particular material may be authorised

Item	Column 1	Column 2
1	material that is or includes protected information	a serious offence punishable by a maximum penalty of imprisonment for 3 years or more, imprisonment for life or the death penalty
2	material that is or includes lawfully accessed information or stored communications warrant information	a serious offence punishable by a maximum penalty of: (a) imprisonment for 3 years or more, imprisonment for life or the death penalty; or (b) a fine of an amount that is at least equivalent to 900 penalty units
3	material that is or includes lawfully intercepted information or interception warrant information	(a) a serious offence punishable by a maximum penalty of imprisonment for 7 years or more, imprisonment for life or the death penalty; or (b) a cartel offence punishable by a maximum penalty of a fine of an amount that is at least equivalent to \$10,000,000

7 **33 Subsection 13A(6) (paragraph (b) of the definition of**
8 ***material lawfully obtained by an enforcement agency in***
9 ***Australia)***

10 Omit “prosecution;”, substitute “prosecution.”.

11 **34 Subsection 13A(6) (definition of *material lawfully obtained***
12 ***by an enforcement agency in Australia)***

13 Omit all the words after paragraph (b).

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

1 ***Telecommunications (Interception and Access) Act 1979***

2 **35 At the end of section 68**

3 Add:

4 ; and (l) if the Attorney-General has authorised the provision of the
5 information to a foreign country under subsection 13A(1) of
6 the *Mutual Assistance in Criminal Matters Act 1987*—to that
7 foreign country, or to the Secretary of the Department for the
8 purpose of providing the information to that foreign country.

9 **36 After section 68**

10 Insert:

11 **68A Communicating information obtained by Secretary**

12 (1) The Secretary of the Department may, personally, or by a person
13 authorised by him or her, communicate to another person
14 (including a foreign country) lawfully intercepted information or
15 interception warrant information if:

16 (a) the information was communicated to the Secretary under
17 paragraph 68(1) for the purpose of providing the information
18 to a foreign country; and

19 (b) the communication of the information is for purposes
20 connected with providing the information to the foreign
21 country.

22 (2) A person to whom lawfully intercepted information or interception
23 warrant information has been communicated under subsection (1)
24 or this subsection may communicate that information to another
25 person (including a foreign country) for purposes connected with
26 providing the information to the foreign country.

27 **37 Paragraph 94(3)(a)**

28 After “Division 2”, insert “(other than section 102B)”.

29 **38 After section 102A**

30 Insert:

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 3 Telecommunications and surveillance devices

1 **102B Report regarding mutual assistance requests**

2 The report must set out the number of occasions on which lawfully
3 intercepted information or interception warrant information was
4 provided to a foreign country under paragraph 68(1) or section 68A
5 in connection with an authorisation under subsection 13A(1) of the
6 *Mutual Assistance in Criminal Matters Act 1987*.

7 **39 At the end of subsection 139(2)**

8 Add:
9 ; or (e) an authorisation under subsection 13A(1) of the *Mutual*
10 *Assistance in Criminal Matters Act 1987* in respect of the
11 information.

12 **40 Paragraph 159(1)(a)**

13 After “Division 2”, insert “(other than section 163A)”.

14 **41 At the end of Division 2 of Part 3-6 of Chapter 3**

15 Add:

16 **163A Report regarding mutual assistance requests**

17 The report must set out the number of occasions on which lawfully
18 accessed information or stored communications warrant
19 information was provided to a foreign country under subsection
20 139(1) or section 142 in connection with an authorisation under
21 subsection 13A(1) of the *Mutual Assistance in Criminal Matters*
22 *Act 1987*.

23 **42 Application**

24 The amendments made by this Division apply in relation to a request by
25 a foreign country that is under consideration on or after the day on
26 which this Act receives the Royal Assent, whether the request was made
27 before or after that day.

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

1 **Division 2—Requests for covert access to stored**
2 **communications and use of surveillance**
3 **devices**

4 *Mutual Assistance in Criminal Matters Act 1987*

5 **43 Subsection 3(1)**

6 Insert:

7 *carrier* has the same meaning as in the *Telecommunications*
8 *(Interception and Access) Act 1979*.

9 **44 Subsection 3(1)**

10 Insert:

11 *stored communication* has the same meaning as in the
12 *Telecommunications (Interception and Access) Act 1979*.

13 **45 After Part III**

14 Insert:

15 **Part IIIA—Assistance in relation to covert access to**
16 **stored communications and use of**
17 **surveillance devices**

18 **Division 1—Assistance in relation to covert access to stored**
19 **communications**

20 **15A Requests by foreign countries for stored communications**

21 The Attorney-General may, in his or her discretion, authorise the
22 Australian Federal Police or a police force or police service of a
23 State, in writing, to apply for a stored communications warrant
24 under section 110 of the *Telecommunications (Interception and*
25 *Access) Act 1979* if the Attorney-General is satisfied that:

- 26 (a) an investigation relating to a criminal matter involving an
27 offence against the law of a foreign country (the *requesting*
28 *country*) has commenced in the requesting country; and

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 3 Telecommunications and surveillance devices

- 1 (b) the offence to which the investigation relates is punishable by
2 a maximum penalty of:
- 3 (i) imprisonment for 3 years or more, imprisonment for life
4 or the death penalty; or
- 5 (ii) a fine of an amount that is at least equivalent to 900
6 penalty units; and
- 7 (c) there are reasonable grounds to believe that stored
8 communications relevant to the investigation are held by a
9 carrier; and
- 10 (d) the requesting country has requested the Attorney-General to
11 arrange for access to the stored communications.

12 Note: Information obtained under the warrant may only be communicated to
13 the requesting country on certain conditions: see subsection 142A(1)
14 of the *Telecommunications (Interception and Access) Act 1979*.

15 Division 2—Assistance in relation to surveillance devices

16 15B Requests by foreign countries for surveillance devices

- 17 (1) The Attorney-General may, in his or her discretion, authorise an
18 eligible law enforcement officer, in writing, to apply for a
19 surveillance device warrant under section 14 of the *Surveillance*
20 *Devices Act 2004* if the Attorney-General is satisfied that:
- 21 (a) an investigation relating to a criminal matter involving an
22 offence against the law of a foreign country (the **requesting**
23 **country**) that is punishable by a maximum penalty of
24 imprisonment for 3 years or more, imprisonment for life or
25 the death penalty has commenced in the requesting country;
26 and
- 27 (b) the requesting country requests the Attorney-General to
28 arrange for the use of a surveillance device; and
- 29 (c) the requesting country has given appropriate undertakings in
30 relation to:
- 31 (i) ensuring that the information obtained as a result of the
32 use of the surveillance device will only be used for the
33 purpose for which it is communicated to the requesting
34 country; and
- 35 (ii) the destruction of a document or other thing containing
36 information obtained as a result of the use of the
37 surveillance device; and

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Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

1 (iii) any other matter the Attorney-General considers
2 appropriate.

3 (2) In this section:

4 *eligible law enforcement officer* means a person referred to in
5 paragraph (a) or (c) of the definition of *law enforcement officer* set
6 out in subsection 6(1) of the *Surveillance Devices Act 2004*.

7 **Division 3—Investigations**

8 **15C References to investigations**

9 In this Part, a reference to an investigation is taken to include a
10 reference to a proceeding of a kind referred to in paragraph (a) or
11 (b) of the definition of *proceeding*.

12 *Surveillance Devices Act 2004*

13 **46 Subsection 6(1)**

14 Insert:

15 *mutual assistance application* means an application for a
16 surveillance device warrant made under a mutual assistance
17 authorisation.

18 **47 Subsection 6(1)**

19 Insert:

20 *mutual assistance authorisation* means an authorisation under
21 subsection 15B(1) of the *Mutual Assistance in Criminal Matters*
22 *Act 1987*.

23 **48 After subsection 14(3)**

24 Insert:

25 (3A) A law enforcement officer (or another person on his or her behalf)
26 may apply for the issue of a surveillance device warrant if he or
27 she:
28 (a) is authorised to do so under a mutual assistance authorisation;
29 and

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 3 Telecommunications and surveillance devices

- 1 (b) suspects on reasonable grounds that the use of a surveillance
2 device is necessary, in the course of the investigation to
3 which the authorisation relates, for the purpose of enabling
4 evidence to be obtained of:
5 (i) the commission of the offence to which the
6 authorisation relates; or
7 (ii) the identity or location of the persons suspected of
8 committing the offence.

9 **49 Subsection 14(4)**

10 Omit “(1) or (3)”, substitute “(1), (3) or (3A)”.

11 **50 After paragraph 16(1)(b)**

12 Insert:

- 13 (ba) in the case of a warrant sought in relation to a mutual
14 assistance authorisation—that such an authorisation is in
15 force and that there are reasonable grounds for the suspicion
16 founding the application for the warrant; and

17 **51 Paragraph 16(2)(a)**

18 After “relevant offence”, insert “or a mutual assistance authorisation”.

19 **52 Paragraph 16(2)(e)**

20 Before “the likely”, insert “in the case of a warrant sought in relation to
21 a relevant offence or a recovery order—”.

22 **53 After paragraph 16(2)(e)**

23 Insert:

- 24 (ea) in the case of a warrant sought in relation to a mutual
25 assistance authorisation—the likely evidentiary or
26 intelligence value of any evidence or information sought to
27 be obtained, to the extent that this is possible to determine
28 from information obtained from the foreign country to which
29 the authorisation relates; and

30 **54 After subparagraph 17(1)(b)(iii)**

31 Insert:

- 32 (iiia) if the warrant relates to a mutual assistance
33 authorisation—the offence or offences against the law

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

1 of a foreign country to which the authorisation relates;
2 and

3 **55 Subsection 20(2)**

4 Omit “or 21(3)(a) and (b)”, substitute “, 21(3)(a) and (b) or 21(3A)(a)
5 and (b)”.

6 **56 After subsection 21(3)**

7 Insert:

8 (3A) If:

- 9 (a) a surveillance device warrant has been sought by or on behalf
10 of a law enforcement officer as authorised under a mutual
11 assistance authorisation; and
12 (b) the chief officer of the law enforcement agency to which the
13 law enforcement officer belongs or is seconded is satisfied
14 that the use of a surveillance device is no longer required for
15 the purpose of enabling evidence to be obtained of:
16 (i) the commission of the offence against a law of a foreign
17 country to which the authorisation relates; or
18 (ii) the identity or location of the persons suspected of
19 committing the offence;
20 the chief officer must, in addition to revoking the warrant under
21 section 20, take the steps necessary to ensure that use of the
22 surveillance device authorised by the warrant is discontinued.

23 **57 After paragraph 21(5)(b)**

24 Insert:

- 25 or (c) if the warrant was issued in relation to a mutual assistance
26 authorisation—of enabling evidence to be obtained of:
27 (i) the commission of the offence against a law of a foreign
28 country to which the authorisation relates; or
29 (ii) the identity or location of the persons suspected of
30 committing the offence;

31 **58 Paragraph 45(4)(f)**

32 Repeal the paragraph, substitute:

- 33 (f) the communication of information for the purpose of
34 providing the information to a foreign country, or an
35 appropriate authority of a foreign country, if:
-

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters Part 3 Telecommunications and surveillance devices

- 1 (i) the provision of the information has been authorised
2 under subsection 13A(1) of the *Mutual Assistance in*
3 *Criminal Matters Act 1987*; or
4 (ii) the information was obtained under, or relates to, a
5 surveillance device warrant issued in relation to a
6 mutual assistance authorisation.

59 After paragraph 50(1)(a)

7 Insert:

- 8 (aa) the number of mutual assistance applications made by or on
9 behalf of, and the number of warrants issued as a result of
10 such applications to, law enforcement officers of the agency
11 during that year; and
12

13 60 After paragraph 50(1)(e)

14 Insert:

- 15 (ea) the number of mutual assistance applications made by or on
16 behalf of law enforcement officers of the agency that were
17 refused during that year, and the reasons for refusal; and

18 61 After paragraph 50(1)(i)

19 Insert:

- 20 (ia) for each offence (the *foreign offence*) against a law of a
21 foreign country in respect of which a warrant was issued as a
22 result of a mutual assistance application made by or on behalf
23 of law enforcement officers of the agency during the year—
24 the offence (if any), under a law of the Commonwealth, or of
25 a State or a Territory, that is of the same nature as, or a
26 substantially similar nature to, the foreign offence; and

27 62 After subparagraph 53(2)(c)(iii)

28 Insert:

- 29 (iiia) if the warrant was issued in relation to a mutual
30 assistance authorisation—the offence against the law of
31 the foreign country to which the authorisation relates;
32 and

33 *Telecommunications (Interception and Access) Act 1979*

34 63 Subsection 5(1)

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 3 Telecommunications and surveillance devices

1 Omit “The matters”, substitute “In the case of an application other than
2 a mutual assistance application, the matters”.

3 **69 Paragraph 116(2)(c)**

4 Omit “paragraph (1)(d)”, substitute “subparagraph (1)(d)(i)”.

5 **70 After subsection 116(2)**

6 Insert:

7 (2A) In the case of a mutual assistance application, the matters to which
8 the issuing authority must have regard are:

- 9 (a) how much the privacy of any person or persons would be
10 likely to be interfered with by accessing those stored
11 communications under a stored communications warrant; and
12 (b) the gravity of the conduct constituting the serious foreign
13 contravention; and
14 (c) how much the information referred to in
15 subparagraph (1)(d)(ii) would be likely to assist in
16 connection with the investigation, to the extent that this is
17 possible to determine from information obtained from the
18 foreign country to which the application relates.

19 **71 Subsection 116(3)**

20 After “contravention”, insert “or serious foreign contravention”.

21 **72 Subsection 118(3)**

22 After “contravention”, insert “or serious foreign contravention”.

23 **73 Subsection 118(3)**

24 Omit “paragraph 116(1)(d)”, substitute “subparagraph 116(1)(d)(i) or
25 (ii), as the case may be”.

26 **74 Subsection 139(1)**

27 After “(2)”, insert “or (4A)”.

28 **75 Subsection 139(2)**

29 Omit “The”, substitute “In the case of information obtained by the
30 agency other than through the execution of a warrant issued as a result
31 of a mutual assistance application, the”.

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

1 **76 After subsection 139(4)**

2 Insert:

3 (4A) In the case of information obtained by the agency through the
4 execution of a warrant issued as a result of a mutual assistance
5 application, the purposes are purposes connected with:

- 6 (a) providing the information to the foreign country, or an
7 appropriate authority of the foreign country, to which the
8 application relates; or
9 (b) the keeping of records by the agency under Part 3-5.

10 **77 After section 142**

11 Insert:

12 **142A Communicating information obtained as a result of a mutual**
13 **assistance application to foreign country**

14 (1) Despite subsection 139(4A) and section 142, a person may only
15 communicate information, obtained through the execution of a
16 warrant issued as a result of a mutual assistance application, to the
17 foreign country to which the application relates, subject to the
18 following conditions:

- 19 (a) that the information will only be used for the purposes for
20 which the foreign country requested the information;
21 (b) that any document or other thing containing the information
22 will be destroyed when it is no longer required for those
23 purposes;
24 (c) any other condition determined, in writing, by the
25 Attorney-General.

26 (2) A determination made under paragraph (1)(c) is not a legislative
27 instrument.

28 **78 At the end of subsection 162(1)**

29 Add:

- 30 ; and (c) the relevant statistics about mutual assistance applications
31 that the agency made during that year; and
32 (d) for each offence (the *foreign offence*) against a law of a
33 foreign country in respect of which a stored communications
34 warrant was issued as a result of a mutual assistance

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 3 Telecommunications and surveillance devices

1 application made by the agency during the year—the offence
2 (if any), under a law of the Commonwealth, or of a State or a
3 Territory, that is of the same nature as, or a substantially
4 similar nature to, the foreign offence.

5 **79 After paragraph 162(2)(b)**

6 Insert:

7 (ba) the relevant statistics about mutual assistance applications
8 that were made during that year; and

9 **80 At the end of subsection 162(2)**

10 Add:

11 ; and (e) for each offence (the *foreign offence*) against a law of a
12 foreign country in respect of which a stored communications
13 warrant was issued as a result of a mutual assistance
14 application made during the year—the offence (if any), under
15 a law of the Commonwealth, or of a State or a Territory, that
16 is of the same nature as, or a substantially similar nature to,
17 the foreign offence.

18 **81 Application**

19 The amendments made by this Division apply in relation to a request by
20 a foreign country that is under consideration on or after the day on
21 which this Act receives the Royal Assent, whether the request was made
22 before or after that day.

23 **Division 3—Amendments relating to telecommunications** 24 **data**

25 *Telecommunications Act 1997*

26 **82 Subparagraph 306(1)(b)(ii)**

27 Omit “or subsection 180(3)”, substitute “, subsection 180(3) or
28 section 180A”.

29 *Telecommunications (Interception and Access) Act 1979*

30 **83 Subsection 5(1) (definition of *authorised officer*)**

31 Repeal the definition, substitute:

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Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

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authorised officer:

- (a) in sections 180A and 180B, subsections 184(5) and 185(2) and paragraph 186(1)(ca), means:
 - (i) the Commissioner of Police; or
 - (ii) a Deputy Commissioner of Police; or
 - (iii) a member of the Australian Federal Police who is covered by an authorisation in force under subsection 5AB(1A); and
- (b) in any other case, means:
 - (i) the head (however described) of the enforcement agency or a person acting as that head; or
 - (ii) a deputy head (however described) of the enforcement agency or a person acting as that deputy head; or
 - (iii) a person who holds, or is acting in, an office or position in the enforcement agency that is covered by an authorisation in force under subsection 5AB(1).

84 Subsection 5(1)

Insert:

foreign law enforcement agency means:

- (a) a police force (however described) of a foreign country; or
- (b) any other authority or person responsible for the enforcement of the laws of the foreign country.

85 Subsection 5AB(1)

Omit “paragraph (c)”, substitute “subparagraph (b)(iii)”.

Note: The following heading to subsection 5AB(1) is inserted “*Authorised officers of an enforcement agency*”.

86 Subsection 5AB(2)

Repeal the subsection, substitute:

Authorised officers of the Australian Federal Police

- (1A) The Commissioner of Police may authorise, in writing, a senior executive AFP employee who is a member of the Australian Federal Police to be an authorised officer.

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 3 Telecommunications and surveillance devices

- 1 (2) A copy of an authorisation must be given to the Communications
2 Access Coordinator:
3 (a) in the case of an authorisation made under subsection (1)—
4 by the head of the enforcement agency; and
5 (b) in the case of an authorisation made under subsection (1A)—
6 by the Commissioner of Police.

7 **87 Subsection 171(1)**

8 Omit “and 4”, substitute “, 4 and 4A”.

9 **88 Subsection 171(1) (note 1)**

10 Repeal the note, substitute:

11 Note 1: Division 3 covers the Organisation. Division 4 covers disclosures for
12 the purposes of Australian law enforcement. Division 4A covers
13 disclosures for the purposes of foreign law enforcement.

14 **89 At the end of subsection 171(3)**

15 Add “or 4A”.

16 **90 Section 172**

17 Omit “and 4”, substitute “, 4 and 4A”.

18 **91 After Division 4 of Part 4-1 of Chapter 4**

19 Insert:

20 **Division 4A—Foreign law enforcement**

21 **Subdivision A—Primary disclosures**

22 **180A Authorisations for access to existing information or**
23 **documents—enforcement of the criminal law of a foreign**
24 **country**

25 *Disclosure to the Australian Federal Police*

- 26 (1) Sections 276, 277 and 278 of the *Telecommunications Act 1997* do
27 not prevent a disclosure of information or a document if the
28 information or document is covered by an authorisation in force
29 under subsection (2).

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Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Telecommunications and surveillance devices **Part 3**

- 1 (2) An authorised officer of the Australian Federal Police may
2 authorise the disclosure of specified information or specified
3 documents that came into existence before the time the person
4 from whom the disclosure is sought receives notification of the
5 authorisation.

6 Note: Section 184 deals with notification of authorisations.

- 7 (3) The authorised officer must not make the authorisation unless he or
8 she is satisfied that the disclosure is reasonably necessary for the
9 enforcement of the criminal law of a foreign country.

10 *Disclosure to a foreign law enforcement agency*

- 11 (4) If specified information or specified documents are disclosed
12 because of an authorisation given under subsection (2), an
13 authorised officer of the Australian Federal Police may authorise
14 the disclosure of the information or documents so disclosed to a
15 foreign law enforcement agency.

- 16 (5) The authorised officer must not make the authorisation unless he or
17 she is satisfied that:

- 18 (a) the disclosure is reasonably necessary for the enforcement of
19 the criminal law of a foreign country; and
20 (b) the disclosure is appropriate in all the circumstances.

21 **Subdivision B—Secondary disclosures**

22 **180B Authorisations to disclose existing information or** 23 **documents—enforcement of the criminal law of a foreign** 24 **country**

- 25 (1) If specified information or specified documents are disclosed
26 because of an authorisation given under Division 4 or subsection
27 180A(2), an authorised officer of the Australian Federal Police
28 may authorise the disclosure of the information or documents so
29 disclosed to a foreign law enforcement agency.

- 30 (2) The authorised officer must not make the authorisation unless he or
31 she is satisfied that:

- 32 (a) the disclosure is reasonably necessary for the enforcement of
33 the criminal law of a foreign country; and
34 (b) the disclosure is appropriate in all the circumstances.

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters
Part 3 Telecommunications and surveillance devices

1 **92 Paragraph 182(1)(a)**

2 After “Division 4”, insert “or subsection 180A(2)”.

3 **93 Subsection 182(2)**

4 Repeal the subsection, substitute:

5 *Exempt disclosures*

6 (2) Paragraph (1)(b) does not apply to a disclosure of information or a
7 document if:

8 (a) the disclosure is reasonably necessary:

9 (i) for the performance by the Organisation of its functions;
10 or

11 (ii) for the enforcement of the criminal law; or

12 (iii) for the enforcement of a law imposing a pecuniary
13 penalty; or

14 (iv) for the protection of the public revenue; or

15 (b) the disclosure is authorised under section 180B.

16 Note: A defendant bears an evidential burden in relation to the matter in
17 subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

18 **94 Paragraph 183(1)(a)**

19 Omit “or 4”, substitute “, 4 or 4A”.

20 **95 At the end of section 184**

21 Add:

22 *Authorised officers of the Australian Federal Police*

23 (5) If an authorised officer of the Australian Federal Police makes an
24 authorisation under subsection 180A(2), a relevant staff member of
25 the Australian Federal Police must notify the person from whom
26 the disclosure is sought.

27 **96 Section 185**

28 Before “The”, insert “(1)”.

29 **97 At the end of section 185**

30 Add:

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 4 Carrying out forensic procedures at the request of a foreign country etc.

1 **Part 4—Carrying out forensic procedures at the**
2 **request of a foreign country etc.**

3 ***Crimes Act 1914***

4 **100 Simplified outline of Part ID (after the paragraph relating**
5 **to Division 7)**

6 Insert:

7 However, certain rules are modified or do not apply if the forensic
8 procedure is carried out in response to a request by a foreign
9 country (as contemplated by the *Mutual Assistance in Criminal*
10 *Matters Act 1987*) or a request by a foreign law enforcement
11 agency (Division 9A).

12 **101 Subsection 23WA(1)**

13 Insert:

14 ***foreign law enforcement agency*** means:
15 (a) a police force (however described) of a foreign country; or
16 (b) any other authority or person responsible for the enforcement
17 of the laws of the foreign country.

18 **102 Subsection 23WA(1)**

19 Insert:

20 ***foreign serious offence*** has the same meaning as in the *Mutual*
21 *Assistance in Criminal Matters Act 1987*.

22 **103 Subsection 23WA(1)**

23 Insert:

24 ***forensic evidence*** means:
25 (a) evidence of forensic material, or evidence consisting of
26 forensic material, taken from a suspect or a volunteer by a
27 forensic procedure; and
28 (b) evidence of any results of the analysis of the forensic
29 material; and

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Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Carrying out forensic procedures at the request of a foreign country etc. **Part 4**

- 1 (c) any other evidence obtained as a result of or in connection
2 with the carrying out of the forensic procedure.

3 **104 Subsection 23WA(1) (definition of *investigating***
4 ***constable*)**

5 Repeal the definition, substitute:

6 *investigating constable* means:

- 7 (a) in the case of a request by a foreign country (as contemplated
8 by the *Mutual Assistance in Criminal Matters Act 1987*) or a
9 foreign law enforcement agency—the constable in charge of
10 coordinating the response to the request; and
11 (b) in any other case—the constable in charge of the
12 investigation of the commission of an offence in relation to
13 which a forensic procedure is carried out or proposed to be
14 carried out.

15 **105 Subsection 23WA(1) (at the end of the definition of**
16 ***suspect*)**

17 Add:

- 18 ; or (d) a person in respect of whom a forensic procedure has been
19 requested by a foreign country (as contemplated by the
20 *Mutual Assistance in Criminal Matters Act 1987*) or a foreign
21 law enforcement agency because the foreign country has:
22 (i) started investigating whether the person has committed
23 an indictable offence; or
24 (ii) started proceedings against the person for an indictable
25 offence.

26 **106 At the end of section 23WA**

27 Add:

28 *Requests by a foreign country and the police force of a foreign*
29 *country*

- 30 (9) The provisions of this Part apply in relation to a forensic procedure
31 carried out because of:
32 (a) a request by a foreign country (as contemplated by the
33 *Mutual Assistance in Criminal Matters Act 1987*); or
34 (b) a request by a foreign law enforcement agency;
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Schedule 3 Amendments relating to providing mutual assistance in criminal matters
Part 4 Carrying out forensic procedures at the request of a foreign country etc.

1 as if a reference to an indictable offence were a reference to a
2 foreign serious offence.

3 **107 Subparagraph 23WF(2)(b)(i)**

4 After “(h), (i)”, insert “, (ib)”.

5 **108 Subsection 23WI(2)**

6 Repeal the subsection, substitute:

- 7 (2) In determining whether a request is justified in all the
8 circumstances, the constable must:
- 9 (a) if the forensic procedure has been requested by a foreign law
10 enforcement agency—balance the public interest in Australia
11 providing and receiving international assistance in criminal
12 matters against the public interest in upholding the physical
13 integrity of the suspect; and
 - 14 (b) in any other case—balance the public interest in obtaining
15 evidence tending to confirm or disprove that the suspect
16 committed the offence concerned against the public interest
17 in upholding the physical integrity of the suspect.

18 **109 After paragraph 23WJ(1)(ia)**

19 Insert:

- 20 (ib) if the suspect is being asked to undergo a forensic procedure
21 because of a request by a foreign law enforcement agency—
22 the following:
- 23 (i) the name of the foreign law enforcement agency that has
24 made the request;
 - 25 (ii) that forensic evidence resulting from the forensic
26 procedure will be provided to the foreign law
27 enforcement agency;
 - 28 (iii) that the forensic evidence may be used in proceedings
29 against the suspect in the foreign country;
 - 30 (iv) that the retention of the forensic evidence will be
31 governed by the laws of the foreign country;
 - 32 (v) that the retention of the forensic evidence will be subject
33 to undertakings given by the foreign law enforcement
34 agency;
 - 35 (vi) the content of those undertakings;

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Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Carrying out forensic procedures at the request of a foreign country etc. **Part 4**

1 **110 After subsection 23WJ(4)**

2 Insert:

3 *Exception—requests by foreign law enforcement agency*

4 (4A) Subsections (3) and (4) do not apply if the suspect is being asked to
5 undergo a forensic procedure because of a request by a foreign law
6 enforcement agency.

7 **111 Subsection 23WJ(5)**

8 After “not in custody”, insert “and is not being asked to undergo a
9 forensic procedure because of a request by a foreign law enforcement
10 agency”.

11 **112 At the end of section 23WJ**

12 Add:

13 *Failure to consent to forensic procedure—procedure requested by*
14 *foreign law enforcement agency*

15 (6) If the suspect is being asked to undergo a forensic procedure
16 because of a request by a foreign law enforcement agency, the
17 constable must inform the suspect (whether or not the suspect is in
18 custody) that, if the suspect does not consent:

19 (a) the foreign country may request that the forensic procedure
20 be carried out; and

21 (b) the Attorney-General may authorise, under the *Mutual*
22 *Assistance in Criminal Matters Act 1987*, a constable to
23 apply to a magistrate for an order for the carrying out of the
24 forensic procedure.

25 Note: Under the *Mutual Assistance in Criminal Matters Act 1987*, the
26 Attorney-General may only authorise a constable who is an authorised
27 applicant.

28 **113 Subsection 23WL(2) (note)**

29 Omit “Note”, substitute “Note 1”.

30 **114 At the end of section 23WL**

31 Add:

32 Note 2: If a foreign law enforcement agency requests that a forensic procedure
33 be carried out on a suspect, a copy of the tape recording or the written

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 4 Carrying out forensic procedures at the request of a foreign country etc.

1 record may also be provided to the foreign law enforcement agency:
2 see subsection 23YQD(2).

3 **115 After subsection 23WM(2)**

4 Insert:

- 5 (2A) This Division does not authorise the carrying out of a forensic
6 procedure on a suspect if the procedure has been requested by:
7 (a) a foreign country (as contemplated by the *Mutual Assistance*
8 *in Criminal Matters Act 1987*); or
9 (b) a foreign law enforcement agency.

10 **116 Section 23WR**

11 Before “A”, insert “(1)”.

12 **117 At the end of section 23WR**

13 Add:

14 ; or (d) the forensic procedure has been requested by a foreign
15 country (as contemplated by the *Mutual Assistance in*
16 *Criminal Matters Act 1987*).

- 17 (2) However, a magistrate is not authorised to order the carrying out of
18 a forensic procedure on a suspect if the procedure has been
19 requested by a foreign law enforcement agency.

20 **118 Paragraph 23WS(a)**

21 Omit “section 23WR”, substitute “subsection 23WR(1)”.

22 **119 After paragraph 23WT(1)(c)**

23 Insert:

- 24 (ca) if the forensic procedure has been requested by a foreign
25 country—the constable has been authorised by the
26 Attorney-General under the *Mutual Assistance in Criminal*
27 *Matters Act 1987* to make the application for an order under
28 this Part; and

29 **120 Subsection 23WT(2)**

30 Repeal the subsection, substitute:

- 31 (2) In determining whether the carrying out of the forensic procedure
32 is justified in all the circumstances, the magistrate must:
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Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Carrying out forensic procedures at the request of a foreign country etc. **Part 4**

- 1 (a) if the forensic procedure has been requested by a foreign
2 country (as contemplated by the *Mutual Assistance in*
3 *Criminal Matters Act 1987*)—balance the public interest in
4 Australia providing and receiving international assistance in
5 criminal matters against the public interest in upholding the
6 physical integrity of the suspect; and
7 (b) in any other case—balance the public interest in obtaining
8 evidence tending to confirm or disprove that the suspect
9 committed the offence concerned against the public interest
10 in upholding the physical integrity of the suspect.

11 **121 Paragraph 23WU(2)(b)**

12 After “(c)”, insert “, (ca)”.

13 **122 Paragraph 23XA(1)(a)**

14 Omit “section 23WR”, substitute “subsection 23WR(1)”.

15 **123 After paragraph 23XWR(2)(d)**

16 Insert:

- 17 (da) if the volunteer undergoes a forensic procedure because of a
18 request by a foreign law enforcement agency—the following:
19 (i) the name of the foreign law enforcement agency that has
20 made the request;
21 (ii) that forensic evidence resulting from the forensic
22 procedure will be provided to the foreign law
23 enforcement agency;
24 (iii) that the forensic evidence may be used in proceedings in
25 the foreign country;
26 (iv) that the retention of the forensic evidence will be
27 governed by the laws of the foreign country;
28 (v) that the retention of the forensic evidence will be subject
29 to undertakings given by the foreign law enforcement
30 agency;
31 (vi) the content of those undertakings;

32 **124 At the end of subsection 23XWU(1)**

33 Add:

- 34 ; or (d) in the case of a forensic procedure that has been requested by
35 a foreign country—a constable has been authorised by the
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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 4 Carrying out forensic procedures at the request of a foreign country etc.

1 Attorney-General under the *Mutual Assistance in Criminal*
2 *Matters Act 1987* to make the application for an order under
3 this Part.

4 **125 After subsection 23XWU(1)**

5 Insert:

6 (1A) However, a magistrate is not authorised to order the carrying out of
7 a forensic procedure on a child or incapable person if the procedure
8 has been requested by a foreign law enforcement agency.

9 **126 Subsection 23XWV(2)**

10 Omit “A magistrate”, substitute “Subject to subsection (2A), a
11 magistrate”.

12 **127 After subsection 23XWV(2)**

13 Insert:

14 (2A) Despite subsection (2), a magistrate may not make an order if:
15 (a) the volunteer was asked to undergo a forensic procedure
16 because of a request by a foreign law enforcement agency;
17 and
18 (b) the forensic evidence has already been provided to the
19 foreign law enforcement agency.

20 **128 At the end of Division 7 of Part ID**

21 Add:

22 **Subdivision C—Application**

23 **23YBA Division does not apply to a proceeding in a foreign country**

24 To avoid doubt, this Division does not apply in relation to a
25 proceeding in a foreign country in which forensic evidence is
26 provided in response to a request by:

- 27 (a) a foreign country (as contemplated by the *Mutual Assistance*
28 *in Criminal Matters Act 1987*); or
29 (b) a foreign law enforcement agency.

30 **129 Before section 23YC**

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 4 Carrying out forensic procedures at the request of a foreign country etc.

1 **Division 9A—Carrying out forensic procedures at the**
2 **request of a foreign jurisdiction**

3 **Subdivision A—Requests by foreign countries**

4 **23YQA Application of Subdivision**

5 This Subdivision applies if:

- 6 (a) a request is made by a foreign country that a forensic
7 procedure be carried out on a suspect in relation to a foreign
8 serious offence; and
9 (b) the Attorney-General authorises, under the *Mutual Assistance*
10 *in Criminal Matters Act 1987*, a constable to apply to a
11 magistrate for the carrying out of the forensic procedure on
12 the suspect.

13 Note: Under the *Mutual Assistance in Criminal Matters Act 1987*, the
14 Attorney-General may only authorise a constable who is an authorised
15 applicant.

16 **23YQB Providing forensic evidence to the Department**

- 17 (1) If a forensic procedure is carried out on a suspect in relation to a
18 foreign serious offence, the forensic evidence resulting from the
19 procedure is to be provided to the Department.
20 (2) If an audio recording, a copy of it, or a copy of a transcript of a
21 tape recording is made available to a suspect (as required by
22 subsection 23YF(1)), a copy of the audio recording or the
23 transcript, or both, as the case may be, may also be provided to the
24 Department.
25 (3) If:
26 (a) a video recording or a copy of it is made available to a
27 suspect (as required by subsection 23YF(1)); or
28 (b) both an audio recording and a video recording are made and
29 the suspect is given an opportunity to view the video
30 recording (as required by subsection 23YF(1));
31 a copy of the video recording may also be provided to the
32 Department.

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Carrying out forensic procedures at the request of a foreign country etc. **Part 4**

1 **Subdivision B—Requests by a foreign law enforcement agency**

2 **23YQC Application of Subdivision**

3 This Subdivision applies if a request is made by a foreign law
4 enforcement agency that a forensic procedure be carried out on:

- 5 (a) a suspect in relation to a foreign serious offence who has
6 given informed consent to the forensic procedure; or
7 (b) a volunteer.

8 **23YQD Providing forensic material etc. to a foreign law** 9 **enforcement agency**

- 10 (1) The Commissioner may provide forensic evidence to a foreign law
11 enforcement agency if the Commissioner is satisfied that:
- 12 (a) the foreign law enforcement agency has given appropriate
13 undertakings in relation to the retention, use and destruction
14 of the forensic evidence; and
15 (b) it is appropriate, in all the circumstances of the case, to do so.
- 16 (2) If forensic evidence is to be provided to the foreign law
17 enforcement agency, a copy of the tape recording or the written
18 record mentioned in section 23WL may also be provided to the
19 foreign law enforcement agency.
- 20 (3) If an audio recording, a copy of it, or a copy of a transcript of a
21 tape recording is made available to a suspect or volunteer (as
22 required by subsection 23YF(1)), a copy of the audio recording or
23 the transcript, or both, as the case may be, may also be provided to
24 the foreign law enforcement agency.
- 25 (4) If:
- 26 (a) a video recording or a copy of it is made available to a
27 suspect or volunteer (as required by subsection 23YF(1)); or
28 (b) both an audio recording and a video recording are made and
29 the suspect or volunteer is given an opportunity to view the
30 video recording (as required by subsection 23YF(1));
31 a copy of the video recording may also be provided to the foreign
32 law enforcement agency.

33 **133 Section 23YQA**

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 4 Carrying out forensic procedures at the request of a foreign country etc.

1 Renumber as section 23YQE.

2 **134 After subsection 23YUB(1)**

3 Insert:

4 (1A) The orders mentioned in subsection (1) do not include an order for
5 the carrying out of a forensic procedure on a suspect that is made
6 under this Part in response to a request by a foreign country (as
7 contemplated by the *Mutual Assistance in Criminal Matters Act*
8 1987).

9 ***Mutual Assistance in Criminal Matters Act 1987***

10 **135 Subsection 3(1)**

11 Insert:

12 *child* has the same meaning as in Part ID of the *Crimes Act 1914*.

13 **136 Subsection 3(1)**

14 Insert:

15 *forensic evidence* has the same meaning as in Part ID of the
16 *Crimes Act 1914*.

17 **137 Subsection 3(1)**

18 Insert:

19 *forensic material* has the same meaning as in Part ID of the *Crimes*
20 *Act 1914*.

21 **138 Subsection 3(1)**

22 Insert:

23 *forensic procedure* has the same meaning as in Part ID of the
24 *Crimes Act 1914*.

25 **139 Subsection 3(1)**

26 Insert:

27 *incapable person* has the same meaning as in Part ID of the *Crimes*
28 *Act 1914*.

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Carrying out forensic procedures at the request of a foreign country etc. **Part 4**

1 **140 Subsection 3(1)**

2 Insert:

3 *parent* has the same meaning as in the *Crimes Act 1914*.

4 **141 After Part IV**

5 Insert:

6 **Part IVA—Forensic procedures**

7 **Division 1—Requests by Australia**

8 **28A Requests by Australia for forensic procedures**

9 (1) If:

10 (a) a proceeding relating to a criminal matter has commenced in
11 Australia; and

12 (b) a person in a foreign country is capable of giving assistance
13 that may result in evidence relevant to the proceeding;

14 Australia may request the foreign country to authorise the carrying
15 out of a forensic procedure on the person for the purpose of giving
16 assistance in connection with the proceeding.

17 (2) If:

18 (a) an investigation relating to a criminal matter has commenced
19 in Australia; and

20 (b) a person in a foreign country is capable of giving assistance
21 in relation to the investigation;

22 Australia may request the foreign country to authorise the carrying
23 out of a forensic procedure on the person for the purpose of giving
24 assistance in relation to the investigation.

25 (3) To avoid doubt, Australia may request that a forensic procedure be
26 carried out in the foreign country even if, under Australian law, the
27 forensic procedure could not have been carried out by using
28 processes similar to those used in the foreign country.

29 (4) Subsection (5) applies if:

30 (a) Australia makes a request under this section; and

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Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 4 Carrying out forensic procedures at the request of a foreign country etc.

1 (b) the foreign country obtains any thing relevant to the
2 proceeding or investigation by means of a process authorised
3 by the law of that country other than the carrying out (as
4 requested by Australia) of a forensic procedure on a
5 particular person.

6 (5) The thing obtained by the foreign country:
7 (a) is not inadmissible in evidence in the proceeding; or
8 (b) is not precluded from being used for the purposes of the
9 investigation;
10 on the ground alone that it was obtained otherwise than in
11 accordance with the request.

12 **Division 2—Requests by foreign countries**

13 **28B Requests by foreign countries for forensic procedures**

14 (1) If a foreign country requests that a forensic procedure be carried
15 out on a person, the Attorney-General may authorise a constable to
16 apply, in accordance with Part ID of the *Crimes Act 1914*, to a
17 magistrate for an order for the carrying out of the forensic
18 procedure on the person, so long as, if the person is a suspect
19 within the meaning of subsection 23WA(1) of that Act, the
20 constable is an authorised applicant within the meaning of that
21 subsection.

22 (2) The Attorney-General must not authorise a constable under
23 subsection (1) unless the Attorney-General is satisfied of the
24 following matters:
25 (a) a request has been made by a foreign country that a forensic
26 procedure be carried out on a person;
27 (b) unless the person is a child or an incapable person—the
28 foreign country has:
29 (i) started investigating whether the person has committed
30 a foreign serious offence against its laws; or
31 (ii) started proceedings against the person for a foreign
32 serious offence;
33 (c) the person is, or is believed to be, in Australia;
34 (d) the foreign country has given:

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Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Carrying out forensic procedures at the request of a foreign country etc. **Part 4**

- 1 (i) appropriate undertakings in relation to the retention, use
2 and destruction of forensic material, or of information
3 obtained from analysis of that forensic material; and
4 (ii) any other undertakings that the Attorney-General
5 considers necessary;
6 (e) unless the person is a child or an incapable person—the
7 person has been given an opportunity to consent to the
8 forensic procedure and has not consented to it;
9 (f) if the person is a child or an incapable person, the matters
10 specified in subsection (3).
- 11 (3) If the person is a child or an incapable person, the
12 Attorney-General must:
13 (a) be satisfied that either of the following applies:
14 (i) the consent of the parent or guardian cannot reasonably
15 be obtained or has been withdrawn;
16 (ii) the parent or guardian is a suspect in relation to the
17 foreign serious offence; and
18 (b) believe that, having regard to the best interests of the child or
19 incapable person, it is appropriate to make the authorisation.

20 **28C Providing forensic evidence to foreign countries**

- 21 (1) If:
22 (a) a foreign country requests that a forensic procedure be
23 carried out on a person; and
24 (b) the Attorney-General authorises a constable to make an
25 application of the kind mentioned in subsection 28B(1); and
26 (c) a forensic procedure is carried out on the person;
27 the Attorney-General may direct the constable as to how the
28 forensic evidence is to be provided to the foreign country.
- 29 (2) A direction by the Attorney-General under subsection (1) is not a
30 legislative instrument.

31 **142 Application**

32 The amendments made by this Part apply in relation to a request by a
33 foreign country that is under consideration on or after the day on which
34 this Part commences, whether the request was made before, on or after
35 that day.
36

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters
Part 5 Proceeds of crime

1 **Part 5—Proceeds of crime**

2 ***Mutual Assistance in Criminal Matters Act 1987***

3 **143 Subsection 3(1)**

4 Insert:

5 *cartel offence* means an offence by a corporation involving cartel
6 conduct.

7 **144 Subsection 34(1)**

8 Omit “in a specified court”.

9 **145 Subsection 34(2)**

10 Omit “that is specified in regulations made for the purposes of this
11 subsection”.

12 **146 Subsection 34(2)**

13 Omit “in a specified court”.

14 **147 Paragraphs 34(3)(a) and (b)**

15 Repeal the paragraphs, substitute:

16 (a) made in respect of a foreign serious offence for which a
17 person has been convicted or charged; or

18 (b) made in respect of the alleged commission of a foreign
19 serious offence (whether or not the identity of the person who
20 committed the offence is known);

21 **148 Subsection 34(3)**

22 Omit “in a specified court”.

23 **149 Subsection 34(4)**

24 Repeal the subsection.

25 **150 Before subsection 34A(1)**

26 Insert:

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Proceeds of crime **Part 5**

1 (1A) If the DPP wishes to apply to a court for registration of a foreign
2 order in accordance with an authorisation under this Subdivision,
3 the DPP's application must be to a court with proceeds jurisdiction.

4 **151 Subsection 34A(1)**

5 After "a court", insert "with proceeds jurisdiction".

6 **152 Subsection 34F(1)**

7 Repeal the subsection, substitute:

8 (1) If a copy of a sealed or authenticated copy of:
9 (a) a foreign order; or
10 (b) an amendment of a foreign order;
11 is sent by fax, email or other electronic means, the copy is to be
12 regarded, for the purposes of this Act, as the same as the sealed or
13 authenticated copy.

14 Note: The heading to section 34F is replaced by the heading "**Copies of foreign orders sent**
15 **by fax, email or other electronic means**".

16 **153 Subsection 34F(2)**

17 Omit "faxed".

18 **154 Subsection 34F(2)**

19 Omit "21", substitute "45".

20 **155 Subsection 34J(1)**

21 Omit "(1)".

22 **156 Subparagraph 34J(1)(a)(ii)**

23 Repeal the subparagraph, substitute:

24 (ii) foreign confiscation proceedings have commenced, or
25 there are reasonable grounds to suspect that such
26 proceedings are about to commence, in a foreign
27 country; and

28 **157 Subsection 34J(1)**

29 Omit "to a specified court".

30 **158 Subsection 34J(2)**

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 5 Proceeds of crime

1 Repeal the subsection.

2 **159 Paragraph 34K(3)(b)**

3 Repeal the paragraph.

4 **160 Paragraph 34K(3)(c)**

5 Omit “subparagraph 34J(1)(a)(i)”, substitute “subparagraph 34J(a)(i)”.

6 **161 Paragraph 34K(3)(d)**

7 Omit “subparagraph 34J(1)(a)(ii)”, substitute “subparagraph 34J(a)(ii)”.

8 **162 Subparagraph 34K(3)(d)(i)**

9 Omit “such proceedings”, substitute “foreign confiscation proceedings”.

10 **163 Section 34N**

11 Repeal the section.

12 **164 Subsection 34P(1)**

13 Repeal the subsection, substitute:

14 (1) If an authorised officer has been authorised under section 34ZG of
15 this Act in relation to a request by a foreign country, the authorised
16 officer may apply for a production order under the Proceeds of
17 Crime Act in relation to the foreign serious offence that is the
18 subject of the request.

19 **165 Paragraph 34P(3)(b)**

20 Repeal the paragraph.

21 **166 Subsection 34Q(2)**

22 Omit “the obtaining of the production order”, substitute “assistance in
23 respect of the foreign serious offence”.

24 **167 Subsection 34R(1)**

25 Omit “The Attorney-General or a senior Departmental officer”,
26 substitute “An officer mentioned in paragraph 213(3)(a), (b) or (c) of
27 the Proceeds of Crime Act”.

28 **168 Subsection 34R(2)**

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Proceeds of crime **Part 5**

1 Omit “Attorney-General or the senior Departmental”.

2 **169 Subsection 34R(3)**

3 Repeal the subsection.

4 **170 Section 34X**

5 Repeal the section.

6 **171 Subsection 34Y(1)**

7 Repeal the subsection, substitute:

8 (1) If an authorised officer has been authorised under section 34ZG of
9 this Act in relation to a request by a foreign country, the authorised
10 officer may apply for a monitoring order under the Proceeds of
11 Crime Act in relation to the foreign serious offence that is the
12 subject of the request, so long as the foreign serious offence is:

- 13 (a) an offence punishable by imprisonment for 3 or more years
14 that:
- 15 (i) involves unlawful conduct relating to a narcotic
16 substance; or
 - 17 (ii) is a money laundering offence; or
 - 18 (iii) involves unlawful conduct by a person that causes, or is
19 intended to cause, a benefit to the value of at least
20 \$10,000 for that person or another person; or
 - 21 (iv) involves unlawful conduct by a person that causes, or is
22 intended to cause, a loss to the foreign country in
23 question or another person of at least \$10,000; or
- 24 (b) an offence involving the smuggling of migrants; or
25 (c) an offence involving failure to report financial transactions;
26 or
27 (d) a cartel offence; or
28 (e) an offence involving terrorism; or
29 (f) an ancillary offence in respect of an offence referred to in
30 paragraph (a), (b), (c), (d) or (e).

31 **172 Paragraph 34Y(3)(a)**

32 Omit “paragraph 34X(1)(a)”, substitute “paragraph (1)(a), (b), (c), (d),
33 (e) or (f)”.

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters
Part 5 Proceeds of crime

1 **173 Section 34ZA**

2 Repeal the section.

3 **174 Subsection 34ZB(1)**

4 Repeal the subsection, substitute:

5 (1) If an authorised officer has been authorised under section 34ZG of
6 this Act in relation to a request by a foreign country, the authorised
7 officer may apply for a search warrant under the Proceeds of Crime
8 Act in relation to the foreign serious offence that is the subject of
9 the request.

10 **175 Paragraph 34ZB(3)(b)**

11 Repeal the paragraph.

12 **176 At the end of Division 2 of Part VI**

13 Add:

14 **Subdivision G—Authorisation of authorised officers**

15 **34ZG Attorney-General may authorise authorised officers**

16 If:

- 17 (a) a proceeding or investigation relating to a criminal matter
18 involving a foreign serious offence has commenced in a
19 foreign country; and
20 (b) the foreign country requests assistance in relation to the
21 proceeding or investigation; and
22 (c) such assistance may be obtained under the Proceeds of Crime
23 Act in the form of a production order, search warrant or
24 monitoring order;

25 then, the Attorney-General may authorise an authorised officer of
26 an enforcement agency to make any applications under that Act
27 that are necessary to respond to the request by the foreign country.

28 **177 Application**

29 (1) The amendments made by items 144 to 162 (other than item 154) and
30 items 167 to 169 apply in relation to a request by a foreign country that
31 is under consideration on or after the day on which this Act receives the
32 Royal Assent, whether the request was made before or after that day.

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Proceeds of crime **Part 5**

- 1 (2) The amendment made by item 154 applies in relation to the registration
2 of an order that has effect under Subdivision A of Division 2 of Part VI
3 of the *Mutual Assistance in Criminal Matters Act 1987* on or after the
4 day on which this Act receives the Royal Assent.
- 5 (3) The amendments made by items 143 and 163 to 176 (other than
6 items 167 to 169) apply in respect of an authorisation given on or after
7 the day on which this Act receives the Royal Assent.
8

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 6 Other amendments

1 **Part 6—Other amendments**

2 ***Mutual Assistance in Criminal Matters Act 1987***

3 **178 Subsection 3(1) (definition of *serious offence*)**

4 Repeal the definition, substitute:

5 *serious offence* means an offence the maximum penalty for which
6 is:

- 7 (a) death; or
8 (b) imprisonment for a period exceeding 12 months; or
9 (c) a fine exceeding 300 penalty units.

10 Note 1: See section 4AA of the *Crimes Act 1914* for the current value of a
11 penalty unit.

12 Note 2: Paragraph (c)—see also subsection (1A).

13 **179 After subsection 3(1)**

14 Insert:

15 (1A) In determining, for the purpose of a request by a foreign country,
16 the Australian dollar equivalent of a fine (whether expressed as an
17 amount or by way of penalty units), a fine or pecuniary penalty
18 (however described) that may be imposed on a person for an
19 offence to which the request relates is to be translated to Australian
20 currency:

- 21 (a) in relation to a country for which the Australian Tax Office
22 publishes exchange rates—at the daily exchange rate listed
23 on the Australian Tax Office website that applies on the day
24 on which the request is received; and
25 (b) in relation to any other country—at the exchange rate that
26 applies at the time when the request is received.

27 **180 Paragraphs 5(a) and (b)**

28 Repeal the paragraphs, substitute:

- 29 (a) to regulate the provision by Australia of international
30 assistance in criminal matters when a request is made by a
31 foreign country in respect of which powers may be exercised
32 under this Act (whether or not in conjunction with other
33 Australian laws); and
-

EXPOSURE DRAFT

Amendments relating to providing mutual assistance in criminal matters **Schedule 3**
Other amendments **Part 6**

1 **181 Section 6**

2 Repeal the section, substitute:

3 **6 Act not to limit other provision etc. of assistance**

4 This Act does not prevent the provision or obtaining of
5 international assistance in criminal matters otherwise than under
6 this Act.

7 **182 Paragraph 13(2)(a)**

8 After “oath”, insert “or affirmation”.

9 **183 Subsection 15(1)**

10 Before “Where”, omit “(1)”.

11 **184 Subsection 15(1)**

12 Omit all the words after “Magistrate”, substitute “for one or more
13 search warrants in respect of the evidential material”.

14 **185 Paragraph 16(1)(b)**

15 Omit “the Attorney-General is of the opinion that”.

16 **186 Paragraph 16(2)(b)**

17 Omit “the Attorney-General is of the opinion that”.

18 **187 Paragraph 35B(c)**

19 Omit “by the oath of”, substitute “on oath or affirmation by”.

20 **188 Subsection 38B(1)**

21 Omit “subsection 15(1)”, substitute “section 15”.

22 **189 Subsections 38B(2) and (3)**

23 After “oath”, insert “or affirmation”.

24 **190 Subsection 39A(1)**

25 Omit “(*original proceeding*)”.

26 **191 Paragraphs 39A(2)(a) and (3)(c)**

27 Omit “original” (wherever occurring).

EXPOSURE DRAFT

Schedule 3 Amendments relating to providing mutual assistance in criminal matters

Part 6 Other amendments

1 **192 Subsection 43(2)**

2 Repeal the subsection, substitute:

3 (2) A document is duly authenticated for the purposes of
4 subsection (1) if it purports to be signed or certified by a Judge,
5 Magistrate or officer in or of a foreign country.

6 **193 Paragraph 44(c)**

7 Omit “oath, the administering of oaths”, substitute “oath or affirmation,
8 the administering of oaths or affirmations”.

9 **194 Application**

10 (1) The amendment made by item 184 of this Part applies in relation to an
11 authorisation given to a police officer by the Attorney-General under
12 section 15 of the *Mutual Assistance in Criminal Matters Act 1987* on or
13 after the day on which this Act receives the Royal Assent.

14 (2) The amendment made by item 192 of this Part applies in relation to a
15 proceeding of a kind mentioned in subsection 43(1) of the *Mutual*
16 *Assistance in Criminal Matters Act 1987* that begins on or after the day
17 on which this Act receives the Royal Assent.