

ARTHUR ROBINSON & HEDDERWICKS  
LIBRARY

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MUTUAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION  
AMENDMENT BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Daryl Williams AM QC MP)



MUTUAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION  
AMENDMENT BILL 1996

OUTLINE

The purpose of this Bill is to amend the Mutual Assistance in Criminal Matters Act 1987 in order to improve Australia's ability to expeditiously request/provide assistance from/to other countries in criminal investigations and prosecutions in Australia and in other countries.

The effect of the Bill will be to:

- clarify the areas in which mutual assistance in criminal matters may only be sought by the Attorney-General and the areas in which assistance may be sought using other channels
- enable the Attorney-General to grant or request assistance without the Act having to be applied by regulation to a particular country
- give the Attorney-General a discretion to refuse assistance where the request relates to the prosecution or punishment of a person for an offence in respect of which the death penalty could be imposed or carried out
- enable the Attorney-General to refuse assistance where he considers it appropriate in the circumstances of a particular request
- by the insertion of new provisions :
  - provide, subject to safeguards, that a court may require the Attorney-General to make application for mutual assistance to a foreign country on behalf of a defendant,
  - limit the use in Australia of material received from a foreign country to the purposes specified in the request, and
  - enable the provision and requesting of evidence via video link
- make certain technical amendments to the Act in order to improve Australia's ability to request and provide mutual assistance.

## FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. Indeed it is possible the Bill could lead to expenditure savings.

These possible savings are unable to be quantified.

However, the cost implications will be examined as part of the evaluation strategy, which is to review the legislation after it has been in place for a period of 3 years.

## NOTES ON CLAUSES

### **Clause 1: Short Title**

1. This clause provides for the short title of the Act.

### **Clause 2: Commencement**

2. Sections 1, 2 and 3 of the Act commence on the day the Act receives Royal Assent. The Schedules commence on a day or days fixed by Proclamation. Subclause 3 provides that if a provision does not commence within 6 months after the day on which the Act receives Royal Assent it commences on the first day after the end of the 6 month period.

### **Clause 3: Schedules**

3. This clause provides that the Acts specified in the Schedules are amended in the manner set out in those Schedules.

**Schedule 1 - Amendment of the Mutual Assistance in Criminal Matters Act 1987**

**Part 1 - Object and application of the Act**

Item 1: Section 5 - Objects of the Act.

4. This item repeals section 5 and substitutes a replacement section which provides that the objects of the Act are as set out in subclauses (a), (b) and (c).

5. Subclause (a) provides that the objects of the Act are to regulate how Australia is to provide international assistance in criminal matters when a request made by a foreign country for the purpose of a proceeding or investigation in relation to a criminal matter in the foreign country would require Australia to exercise compulsory powers in order to execute the request. The subclause lists 5 types of assistance the provision of which require the exercise of compulsory powers. The types of assistance listed are;

- the taking of evidence and production of documents or other articles;
- the issue of a search warrant and the seizure of a thing;
- the forfeiture or confiscation of property in respect of a 'foreign serious offence' ( defined in the Act to mean a serious offence against the law of the foreign country);
- the recovery of pecuniary penalties in respect of a foreign serious offence;
- the restraining of dealings in property that may be forfeited or confiscated or that may be needed to satisfy pecuniary penalties imposed in respect of a foreign serious offence.

6. Subclause (b) provides that the objects of the Act are to facilitate the provision of assistance in relation to the making of arrangements for a person to give evidence in a proceeding or to give assistance in relation to an investigation in a foreign country. This is a type of assistance which does not require the exercise of compulsory powers in Australia.

7. Subclause (c) provides that the objects of the Act are to facilitate the obtaining by Australia of international assistance in criminal matters.

Item 2: Section 6 (Act not to limit other provision etc. of assistance).

8. This item repeals existing section 6 and inserts a replacement section. The replacement section provides that the Act does not prevent the provision or obtaining of assistance other than of a kind that may be provided or obtained under this Act. This clause is intended to clarify that assistance that may be requested or provided through other channels may continue to be requested or provided in that manner as long as it is not assistance of a kind that may only be requested or provided under the Act. The Act provides that only the Attorney-General may request or provide assistance that requires the exercise of coercive powers (for example the issue of a summons requiring a person to attend court to give evidence). Where the assistance requested or provided does not require the exercise of coercive powers and other channels exist for the provision or obtaining of the assistance then those channels may be used, for example, channels such as Interpol, World Customs Organisation, Australian Federal Police Liaison Officer network.

Item 3: Section 7 (Application of the Act).

9. This item repeals existing section 7 and inserts a replacement section 7.

10. Subclause 7(1) provides that, subject to the terms of the section, the Act applies to all foreign countries. The subclause will enable the Attorney-General to grant or request assistance without the Act having to be applied by regulation to a particular country. This enables assistance to be granted or requested much more expeditiously than was the case under the previous section which required the Act to have been applied to a country by regulation before assistance could be granted (except for 'take evidence' assistance) or requested.

11. Subclause 7(2) provides that regulations may apply the Act to a foreign country subject to the terms of a bilateral and a multilateral mutual assistance treaty (where the country concerned is also a party to a multilateral treaty containing mutual assistance in criminal matters provisions) referred to in the regulations and subclause 7(3) provides that the regulations will be subject to such limitations, conditions, exceptions, or qualifications as are necessary to give effect to the bilateral treaty or to the relevant part of the multilateral treaty.

12. Subclause 7(3) provides that regulations under subclause 7(2) may apply the Act to a foreign country to give effect to a bilateral or multilateral mutual

assistance treaty subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to the treaty.

Item 4: Subsection 14(1).

13. This item omits the words "to which this Act applies" from subsection 14(1). This is consistent with the amendment in item 3 which inserts a replacement section 7 which provides, in subsection 7(1), that the Act applies to all foreign countries. As a result requests by Australia to a foreign country for search and seizure can be made to any foreign country subject to the terms of the Act.

Item 5: Subsection 16(1)(b) and 16(2)(b).

14. These items omit the words "to which this Act applies" from subsections 16(1)(b) and 16(2)(b). This is consistent with the amendment in item 3 which inserts a replacement section 7 which provides, in subsection 7(1), that the Act applies to all foreign countries. As a result requests by Australia for removal of certain persons to Australia to give evidence [subsection 16(1)(b)] or to assist an investigation [subsection 16(2)(b)] can be made to any foreign country subject to the terms of the Act.

Item 6: Subsection 29(1)

15. Section 29 of the Act deals with transit of persons from a foreign country through Australia to another foreign country in order that the persons may give evidence (or assist an investigation) in the latter foreign country.

16. Item 6 deletes paragraphs 29(1)(a) and (b) and replaces them with paragraphs which omit the requirement in existing paragraph 29(1)(b) that at least one of the foreign countries is a foreign country to which the Act applies. This amendment is consistent with new subclause 7(1) and is intended to enable transit of persons (to give evidence or assist investigations) through Australia irrespective of whether the Act has been applied by regulation to either of the 2 foreign countries concerned.



Items 7 and 8: sections 32 and 33.

17. These items omit the words "to which this Act applies" from sections 32 and 33. The omission of these words from the 2 sections is consequential upon the new subclause 7(1) and enables the Attorney-General to make a request to a foreign country under section 32 (requests for enforcement of orders) or 33 (requests for issue of orders in foreign countries) irrespective of whether the Act has been applied by regulation to the particular country concerned.

Item 9: Subsection 37A(1)

18. Subsection 37A(1) provides that the Attorney-General may direct the Director of the Australian Transaction Reports Analysis Centre (AUSTRAC) to give the Attorney-General access to 'FTR' information (ie information obtained by AUSTRAC under the Financial Transactions Reports Act 1988) to enable the Attorney-General to reply to a request from a foreign country.

19. This item omits from subsection 37A(1) the words "being a country to which this Act applies because of regulations made under subsection 7(2A)". This amendment is consequential upon the new subclause 7(1) and enables the Attorney-General to give such a direction, where the Attorney-General has been requested by a foreign country to provide it with FTR information, irrespective of whether the Act has been applied by regulation to the particular country concerned. Item 3 repealed the whole of the previous section 7, including subsection 7(2A) which required the making of regulations applying the Act to a foreign country in respect of obtaining access (for the purpose of international assistance in criminal matters) to FTR information. There is no equivalent of subsection 7(2A) in the replacement section 7. As a matter of practice requests for provision of FTR information will only be granted where there is a specific agreement in place between Australia and the requesting country. However it will no longer be necessary for there to be regulations under subsection 7(2A) to give effect to such an agreement.

## **Part 2 - Requests for assistance**

Item 10: Subsection 3(1): Definition of 'video link'.

20. This item inserts a definition of 'video link'; a video and sound system that enables persons in a place in one country to see, hear and talk to persons in a place in another country. The insertion of this definition is consequential upon insertion

of provisions in sections 12 and 13 of the Act whereby 'take evidence' assistance may be requested and provided pursuant to a video link.

**Item 11: Section 10 (Request by Australia).**

21. This item repeals existing section 10 and inserts a replacement section 10.

22. Subclause (1) provides that requests for international assistance in a criminal matter under the Act may only be made by the Attorney-General. This power may be delegated by the Attorney-General pursuant to the amendment to subsection 40(1) by item 96.

23. Subclause (2) provides that the Attorney-General may also make requests for assistance of a type that can be requested outside of the Act. This subclause is intended to complement the replacement section 6 which enables requests by authorities or agencies other than the Attorney-General to be made outside of the Act using other channels (for example, Interpol) if the particular requests do not require the exercise of compulsory powers in the requested country; the subclause is intended to ensure that the Attorney-General or his or her delegate may also make requests outside of the Act.

**Item 12: Subsection 11(2)**

24. This item repeals subsection 11(2) and inserts a replacement section which provides that a request must be in writing and that certain information must be included in a request, or accompany a request, by a foreign country.

25. Subclauses (a), (b) and (c) set out the minimum information which must accompany a request; the name of the authority concerned with the criminal matter in the foreign country, a description of the nature of the matter and a summary of the facts and laws and a description of the purpose of the request and nature of assistance sought. Subclause (d) provides for any information which may assist in carrying out the request. The clause concludes by providing that failure to comply with the subsection is not a ground to refuse assistance.

**Item 13: Section 11**

26. This item inserts a new subclause 11(4) which provides that if a foreign country (including a court of a foreign country) makes a request to a court in Australia then the Australian court must refer the request to the Attorney-General and the request is to be taken to be a request made to the Attorney-General.

27. This amendment ensures that all incoming requests for mutual assistance which require the exercise of coercive powers in Australia (including requests issued by a foreign court and sent direct to an Australian court) are executed in a consistent manner. Where a foreign court issued a 'letter rogatory' direct to an Australian court requesting evidence to be taken in Australia for the purpose of a criminal proceeding in the foreign country the Attorney-General would be able, subject to other relevant provisions of the Act, to issue an authorisation to a magistrate under section 13 of the Act for the evidence to be taken by the magistrate.

Item 14: Section 12 (Requests by Australia).

28. This item repeals existing section 12 and inserts a replacement section 12.

29. The new subclause 12(1) provides that Australia may request the appropriate authority of a foreign country to arrange for evidence to be taken or documents or other articles to be produced in accordance with the law of the requested country and sent to Australia for the purposes of a proceeding or investigation into a criminal matter in Australia.

30. Subclause 12(2) is intended to apply where the requested country requires a person to give evidence or produce documents in a situation where the person might not be obliged to give the evidence or produce the documents in Australia (for example where a privilege available under Australian law against giving the evidence is not available in the foreign country). The subclause confirms that such evidence or documents provided by the country in accordance with its law would be regarded by Australia as material provided in response to the request but the material's admissibility into evidence in Australia would be subject to usual rules of evidence applicable under Australian law.

31. Subclause 12(3) provides that a request under section 12 can include a request that the person giving the evidence or producing the documents be given the opportunity in the requested country to be examined or cross-examined by video-link from Australia. The subclause provides the categories of persons who may conduct such examination or cross-examination; any party to the proceeding or that party's legal representative [12(3)(a)], or any person being investigated in Australia or that person's legal representative [12(3)(b)].

Items 15-17: Subclause 13(1).

32. Section 13 provides that the Attorney-General may authorise the taking of evidence and production of documents on behalf of a requesting foreign country for the purpose of proceedings in relation to a criminal matter in that country.

33. These items make minor technical amendments to subsection 13(1) to remove any doubt that the Attorney-General may authorise the taking of evidence for use by the requesting country in relation to criminal proceedings in that country or in a third country. The intention is to ensure that evidence may be taken in Australia for use by the requesting country to support an extradition request that country may propose to make to a third country.

Items 18 to 20 inclusive: subsection 13(3), paragraphs 13(4)(a), 13(4)(c).

34. These items make a series of minor technical amendments all of which are consequential upon the amendments made by items 15 to 17.

Item 21: New Subclause 13(4A)

35. Item 21 inserts a new subclause 13(4A) into section 13. The new subclause 13(4A) provides that, where requested by the foreign country, the magistrate who has been authorised by the Attorney-General to take the evidence or require production of documents or other articles, may permit examination and cross-examination via video link from the requesting foreign country of any person giving evidence or producing a document or other article. The subclause provides 2 categories of persons who may conduct such examination or cross-examination; any person to whom the proceedings in the requesting country relates or that person's legal representative [13(4A)(a)], the legal representative of the relevant authority of the requesting country [13(4A)(b)].

Items 22 to 26 inclusive: Paragraphs 13 (5)(a), subsections 13(7), 13(8) and 13(10).

36. These items also make a series of minor technical amendments all of which are consequential upon the amendments made by items 15 to 17.

Item 27: Subsections 14(2) and (3).

37. Subsection 14(1) provides that section 14 applies to a proceeding or investigation relating to a serious offence against Australian law (serious offence is defined in section 3 of the Act to mean an offence the maximum penalty for which

is death or imprisonment for not less than 12 months) and where there are reasonable grounds to believe a thing relevant to the proceeding or investigation may be located in a foreign country.

Item 27 omits existing subsections 14(2) and 14(3) and substitutes new subsections 14(2) and (3).

38. New subsection 14(2) provides that Australia may request the appropriate authority of the foreign country to obtain a warrant or other instrument under the law of that country which authorises a search for a thing relevant to the Australian proceeding or investigation, seizure of the thing if found as a result of the search and its transmission to Australia.

39. New subsection 14(3) provides that, if the requested material has been obtained by the foreign country by a process under the law of that country other than by issue of a warrant or other instrument as was requested by Australia, the mere fact that material was obtained in a manner different to that which was requested will not make the thing inadmissible in evidence in the proceeding or preclude it from being used in the investigation for which it was sought.

Item 28: Paragraph 15(1)(b).

40. Section 15(1) provides that, where requested by a foreign country, the Attorney-General may authorise a police officer to apply to a magistrate for the issue of a search warrant in relation to evidential material relating to an investigation or proceeding in the foreign country where such material is believed to be located in Australia.

41. This item substitutes the words "evidential material" for the word "thing"; "evidential material" (per the definition inserted into subsection 3(1) of the Act by item 46) means a thing relevant to a proceeding or investigation including a thing in electronic form

Items 29 and 30: Paragraph 15(1)(c) and Subsection 15(1)

42. These items are consequential the amendment made by item 28..

Item 31: Subsection 15(1)

43. Item 31 inserts a note at the end of subsection 15(1). The note states that Divisions 2 and 3 of new Part VIIA make provision in relation to search and seizure warrants requested by foreign countries.

Item 32: Subsections 15(2) to (15).

44. Item 32 repeals subsections 15(2) to (15) inclusive. These subsections are replaced by new Part VIIA which is inserted, by item 59, before Part VIII. The provisions in new Part VIIA bring the Act into line with the search and seizure and powers of arrest provisions in Part 1AA of the Crimes Act 1914. It also inserts a note which provides that the heading to section 15 is altered by adding at the end the words "-action by the Attorney-General".

Item 33: Subsections 16(1) and (2).

45. Item 33 omits the words "the Attorney-General may, in his or her discretion," in both subsections 16(1) and (2) and replaces them with the words "Australia may". This amendment makes the terms of the subsections more consistent with proposed subclause 10(1) [item 11] which provides that requests are 'by Australia'.

Item 34: Subsection 16(3)

46. This item omits the words "Where the Attorney-General makes a request" and replaces them with the words "If a request is made". This amendment makes subsection 16(3) consistent with the amended subsections 16(2) and (3) [item 33] and is also consistent with proposed subclause 10(1) [item 11].

Items 35 and 36: Sections 32 and 33.

47. These items omit the words 'The Attorney-General may, in his or her discretion,' in sections 32 and 33 and replace them with the words 'Australia may'. The amendments make the terms of the sections more consistent with proposed subclause 10(1) which provides that requests are 'by Australia'.

Item 37: Clause 39A Requests by the Attorney-General on behalf of a defendant.

48. This item inserts proposed clauses 39A and 39B after existing section 39.

49. Proposed clause 39A is a significant addition to the Act in that it enables a defendant to a criminal proceeding to apply to a Supreme Court of the State or

Territory in which the proceeding against the defendant is being heard for a certificate that it would be in the interests of justice for the Attorney-General to make a request to the foreign country under the Act on behalf of a defendant. The new clause will enable a defendant to seek evidence [39A(1)(a)], including rebuttal evidence, or the other types of assistance listed in subclauses 39A(1)(b), (c) and (d), from the foreign country.

50. Subclause 39A(1) provides that a defendant may make the application if the defendant thinks it is necessary for the purposes of the proceedings that a request be made

under Part II of the Act for evidence to be taken in a foreign country or a document or other article or thing in a foreign country to be produced, or

under Part III of the Act for a thing located in a foreign country to be seized, or

under Part IV of the Act for arrangements to be made for a person who is in a foreign country to come to Australia to give evidence in the proceedings.

51. Subclause 39A(2) provides that the court must give an opportunity to all parties to the original proceedings and to the Attorney-General to appear before the court and to be heard on the merits of the application before it makes a decision on the application. Some countries have indicated that they regard mutual assistance in criminal matters arrangements as restricted to 'government to government' requests and that they would be unwilling, or unable, to grant assistance to defendants to proceedings. Subsection 39A(2) would enable the Attorney-General, or his or her representative, to put information such as this before the court where it was known, or believed on reasonable grounds, that this would be the likely response of the particular foreign country to a request made on behalf of the defendant.

52. Subclause 39A(3) lists a number of matters to which the court must have regard in deciding whether to issue a certificate. Pursuant to subsection 39A(2) the Attorney-General and all parties to the original proceedings would have the opportunity to address the matters listed in subsection 39A(3). The matters listed are

whether the foreign country would be likely to grant the request;

the extent to which the material would not otherwise be available;

whether it is likely the material would be admitted into evidence;

if the material were admitted into evidence its likely probative value with respect to issues to be determined in the proceedings; and

whether the absence of the material would unfairly prejudice the defendant.

53. Subclause 39A(4) provides that the matters the court may take into account are not limited to the matters listed in subclause 39A(3).

54. Subclause 39A(5) provides that where a court issues a certificate it must send a copy of it to the Attorney-General and that the Attorney-General must make the request to the foreign country in accordance with the certificate unless the Attorney-General considers that there are special circumstances why a request should not be made.

55. In some matters where the Attorney-General decides that it is appropriate for the residual discretion in subclause 39A(5) to be exercised the Attorney-General, or his or her representative, may have already made submissions to the court as to why he or she does not consider it appropriate to make the request. If the court nevertheless decides that it is in the interests of justice in the particular case that the request be made the residual discretion will enable the Attorney-General, in an appropriate case, to re-consider the matter if the Attorney-General was of the opinion that making the request could have adverse results outweighing the consequences in the particular case of not making the request.

Item 37 continued: Clause 39B (Certificate by Attorney-General if foreign country refuses request made under section 39A)

56. This new clause will enable the Attorney-General to give a certificate, which will be prima facie evidence of the matters stated in it, where a request made under subclause 39A(5) has been refused by the foreign country.

### **Part 3 - Refusal of assistance**

Items 38 and 39: paragraphs 8(1)(a), (b), (c), (d), (e), (f) and (g).

57. Item 38 inserts the word "or" at the end of paragraphs 8(1)(a), (b), (c), (d), and (e), item 39 omits the word "or" from the end of paragraph 8(1)(f) and item 40 repeals paragraph 8(1)(g). item 39 is consequential upon item 40.



58. Item 40 is consequential upon item 3. Paragraph 8(1)(g) provided that it was a mandatory ground of refusal of a request for assistance that the Act had not been applied by regulation to the requesting country (except in the case of 'take evidence' requests). Its repeal is consequential upon proposed subclause 7(1) which provides that the Act applies to all foreign countries.

Item 41: Subclauses 8(1A) and 8(1B).

59. This item inserts 2 new subclauses after subsection 8(1) relating to refusal of assistance in relation to offences carrying the death penalty in the requesting country.

60. Subclause 8(1A) provides that the Attorney-General must refuse a request for assistance from a foreign country if it relates to the prosecution or punishment of a person charged with or convicted of an offence in respect of which the death penalty may be imposed; the subsection allows the Attorney-General limited discretion to grant the assistance sought if there are special circumstances in the particular case. Such circumstances could arise if the evidence sought could be exculpatory. Normally assistance would not be granted unless the requesting state gave an assurance that the death penalty, if imposed, would not be carried out. However it would not be appropriate for Australia to insist that an assurance be given in all cases. For example it would not be appropriate for an assurance to be required where the assistance sought by the request is of an exculpatory nature.

61. Item 41 also inserts new subclause 8(1B) which provides that, if the Attorney-General believes provision of the assistance may result in the death penalty being imposed on a person, the Attorney-General may refuse the assistance, after taking into account the interests of international criminal co-operation, if the Attorney-General is of the opinion that in the circumstances of the case assistance should be refused.

62. Subclause 8(1A) will apply where charges carrying the death penalty have been laid in the foreign country (or the person has been convicted of an offence carrying the death penalty); in these circumstances assistance must be refused except in special circumstances. Subclause 8(1B) applies where charges have not yet been laid in the foreign country. In such requests it is intended that there be more discretion available to the Attorney-General to grant assistance. In the exercise of the discretion the Attorney-General may take into account the interests of international criminal co-operation (including the desire to maximise possibilities

of reciprocal assistance by the foreign country to Australia and of the general international interest in cross-jurisdictional assistance in serious criminal matters) and the surrounding circumstances of the case.

Item 42: Paragraphs 8(2)(a), (b), (c) and (d).

63. Item 42 inserts the word “or” at the end of paragraphs 8(2)(a), (b), (c) and (d); the word “or” previously only appeared after penultimate paragraph (e). A new final paragraph [paragraph 8(2)(g)] is added by item 43 and that item also inserts “or” after the new penultimate paragraph 8(2)(f).

Item 43: Paragraph 8(2)(g)

64. Item 43 inserts paragraph 8(2)(g) which gives a residual refusal ground to give the Attorney-General. The Attorney-General will be able to refuse a request where it is appropriate, in all of the circumstances of the case, that assistance should not be granted. For example this paragraph would enable the Attorney-General to refuse assistance where it was considered that the offence, in relation to which the assistance is sought, was trivial. Insertion of this ground balances proposed subclause 7(1) [inserted by item 3] whereby the Act applies to all foreign countries.

#### **Part 4 - Restriction on use of information**

Item 44: Clause 43B Restriction on use of information etc.

65. Item 44 inserts clause 43B in the Act after existing section 43A. Subsection 43B(1) provides that material sent to Australia in response to a request by the Attorney-General under the Act is not to be intentionally used (or disclosed - subclause 43B(5) provides that use of the material includes disclosure of it) for any purpose other than that for which it was requested without the approval of the Attorney-General. The Attorney-General would not normally give approval without having received the consent of the foreign country.

66. Subclause 43B(2) extends the restriction on unauthorised use of the material to inadmissibility in evidence in any proceedings other than those for which it was obtained without the Attorney-General’s approval.

67. Subclause 43B(3) further extends the restriction against unapproved use by providing that any information, document, article or thing which has itself been obtained directly or indirectly from a person as a result of unapproved use of the material received from the foreign country shall also be inadmissible in evidence in

any proceedings other than those for which it was requested (or used for the purposes of any other investigation) without the Attorney-General's approval.

68. These 2 subclauses impose a sanction against unapproved use of material which is intended to negative any evidential value that might otherwise arise out of unapproved use.

69. Subclause 43B(4) creates an offence where a person has contravened subclause 43B(1). Conviction of the offence is punishable by imprisonment not exceeding 2 years.

70. Subclause 43B(5) provides that disclosure of any material is taken to be use of the material. This subsection is intended to put it beyond doubt that unauthorised use of the material includes disclosure of any material.

Item 44 continued: Clause 43C Requests for international assistance not to be disclosed.

71. This item also inserts a new clause which creates an offence for intentional disclosure of the contents of a request for international assistance made by a foreign country to Australia, of the fact that such a request has been made or of the fact that assistance has been granted or refused by a person who has such knowledge as a result of his or her office of employment unless disclosure is necessary in the performance of his or her duties or the Attorney-General has approved such disclosure. The section provides a penalty of 2 years imprisonment for conviction of the offence. The Attorney-General would normally only give his or her approval after obtaining the consent of the requesting foreign country.

72. These 2 clauses are inserted because of the need for Australia to be able to ensure compliance with conditions as to confidentiality that a foreign country may request Australia to observe when it makes a request to Australia or when it provides material to Australia in response to a request made by Australia. Australia's capacity to ensure confidentiality where requested by the foreign country will determine, to a significant practical extent, the degree of reciprocity that Australia can expect to obtain when making similar requests for mutual assistance in criminal matters to other countries.

## **Part 5 - Search, seizure and powers of arrest**

Items 45 - 58 inclusive: Subsection 3(1) - Interpretation

73. These items amend the definition of "premises" in subsection 3(1) and insert various new definitions in section 3 of the Act. The new definitions are consequential upon insertion, by item 59, of new Part VIIA

Item 59: Part VIIA -Search seizure and powers of arrest

74. This item inserts a new Part VIIA in the Act dealing with search, seizure and powers of arrest. This is an extensive new Part which comprises sections 38A to 38ZB inclusive. The insertion of this Part is consistent with amendments to the Crimes Act 1914 by the Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994 which inserted new Part 1AA in the Crimes Act 1914. New Part 1AA spells out details relating to powers of arrest and execution of search warrants.

### *Division 1 - General*

Clause 38A Object of Part.

75. This clause makes it clear that the object of the new Part in the Act is to provide for the issue and execution of search and seizure warrants in Australia on behalf of a foreign country in relation to a criminal matter involving a serious offence in the foreign country. The Part also provides for matters relating to the arrest of a person where this is authorised under the Act or the regulations.

### *Division 2 - Issue of Search Warrants*

Clause 38B Application for search warrant.

76. Subclause 38B(1) provides that clause 38B applies where a police officer has been authorised under subsection 15(1) of the Act to apply for a warrant authorising a search in Australia for evidential material relating to an investigation or proceeding in relation to a criminal matter involving a serious offence in a foreign country.

77. Subclause 38B(2) provides when the police officer may lay an information on oath applying for a warrant to search premises for evidential material relevant to the foreign country investigation or proceeding. An information may be laid when the police officer has reasonable grounds for suspecting that evidential material is,

or will be, on particular premises within the 'applicable period' [this term is defined in subclause 38B(4)]. The information should set out the grounds for the suspicion.

78. Subclause 38B(3) provides when the police officer may lay an information on oath applying for a warrant to search a person for evidential material relevant to the foreign country investigation or proceeding. An information may be laid when the police officer has reasonable grounds for suspecting that evidential material is, or will be, in the possession of the person within the 'applicable period'. The information should set out the grounds for the suspicion.

79. Subclause 38B(4)(a) defines the term 'applicable period' to be 48 hours when the warrant is applied for by telephone, telex, fax or any other electronic means; clause 38H provides when an application for a warrant may be made by electronic means. Subclause 38B(4)(b) defines the term 'applicable period' to be 72 hours when the warrant is applied for other than by electronic means.

#### Clause 38C When search warrants may be issued

80. Subclause 38C(1) provides that a magistrate may issue a warrant to search premises if he or she is satisfied by the information on oath that there are reasonable grounds for suspecting that evidential material is, or will be within the 'applicable period' [this term is defined in subclause 38C(3)], on particular premises.

81. Subclause 38C(2) provides that a magistrate may issue a warrant authorising an a frisk or ordinary search [definitions of these terms are inserted in subsection 3(1) of the Act by items 49 and 51] of a person if he or she is satisfied by the information on oath that there are reasonable grounds for suspecting that the evidential material is, or will be within the 'applicable period' [this term is defined in subclause 38C(3)], in the possession of the person.

82. Subclause 38C(3)(a) defines the term 'applicable period' to be 48 hours when the warrant is applied for by telephone, telex, fax or any other electronic means; clause 38H provides when an application for a warrant may be made by electronic means. Subclause 38B(3)(b) defines the term 'applicable period' to be 72 hours when the warrant is applied for other than by electronic means.

83. Subclause 38C(4) provides that if the police officer applying for the warrant suspects that, in executing the warrant, it will be necessary to use firearms, the

grounds for that suspicion must be stated in the information. This is intended to alert the magistrate to the possibility of violence.

84. Subclause 38C(5) requires members or special members of the Australian Federal Police to disclose to the magistrate at the time of applying for a search warrant the particulars, and outcomes, of all previous applications for a warrant in relation to the same person or premises. It is intended to curtail the opportunity for forum shopping in applying for search warrants in relation to persons or premises.

85. Subclause 38C(6) provides that a Magistrate of New South Wales or the Australian Capital Territory may issue a search warrant in relation to premises or a person in the Jervis Bay Territory.

86. Subclause 38C(7) provides that a Magistrate in a State or internal Territory may issue a warrant for search of premises or of a person in that State or Territory or in an external Territory. The Magistrate may also issue such warrants for execution in another State or internal Territory if he or she is satisfied that it is appropriate to do so. This is to cover situations where warrants need to be simultaneously executed in a number of jurisdictions (for example, it would be undesirable for applications to be made in different jurisdictions if officers with the necessary knowledge of the matter are located in one jurisdiction). The Magistrate may also issue warrants in relation to a person wherever the person is in Australia or in an external Territory if the Magistrate is satisfied it is not possible to predict where the person may be.

#### Clause 38D: Content of warrants

Subclause 38D(1) sets out the matters which must be specified in a warrant.

87. Subclause 38D(2) ensures that the 7 day (or 48 hour) limit on the duration of warrant (referred to in paragraph (e) of subclause (1)) does not prevent the issue of further warrants for the same premises or person.

88. Subclause 38D(3) sets out the additional matters which the Magistrate is to specify in a warrant that relates to premises. Paragraph (a) requires the Magistrate to state that the warrant authorises the seizure of a thing, other than the evidential material for which the warrant was specifically issued, which the executing officer believes on reasonable grounds to be evidential material in the relevant proceeding or investigation or relevant to an indictable offence against an Australian law where seizure is necessary to prevent concealment, loss or destruction or use of the thing in commission of an indictable offence against an Australian law. Paragraph

(b) requires an express statement as to whether the warrant authorises a frisk or ordinary search of persons at, or near, the premises. This is designed to ensure that the Magistrate considers the appropriateness of authorising the search of persons.

89. Subclause 38D(4) sets out the additional matters which the Magistrate is to specify in a warrant that relates to a person. These include the kind of search (ordinary or frisk search) [paragraph (a)] and whether the warrant authorises the seizure of any thing other than the evidential material for which it was specifically issued [paragraph (b) - for example other things found in the possession of the person or in a vehicle recently used by the person - item 52 inserts a definition in subsection 3(1) of the term 'recently used vehicle' to mean a vehicle operated or occupied by the person within 24 hours before the search commenced].

90. Clause 38E The things authorised by a search warrant in relation to premises

91. Subclause 38E(1) sets out the activities authorised by a warrant to search premises.

92. Subclause 38E(2) obliges those executing a warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed.

93. Clause 38F The things authorised by a search warrant in relation to a person

94. Subclause 38F(1) sets out the activities authorised by a warrant to search a person.

95. Subclauses 38F(2) and (3) oblige those executing a warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed, and as to the type of personal search which may be conducted.

Clause 38G: Restrictions on personal searches

96. Clause 38G provides that a search warrant may not authorise either a strip search or a search of a person's body cavities.

Clause 38H: Warrants may be issued by telephone etc.

97. This clause enables applications for the issue of a warrant to be made by telephone, telex, facsimile or other electronic means in an urgent case or where delay could frustrate the execution of the warrant. The clause covers the procedure for such applications and the issuing of warrants in these circumstances.

Clause 38I: Formalities relating to warrants issued by telephone etc.

98. This clause sets out the procedures if a Magistrate issues a warrant under clause 38H. The Magistrate is required to inform the applicant by the appropriate electronic means of the terms of the warrant and the date and time at which it was signed. The applicant must then complete a form of warrant which sets out the substance of those terms and states the name of the Magistrate and the date and time at which the warrant was signed. The applicant must, not later than the day after expiry of the warrant, or the day after the warrant was executed, whichever is the earlier, give or transmit to the Magistrate the form of warrant completed by the applicant and, if the information had not been sworn, the sworn information. The Magistrate must attach to these documents the warrant completed by the Magistrate. The clause also provides that in any court proceedings concerning the exercise of a power under the warrant, if the warrant signed by the Magistrate is not produced, the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

### *Division 3 - Execution of search warrants*

Clause 38J: Availability of assistance and use of force in executing a warrant

99. This clause provides that, in executing a warrant, the executing officer may obtain such assistance and use such force as is necessary and reasonable in the circumstances. It provides that where the person assisting is not a police officer, he or she may only use force in relation to things, and not persons.

Clause 38K: Copy of warrant to be shown to occupier etc.

100. This clause provides that if a warrant in relation to premises or a warrant in relation to a person is being executed, a copy of the warrant must be made available to the occupier (or his or her apparent representative) of the premises (if present) or to the person being searched. The clause covers the different situations and the manner in which this should be done.

Clause 38L: Specific powers available to officers executing warrants

101. This clause provides that officers executing warrants in relation to premises may, for purposes incidental to execution of the warrant and with the consent in writing of the occupier of the premises, photograph, film or videorecord the premises, or things at the premises. The clause also provides when the executing officer may resume execution of a warrant after particular interruptions to such execution.



#### Clause 38M: Use of equipment to examine or process things

102. This clause covers the use of equipment to examine or process things. It permits the taking of equipment to premises to determine whether things are liable to seizure, the movement of things to another place in certain circumstances so that examination or processing can be carried out, and the operation of equipment already at the warrant premises in certain circumstances to determine whether things are liable to seizure.

#### Clause 38N: Use of electronic equipment at premises

103. This clause provides for the use of electronic equipment at premises. The executing officer or an officer assisting (the definition of "officer assisting" inserted in subsection 3(1) by item 50 includes a person who is not a police officer but is authorised by the executing officer to assist, for example a computer expert) may operate equipment at the premises to see whether evidential material is accessible if he or she believes that the equipment may be operated without damaging it. If evidential material is accessible, the executing officer or officer assisting may seize the equipment or any disk, tape or other associated storage device, or operate the equipment to obtain a printout and seize documents produced, or copy the records to another storage device and remove it from the premises. Subclauses 38N(2) and (3) indicate that there is a statutory preference for seizure of printouts or duplicate disks, tapes or other storage devices wherever possible; subclause 38N(3) provides that equipment may only be seized if it is not practicable to put the material into documentary form or copy it onto a disk, tape or other storage device or if possession of the equipment by the occupier of the premises could be an offence against an Australian law.

104. The executing officer or officer assisting may secure the equipment by locking it up or placing it under guard if he or she believes on reasonable grounds that the evidential material may be accessible by operating the equipment at the premises but expert assistance is needed to operate the equipment and the evidential material may be destroyed or otherwise interfered with if the equipment is not secured in the meantime. Notice must be given to the occupier in this situation. The equipment may be secured for up to 24 hours, or until such time as expert assistance is obtained to operate the equipment. The executing officer may apply to the Magistrate who issued the warrant for extension of the 24 hour period if he or she believes that the expert assistance will not be available within that time. The executing officer must give notice to the occupier of such intended

application for an extension and the occupier is entitled to be heard concerning the application.

**Clause 38O: Compensation for damage to electronic equipment**

105. This clause provides for compensation to be paid to the owner of equipment if damage is caused to equipment in certain circumstances.

**Clause 38P: Copies of seized things to be provided**

106. This clause requires an executing officer or officer assisting, on request, to give (to the occupier or his or her representative) a copy of a thing or information seized that can be readily copied. This does not apply if the material which was seized was not itself original material but was material printed out or transferred onto a storage disk (as per subclauses 38N(2) and (3)) or if possession of the thing seized could constitute an offence against an Australian law.

**Clause 38Q: Occupier entitled to watch search**

107. This clause entitles occupiers of premises or their representatives to observe the searching of the premises, providing they do not impede the search. For practical reasons, the right to observe the search does not preclude the police from searching two or more areas of the premises at the same time. In these circumstances, the person could move from area to area or elect to observe particular parts of the search. In some cases, it will be necessary to search different parts of the building at once because of its size or where there is an opportunity for the destruction or concealment of evidentiary material.

**Clause 38R: Receipts for things seized under warrant**

108. This clause requires receipts to be issued for things seized under a warrant or moved pursuant to subclause 38M(2). It is possible for two or more items to be listed on the same receipt, so that the executing officer would not be required to identify every item individually where those items could be adequately identified by a class description.

*Division 4 - Arrest and related matters*

**Clause 38S: Power to enter premises to arrest person**

109. Subclause 38S(1) provides that if a police officer has power to arrest a person and the police officer believes on reasonable grounds that the person is on any

premises, the police officer may enter the premises at any time (subject to the conditions in subclause (2) being met), using such force as is necessary and reasonable in the circumstances for the purpose of searching for, and arresting, the person.

110. Subclause 38S (2) provides that the police officer may not enter a “dwelling house” (defined in subclause 38S(3) to include a vehicle or room in a hotel, motel, boarding house or club in which people ordinarily retire for the night) between 9 pm on a day and 6 am on the following day to search for and arrest a person unless the police officer believes on reasonable grounds that it would not be practicable to arrest the person in the dwelling house or elsewhere at another time, or that it is necessary to prevent the concealment, loss or destruction of evidential material.

Clause 38T: Use of force in making arrest

111. This clause sets out the use of force which may be used in the course of arresting a person under this Act or pursuant to a warrant issued under this Act.

Clause 38U: Persons to be informed of grounds of arrest

112. This clause requires a police officer to inform a person he or she is arresting, at the time of arrest, of the reason for the arrest. The person need not be informed in precise or technical language. This requirement does not apply if the arrested person should, in the circumstances, know the reason for arrest, or if the arrested person’s actions make it impracticable.

Clause 38V: Power to search an arrested person

113. This clause provides that a police officer may, upon or soon after arrest, conduct a frisk search of an arrested person and seize any seizeable items found as a result of that search if the police officer thinks on reasonable grounds that it is prudent to do so to ascertain whether a person is carrying seizeable items.

Alternatively, if the police officer suspects on reasonable grounds that the person is carrying any seizeable item, the police officer may conduct an ordinary search of the person at the time of arrest or soon after. In both cases the police officer may seize any seizeable items found in the course of the search.

114. The definition of “seizeable item” inserted into subsection 3(1) by item 56 is anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody. The definition of “ordinary search” inserted into subsection 3(1) by item 51 is a search of a person or of articles in his

or her possession that may include requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes or headgear and an examination of those items. The definition of “frisk search” inserted into subsection 3(1) by item 49 is a search of a person by quickly running the hands over the person’s outer garments and an examination of anything worn or carried by the person that is conveniently or voluntarily removed by the person.

#### *Division 5 - General*

##### Clause 38W: Conduct of ordinary searches and frisk searches

115. This clause provides that ordinary or frisk searches must, if practicable, be conducted by a person of the same sex as the person being arrested. An officer assisting who is not a police officer must not take part in an ordinary or frisk search.

##### Clause 38X: Announcement before entry

116. This clause provides that before any person enters premises (to carry out a search or to arrest a person), a police officer must announce that he or she is authorised to enter and give any person at the premises an opportunity to allow entry to the premises, unless there are reasonable grounds to believe that immediate entry to the premises is required to ensure the safety of a person or that the effective execution of the warrant or the arrest is not frustrated.

##### Clause 38Y: Offence for making false statements in warrants

117. This clause creates an offence of making a statement that the person knows to be false or misleading in a material particular in an application for a warrant. The penalty for conviction of this offence is imprisonment for 2 years. As pointed out in the Note on this clause of the Bill subsection 4D(1) of the Crimes Act 1914 provides that this is the maximum penalty for this offence; subsection 4B(2) of the Crimes Act 1914 allows the court to impose an appropriate fine instead of, or in addition to, a term of imprisonment.

##### Clause 38Z: Offences relating to telephone warrants

118. This clause creates offences arising from the preparation, and execution, of a form of warrant obtained by telephone or other electronic means. It is an offence for a person to name a Magistrate in a form of warrant under clause 38H unless that Magistrate issued the warrant, or to knowingly state in a warrant something materially different from that authorised by the Magistrate. It is also an offence to

purport to execute an unauthorised or false form of warrant or to send to a Magistrate a form of warrant that is not the form that the person purported to execute. Offences under this clause, which are intended to prevent abuses of telephone search warrants, are punishable by imprisonment for up to 2 years. As pointed out in the Note on this clause of the Bill subsection 4D(1) of the Crimes Act 1914 provides that this is the maximum penalty for this offence; subsection 4B(2) of the Crimes Act 1914 allows the court to impose an appropriate fine instead of, or in addition to, a term of imprisonment.

#### Clause 38ZA: Retention of things seized

119. This clause provides for the manner in which things are to be dealt with after they have been seized under this Part.

120. Subclause 38ZA(1) provides that, subject to subclause 38ZA(2), a police officer who seizes a thing while executing a warrant is required to deliver it into the custody and control of the Commissioner of Police of the Australian Federal Police (the Commissioner).

121. Subclause 38ZA(2) provides that if the thing seized relates to a State or Territory offence and is not evidential material relating to the proceeding or investigation relevant to the warrant the police officer may make the thing available to State or Territory police.

122. Subclause 38ZA(3) provides that where a thing is delivered to the Commissioner he or she must so inform the Attorney-General and is required to retain the thing pending a direction from the Attorney-General as to the manner in which it is to be dealt with. The Commissioner must comply with any direction that the Attorney-General gives [under subclause 38ZA(4)] which may include a direction that the thing be sent to the foreign country [subclause 38ZA(5)] or that it be returned (if the reason for its seizure no longer exists or it is decided it is not to be used in evidence in the foreign country or in criminal proceedings in Australia) unless it is forfeited or forfeitable to the Commonwealth or its ownership is the subject of dispute [subclause 38ZA(6)].

#### Clause 38ZB: Arrest of person released on bail

123. This clause provides that where a police officer has reasonable grounds to believe that a person, who has been arrested under warrant and released by a Magistrate on bail, has contravened or is about to contravene a term or condition

of his or her bail recognisance the police officer may arrest the person without warrant. The person must be brought before a Magistrate as soon as practicable.

## **Part 6 - Miscellaneous**

Item 60: Subsection 3(1) (definition of facsimile copy)

124. This item makes a minor technical amendment to the definition, in subsection 3(1) of 'facsimile copy'.

Item 61: Subsection 3(1) (definition of "foreign organised fraud offence")

125. This item inserts a definition of the term "foreign organised fraud offence" which covers a person who engages in 2 or more acts or omissions of defrauding or conspiring to defraud the government (or a public authority) of a foreign country and who derives substantial benefit therefrom within the meaning of the Proceeds of Crime Act.

Item 62: Subsection 3(1) (definition of "Governor")

126. This item repeals, and replaces, the definition of "Governor" in the original Act which had been amended by regulation 2 and Schedule 1 of the A.C.T. Self-Government (Consequential Provisions) Regulations. The amendment by the latter regulations extended the definition to include the Chief Minister of the Australian Capital Territory. This replacement definition continues that definition but does so via the more usual manner of legislative amendment.

Item 63: Subsection 3(1) (definition of "Magistrate")

127. This item repeals, and replaces, the definition of "Magistrate". The replacement definition, in relation to State and Norfolk Island Magistrates, recognises that express arrangements will be in force between the Commonwealth and the States and Norfolk Island as to the performance by State and Norfolk Island Magistrates of duties under the Act. This is consequential upon the amendment in item 94 which inserts a new subsection 2A in section 39 of the Act whereby the Governor-General may make arrangements with the Administrator of Norfolk Island for the performance of the functions of a Magistrate. There do not need to be express arrangements in relation to Magistrates of external Territories other than Norfolk Island. Under the repealed definition express arrangements were not required in relation to Norfolk Island Magistrates.

Item 64: Subsection 3(1) (definition of "money laundering offence")

128. This item repeals, and replaces, the definition of "money laundering offence". The replacement definition is no longer limited to an offence in relation to the proceeds of a "serious narcotics offence" within the meaning of the Proceeds of Crime Act; it now extends to an offence in relation to the proceeds of a "serious offence". "Serious narcotics offence" is defined in subsection 3(1) of the Act to mean the same as it means in the Proceeds of Crime Act, namely offences in relation to narcotics substances whereas "serious offence" in the Act means offences the maximum penalty for which is death or imprisonment for not less than 12 months. The purpose of the replacement definition is consequential upon the amendment by item 92 to subsection 37(3) of the Act which amendment is intended to enable the Attorney-General to authorise application for monitoring orders on behalf of a foreign country for the same range of equivalent offences for which monitoring orders can be authorised under the Proceeds of Crime Act. The previous definition, when linked with the previous form of subsection 37(3) did not allow monitoring orders in relation to foreign organised fraud offences.

Item 65: Subsection 3(1): definition of "proceeding"

129. This item inserts a definition of "proceeding". The definition is an inclusive definition which is intended to be taken to include proceedings that are already well understood to be criminal proceedings (for example a criminal trial or committal proceeding) but specifically extends the term to include certain other proceedings in foreign jurisdictions. Paragraph (a) of the definition is intended to include proceedings before a Grand Jury in the United States of America and paragraph (b) is intended to include proceedings before an Examining Magistrate in a Civil Law country (Judge D'Instruction). Both these types of proceedings would occur at an earlier stage than committal proceedings in the Australian criminal justice system.

130. The insertion of this definition is intended to remove any doubt that the Attorney-General may authorise a magistrate under section 13 of the Act to take evidence on behalf of a foreign country where the proceedings in that country for which the country seeks evidence from Australia are in the nature of Grand Jury or Examining Magistrate type proceedings where charges have not yet been laid.

**Item 66: Subsection 3(1) (definition of “public authority”)**

131. The definition inserted by this item (namely that a “public authority” of a foreign country means any authority or body constituted by or under a law of a foreign country) is consequential upon the definition of “foreign organised fraud offence” inserted by item 61.

**Item 67: Subsection 3(1) (definition of “State”)**

132. This item repeals, and replaces, the definition of “State” that was in the original Act and which was amended by regulation 2 and Schedule 1 of the A.C.T. Self-Government (Consequential Provisions) Regulations. The amendment by the latter regulations extended the definition to include the Australian Capital Territory. This replacement definition continues that definition but does so via the more usual manner of legislative amendment.

**Item 68: Subsection 3(1) (definition of “State Minister”)**

133. This item repeals, and replaces, the definition of “State Minister” to expressly include a Minister of the Crown of a State or a Minister of the Australian Capital Territory or the Northern Territory.

134. The amended definition arrives at the same result as the previous definition but more accurately reflects the status of a Minister of a State (who is a Minister of the Crown) as opposed to a Minister of a Territory.

**Item 69: Subsection 3(1) (definition of “Territory”)**

135. This item repeals, and replaces, the definition of “Territory” in the original Act which had been amended by regulation 2 and Schedule 1 of the A.C.T. Self-Government (Consequential Provisions) Regulations. The amendment by the latter regulations extended the definition to include the Australian Capital Territory. This replacement definition continues that definition but does so via the more usual manner of legislative amendment.

**Item 70: Subsection 3(1) (definition of “treaty”)**

136. This item amends the definition of “treaty” by excluding reference to “arrangement” thereby confining the definition to instruments of recognised treaty status which contain binding obligations at international law.



Items 71 and 72: Amendment of Paragraph 21(1)(a) and insertion of new paragraph 21(1A)

137. Section 21 provides that a person who comes to Australia to give evidence shall not have that evidence used against him or her except where the person commits perjury. The existing section does not extend this protection to a person who comes to Australia to assist an investigation. The purpose of these amendments is to ensure that where a person has come to Australia and made statements or given other assistance in relation to an investigation, such statements can not be used against the person.

138. Item 71 redrafts existing subsection 21(1) in order to clearly limit the protection provided by the subsection to persons who have come to Australia to give evidence in relation to a proceeding.

139. Item 72 inserts a new subsection 21(1A) which provides that anything said or done by a person who has come to Australia to assist an investigation when the person is giving that assistance is not to be admitted or otherwise used in any prosecution of the person for an offence against Australian law.

140. The purpose of the limitation on use provided by subsections 21(1) and 21(1A) is to facilitate the consent of foreign persons to come to Australia to give evidence or assist an investigation.

141. The Note at the foot of item 71 amends the heading to section 21 consequential upon the amendments made by items 71 and 72.

Items 73 and 74: Sections 24 and 25

142. Section 24 provides for an offence of escaping from lawful custody in relation to a person brought to Australia pursuant to a request under section 16 of the Act.

143. Item 73 repeals section 24. Where such a person escapes from custody the object should be to return the person to custody so that he or she can be transferred back to the foreign country at the completion of the purpose of temporary transfer. If the person has to serve a local sentence for conviction of the offence of escaping from custody this could delay the person's return to the foreign country. Such delay could be contrary to the terms upon which the foreign country temporarily transferred the person to Australia.

144. Subsection 25(1) permits the arrest by any police officer of a foreign prisoner brought to Australia pursuant to a request under section 16 of the Act and who escapes from custody. Subsection 25(2) enables the return to custody under the Act of such persons.

145. Item 74 repeals subsection 25(2) and replaces it with a subsection which requires the police officer to take the person before a Magistrate as soon as practicable and enables the Magistrate to issue a warrant authorising the return of the person to custody if the Magistrate is satisfied the person has escaped from custody.

Item 75: Aiding person to escape etc.

146. Item 75 inserts a new section 25A in the Act which applies sections 46, 47A, 47C and 48 of the Crimes Act to the Act as if references in those sections to custody were references to custody while a person is in Australia pursuant to a section 16 request. Sections 46, 47A, 47C and 48 of the Crimes Act create offences of aiding a prisoner to escape from custody, rescuing a prisoner from custody, permitting escape and harbouring an escapee respectively.

Item 76: Section 30

This item repeals section 30.

147. Section 30 provides for an offence of escaping from lawful custody by a person who is in custody in Australia whilst in transit pending completion of transportation from one foreign country to a second foreign country for the purpose of giving evidence in a proceeding or assisting an investigation into a criminal matter in the second foreign country.

148. Where such a person escapes from custody the object should be to return the person to custody so that he or she can complete their transportation to the second foreign country. If the person has to serve a local sentence for conviction of the offence of escaping from custody this could delay the person's transportation to the second foreign country.

Item 77: Subsection 31(2)

149. Section 31 enables the arrest of a person who has escaped from custody whilst in transit in Australia pending completion of transportation from one foreign country to a second foreign country for the purpose of giving evidence in a

proceeding or assisting an investigation into a criminal matter in the second foreign country.

150. Item 77 repeals and replaces subsection 31(2). The replacement subsection requires that the person, as soon as practicable after being arrested, must be taken before a Magistrate, who may issue a warrant authorising the person's return to custody, if the Magistrate is satisfied that the person has escaped from lawful custody.

Item 78: Insertion of new section 31A

151. Item 78 inserts a new section 31A in the Act which applies sections 46, 47A, 47C and 48 of the Crimes Act to the Act as if references in those sections to custody were references to custody while a person is in Australia in transit pending completion of transportation from a foreign country through Australia to another foreign country for the purpose of giving evidence in a proceeding or giving assistance in an investigation in that country. Sections 46, 47A, 47C and 48 of the Crimes Act create offences of aiding a prisoner to escape from custody, rescuing a prisoner from custody, permitting escape and harbouring an escapee respectively.

Item 79: Paragraph 35(1)(c)

152. This item omits the words "under the Proceeds of Crime Act". It is very unlikely that a foreign country would actually term its request to be made under our Proceeds of Crime Act. The purpose of this amendment is to remove any possibility of challenge to the Attorney-General's authorisation to a police officer to apply to a magistrate for a search warrant in relation to tainted property on behalf of a foreign country. The Attorney-General's authorisation could be challenged if the foreign country's request was construed as not meeting the criteria of paragraph 35(1)(c).

Item 80: Subsection 35(1)

153. This item is consequential upon item 79. It is appropriate for there to be reference in this part of subsection 35(1) to the exact nature of the order under the Proceeds of Crime Act because this part of the subsection comes into operation when the Attorney-General is making the authorisation and therefore the details of the order required, being orders under Australian law, are details known to the Attorney-General. It was inappropriate to have reference to the exact nature of the order under the Proceeds of Crime Act in paragraph 35(1)(c) because that part

of the subsection prescribes the content of the foreign country request and it is not reasonable to expect that the foreign country will have sufficient knowledge of our law to adequately specify, in its request, that the order it seeks is under our Proceeds of Crime Act.

Item 81 : Paragraph 36(1)(a).

154. Item 81 repeals and replaces paragraph 36(1)(a) in order to enable the Attorney-General to authorise the DPP to apply for a restraining order on behalf of a foreign country where property which may be the subject of such an order is believed to be located in Australia and criminal proceedings have commenced in the foreign country or it is believed that criminal proceedings are about to commence in the foreign country in respect of a serious offence. Consequential on this amendment six amendments are made by Schedule 3 of the Bill to subsection 59(1) of the Proceeds of Crime Act 1987. Those amendments are dealt with later in the Explanatory Memorandum.

Item 82: Paragraph 36(1)(c)

155. This item omits the words “under the Proceeds of Crime Act”. It is very unlikely that a foreign country would actually term its request to be made under our Proceeds of Crime Act. The purpose of this amendment is to remove any possibility of challenge to the Attorney-General’s authorisation to the DPP to apply to a specified court for a restraining order under the Proceeds of Crime Act against the property. The Attorney-General’s authorisation could be challenged if the foreign country’s request was construed as not meeting the criteria of paragraph 36(1)(c).

Item 83

156. This item is consequential upon item 82. It is appropriate for there to be reference in this part of subsection 36(1) to the exact nature of the order under the Proceeds of Crime Act because this part of the subsection comes into operation when the Attorney-General is making the authorisation and therefore the details of the order required, being orders under Australian law, are details known to the Attorney-General. It was inappropriate to have reference to the exact nature of the order under the Proceeds of Crime Act in subsection 36(1)(c) because that part of the subsection prescribes the content of the foreign country request and it is not reasonable to expect that the foreign country will have sufficient knowledge of our law to adequately specify, in its request, that the order it seeks is under our Proceeds of Crime Act.

Item 84: Subparagraphs 37(1)(c)(i) and (ii)

157. Item 84 repeals and replaces the subparagraphs. The purpose of the replacement subparagraphs is because it is very unlikely that a foreign country would actually term its request to be made under our Proceeds of Crime Act. The purpose of this amendment is to remove any possibility of challenge to the Attorney-General's authorisation to a police officer to apply to a judge of a specified court for a production order or search warrant under the Proceeds of Crime Act in relation to a property-tracking document. The Attorney-General's authorisation could be challenged if the foreign country's request was construed as not meeting the criteria of paragraph 37(1)(c).

Item 85: Subsection 37(1)

158. This item is consequential upon item 84. It is appropriate for there to be reference in this part of subsection 37(1) to the exact nature of the order under the Proceeds of Crime Act because this part of the subsection comes into operation when the Attorney-General is making the authorisation and therefore the details of the order required, being orders under Australian law, are details known to the Attorney-General. It was inappropriate to have reference to the exact nature of the order under the Proceeds of Crime Act in subparagraphs 37(1)(c)(i) and (ii) because those subparagraphs prescribe the content of the foreign country request and it is not reasonable to expect that the foreign country will have sufficient knowledge of our law to adequately specify, in its request, the order it seeks is under our Proceeds of Crime Act.

Items 86 to 89: subparagraphs 37(3)(a)(i) 37(3)(a)(ii) and 37(3)(a)(iii).

159. Subsection 37(3) enables the Attorney-General to authorise a police officer to apply, on behalf of a foreign country, to a judge of a specified court for a monitoring order under the Proceeds of Crime Act against a financial institution in Australia where such information is reasonably believed to be relevant to a criminal proceeding or criminal investigation in a foreign country. A monitoring order is an order directing a financial institution to give information to the Australian Federal Police about transactions conducted through an account held in that financial institution. The terms of subsection 37(3) at present enable a monitoring order to be sought where a criminal proceeding or investigation has commenced in the foreign country in relation to a serious narcotics offence or a money laundering offence in respect of a serious narcotics offence. The terms of subsection 37(3) of the Act are currently more restrictive than the equivalent provision in the Proceeds

of Crime Act 1987 (section 74) which enable a monitoring order to be sought in relation to an organised fraud offence in Australia.

160. The amendments to the subsection by items 86, 87, 88 and 89 of the Bill enable the Attorney-General to authorise an application for a monitoring order in relation to foreign organised fraud offence. Item 61 of the Bill inserts a definition of the term 'foreign organised fraud offence' in subsection 3(1) of the Act. The term is defined to mean an offence against the law of a foreign country committed when a person engages in 2 or more acts or omissions of defrauding, or conspiring to defraud, the government or a public authority of a foreign country and from which the person derives substantial benefit within the meaning of the Proceeds of Crime Act.

Items 90 and 91: Paragraph 37(3)(c)

161. Items 90 and 91 amend paragraph 37(3)(c). The amendments delete the requirement for the foreign country request to specify the exact nature of the order required under Australian law. The purpose of the amendments is because it is very unlikely that a foreign country would actually term its request to be made under our Proceeds of Crime Act. The purpose of this amendment is to remove any possibility of challenge to the Attorney-General's authorisation to a police officer to apply to a judge of a specified court for a monitoring order under the Proceeds of Crime Act. The Attorney-General's authorisation could be challenged if the foreign country's request was construed as not meeting the criteria of paragraph 37(3)(c).

Item 92: Subsection 37(3)

162. This item is consequential upon item 91. It is appropriate for there to be reference in this part of subsection 37(3) to the exact nature of the order under the Proceeds of Crime Act because this part of the subsection comes into operation when the Attorney-General is making the authorisation and therefore the details of the order required, being orders under Australian law, are details known to the Attorney-General. It was inappropriate to have reference to the exact nature of the order under the Proceeds of Crime Act in paragraph 37(3)(c) because that paragraph prescribes the content of the foreign country request and it is not reasonable to expect that the foreign country will have sufficient knowledge of our law to adequately specify, in its request, the order it seeks under our Proceeds of Crime Act.

Item 93: Part VII

163. This item repeals Part VII of the Act. Part VII consisted of section 38. Subsection 38(1) enabled the Attorney-General to arrange for service of process in Australia in relation to a criminal matter in a foreign country where so requested by a foreign country. Subsection 38(2) enabled proof of service of a document in Australia by affidavit of the person who served the document.

164. Criminal process could be served in Australia on behalf of a foreign country prior to the Act coming into operation. Subsequent to the Act coming into operation such process can still be served in Australia on behalf of a foreign country outside of the Act. For this reason it is unnecessary and undesirable that the Part remain in the Act and accordingly item 93 repeals the Part.

Items 94 and 95: Clauses 39(2A) and 39(2B) and subsection 39(3).

165. Item 94 inserts subclause 39(2A) whereby the Governor-General may make arrangements with the Administrator of Norfolk Island with respect to administration of the Act including arrangements for the performance of the functions of a Magistrate under the Act by a Magistrate of Norfolk Island. At present there are express magisterial arrangements under the Act between the Commonwealth and the States and the Northern Territory and the Australian Capital Territory. Norfolk Island magistrates obtain the power to perform the functions of Magistrates under the Act per force of the Act itself without the need for there to be express arrangements. However it is preferable that there be express arrangements between the Commonwealth and Norfolk Island. The insertion, by item 63, of a replacement definition of "Magistrate" is consequential upon item 94.

166. Item 94 also inserts subclause 39(2B) which enables the Governor-General and the Administrator to vary or revoke arrangements made under the new subclause 39(2B). Subclause 39(2B) is consequential upon subclause 39(2A).

167. The amendment by item 95 to subsection 39(3) ensures that the requirement to gazette the making, variation or revocation of arrangements extends to arrangements made between the Commonwealth and Norfolk Island.

168. There is a note at the end of item 95 which states that the heading to section 39 ('Arrangements with States') is replaced by a new heading ('Arrangements with Governors of States and Administrator of Norfolk Island').

Items 96, 97 and 98: Subsections 40(1), 40(2) and 40(3)

169. Section 40 provides that the Attorney-General may delegate all or any of his or her powers and functions under the Act except for the power of delegation itself and his or her powers under section 8 of the Act. Section 8 contains the grounds upon which a request for assistance from a foreign country shall, (in the case of subsection 8(1)), and may (in the case of subsection 8(2)), be refused. With the volume of requests for assistance made by foreign countries increasing it has become impractical for this prohibition on delegation of the Attorney-General's powers under section 8 to continue. Accordingly item 97 repeals the proviso on delegation of section 8 powers so that the Attorney-General may now delegate all his or her functions under the Act with the only exception being the power of delegation itself.

170. Items 96 and 98 amend part of subsection 40(1) and repeal the whole of subsections 40(2) and (3). Subsection 40(1) is amended by item 97 to enable the Attorney-General to delegate his or her powers of refusal of a request under section 8 of the Act. A further amendment is made to subsection 40(1) to ensure that there is no doubt that the Attorney-General may delegate his or her powers to make a request under section 10 of the Act.

171. The repeal of subsections 40(2) and 40(3) is consistent with the provisions of section 34AB of the Acts Interpretation Act. That section was enacted later in time to the Mutual Assistance in Criminal Matters Act and contains subsections which provide in relation to all Commonwealth Acts for the same matters previously covered in the Mutual Assistance in Criminal Matters Act by subsections 40(2) and (3). The subsections are therefore now unnecessary and are repealed.

Item 99: Paragraph 43(2)(b)

172. Item 99 omits certain words from paragraph 43 (2)(b) ["to be authenticated by the oath of a witness or an officer of the Government of the foreign country or"]. This amendment clarifies the authentication requirements prescribed by subsection 43(2).

Item 100: Subsection 43A(2)

173. Item 100 corrects a paragraph numbering reference error.



## **Part 7 - Saving provision**

### **Item 101: Regulations under subsection 7(2)**

174. Subclause (a) of this clause provides that any regulations made under section 7(2) of the Act which were in force immediately before the amended section 7 came into force shall continue in force after commencement of the amended section 7 and may be amended or repealed as if they were regulations made under the amended section 7.

175. Subclause (b) of this clause provides that any regulations made under the former section 7 of the Act applying the Act to a particular country or countries subject to limitations, conditions, exceptions or qualifications necessary to give effect to a mutual assistance treaty or part of a treaty shall continue in force after commencement of the amended section 7 and may be amended or repealed as if they were regulations made under the amended section 7.

**Schedule 2 - Amendment of the Financial Transaction Reports Act 1988**

176. This amendment is consequential on amendments made to section 7 of the Mutual Assistance in Criminal Matters Act 1987. Item 3 of Schedule 1 repeals the whole of section 7 of that Act. The replacement section does not include replacement of subsection 7(2A) which provided for regulations applying the Act to foreign countries in respect of obtaining access to 'FTR information'. A replacement subsection is not necessary consequential on the amendment providing that the Act applies to all foreign countries.

177. As a matter of policy, access to FTR information will still only be available pursuant to specific agreements with countries (such as Memoranda of Understanding - MOU). However, it will no longer be necessary for the purpose of giving effect to an MOU to make regulations under subsection 7(2A) of the Mutual Assistance in Criminal Matters Act 1987.

### **Schedule 3 - Amendment of the Proceeds of Crime Act 1987**

178. These amendments are consequential on amendments made by item 81 to paragraph 36(1)(a) of the Mutual Assistance in Criminal Matters Act 1987, whereby the Attorney-General can authorise the Director of Public Prosecutions to apply to a specified court for a restraining order under the Proceeds of Crime Act 1987 on behalf of a foreign country where criminal proceedings have not yet commenced in that country but there are reasonable grounds to believe that such proceedings are about to commence.

179. The application by the Director of Public Prosecutions is pursuant to provisions of the Proceeds of Crime Act 1987. These amendments to the Proceeds of Crime Act 1987 where an authorisation is issued under the Mutual Assistance in Criminal Matters Act 1987 bring these particular provisions of the Proceeds of Crime Act 1987 into line with provisions under that Act where a restraining order is made in relation to criminal proceedings in Australia. The domestic restraining order proceedings of the Proceeds of Crime Act 1987, where charges have not been laid, require charges to be laid within the ensuing 48 hours. These amendments require that the foreign country lay its charges within the same timeframe.











9 780644 442992