

National Interest Analysis [2016] ATNIA 6

with attachment on consultation

**Treaty on Extradition Between Australia and the People's Republic of China
(Sydney, 6 September 2007)**

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NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action relates to the proposed ratification of the *Treaty on Extradition Between Australia and the People's Republic of China* (the proposed Treaty), which was signed for Australia on 6 September 2007 by the then Attorney-General, the Hon Philip Ruddock MP.
2. **Article 23(1)** of the proposed Treaty provides that the Treaty will enter into force on the thirtieth day from the date on which the Parties have notified each other by diplomatic note that they have taken all necessary steps for the entry into force of the Treaty. Before notification can be provided by Australia, Australia's domestic implementation requirements must be completed. These requirements include tabling the Treaty in Parliament, consideration by the Joint Standing Committee on Treaties (JSCOT) and the making of implementing regulations under the *Extradition Act 1988* (Cth) (the Extradition Act).

Overview and national interest summary

3. Australia needs to ensure that criminals cannot evade justice simply by crossing borders. This requires a responsive, streamlined extradition system that effectively combats domestic and transnational crime while providing appropriate safeguards.
4. The purpose of the proposed Treaty is to provide for effective extradition arrangements between Australia and China. Australia does not currently have a bilateral arrangement with China to enable extradition. However, Australia can consider requests for extradition from China for offences under multilateral conventions to which both countries are party, including corruption, money laundering and other serious crimes. The proposed Treaty will establish a bilateral extradition relationship that allows extradition for offences punishable under the laws of both countries, and meets the specific needs of each country.
5. The proposed Treaty is consistent with other Australian bilateral extradition treaties and is able to be implemented under Australia's existing domestic legislative framework for extradition. The proposed Treaty adds to Australia's existing network of modern bilateral extradition treaties with 39 other countries.
6. The safeguards and protections in the proposed Treaty are consistent with those in the Extradition Act.

Reasons for Australia to take the proposed treaty action

7. Australia and China have an established law enforcement and international crime cooperation relationship. Such cooperation assists Australian law enforcement agencies to tackle transnational crime in the region, including illegal drug trafficking and other serious and organised crimes. The proposed Treaty will facilitate closer cooperation between Australia and China on law enforcement matters and will assist authorities in their efforts to bring criminals to justice.

8. The proposed Treaty is consistent with Australia's domestic legislative arrangements for extradition under the Extradition Act. The Extradition Act sets out a number of mandatory requirements which must be met before Australia can make or receive an extradition request. Those requirements are supplemented by requirements contained in multilateral or bilateral treaties. Australia will consider each individual extradition request on a case-by-case basis in light of its domestic legislative framework for extradition, as well as its international obligations.

9. The proposed Treaty will provide a framework under which both Parties will be able to consider requests for extradition from the other. The Extradition Act allows Australia to receive extradition requests from countries that are declared to be an 'extradition country' under the Act. A country is declared to be an 'extradition country' by regulations made under the Extradition Act (see section 5 of the Extradition Act). Australia can currently only consider extradition requests from China for offences under multilateral conventions to which both countries are party, such as the *United Nations Convention against Corruption* ([2006] ATS 2) and the *United Nations Convention against Transnational Organized Crime* ([2004] ATS 12). Prior to bringing the proposed Treaty into force, regulations will be made under the Extradition Act to generally declare China to be an 'extradition country', and will specify that the Extradition Act applies in relation to China subject to the proposed Treaty.

10. Extradition requests may only be granted where the requirements set out in the proposed Treaty and domestic legislation are met. The requirements set out in the proposed Treaty include a range of human rights safeguards. Under the proposed Treaty, extradition must be refused if there are substantial grounds for believing the person sought has been, or will be, subjected to torture or other cruel, inhuman or humiliating treatment or punishment, or where extradition is sought for a political offence or a purely military offence, or for the purpose of prosecuting or punishing the person on account of their religion or political opinion.

11. The proposed Treaty also provides that an extradition request must be refused if the offence for which extradition is sought carries the death penalty, unless the country seeking extradition has provided an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out. The human rights safeguards in the proposed Treaty are consistent with Australia's international human rights law obligations.

12. The proposed Treaty adopts the 'no evidence' standard for extradition requests and is consistent with the scheme under the Extradition Act.¹ This accords with the international approach of simplifying extradition requests and is consistent with the United Nations Model Treaty on Extradition.² Australia has over 30 modern bilateral extradition treaties which adopt the 'no evidence' standard. The term 'no evidence' does not mean 'no information'. Rather, it means that an extradition request needs to be supported by a statement of the offence and the applicable penalty, and a statement setting out the conduct alleged against the person in respect of each offence for which extradition is sought (**Article 7**), but does not require evidence sufficient to prove each element of each alleged offence under the laws of the requested country (such as 'prima facie' evidence including witness statements and affidavits). This is because extradition is not a criminal

¹ The 'no evidence' approach has been Australia's default scheme since the Extradition Act commenced in 1988.

² https://www.unodc.org/tldb/en/model_laws_treaties.html

process. Rather, it is an administrative process to determine whether a person is to be surrendered to face justice in the Requesting Party.

13. Extradition is a preliminary step towards the trial of a person, or return of a person to serve a sentence of imprisonment. The purpose of extradition proceedings is not to determine guilt or innocence. The Extradition Act provides safeguards for decision making under the Extradition Act, and there are also opportunities for review of extradition decisions.

Obligations

14. The proposed Treaty will oblige Australia and China to consider requests from the other for the extradition of persons wanted for prosecution, or the imposition or enforcement of a sentence, for an ‘extraditable offence’ (**Article 1**).

15. The proposed Treaty provides that an ‘extraditable offence’ is an offence which, at the time the extradition request is made, is punishable under the laws of both countries by a maximum penalty of imprisonment of at least one year, or by a more severe penalty – this is commonly referred to as ‘dual criminality’ (**Article 2**). Where extradition is sought for a person to enable the enforcement of a sentence of imprisonment imposed on that person in respect of a conviction for an extraditable offence, extradition will only be granted if at least six months imprisonment remains to be served (**Article 2(2)**).

16. The obligation to extradite (contained in Article 1 of the proposed Treaty) is qualified by other provisions of the proposed Treaty. The proposed Treaty expressly includes provisions that specify numerous internationally accepted mandatory and discretionary grounds for refusing extradition (Article 3 and Article 4) and **Article 21** of the proposed Treaty expressly preserves the rights enjoyed and obligations undertaken by the Parties under multilateral conventions.

17. The grounds for refusing extradition under the proposed Treaty are consistent with Australia’s domestic legal requirements and the grounds for refusal under the Extradition Act.

18. **Article 3** of the proposed Treaty specifies the mandatory grounds of refusal. Under the Treaty, extradition must be refused if any of the following exists:

- the offence for which extradition is requested is a political offence³ (**Article 3(a)**);
- the Requested Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing the person sought on account of that person’s race, sex, language, religion, nationality, political opinion or personal status, or that that person’s position in judicial proceedings may be prejudiced for any of those reasons (**Article 3(b)**);
- the offence for which extradition is requested is a military offence, but the conduct constituting the offence does not otherwise constitute an offence under criminal law (**Article 3(c)**);
- the person whose extradition is requested would be exposed to ‘double jeopardy’, that is, the person has already been convicted, acquitted or pardoned, or has undergone the punishment provided by the law of the Requested Party, in respect of the offence for which extradition is requested (**Article 3(d)**);

³ ‘Political offence’ is defined in section 5 of the Extradition Act as an offence that is of a political character, whether because of the circumstances in which it is committed or otherwise, and whether or not there are competing political parties in the country, but does not include an act of violence against a person’s life or liberty. Regulation 2B of the *Extradition Regulations 1988* also expressly provides that certain offences are not to be regarded as political offences, such as offences established under the *United Nations Convention against Corruption* or conduct referred to in terrorism conventions including the *International Convention for the Suppression of Terrorist Bombings*.

- for the offence for which extradition is requested, the limitation period applicable to prosecution for the offence in the Requesting Party has expired (**Article 3(e)**);
- the offence for which extradition is requested carries the death penalty, and the Requesting Party has not provided an undertaking that the death penalty will not be imposed or, if imposed, will not be carried out (**Article 3(f)**);
- the Requested Party has substantial grounds for believing the person sought has been, or will be, subjected to torture or other cruel, inhuman or humiliating treatment or punishment in the Requesting Party (**Article 3(g)**);
- the request is made in order to enforce a judgment rendered in absentia, and the Requesting Party has not guaranteed that the case would be retried after extradition (**Article 3(h)**); or
- the conduct constituting the offence for which extradition is requested was not a criminal offence at the time the conduct occurred, that is, if the extradition offence is a retrospective offence and was not an offence at the time of the alleged/relevant conduct (**Article 3(i)**).

19. **Article 4** of the proposed Treaty specifies additional grounds for refusing extradition. These are discretionary grounds for refusal and can further qualify the obligation to extradition in Article 1 of the proposed Treaty. Extradition may be refused if:

- the Requested Party has jurisdiction over the offence for which extradition is requested and is conducting, or contemplates instituting, proceedings against the person under its domestic law (**Article 4(a)**);
- the Requested Party has decided to refrain from prosecuting the person for the offence in respect of which extradition is sought (**Article 4(b)**);
- the Requested Party, while taking into account the seriousness of the offence and the interests of the Requesting Party, considers that extradition would be incompatible with humanitarian considerations in view of that person's age, health or other personal circumstances (**Article 4(c)**);
- the person whose extradition is sought would be tried or sentenced by an ad hoc court (**Article 4(d)**); or
- the offence for which extradition is requested was committed outside of the territory of either Party and the equivalent offence under the law of the Requested Party does not provide for extraterritorial geographic jurisdiction (**Article 4(e)**).

20. **Article 5** of the proposed Treaty provides a further discretionary ground for refusing extradition on the basis of nationality.⁴ However if extradition is refused on the basis of nationality, the Requested Party shall, at the request of the Requesting Party, submit the case to its competent authorities for the purpose of instituting criminal proceedings in accordance with its domestic law (**Article 5(2)**). This will assist to ensure that nationality cannot be a basis for safe haven.

21. For extradition requests where Australia is the Requested Country, section 22(3)(f) of the Extradition Act provides that a person can only be surrendered if the Attorney-General, in his or her discretion, considers that the person should be surrendered for the extradition offence/s. This requirement is additional to the mandatory and discretionary grounds for refusal (explained above)

⁴ The extradition of Chinese nationals from China to a foreign country is expressly prohibited under China's Extradition Law: Article 8(1) of the *Extradition Law of the People's Republic of China*, 28 December 2000.

and the other requirements required for extradition under the proposed Treaty and the Extradition Act. In making his or her consideration, the Attorney-General may also have regard to Australia's international law considerations.

22. **Article 7** of the proposed Treaty prescribes the procedure and supporting documentation required to make an extradition request. The information and documentation that must be provided in support of an extradition request includes:

- the name of the requesting authority (**Article 7(2)(a)**);
- details necessary to establish the identity, nationality and location of the person (**Article 7(2)(b)**);
- for each offence for which extradition is sought, a statement of the offence and the conduct constituting the offence (**Article 7(2)(c)**);
- for each offence for which extradition is sought, text of the law in the Requesting Country establishing criminal jurisdiction, the offence and the penalty (**Article 7(2)(d)**), and any limitation period applicable to prosecution or execution of a sentence (**Article 7(2)(e)**);
- if the extradition request is for the purpose of returning the person to face criminal proceedings, a copy of the warrant for the arrest of the person (**Article 7(3)(a)**);
- if the extradition request is for the purpose of returning the person to enforce a sentence in respect of a conviction, a copy of the court judgment and a description of the period of sentence which has already been enforced (**Article 7(3)(b)**); and
- if the extradition request is for the purpose of returning the person for a sentence to be imposed in respect of a conviction, a copy of the judgment and a statement that it is intended that a sentence be imposed (**Article 7(3)(c)**).

23. **Article 9** of the proposed Treaty enables additional information to be provided in support of an extradition request if necessary.

24. **Article 12** of the proposed Treaty provides that the Requested Party shall deal with extradition requests in accordance with the procedures specified in its domestic law. **Article 20(1)** provides that the Requested Party shall make all necessary arrangements for any proceedings arising out of a request for extradition, and shall otherwise represent the interests of the Requesting Party.

25. For Australia, the Extradition Act prescribes the process by which an extradition request from an extradition country can be received by Australia, a person can be arrested and remanded in extradition custody, and eligibility for surrender is to be determined. In Australia, there are avenues of judicial review available to a person who is the subject of an extradition decision. For China, the Extradition Law of the People's Republic of China prescribes the process for considering extradition requests from foreign countries, which includes consideration of the extradition request by the Higher People's Court and the opportunity for review by the Supreme People's Court of China.

26. If an extradition request is refused in whole or in part, notification of the reasons for refusal is to be provided (**Article 12(2)**).

27. **Article 13** of the proposed Treaty sets out the procedures for surrender of a person when extradition has been granted. For instance, it provides that the Parties will agree on a time and place for the surrender, and that the Requesting Party will inform the Requested Party of the period of time that the person was held in extradition custody.

28. **Article 15** of the proposed Treaty allows surrender to be postponed, deferred or temporary in certain circumstances. Under **Article 15(1)**, surrender can be postponed to enable domestic proceedings and/or sentence enforcement in the Requested Party. Under **Article 15(3)**, surrender can be deferred if the Requested Party considers the person cannot be physically transported without serious danger to the person's life due to grave illness, until a time when the Requested Party considers the danger has been sufficiently mitigated. **Article 15(2)** allows for the temporary surrender of a person in cases where postponed surrender would seriously impede prosecution or investigation by the Requesting Party. In such cases, a person can be surrendered to the Requesting Party to enable prosecution or investigation; upon conclusion of the prosecution or investigation, the person is returned to the Requested Party; and the person is finally surrendered to the Requesting Party after proceedings and/or sentence enforcement are finalised in the Requested Party.

29. Under **Article 16** of the proposed Treaty, a person extradited under this Treaty shall not be detained, proceeded against or subject to the execution of sentence in the territory of the Requesting Party for any offence committed before her or his extradition other than for:

- an offence for which extradition was granted;
- another extraditable offence that is provable on the same facts, and punishable by the same or lesser penalty, as an offence for which extradition was granted; or
- another extraditable offence, to which the Requested Party consents.

This is commonly referred to as 'the rule of speciality'. This protection will cease to apply if the person remains in the jurisdiction of the Requesting Party 30 days after being free and able to leave, or has left the Requesting Party's jurisdiction and subsequently voluntarily returned. The protection does not extend to offences that are committed after surrender.

30. **Article 10** of the proposed Treaty enables Australia and China to request the provisional arrest of a person whose extradition will later be requested. A provisional arrest request is an urgent request to arrest a person pending receipt of a request for extradition. A provisional arrest request may be appropriate in cases of urgency, for example, when it is believed that there is a risk that the person whose extradition will be sought may abscond or flee the jurisdiction of the Requested Party. **Article 10** of the proposed Treaty requires that a provisional arrest request must be accompanied by the following:

- the name of the requesting authority;
- details necessary to establish the identity, nationality and location of the person;
- for each offence for which extradition will be sought, a statement of the offence and the conduct constituting the offence;
- for each offence for which extradition will be sought, text of the law in the Requesting Country establishing criminal jurisdiction, the offence and the penalty, and any limitation period applicable to prosecution or execution of a sentence; and
- a statement that a formal request for the extradition of the person will follow, and:
 - if the extradition request that will be forthcoming will be for the purpose of returning the person to face criminal proceedings, a statement of the existence of a warrant for the arrest of the person; or
 - if the extradition request that will be forthcoming will be for the purpose of returning the person to enforce a sentence in respect of a conviction, a statement of the

existence of a court judgment and description of the sentence that has already been enforced; or

- if the extradition request that will be forthcoming will be for the purpose of returning the person in order for a sentence to be imposed in respect of a conviction, a statement of the existence of a court judgment and that it is intended that a sentence will be imposed.

31. A request for the extradition of a person taken into custody on the basis of a provisional arrest request must be received by the Requested Country within 45 days of the person having been taken into custody. If an extradition request is not received within time, the person must be released from custody (**Article 10(4)**).

32. **Article 11** of the proposed Treaty provides a regime for managing competing requests for the extradition of a person, that is, in cases where two or more States are seeking the extradition of the same person. In determining which extradition request is to receive priority, the Requested Party must consider the relative seriousness of the offences for which extradition is sought; the time and place of the commission of the offences; the dates on which the extradition requests were made; the nationality and residence of the person whose extradition is sought; and the possibility of re-extraditing the person (**Article 11(2)**).

33. **Article 14** of the proposed Treaty makes provision for the seizure and surrender, upon request, of proceeds and instruments of the extradition offence and other property which may serve as evidence of the extradition offence, if such items are found in the Requested Party's territory. Surrender of such property is subject to the domestic law of the Requested Party, and the rights of third parties.

34. **Article 17** of the proposed Treaty regulates extradition to a third country for offences committed prior to surrender. A Requesting Party must not extradite a person to a third country for any offence committed prior to the person's surrender to the Requesting Party unless:

- the Requested Party consents;
- the person remains in the jurisdiction of the Requesting Party 30 days after being free and able to leave; or
- the person has left the Requesting Party's jurisdiction and subsequently voluntarily returned.

35. **Article 18** of the proposed Treaty provides procedures to enable permission to transit through the territory of one Party, for the purposes of enabling the surrender of a person from a third State to the other Party.

Implementation

36. Section 11 of the Extradition Act allows regulations to be made providing that the Extradition Act applies to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty between that country and Australia. This is the mechanism through which extradition treaties are given effect in Australia's domestic law. It is proposed that the proposed Treaty will be implemented by way of regulations made under the Extradition Act declaring China to be an 'extradition country'.

Costs

37. **Article 20** of the proposed Treaty provides that the Requested Party shall make all necessary arrangements for any proceedings in the Requested Party arising out of a request for extradition, and bear any expenses incurred in the Requested Party in connection with those proceedings. The

Requesting Party will bear the costs related to transportation and transit for the surrender of a person.

38. In accordance with the usual procedure for international extradition, expenses incurred by Australia for extradition requests received or made by Australia under the proposed Treaty will be met from existing budgets: principally by the Attorney-General's Department (AGD) for extradition requests made to Australia by China; and Australian investigative and prosecutorial agencies seeking extradition for extradition requests made by Australia to China.

Monitoring of persons extradited from Australia

39. **Article 19** of the proposed Treaty provides that the Requesting Party must promptly provide the Requested Party with information about the proceedings and/or execution of a sentence against a person extradited under the Treaty. The Requesting Party must also provide the Requested Party with information about any further extradition of a person to a third State (noting that extradition to a third State is regulated by **Article 17** of the proposed Treaty).

40. Where an Australian national or Australian permanent resident is to be surrendered to China pursuant to the Treaty, AGD will inform the Department of Foreign Affairs and Trade (DFAT) of the extradition, including the terms of the extradition and any special conditions applying to the case. Australia's ability to provide consular assistance to Australian nationals and Australian-Chinese dual nationals in China is provided for under the *Agreement on Consular Relations between Australia and the People's Republic of China* ([2000] ATS 26).⁵ Following surrender, as long as the individual has entered China on a valid Australian travel document, DFAT can provide consular assistance to the person through the existing consular network to the extent practically and legally possible, and subject to the person's ongoing consent.

41. Where a foreign national from a third country is extradited from Australia to China under the Treaty, AGD will formally advise that person's country of citizenship of his or her extradition, subject to the person's consent and Australia's privacy laws. Ongoing responsibility for monitoring that person's welfare remains with their country of citizenship.

42. The differences in the approach to monitoring Australian and foreign nationals reflects the *Vienna Convention on Consular Relations* ([1973] ATS 7), which provides States with the right to directly monitor proceedings against its nationals who are subject to detention or prosecution in another State.

Reporting

43. AGD reports on all extradition cases in its Annual Reports. This includes information on:

- extradition requests granted by Australia, and the categories of the relevant offences, by reference to the countries which made the request;
- the number of Australian permanent residents extradited; and
- any breaches of substantive obligations under bilateral extradition agreements noted by Australian authorities, including breaches of undertakings provided by a Requesting Country in support of an extradition request.

Regulation Impact Statement

44. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

⁵ <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/1C1935E09A6E7033CA256B1E0015DF19>

Future treaty action

45. The proposed Treaty provides that the Parties shall consult on the interpretation, application or implementation of the proposed Treaty and any dispute shall be resolved through consultation by diplomatic channels (**Article 22**).

46. The proposed Treaty is silent as to amendment. In the absence of an amendment provision, Article 39 of the *Vienna Convention on the Law of Treaties* ([1974] ATS 2) applies to allow amendment by agreement between the Parties.

47. Any amendment to the proposed Treaty would be a treaty action and would be subject to Australia's domestic treaty requirements.

Termination

48. Pursuant to **Article 23(3)** of the proposed Treaty, either Party may terminate the proposed Treaty by written notice through the diplomatic channels at any time. The proposed Treaty will cease to be in force on the one hundred and eightieth day after the date on which such notice is given. Termination of the proposed Treaty will not affect the extradition proceedings commenced prior to termination. Termination by Australia would be subject to Australia's domestic treaty requirements.

Contact details

Treaties Taskforce

Attorney-General's Department

CONSULTATION

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1. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the proposed Treaty was provided to State and Territory representatives through the biannual SCOT meetings throughout the course of the treaty negotiations. No requests for further information or comments on the Treaty with China have been received to date.
2. Negotiations with China about the Treaty were not in the public domain as Australia follows the international practice that a bilateral treaty remains confidential to the parties until it is signed. Consultation was conducted with relevant Australian Government departments and agencies.