

Appendix 4

The International War Crimes Tribunal Bill 1994

and

**The International War Crimes Tribunal
Consequential Amendments Bill 1994**

and

Explanatory Memoranda

1993-94

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

As read a third time

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

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SCHEDULE 1

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STATUTE OF THE INTERNATIONAL TRIBUNAL

THIS bill originated in the Senate; and, having this day passed, is now ready for presentation to the House of Representatives for its concurrence.

HARRY EVANS
Clerk of the Senate

The Senate
Canberra, 4 May 1994

A BILL

FOR

An Act to provide for the Commonwealth to help the International War Crimes Tribunal perform its functions, and for related purposes

The Parliament of Australia enacts:

PART 1—PRELIMINARY

Short title

5 1. This Act may be cited as the *International War Crimes Tribunal Act 1994*.

Commencement

2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.

10 (2) Subject to subsection (3), the remaining provisions of this Act commence on a day or days to be fixed by Proclamation.

(3) If a provision of this Act does not commence under subsection (2) within 6 months after the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

The objects of this Act

3. The objects of this Act are to enable the Commonwealth to co-operate with the Tribunal in the investigation and prosecution of persons accused of committing Tribunal offences, and, in particular:

- (a) to enable the Tribunal to make requests for assistance (see Part 2); and
- (b) to provide for persons accused of Tribunal offences to be surrendered to the Tribunal (see Part 3); and
- (c) to provide the Tribunal with other forms of assistance in the investigation and prosecution of Tribunal offences (see Part 4); and
- (d) to enable the Tribunal to sit in Australia (see Part 5); and
- (e) to enable forfeiture orders of the Tribunal to be enforced (see Part 6).

Definitions

4. In this Act, unless the contrary intention appears:

“**Australia**”, when used in a geographical sense, includes the external Territories;

“**Australian law**” means a law of the Commonwealth, a State or a Territory;

“**evidential material**” means a thing relevant to a Tribunal offence, including such a thing in electronic form;

“**executing officer**”, in relation to a warrant, means:

- (a) the police officer named in the warrant, by the magistrate who issued the warrant, as being responsible for executing the warrant; or
- (b) if that police officer does not intend to be present at the execution of the warrant—another police officer whose name has been written in the warrant by the police officer so named; or
- (c) another police officer whose name has been written in the warrant by the police officer last named in the warrant;

“**fax**”, in relation to a document, means a copy of a document obtained or sent by facsimile transmission;

“**federal prisoner**” means a person who:

- (a) is being held in custody pending trial for, or sentencing for an offence against a law of the Commonwealth or of a Territory; or
- (b) is under a sentence of imprisonment for an offence against a law of the Commonwealth or of a Territory;

but does not include a person who is at large (having escaped from lawful custody);

“forfeiture order” means:

- (a) an order made by the Tribunal, under the Statute of the Tribunal or under rules adopted under the Statute of the Tribunal, for forfeiture of property in respect of a Tribunal offence; or
- 5 (b) a declaration made by the Tribunal, under the Statute of the Tribunal or under the rules adopted under the Statute of the Tribunal, evidencing forfeiture of property under that Statute or those rules;

“frisk search” means:

- 10 (a) a search of a person conducted by quickly running the hands over the person’s outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person;

“law”, in relation to the Commonwealth, a State or a Territory, means a law (whether written or unwritten) of the Commonwealth, that State or that

15 Territory, and includes a law (whether written or unwritten) in force in the Commonwealth, that State or that Territory or in any part of the Commonwealth, that State or that Territory;

“magistrate” means:

- (a) a magistrate of a Territory; or
- 20 (b) a magistrate of a State in respect of whom an arrangement under section 81 is in force;

Note: The Australian Capital Territory, the Northern Territory and Norfolk Island are treated as States under this Act—see section 5.

“offence”, in relation to an Australian law, includes an offence against a law relating to taxation, customs duty or other revenue matters or relating to

25 foreign exchange control;

“officer assisting”, in relation to a warrant, means:

- (a) a person who is a police officer and who is assisting in executing the warrant; or
- 30 (b) a person who is not a police officer and who has been authorised by the relevant executing officer to assist in executing the warrant;

“ordinary search” means a search of a person or of articles in the possession of a person that may include:

- 35 (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and
- (b) an examination of those items;

“police officer” means:

- (a) a member, special member or staff member of the Australian Federal Police; or
- 40 (b) a member of the police force of a State or Territory;

“police station” includes:

- (a) a police station of a State or Territory; and
- (b) a building occupied by the Australian Federal Police;

“possession”, in relation to a thing, includes having the thing under control in any place whatsoever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing in question; 5

“premises” includes a place and a conveyance;

“prisoner” means a federal prisoner or a State prisoner;

“property” means real or personal property of every description, whether situated in Australia or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property; 10

“recently used conveyance”, in relation to a search of a person, means a conveyance that the person had operated or occupied at any time within 24 hours before the search commenced; 15

“search warrant” means a warrant issued under section 47;

“seizable item” means anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody;

“State prisoner” means a person who:

- (a) is being held in custody pending trial for or sentencing for an offence against a law of a State; or 20
- (b) is under a sentence of imprisonment for an offence against a law of a State;

but does not include a person who is at large after having escaped from lawful custody; 25

“Statute of the Tribunal” means the Statute of the Tribunal, a copy of the English text of which is set out in Schedule 2, adopted by Resolution 827 (1993) of the Security Council of the United Nations, a copy of the English text of which is set out in Schedule 1;

“statutory form”, in relation to a warrant or notice, means the form of the warrant or notice, as the case may be, set out in the regulations; 30

“strip search” means a search of a person or of articles in the possession of a person that may include:

- (a) requiring the person to remove all of his or her garments; and
- (b) an examination of the person’s body (but not of the person’s body cavities) and of those garments; 35

“surrender warrant” means a warrant issued under section 18;

“Tribunal”:

5 (a) means the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Resolution 827 (1993) of the Security Council of the United Nations, a copy of the English text of which is set out in Schedule 1; and

(b) includes any of the organs referred to in Article 11 of the Statute of the Tribunal;

10 **“Tribunal offence”** means an offence for which the Tribunal has the power to prosecute persons under Article 2, 3, 4 or 5 of the Statute of the Tribunal; **“warrant premises”** means premises in relation to which a search warrant is in force.

Some Territories to be regarded as States

15 5. For the purposes of this Act (other than section 6), the Australian Capital Territory, the Northern Territory and Norfolk Island are to be regarded as States, and are not to be regarded as Territories.

External Territories

6. This Act extends to each external Territory.

20 **PART 2—REQUESTS BY THE TRIBUNAL FOR ASSISTANCE**

Tribunal may request assistance

25 7.(1) A request by the Tribunal, for assistance that it needs to perform its functions in respect of an investigation or prosecution it is conducting or proposes to conduct, is to be made to the Attorney-General, or a person authorised by the Attorney-General.

(2) Without limiting subsection (1), the request may be for assistance of one or more of the following types:

- (a) arresting and surrendering to the Tribunal a person in relation to whom the Tribunal has issued an arrest warrant;
- 30 (b) executing a request for search and seizure;
- (c) obtaining evidence, a document or other article;
- (d) providing a document or other record;
- (e) locating and identifying a witness or suspect;
- (f) arranging for a person to give evidence or assist an investigation;
- 35 (g) causing the forfeiture of property or the proceeds of crime;
- (h) serving documents;
- (i) arranging for the Tribunal to sit in Australia.

(3) If a request by the Tribunal is made to, or received by, a person authorised under subsection (1), the request is taken for the purposes of this Act to have been made to, or received by, the Attorney-General.

Form of requests

- 8.(1)** The request must be in writing and must indicate: 5
- (a) the nature of the investigation or prosecution in respect of which the request is made; and
 - (b) the International Convention or other legal basis on which the Tribunal relies for conducting the investigation or prosecution; and
 - (c) the nature of the assistance sought; and 10
 - (d) the procedure (if any) that the Tribunal wants the Attorney-General to follow in complying with the request, including the form in which material must be given to the Tribunal; and
 - (e) the period within which the Tribunal wants the request complied with; and 15
 - (f) any confidentiality requirements that the Tribunal wants observed; and
 - (g) any other matters that might assist in complying with the request.
- (2)** Failure to comply with this section does not invalidate a request.

PART 3—SURRENDER OF PERSONS TO THE TRIBUNAL 20

Division 1—Arrest of persons

Notice by Attorney-General

9. If:

- (a) the Attorney-General receives from the Tribunal a request for surrender of a person; and 25
- (b) the request is accompanied by an arrest warrant in relation to the person that was issued by the Tribunal, or by a copy of that warrant authenticated by the Tribunal;

the Attorney-General must, by notice in writing in the statutory form expressed to be directed to any magistrate, state that the request has been received. 30

Issue of warrants

10.(1) A magistrate must issue a warrant, in the statutory form, for a person's arrest if an application is made, in the statutory form, on behalf of the Tribunal, for issue of a warrant pursuant to the notice. 35

(2) A magistrate must issue a warrant, in the statutory form, for a person's arrest if:

- 5 (a) an application is made, in the statutory form, on behalf of the Tribunal, for issue of a warrant otherwise than pursuant to such a notice; and
- (b) the application is accompanied by a copy of an arrest warrant for the person that was issued by the Tribunal; and
- 10 (c) the application contains a statement to the effect that, because of circumstances of urgency, it is necessary to issue a warrant before receiving a notice from the Attorney-General under section 9.

(3) The magistrate must without delay send to the Attorney-General a report stating whether the magistrate has issued the warrant.

Note: Division 4 of Part 7 deals with matters relating to arrest.

Cancellation of warrants

15 **11.** The Attorney-General must, by written notice in the statutory form, direct a magistrate to cancel a warrant if the person has not been arrested under the warrant and:

- 20 (a) the Attorney-General is satisfied that a request from the Tribunal that would oblige the Attorney-General to issue a notice under section 9 will not be received; or
- (b) the Attorney-General considers for any other reason that the warrant should be cancelled.

Remand

25 **12.(1)** A person who is arrested under a warrant must, as soon as practicable:

- 30 (a) be given a written notice that:
 - (i) specifies the Tribunal offence in respect of which the warrant was issued; and
 - (ii) describes the conduct that is alleged to constitute that offence; and
- (b) be brought before a magistrate in the State or Territory in which the person is arrested.

35 (2) A magistrate must remand the person in custody or on bail for such period or periods as may be necessary to enable the Attorney-General to make a surrender determination and (if appropriate) to enable a magistrate to remand the person under section 20.

(3) The magistrate must remand the person in custody unless there are exceptional circumstances justifying remand on bail.

(4) If a magistrate remands the person in custody after the person has made an application for bail, the person cannot apply to any other magistrate for release on bail during that remand.

Release from remand on the Attorney-General's direction

13. The Attorney-General must, by notice in writing in the statutory form, direct a magistrate to order the release from custody of a person remanded under this Division, or the discharge of the recognisances on which bail was granted to the person, as the case requires, if: 5

- (a) the Attorney-General is satisfied that a request from the Tribunal that would oblige the Attorney-General to issue a notice under section 9 will not be received; or 10
- (b) the Attorney-General considers for any other reason that the remand should cease.

Release from remand after certain periods

14.(1) A person must be brought before a magistrate if: 15

- (a) the person was arrested under a warrant issued under subsection 10(2); and
- (b) the person is, under this Division, on remand 45 days after the day on which the person was arrested; and
- (c) a notice has not been given under section 9 in relation to the person. 20

(2) Unless the magistrate is satisfied that such a notice is likely to be given within a particular period that is reasonable in all the circumstances, the magistrate must:

- (a) order the release of the person from custody; or
- (b) order the discharge of the recognisances on which bail was granted to the person; 25

as the case requires.

(3) If:

- (a) a magistrate was satisfied under subsection (2) that such a notice was likely to be given in relation to the person within a particular period; and 30
- (b) the notice is not given within the period;

the person must be brought before a magistrate.

(4) The magistrate must:

- (a) order the release of the person from custody; or 35
- (b) order the discharge of the recognisances on which bail was granted to the person;

as the case requires.

Application for search warrants

15. (1) If:

- (a) a person is arrested under a warrant issued under section 10; and
- (b) a police officer has reasonable grounds for suspecting that evidential material relating to a Tribunal offence in respect of which the warrant was issued is, or within the applicable period referred to in subsection (3) of this section will be, at any premises;

the police officer may, by an information on oath that sets out the grounds for that suspicion, apply for a search warrant in relation to the premises to search for that material.

(2) If:

- (a) a person is arrested under a warrant issued under section 10; and
- (b) a police officer has reasonable grounds for suspecting that evidential material relating to a Tribunal offence in respect of which the warrant was issued is, or within the applicable period referred to in subsection (3) of this section will be, in a person's possession;

the police officer may, by an information on oath that sets out the grounds for that suspicion, apply for a search warrant in relation to that person to search for that material.

(3) For the purposes of this section, the applicable period is:

- (a) if the application for the warrant is made by telephone, telex, fax or other electronic means, as provided by section 52—48 hours; or
- (b) otherwise—72 hours.

Note: Part 7 deals with search warrants.

Division 2—Surrender of persons

Surrender determination by Attorney-General

16. (1) The Attorney-General must determine whether a person remanded under Division 1 is to be surrendered to the Tribunal.

(2) Unless the Attorney-General is satisfied that there are exceptional circumstances, he or she must determine that the person is to be surrendered to the Tribunal.

(3) In considering whether there are exceptional circumstances, the Attorney-General must:

- (a) give the person a reasonable opportunity to provide to the Attorney-General documents intended to show that there are exceptional circumstances; and
- (b) consider any documents so provided.

(4) The determination must be made as soon as reasonably practicable, having regard to the circumstances, after the person is remanded under Division 1.

Release from remand on refusal to surrender the person

17. If the Attorney-General has determined not to surrender the person to the Tribunal, the Attorney-General must, by notice in writing in the statutory form, direct a magistrate to order:

- (a) the release of the person from custody; or 5
- (b) the discharge of the recognisances on which bail was granted to the person;

as the case requires.

Surrender warrants

18.(1) Subject to section 19, if the Attorney-General determines that the person is to be surrendered to the Tribunal, the Attorney-General must issue a warrant for the surrender of the person to the Tribunal. 10

- (2) The surrender warrant must be in writing in the statutory form.

Persons imprisoned under Australian law

19.(1) The Attorney-General must not issue a surrender warrant if: 15

- (a) the person is serving a sentence of imprisonment in respect of an offence against an Australian law; and
- (b) the Tribunal has been required to give adequate undertakings to the Attorney-General relating to:
 - (i) the person's return to Australia to serve the remainder of the sentence once the person is no longer required to be detained by, or on the order of, the Tribunal; and 20
 - (ii) the person's custody while travelling, and while in other countries, for the Tribunal's purposes; and
- (c) the Attorney-General is not satisfied that the Tribunal has given adequate undertakings relating to those matters. 25

(2) For the purposes of this section, the person is not taken to be serving a sentence of imprisonment if he or she has been released on parole or licence, or has been otherwise conditionally released, for the remainder of the sentence. 30

Detention following surrender warrants

20.(1) If the Attorney-General issues the surrender warrant, the person must be brought as soon as practicable before a magistrate in the State or Territory in which the person is on remand.

(2) A magistrate must remand the person in custody for such period or periods as may be necessary to enable the warrant to be executed. 35

Content of surrender warrants

21.(1) A surrender warrant in relation to a person (the “eligible person”) must:

- 5 (a) require the person in whose custody the eligible person is being held to release the eligible person into the custody of a police officer; and
- (b) authorise the police officer to transport the eligible person in custody, and, if necessary or convenient, to detain the eligible person in custody, for the purpose of enabling the eligible person:
 - 10 (i) to be placed in the custody of a specified person who is an officer of the Tribunal or other person authorised by the Tribunal; and
 - (ii) to be transported to a place specified by the Tribunal; and
- 15 (c) authorise the specified person to transport the eligible person in custody to a place specified by the Tribunal for the purpose of surrendering the eligible person to a person appointed by the Tribunal to receive the person.

(2) A place referred to in paragraph (1)(b) or (c) may be a place in or outside Australia.

Execution of surrender warrants

20 22. A surrender warrant must be executed according to its tenor.

Release from remand

23.(1) This section applies to a person:

- 25 (a) in relation to whom a surrender warrant has been issued; and
- (b) who is in custody in Australia under the warrant, or otherwise under this Act, more than 2 months after the day on which the warrant was first liable to be executed.

(2) Subject to subsection (3), the Federal Court of Australia, or the Supreme Court of the State or Territory in which the person is in custody, must order that the person be released from that custody if:

- 30 (a) the person applies to the court; and
- (b) reasonable notice of the intention to apply has been given to the Attorney-General.

35 (3) The court must not order that the person be released from custody if it is satisfied that the surrender warrant has not been executed within the period of 2 months, or since the person last made an application under subsection (2), as the case may be:

- (a) because to do so would have been dangerous to the person’s life or prejudicial to the person’s health; or
- (b) for any other reasonable cause.

Effect of surrender to Tribunal on person's terms of imprisonment

24.(1) If, at the time a person was surrendered to the Tribunal under this Part in connection with a Tribunal offence, the person was serving a sentence of imprisonment in respect of an offence against a law of the Commonwealth or of a Territory: 5

- (a) any time spent by the person in custody in connection with the surrender warrant; and
- (b) any time spent by the person in custody in connection with detention by, or on the order of, the Tribunal in respect of the Tribunal offence;

is to be counted as time served towards the sentence of imprisonment. 10

(2) A reference in this section to time spent in custody includes a reference to time spent in custody outside Australia.

Expiry of Australian sentences while under Tribunal detention

25. If:

- (a) at the time a person was surrendered to the Tribunal under this Part, the person was serving a sentence of imprisonment in respect of an offence against an Australian law; and 15
- (b) each such sentence of imprisonment that the person was serving at that time expires while the person is being detained by, or on the order of, the Tribunal; 20

the Attorney-General must without delay inform the Tribunal of the expiry and, if the Tribunal was required to give undertakings as referred to in section 19, that the undertakings are no longer required to be complied with.

PART 4—OTHER FORMS OF ASSISTANCE TO THE TRIBUNAL*Division 1—Taking evidence etc.* 25**Attorney-General may authorise taking of evidence etc.**

26.(1) This section applies if the Tribunal makes a request to the Attorney-General that:

- (a) evidence be taken in Australia; or
- (b) documents or other articles in Australia be produced; 30

for the purposes of a proceeding before, or an investigation conducted by, the Tribunal.

(2) Subject to subsection (3), the Attorney-General may comply with the request by authorising, by written notice in the statutory form:

- (a) the taking of evidence or production of documents or other articles; and 35
- (b) transmission of evidence, documents or other articles to the Tribunal.

(3) The Attorney-General must not comply with the request if, in his or her opinion:

- (a) complying with the request would prejudice Australia's sovereignty, security or national interest; or
- 5 (b) there are exceptional circumstances justifying non-compliance.

Taking of evidence

27.(1) If the Attorney-General authorises taking of evidence, a magistrate may take the evidence on oath from each witness appearing before the magistrate to give evidence in relation to the matter.

- 10 (2) A magistrate who takes any such evidence must:
 - (a) cause the evidence to be put in writing; and
 - (b) certify that the evidence was taken by the magistrate; and
 - (c) cause the writing so certified to be sent to the Attorney-General.

Producing documents or other articles

15 28.(1) If the Attorney-General authorises production of documents or other articles, a magistrate may require production of the documents or other articles.

(2) Subject to subsection (3), if the documents or other articles are produced, the magistrate must send them to the Attorney-General together with a written statement certifying that they were produced to the magistrate.

(3) In the case of documents, the magistrate may send to the Attorney-General copies of the documents certified by the magistrate to be true copies.

Legal representation

25 29.(1) The evidence of a witness may be taken under section 27 in the presence or absence of:

- (a) the person to whom the proceeding before, or the investigation conducted by, the Tribunal relates; or
- (b) his or her legal representative (if any).

30 (2) The magistrate conducting a proceeding under either section 27 or 28, or both, may permit:

- (a) the person to whom the proceeding before, or investigation conducted by, the Tribunal relates; and
- (b) any other person giving evidence or producing documents or other articles at the proceeding before the magistrate; and
- 35 (c) the Tribunal;

to have legal representation at the proceeding before the magistrate.

Form of certificates

30. A certificate by a magistrate under subsection 27(2) or 28(2) must state whether, when the evidence was taken or the documents or other articles were produced, any of the following persons were present:

- (a) the person to whom the proceeding before, or the investigation conducted by, the Tribunal relates, or his or her legal representative (if any); 5
- (b) any other person giving evidence or producing documents or other articles, or his or her legal representative (if any).

Compellability of persons to attend etc.

10

31.(1) Subject to subsections (2) and (3), the laws of each State or Territory with respect to compelling persons:

- (a) to attend before a magistrate; and
- (b) to give evidence, answer questions, and produce documents or other articles; 15

on the hearing of a charge against a person for an offence against the law of that State or Territory apply, so far as they are capable of application, with respect to so compelling persons for the purposes of this Division.

(2) For the purposes of this Division, the person to whom the proceeding before, or the investigation conducted by, the Tribunal relates, is competent but not compellable to give evidence. 20

(3) If:

- (a) a person is required to give evidence, or produce documents or other articles, for the purposes of a proceeding before, or an investigation conducted by, the Tribunal; and 25
- (b) the person is not compellable to answer a particular question, or to produce a particular document or article, for the purposes of that proceeding or investigation;

the person is not compellable to answer the question, or produce the document or article, for the purposes of this Division. 30

Tribunal immunity certificates

32.(1) An authenticated Tribunal immunity certificate is admissible in proceedings under this Division as *prima facie* evidence of matters stated in the certificate.

(2) In this section: 35

“Tribunal immunity certificate” means a certificate or declaration that:

- (a) is given or made by the Tribunal under the Statute of the Tribunal or under the rules adopted under the Statute of the Tribunal; and

(b) specifies or declares that, under the Statute of the Tribunal or under the rules adopted under the Statute of the Tribunal, persons generally or a specified person could or could not:

- 5 (i) either generally or in specified proceedings; and
(ii) either generally or in specified circumstances;

be required to answer a specified question or to produce a specified document.

Division 2—Search and seizure

Attorney-General may authorise applications for search warrants

10 **33.(1)** Subject to subsection (2), if:

(a) the Tribunal makes a request to the Attorney-General compliance with which may involve the issue of a search warrant in relation to evidential material; and

15 (b) there are reasonable grounds to believe that the material is in Australia;

the Attorney-General may, in writing, authorise a police officer to apply to a magistrate of the State or Territory in which that material is believed to be located for the search warrant.

20 (2) The Attorney-General must not comply with the request if, in his or her opinion:

(a) complying with the request would prejudice Australia's sovereignty, security or national interest; or

(b) there are exceptional circumstances justifying non-compliance.

Applications for search warrants

25 **34.(1)** If:

(a) a police officer is authorised under section 33 to apply for a search warrant; and

30 (b) the police officer has reasonable grounds for suspecting that the evidential material is, or within the applicable period referred to in subsection (3) of this section will be, at any premises;

the police officer may, by an information on oath setting out the grounds for that suspicion, apply for a search warrant in relation to the premises to search for that material.

(2) If:

35 (a) a police officer is authorised under section 33 to apply for a search warrant; and

(b) the police officer has reasonable grounds for suspecting that the evidential material is, or within the applicable period referred to in subsection (3) of this section will be, in a person's possession; the police officer may, by an information on oath setting out the grounds for that suspicion, apply for a search warrant in relation to that person to search for that material. 5

(3) For the purposes of this section, the applicable period is:

(a) if the application for the warrant is made by telephone, telex, fax or other electronic means, as provided by section 52—48 hours; or

(b) otherwise—72 hours. 10

Note: Part 7 deals with search warrants.

Division 3—Giving evidence at hearings, or assisting in investigations, in foreign countries

Persons giving evidence or assisting (other than prisoners)

35.(1) Subject to subsection (2), the Attorney-General may make arrangements for the travel to a foreign country of a person who is in Australia if: 15

(a) the Tribunal makes a request to the Attorney-General for the attendance of the person:

(i) at a hearing in the foreign country in connection with a proceeding before the Tribunal; or 20

(ii) in the foreign country to assist an investigation being conducted by the Tribunal; and

(b) the person is not a prisoner; and

(c) there are reasonable grounds to believe that the person can give evidence relevant to the proceeding or assist the investigation; and 25

(d) the Attorney-General is satisfied that the person has consented to giving evidence or assisting in the foreign country; and

(e) the Attorney-General is satisfied that the Tribunal has given, to the extent (if any) required by the Attorney-General, an adequate (whether or not unqualified) undertaking that the person will be returned to Australia in accordance with arrangements agreed to by the Attorney-General. 30

(2) The Attorney-General must not comply with the request if, in his or her opinion: 35

(a) complying with the request would prejudice Australia's sovereignty, security or national interest; or

(b) there are exceptional circumstances justifying non-compliance.

Prisoners giving evidence or assisting

36.(1) This section applies if:

- (a) the Tribunal makes a request to the Attorney-General for the attendance of a person:
 - 5 (i) at a hearing in a foreign country in connection with a proceeding before the Tribunal; or
 - (ii) in a foreign country to assist an investigation being conducted by the Tribunal; and
- 10 (b) the person is a federal prisoner, or a State prisoner, who is in Australia (whether or not in custody); and
- (c) there are reasonable grounds to believe that the prisoner can give evidence relevant to the proceeding or assist the investigation; and
- (d) the Attorney-General is satisfied that the prisoner has consented to giving evidence or assisting in the foreign country; and
- 15 (e) the Attorney-General is satisfied that the Tribunal has given, to the extent (if any) required by the Attorney-General, adequate (whether or not unqualified) undertakings in respect of the matters referred to in section 37.

20 **(2)** Subject to subsection (4), if the prisoner is being held in custody, the Attorney-General may:

- (a) if the prisoner is a federal prisoner and is not also a State prisoner—direct that the prisoner be released from prison for the purpose of travelling to the foreign country to give evidence at the proceeding or to assist the investigation; and
- 25 (b) if the prisoner is a federal prisoner and also a State prisoner—direct, subject to the obtaining of any approvals required to be obtained from an authority of the relevant State, that the prisoner be released from prison for the purpose of such travel; and
- 30 (c) in any case—subject to the making or giving of any necessary directions or approvals relevant to release of the prisoner, make arrangements for such travel in the custody of a police officer, or prison officer, appointed by the Attorney-General for the purpose.

(3) Subject to subsection (4), if the prisoner, having been released from custody on parole, is not being held in custody, the Attorney-General may:

- 35 (a) if the prisoner is a federal prisoner and is not also a State prisoner:
 - (i) approve the travel of the prisoner to the foreign country to give evidence at the proceeding or to assist the investigation; and
 - (ii) obtain such parole decisions as may be required; and

- (b) if the prisoner is a federal prisoner and also a State prisoner—subject to the obtaining of any parole decisions required to be obtained from an authority of the relevant State:
- (i) approve the travel of the prisoner to the foreign country to give evidence at the proceeding or to assist the investigation; and 5
 - (ii) obtain such parole decisions under a law of the Commonwealth or of a Territory as may be required; and
- (c) in any case—subject to the obtaining of any necessary parole decisions, make arrangements for the travel of the prisoner to the foreign country. 10
- (4) The Attorney-General must not comply with the request if, in his or her opinion:
- (a) complying with the request would prejudice Australia’s sovereignty, security or national interest; or
 - (b) there are exceptional circumstances justifying non-compliance. 15
- (5) In this section:

“parole” includes any order or licence to be at large;

“parole decision” means any approval, authority or permission relating to parole, and includes any variation of parole.

Undertakings relating to prisoners 20

37.(1) The Tribunal is to give, to the extent (if any) required by the Attorney-General, an undertaking, in relation to any prisoner who is to give evidence in a foreign country pursuant to a request by the Tribunal, that the prisoner will be returned to Australia in accordance with arrangements agreed to by the Attorney-General. 25

(2) If the prisoner is being held in custody in Australia and the Attorney-General requests the Tribunal to make arrangements for keeping the prisoner in custody while he or she is in the foreign country, the Tribunal is also to give, to the extent (if any) required by the Attorney-General, the following undertakings: 30

- (a) that appropriate arrangements will be made for that purpose;
- (b) that the prisoner will not be released from custody in the foreign country unless the Attorney-General notifies the Tribunal that the prisoner is entitled to be released from custody under Australian law;
- (c) if the prisoner is so released—that his or her accommodation and expenses will be paid for by the Tribunal until the Tribunal decides that the person is no longer required to give evidence in the proceeding, or to assist the investigation, to which the request relates. 35

Effect of removal to foreign country on prisoners' terms of imprisonment

- 5 38. A prisoner who is serving a term of imprisonment for an offence against a law of the Commonwealth or of a Territory is taken to be continuing to serve that term of imprisonment at any time during which the person:
- (a) is released from a prison pursuant to a request by the Tribunal under section 36; and
 - (b) is in custody in connection with the request (including custody outside Australia).

10 ***Division 4—Custody of persons in transit***

Transit

- 15 39.(1) If a person is to be transported in custody from a foreign country through Australia to another foreign country for the purpose of:
- (a) giving evidence in a proceeding before the Tribunal; or
 - (b) giving assistance in relation to an investigation being conducted by the Tribunal; or
 - (c) being surrendered to the Tribunal;
- the person may be transported through Australia in the custody of another person.
- 20 (2) If an aircraft or ship by which the person is being transported lands or calls at a place in Australia, the person must be kept in such custody as the Attorney-General directs in writing until his or her transportation is continued.
- 25 (3) If:
- (a) a person is being held in custody pursuant to a direction under subsection (2); and
 - (b) the person's transportation is not, in the Attorney-General's opinion, continued within a reasonable time;
- 30 the Attorney-General may direct that the person be transported in custody to the foreign country from which the person was first transported.

Division 5—Service of process

Service of process

- 35 40.(1) Subject to subsection (2), if the Tribunal requests the Attorney-General to arrange for service in Australia of a process relating to a proceeding before, or an investigation conducted by, the Tribunal, the Attorney-General may arrange for service of the process.

(2) The Attorney-General must not comply with the request if, in his or her opinion:

- (a) complying with the request would prejudice Australia's sovereignty, security or national interest; or
- (b) there are exceptional circumstances justifying non-compliance. 5

PART 5—SITTINGS OF THE TRIBUNAL IN AUSTRALIA

Tribunal sittings in Australia

41.(1) The Tribunal may sit in Australia for the purpose of performing its functions.

(2) Without limiting subsection (1), the Tribunal may sit in Australia for the purpose of: 10

- (a) taking evidence; or
- (b) conducting or continuing a proceeding before the Tribunal; or
- (c) giving judgment in a proceeding before the Tribunal.

Tribunal's powers while sitting in Australia 15

42.(1) While the Tribunal is sitting in Australia, it may exercise such powers as are prescribed by the regulations.

(2) Regulations made for the purposes of subsection (1) must implement agreements between the Commonwealth and the Tribunal about the powers that the Tribunal may exercise while sitting in Australia. 20

(3) Despite section 49A of the *Acts Interpretation Act 1901*, regulations made for the purposes of subsection (1) may apply, adopt or incorporate, with or without modification, the rules of procedure and evidence, as in force at a particular time or as in force from time to time, adopted under Article 15 of the Statute of the Tribunal. 25

Contravention of Tribunal orders etc.

43. A person must not:

- (a) knowingly or recklessly contravene an order that the Tribunal makes while sitting in Australia; or
- (b) otherwise knowingly or recklessly hinder the Tribunal in performing its functions while sitting in Australia. 30

Penalty: Imprisonment for 2 years.

Note: Under subsection 4D(1) of the *Crimes Act 1914*, this penalty is only a maximum penalty for the offence. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. 35

PART 6—FORFEITURE OF PROCEEDS OF TRIBUNAL OFFENCES

Requests for enforcement of forfeiture orders

44.(1) Subject to subsection (3), if:

- 5 (a) the Tribunal requests the Attorney-General to make arrangements for the enforcement of a forfeiture order made in relation to property that is believed to be in Australia; and
- (b) the Attorney-General is satisfied that a person has been convicted by the Tribunal of the Tribunal offence to which the order relates; and
- 10 (c) the Attorney-General is satisfied that the conviction and the order are not subject to further appeal in the Tribunal;

the Attorney-General may, in writing, authorise the Director of Public Prosecutions to apply for the registration of the order in a specified court.

15 (2) The court specified must be the Supreme Court of a State or Territory in which the property, or some of the property, is believed to be located.

(3) The Attorney-General must not comply with the request if, in his or her opinion:

- (a) complying with the request would prejudice Australia's sovereignty, security or national interest; or
- 20 (b) there are exceptional circumstances justifying non-compliance.

Registration of order

45.(1) If the Director of Public Prosecutions applies to a court for registration of an order in accordance with an authorisation under this Part, the court must register the order and must direct the Director of Public

25 Prosecutions:

- (a) to give notice of the registration, in the manner and within the time the court considers appropriate, to specified persons (other than a person convicted of an offence in respect of which the order was made) the court has reason to believe may have an interest in the
- 30 property; or
- (b) to publish notice of the registration in the manner and within the time the court considers appropriate.

(2) An order must be registered in a court by the registration, under the rules of the court, of a copy of the appropriate order sealed by the Tribunal.

35 (3) Subject to subsection 46(2), a fax of a sealed copy of an order is, for the purposes of subsection (2) of this section, taken to be the same as the sealed copy.

Effect of order

46.(1) A forfeiture order registered in a court has effect, and may be enforced, as if it were a forfeiture order made by the court under the *Proceeds of Crime Act 1987* at the time of registration.

(2) A registration effected by registering a fax of a sealed copy ceases to have effect after 21 days unless the sealed copy has been registered by then. 5

(3) Sections 100, 101 and 102 of the *Proceeds of Crime Act 1987* do not apply to an order registered under this Part.

PART 7—SEARCH, SEIZURE AND POWERS OF ARREST***Division 1—Search warrants***

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When search warrants can be issued

47.(1) A magistrate may issue a warrant to search premises if:

(a) an application has been made to the magistrate under subsection 15(1) or 34(1); and

(b) the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or within the applicable period referred to in subsection (3) of this section will be, any evidential material at the premises. 15

(2) A magistrate may issue a warrant authorising an ordinary search or a frisk search of a person if: 20

(a) an application has been made to the magistrate under subsection 15(2) or 34(2); and

(b) the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that the person has, or within the applicable period referred to in subsection (3) of this section will have, any evidential material in his or her possession. 25

(3) For the purposes of subsections (1) and (2), the applicable period is:

(a) if the application for the warrant is made by telephone, telex, fax or other electronic means, as provided by section 52—48 hours; or

(b) otherwise—72 hours. 30

(4) If the person applying for the warrant suspects that, in executing the warrant, it will be necessary to use firearms, the person must state that suspicion, and the grounds for that suspicion, in the information.

(5) If the person applying for the warrant is a member or special member of the Australian Federal Police and has, at any time previously, applied for a warrant relating to the same person or premises, the person must state particulars of those applications and their outcome in the information. 35

(6) A magistrate in New South Wales or the Australian Capital Territory may issue a warrant in relation to premises or a person in the Jervis Bay Territory.

(7) A magistrate in a State or internal Territory may:

- 5 (a) issue a warrant in relation to premises or a person in that State or Territory; or
- (b) issue a warrant in relation to premises or a person in an external Territory; or
- 10 (c) issue a warrant in relation to premises or a person in another State or internal Territory (including the Jervis Bay Territory) if he or she is satisfied that there are special circumstances that make the issue of the warrant appropriate; or
- 15 (d) issue a warrant in relation to a person wherever the person is in Australia or in an external Territory if he or she is satisfied that it is not possible to predict where the person may be.

Content of warrants

48.(1) If a magistrate issues a search warrant, the magistrate is to state in the warrant:

- 20 (a) the purpose for which it is issued, including the Tribunal offence to which the Tribunal's proceeding or investigation relates; and
- (b) a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and
- (c) the kinds of evidential material that are to be searched for under the warrant; and
- 25 (d) the name of the police officer who, unless he or she inserts the name of another police officer in the warrant, is to be responsible for executing the warrant; and
- (e) the period for which the warrant remains in force, which must not be more than:
- 30 (i) if the warrant is issued on an application by telephone, telex, fax or other electronic means as provided by section 52—48 hours; or
- (ii) otherwise—7 days; and
- 35 (f) whether the warrant may be executed at any time or only during particular hours.

(2) Paragraph (1)(e) does not prevent the issue of successive warrants in relation to the same premises or person.

- (3) The magistrate is also to state, in a warrant in relation to premises:
- (a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (1)(c)) found at the premises in the course of the search that the executing officer or an officer assisting believes on reasonable grounds to be: 5
- (i) evidential material; or
- (ii) a thing relevant to an indictable offence against an Australian law;
- if the executing officer or an officer assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing a Tribunal offence or an indictable offence against an Australian law; and 10
- (b) whether the warrant authorises an ordinary search or a frisk search of a person who is at or near the premises when the warrant is executed if the executing officer or an officer assisting suspects on reasonable grounds that the person has any evidential material or seizable items in his or her possession. 15
- (4) The magistrate is also to state, in a warrant in relation to a person:
- (a) that the warrant authorises the seizure of a thing (other than evidential material of the kind referred to in paragraph (1)(c)) found, in the course of the search, in the possession of the person or in or on a recently used conveyance, being a thing that the executing officer or an officer assisting believes on reasonable grounds to be: 20
- (i) evidential material; or
- (ii) a thing relevant to an indictable offence against an Australian law; 25
- if the executing officer or an officer assisting believes on reasonable grounds that seizure of the thing is necessary to prevent its concealment, loss or destruction or its use in committing a Tribunal offence or an indictable offence against an Australian law; and 30
- (b) the kind of search of a person that the warrant authorises.

The things authorised by a search warrant in relation to premises

49.(1) A warrant in force in relation to premises authorises the executing officer or an officer assisting:

- (a) to enter the warrant premises and, if the premises are a conveyance, to enter the conveyance, wherever it is; and 35
- (b) to search for and record fingerprints found at the premises and to take samples of things found at the premises for forensic purposes; and

- (c) to search the premises for the kinds of evidential material specified in the warrant, and to seize things of that kind found at the premises; and
- 5 (d) to seize other things found at the premises in the course of the search that the executing officer or an officer assisting believes on reasonable grounds to be:
 - (i) evidential material; or
 - (ii) things relevant to an indictable offence against an Australian law;
- 10 if the executing officer or an officer assisting believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing a Tribunal offence or an indictable offence against an Australian law; and
- 15 (e) to seize other things found at the premises in the course of the search that the executing officer or an officer assisting believes on reasonable grounds to be seizable items; and
- (f) if the warrant so allows—to conduct an ordinary search or a frisk search of a person at or near the premises if the executing officer or an officer assisting suspects on reasonable grounds that the person
- 20 has any evidential material or seizable items in his or her possession.
- (2) If the warrant states that it may be executed only during particular hours, it must not be executed outside those hours.

The things authorised by a search warrant in relation to a person

25 **50.(1)** A warrant in force in relation to a person authorises the executing officer or an officer assisting:

- (a) to:
 - (i) search the person as specified in the warrant; and
 - (ii) search things found in the possession of the person; and
 - (iii) search any recently used conveyance;
- 30 for things of the kind specified in the warrant; and
- (b) to:
 - (i) seize things of that kind; and
 - (ii) record fingerprints from things; and
 - (iii) take forensic samples from things;
- 35 found in the course of the search; and
- (c) to seize other things found in the possession of the person or in or on the conveyance in the course of the search that the executing officer or an officer assisting believes on reasonable grounds to be:
 - (i) evidential material; or

- (ii) things relevant to an indictable offence against an Australian law;

if the executing officer or a police officer assisting believes on reasonable grounds that seizure of the things is necessary to prevent their concealment, loss or destruction or their use in committing a Tribunal offence or an indictable offence against an Australian law; and

- (d) to seize other things found in the course of the search that the executing officer or a police officer assisting believes on reasonable grounds to be seizable items.

(2) If the warrant states that it may be executed only during particular hours, it must not be executed outside those hours.

(3) If the warrant authorises an ordinary search or a frisk search of a person, a search of the person different to that so authorised must not be done under the warrant.

Restrictions on personal searches

51. A warrant can not authorise a strip search or a search of a person's body cavities.

Warrants may be issued by telephone etc.

52.(1) A police officer may apply to a magistrate for a warrant by telephone, telex, fax or other electronic means:

- (a) in an urgent case; or
 (b) if the delay that would occur if an application were made in person would frustrate the effective execution of the warrant.

(2) The magistrate may require communication by voice to the extent that is practicable in the circumstances.

(3) An application under this section must include all information required to be provided in an ordinary application for a warrant, but the application may, if necessary, be made before the information is sworn.

(4) If an application is made to a magistrate under this section and the magistrate, after considering the information and having received and considered such further information (if any) as the magistrate requires, is satisfied that:

- (a) a warrant in the terms of the application should be issued urgently;
 or
 (b) the delay that would occur if an application were made in person would frustrate the effective execution of the warrant;

the magistrate may complete and sign the same form of warrant that would be issued under section 47.

Formalities relating to warrants issued by telephone etc.

5 53.(1) If the magistrate decides to issue the warrant under section 52, the magistrate is to inform the applicant, by telephone, telex, fax or other electronic means, of the terms of the warrant and the day on which and the time at which it was signed.

(2) The applicant must then complete a form of warrant in terms substantially corresponding to those given by the magistrate, stating on the form the name of the magistrate and the day on which and the time at which the warrant was signed.

10 (3) The applicant must, not later than the day after the day of expiry of the warrant or the day after the day on which the warrant was executed, whichever is the earlier, give or transmit to the magistrate:

- (a) the form of warrant completed by the applicant; and
- 15 (b) if the information referred to in subsection 52(3) was not sworn—that information duly sworn.

(4) The magistrate is to attach to the documents provided under subsection (3) the form of warrant completed by the magistrate.

(5) If:

- 20 (a) it is material, in any proceedings, for a court to be satisfied that the exercise of a power under a warrant issued under section 52 was duly authorised; and
- (b) the form of warrant signed by the magistrate is not produced in evidence;

25 the court is to assume, unless the contrary is proved, that the exercise of the power was not duly authorised.

Division 2—Provisions relating to execution of search warrants

Availability of assistance and use of force in executing a warrant

54. In executing a search warrant:

- 30 (a) the executing officer may obtain such assistance; and
- (b) the executing officer, or a person who is a police officer and who is assisting in executing the warrant, may use such force against persons and things; and
- (c) a person who is not a police officer and who has been authorised to assist in executing the warrant may use such force against things;
- 35 as is necessary and reasonable in the circumstances.

Copy of warrant to be shown to occupier etc.

40 55.(1) If a search warrant in relation to premises is being executed and the occupier of the premises, or another person who apparently represents the occupier, is present at the premises, the executing officer or an officer assisting must make available to that person a copy of the warrant.

(2) If a search warrant in relation to a person is being executed, the executing officer or an officer assisting must make available to that person a copy of the warrant.

(3) If a person is searched under a search warrant in relation to premises, the executing officer or an officer assisting must show the person a copy of the warrant. 5

(4) The executing officer must identify himself or herself to the person at the premises or the person being searched.

(5) The copy of the warrant referred to in subsections (1), (2) and (3) need not include the signature of the magistrate who issued it or the seal of the relevant court. 10

Specific powers available to officers executing warrants

56.(1) In executing a search warrant in relation to premises, the executing officer or an officer assisting may:

(a) for a purpose incidental to execution of the warrant; or 15

(b) if the occupier of the warrant premises consents in writing; take photographs (including video recordings) of the premises or of things at the premises.

(2) In executing a search warrant in relation to premises, the executing officer and the police officers assisting may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the warrant premises: 20

(a) for not more than one hour; or

(b) for a longer period if the occupier of the premises consents in writing.

(3) If: 25

(a) the execution of a search warrant is stopped by an order of a court; and

(b) the order is later revoked or reversed on appeal; and

(c) the warrant is still in force;

the execution of the warrant may be completed. 30

Use of equipment to examine or process things

57.(1) The executing officer or an officer assisting may bring to the warrant premises any equipment reasonably necessary for the examination or processing of things found at the premises in order to determine whether the things may be seized under the warrant. 35

(2) If:

(a) it is not practicable to examine or process the things at the warrant premises; or

(b) the occupier of the premises consents in writing;

the things may be moved to another place so that the examination or processing can be carried out in order to determine whether the things may be seized under the warrant.

5 (3) If things are moved to another place for the purpose of examination or processing under subsection (2), the executing officer must, if it is practicable to do so:

- (a) inform the occupier of the address of the place and the time at which the examination or processing will be carried out; and
- 10 (b) allow the occupier or his or her representative to be present during the examination or processing.

(4) The executing officer or an officer assisting may operate equipment already at the warrant premises to carry out the examination or processing of a thing found at the premises in order to determine whether it may be seized under the warrant if the executing officer or police officer assisting
15 believes on reasonable grounds that:

- (a) the equipment is suitable for the examination or processing; and
- (b) the examination or processing can be carried out without damage to the equipment or thing.

Use of electronic equipment at premises

20 58.(1) The executing officer or an officer assisting may operate electronic equipment at the warrant premises to see whether evidential material is accessible by doing so if he or she believes on reasonable grounds that the operation of the equipment can be carried out without damage to the equipment.

25 (2) If the executing officer or an officer assisting, after operating the equipment, finds that evidential material is accessible by doing so, he or she may:

- (a) seize the equipment and any disk, tape or other associated device; or
- 30 (b) if the material can, by using facilities at the premises, be put in a documentary form—operate the facilities to put the material in that form and seize the documents so produced; or
- (c) if the material can be transferred to a disk, tape or other storage device:
 - (i) that is brought to the premises; or
 - 35 (ii) that is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises;

operate the equipment or other facilities to copy the material to the storage device and take the storage device from the premises.

(3) Equipment may be seized under paragraph (2)(a) only if:

(a) it is not practicable to put the material in documentary form as mentioned in paragraph (2)(b) or to copy the material as mentioned in paragraph (2)(c); or

(b) possession by the occupier of the equipment could constitute an offence against an Australian law. 5

(4) If the executing officer or an officer assisting believes on reasonable grounds that:

(a) evidential material may be accessible by operating electronic equipment at the warrant premises; and 10

(b) expert assistance is required to operate the equipment; and

(c) if he or she does not take action under this subsection, the material may be destroyed, altered or otherwise interfered with;

he or she may do whatever is necessary to secure the equipment, whether by locking it up, placing a guard or otherwise. 15

(5) *The executing officer or an officer assisting must give notice to the occupier of the premises of his or her intention to secure equipment and of the fact that the equipment may be secured for up to 24 hours.*

(6) The equipment may be secured:

(a) for up to 24 hours; or 20

(b) until the equipment has been operated by the expert;

whichever happens first.

(7) If the executing officer or an officer assisting believes on reasonable grounds that the expert assistance will not be available within 24 hours, he or she may apply to the magistrate who issued the warrant for an extension of that period. 25

(8) The executing officer or an officer assisting must give notice to the occupier of the premises of his or her intention to apply for an extension, and the occupier is entitled to be heard in relation to the application.

(9) Division 1 applies, with such modifications as are necessary, to issuing an extension. 30

Compensation for damage to electronic equipment

59.(1) If:

(a) damage is caused to equipment as a result of it being operated as mentioned in section 57 or 58; and 35

(b) the damage was caused as a result of:

(i) insufficient care being exercised in selecting the person who was to operate the equipment; or

(ii) insufficient care being exercised by the person operating the equipment;

5

compensation for the damage is payable to the owner of the equipment.

(2) Compensation is payable out of money appropriated by the Parliament for the purpose.

(3) In determining the amount of compensation payable, regard is to be had to whether the occupier of the warrant premises and his or her employees and agents, if they were available at the time, had provided any warning or guidance as to the operation of the equipment that was appropriate in the circumstances.

10

Copies of seized things to be provided

15 **60.(1)** Subject to subsection (2), if an executing officer or officer assisting seizes, under a warrant in relation to premises:

(a) a document, film, computer file or other thing that can be readily copied; or

(b) a storage device the information in which can be readily copied;

20 the executing officer or officer assisting must, if requested to do so by the occupier of the warrant premises or another person who apparently represents the occupier and who is present when the warrant is executed, give a copy of the thing or the information to that person as soon as practicable after the seizure.

25 (2) Subsection (1) does not apply if:

(a) the thing was seized under paragraph 58(2)(b) or (c); or

(b) possession by the occupier of the document, film, computer file, thing or information could constitute an offence against an Australian law.

30 Occupier entitled to be present during search

61.(1) If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the person is entitled to observe the search being conducted.

35 (2) The right to observe the search being conducted ceases if the person impedes the search.

(3) This section does not prevent 2 or more areas of the premises being searched at the same time.

Receipts for things seized under warrant

62.(1) If a thing is seized under a warrant or moved under subsection 57(2), the executing officer or an officer assisting must provide a receipt for the thing.

(2) If 2 or more things are seized or removed, they may be covered in the one receipt. 5

Division 3—Stopping and searching conveyances**Searches without warrant in emergency situations**

63.(1) This section applies if a police officer suspects, on reasonable grounds, that: 10

- (a) evidential material is in or on a conveyance; and
- (b) it is necessary to exercise a power under subsection (2) in order to prevent the material from being concealed, lost or destroyed; and
- (c) it is necessary to exercise the power without the authority of a search warrant because the circumstances are serious and urgent. 15

(2) The police officer may:

- (a) stop and detain the conveyance; and
- (b) search the conveyance, and any container in or on the conveyance, for the material; and
- (c) seize the material if he or she finds it there. 20

(3) If, in the course of searching for the material, the police officer finds other evidential material or a thing relevant to an offence against an Australian law, the police officer may seize that material or thing if he or she suspects, on reasonable grounds, that:

- (a) it is necessary to seize it in order to prevent its concealment, loss or destruction; and 25
- (b) it is necessary to seize it without the authority of a search warrant because the circumstances are serious and urgent.

(4) The police officer must exercise his or her powers subject to section 64. 30

How a police officer exercises a power under section 63

64. When a police officer exercises a power under section 63 in relation to a conveyance, he or she:

- (a) may use such assistance as is necessary; and
- (b) must search the conveyance in a public place or in some other place to which members of the public have ready access; and 35
- (c) must not detain the conveyance for longer than is necessary and reasonable to search it and any container found in or on the conveyance; and

- (d) may use such force as is necessary and reasonable in the circumstances, but must not damage the conveyance or any container found in or on the conveyance by forcing open a part of the conveyance or container unless:
- 5 (i) the person (if any) apparently in charge of the conveyance has been given a reasonable opportunity to open that part or container; or
- (ii) it is not possible to give that person such an opportunity.

Division 4—Arrest and related matters

10 **Power to enter premises to arrest person**

65.(1) Subject to subsection (2), if:

- (a) a police officer has, under this Act or pursuant to a warrant issued under this Act, power to arrest a person; and
- 15 (b) the police officer believes on reasonable grounds that the person is on any premises;

the police officer may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

20 (2) A police officer must not enter a dwelling house under subsection (1) at any time during the period commencing at 9 p.m. on a day and ending at 6 a.m. on the following day unless the police officer believes on reasonable grounds that:

- (a) it would not be practicable to arrest the person, either at the dwelling house or elsewhere, at another time; or
- 25 (b) it is necessary to do so in order to prevent the concealment, loss or destruction of evidential material.

(3) In subsection (2):

“dwelling house” includes a conveyance, and a room in a hotel, motel, boarding house or club, in which people ordinarily retire for the night.

30 **Use of force in making arrest**

66.(1) A person must not, in the course of arresting another person under this Act or pursuant to a warrant issued under this Act, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

35 (2) Without limiting the operation of subsection (1), a police officer must not, in the course of arresting a person under this Act or pursuant to a warrant issued under this Act:

- (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); or
- (b) if the person is attempting to escape arrest by fleeing—do such a thing unless:
 - (i) the police officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the police officer); and
 - (ii) the person has, if practicable, been called on to surrender and the police officer believes on reasonable grounds that the person cannot be apprehended in any other manner.

Persons to be informed of grounds of arrest

67.(1) A person who arrests another person under this Act or pursuant to a warrant issued under this Act must inform the other person, at the time of the arrest, of the Tribunal offence in respect of which, or, if the other person is arrested under section 78 or 79, the reason for which, the other person is being arrested.

(2) It is sufficient if the other person is informed of the substance of the offence or reason, and it is not necessary that this be done in language of a precise or technical nature.

(3) Subsection (1) does not apply to the arrest of the other person if:

- (a) the other person should, in the circumstances, know the substance of the Tribunal offence in respect of which, or the reason for which, he or she is being arrested; or
- (b) the other person's actions make it impracticable for the person making the arrest to inform the other person of the Tribunal offence in respect of which, or the reason for which, he or she is being arrested.

Power to conduct a frisk search of an arrested person

68. A police officer who arrests a person under this Act or pursuant to a warrant issued under this Act, or who is present at such an arrest, may, if the police officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying any seizable items:

- (a) conduct a frisk search of the person at or soon after the time of arrest; and
- (b) seize any seizable items found as a result of the search.

Power to conduct an ordinary search of an arrested person

69. A police officer who arrests a person under this Act or pursuant to a warrant issued under this Act, or who is present at such an arrest, may, if the police officer suspects on reasonable grounds that the person is carrying:

- (a) evidential material relating to the Tribunal offence to which the person's custody relates; or
- (b) a seizable item;

5 conduct an ordinary search of the person at or soon after the time of arrest, and seize any such thing found as a result of the search.

Power to conduct search of arrested person's premises

70. A police officer who arrests a person at premises under this Act or pursuant to a warrant issued under this Act, or who is present at such an arrest, may seize things in plain view at those premises that the police officer
10 believes on reasonable grounds to be:

- (a) evidential material relating to the Tribunal offence to which the person's custody relates; or
- (b) seizable items.

Power to conduct an ordinary search or strip search

15 71.(1) If a person who has been arrested under this Act or pursuant to a warrant issued under this Act is brought to a police station, a police officer may:

- (a) if an ordinary search of the person has not been conducted—conduct an ordinary search of the person; or
- 20 (b) subject to this section, conduct a strip search of the person.

(2) A strip search may be conducted if:

- (a) a police officer suspects on reasonable grounds that:
 - 25 (i) the person has in his or her possession evidential material relating to the Tribunal offence to which the person's custody relates; or
 - (ii) the person has in his or her possession a seizable item; or
 - (iii) a visual inspection of the person's body will provide evidence of the person's involvement in that offence; and
- 30 (b) the police officer suspects on reasonable grounds that it is necessary to conduct a strip search of the person in order to recover that thing or to discover that evidence; and
- (c) a police officer of the rank of superintendent or higher has approved the conduct of the search.

35 (3) Subject to section 72, a strip search may also be conducted if the person consents in writing.

(4) Subject to section 72, a strip search may be conducted in the presence of a medical practitioner who may assist in the search.

(5) The approval may be obtained by telephone, telex, fax or other electronic means.

(6) A police officer who gives or refuses to give an approval for the purposes of paragraph (2)(c) must make a record of the decision and of the reasons for the decision.

(7) Such force as is necessary and reasonable in the circumstances may be used to conduct a strip search under subsection (2). 5

(8) Any item of a kind referred to in subparagraph (2)(a)(i) or (ii) that is found during a strip search may be seized.

Rules for conduct of strip search

72.(1) A strip search:

(a) must be conducted in a private area; and 10

(b) must be conducted by a police officer who is of the same sex as the person being searched; and

(c) subject to subsections (3) and (4), must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched; and 15

(d) must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search; and

(e) must not be conducted on a person who is under 10; and

(f) if the person being searched is at least 10 but under 18, or is incapable of managing his or her affairs: 20

(i) may only be conducted if a court orders that it be conducted; and

(ii) must be conducted in the presence of a parent or guardian of the person being searched or, if that is not acceptable to the person, in the presence of another person (other than a police officer) who is capable of representing the interests of the person and who, as far as is practicable in the circumstances, is acceptable to the person; and 25

(g) must not involve a search of a person's body cavities; and

(h) must not involve the removal of more garments than the police officer conducting the search believes on reasonable grounds to be necessary to determine whether the person has in his or her possession the item searched for or to establish the person's involvement in the Tribunal offence; and 30

(i) must not involve more visual inspection than the police officer believes on reasonable grounds to be necessary to establish the person's involvement in the Tribunal offence. 35

(2) In deciding whether to make an order referred to in paragraph (1)(f), the court must have regard to:

(a) the seriousness of the Tribunal offence to which the person's custody relates; and 40

- (b) the age or any disability of the person; and
- (c) such other matters as the court thinks fit.

5 (3) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if a medical practitioner of the same sex as the person being searched is not available within a reasonable time.

(4) Paragraph (1)(c) does not apply to a parent, guardian or personal representative of the person being searched if the person being searched has no objection to the person being present.

10 (5) If any of a person's garments are seized as a result of a strip search, the person must be provided with adequate clothing.

Division 5—General

Conduct of ordinary searches and frisk searches

15 73.(1) An ordinary search or a frisk search of a person under this Part must, if practicable, be conducted by a person of the same sex as the person being searched.

(2) An officer assisting who is not a police officer must not take part in an ordinary search or a frisk search of a person under this Part.

Announcement before entry

20 74.(1) A police officer must, before any person enters premises under a warrant or to arrest a person:

- (a) announce that he or she is authorised to enter the premises; and
- (b) give any person at the premises an opportunity to allow entry to the premises.

25 (2) A police officer is not required to comply with subsection (1) if he or she believes on reasonable grounds that immediate entry to the premises is required to ensure:

- (a) the safety of a person (including the police officer); or
 - (b) that the effective execution of the warrant or the arrest is not
- 30 frustrated.

Offence for making false statements in warrants

75. A person must not make, in an application for a warrant, a statement that the person knows to be false or misleading in a material particular.

Penalty: Imprisonment for 2 years.

35 Note: Under subsection 4D(1) of the *Crimes Act 1914*, this penalty is only a maximum penalty for the offence. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment.

Offences relating to telephone warrants

76. A person must not:

- (a) state in a document that purports to be a form of warrant under section 52 the name of a magistrate unless that magistrate issued the warrant; or 5
- (b) state on a form of warrant under that section a matter that, to the person's knowledge, departs in a material particular from the form authorised by the magistrate; or
- (c) purport to execute, or present to a person, a document that purports to be a form of warrant under that section that: 10
 - (i) the person knows has not been approved by a magistrate under that section; or
 - (ii) the person knows to depart in a material particular from the terms authorised by a magistrate under that section; or
- (d) send to a magistrate a form of warrant under that section that is not the form of warrant that the person purported to execute. 15

Penalty: Imprisonment for 2 years.

Note: Under subsection 4D(1) of the *Crimes Act 1914*, this penalty is only a maximum penalty for the offence. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. 20

Retention of things seized

77.(1) If a police officer seizes a thing under this Part, he or she must deliver it into the custody and control of the Commissioner of Police of the Australian Federal Police.

- (2) Subject to subsection (5), the Commissioner must: 25
 - (a) inform the Attorney-General that the thing has been so delivered; and
 - (b) retain the thing pending the Attorney-General's direction under subsection (3) about how to deal with the thing; and
 - (c) comply with any such direction that the Attorney-General gives.

(3) The Attorney-General may, by written notice, give the Commissioner a direction about how to deal with the thing. 30

(4) Without limiting the directions that may be given, a direction may require the Commissioner to send the thing to the Tribunal.

(5) The Attorney-General must direct the Commissioner to return the thing if: 35

- (a) the reason for its seizure no longer exists; or
- (b) it is decided that the thing is not to be used in evidence by the Tribunal or in respect of criminal proceedings in Australia;

unless the thing is forfeited or forfeitable to the Commonwealth or is the subject of a dispute as to ownership. 40

PART 8—MISCELLANEOUS

Arrest of persons escaping from custody

5 78.(1) A police officer may, without warrant, arrest a person, if the police officer has reasonable grounds to believe that the person has escaped from custody authorised by this Act.

 (2) A person who has been arrested under subsection (1) must be returned to the custody referred to in that subsection.

Arrest of person released on bail

10 79.(1) A police officer may, without warrant, arrest a person who has been released on bail under this Act if the police officer has reasonable grounds for believing that the person has contravened, or is about to contravene, a term or condition of a recognisance on which bail was granted to the person.

15 (2) A person arrested under subsection (1) must, as soon as practicable, be brought before the court by which the person was admitted to bail.

Aiding persons to escape, etc.

 80. Sections 46, 47A and 48 of the *Crimes Act 1914* (other than paragraphs 46(ab) and 47A(d) of that Act) apply as if:

20 (a) references in those sections to custody in respect of any offence against a law of the Commonwealth were references to custody while in Australia pursuant to this Act; and

 (b) references in those sections to arrest in respect of any offence against a law of the Commonwealth were references to arrest pursuant to this Act.

25 **Arrangements with States**

 81.(1) The Governor-General may make arrangements with the Governor of a State with respect to the administration of this Act, including arrangements for the performance of the functions of a magistrate under this Act by all or any of the persons who from time to time hold office as magistrates of that State.

30 (2) The Governor-General may arrange with the Governor of a State with whom an arrangement is in force under subsection (1) for the variation or revocation of the arrangement.

35 (3) A copy of each instrument by which an arrangement under subsection (1) or (2) is made, varied or revoked is to be published in the *Gazette*.

40 (4) For the purposes of the application of this section in relation to the Australian Capital Territory, references in this section to the Governor of a State are taken to be references to the Chief Minister of the Australian Capital Territory.

(5) For the purposes of the application of this section in relation to the Northern Territory, references in this section to the Governor of a State are taken to be references to the Administrator of the Northern Territory.

(6) For the purposes of the application of this section in relation to Norfolk Island, references in this section to the Governor of a State are taken to be references to the Administrator of Norfolk Island. 5

Delegation

82. The Attorney-General may delegate to an officer of the Attorney-General's Department all or any of his or her powers under this Act, other than: 10

- (a) his or her powers under Part 3; or
- (b) the power to decide under subsection 26(3), 33(2), 35(2), 36(4), 40(2) or 44(3) not to comply with a request by the Tribunal.

Act not to limit other provision of assistance

83. This Act does not prevent provision of assistance to the Tribunal otherwise than under this Act. 15

Regulations

84. The Governor-General may make regulations, not inconsistent with this Act, prescribing matters:

- (a) required or permitted by this Act to be prescribed; or 20
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
-

SCHEDULE 1

Section 4

RESOLUTION 827 (1993)

Adopted by the Security Council at its 3217th meeting, on 25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

SCHEDULE 1—continued

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;
 2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;
 3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;
 4. Decides that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;
 5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;
 6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;
 7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;
 8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective functioning of the International Tribunal at the earliest time and to report periodically to the Council;
 9. Decides to remain actively seized of the matter.
-

SCHEDULE 2

Section 4

STATUTE OF THE INTERNATIONAL TRIBUNAL

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

SCHEDULE 2—continued

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) imposing measures intended to prevent births within the group;
- (e) forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) genocide;
- (b) conspiracy to commit genocide;
- (c) direct and public incitement to commit genocide;
- (d) attempt to commit genocide;
- (e) complicity in genocide.

Article 5Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

SCHEDULE 2—continued

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecution on political, racial and religious grounds;
- (i) other inhuman acts.

Article 6

Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

SCHEDULE 2—continued**Article 8****Territorial and temporal jurisdiction**

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9**Concurrent jurisdiction**

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10**Non-bis-in-idem**

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

- (a) the act for which he or she was tried was characterized as an ordinary crime; or
- (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

SCHEDULE 2—continued

Article 11

Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

- (a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;
- (b) The Prosecutor, and
- (c) A Registry, servicing both the Chambers and the Prosecutor.

Article 12

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

- (a) Three judges shall serve in each of the Trial Chambers;
- (b) Five judges shall serve in the Appeals Chamber.

Article 13

Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

- (a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
- (b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality;
- (c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation of the principal legal systems of the world;

SCHEDULE 2—continued

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eleven judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

4. The judges shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 14**Officers and member of the Chambers**

1. The judges of the International Tribunal shall elect a President.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the judges of the International Tribunal, the President shall assign the judges to the Appeals Chamber and to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

4. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of the Trial Chamber as a whole.

Article 15**Rules of procedure and evidence**

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

SCHEDULE 2—continued

Article 16

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

SCHEDULE 2—continued**Article 18****Investigation and preparation of indictment**

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

4. Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19**Review of the indictment**

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

3. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20**Commencement and conduct of trial proceedings**

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

SCHEDULE 2—continued

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) to be tried without undue delay;
- (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

SCHEDULE 2—continued

- (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
- (g) not to be compelled to testify against himself or to confess guilt.

Article 22**Protection of victims and witnesses**

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23**Judgement**

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24**Penalties**

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25**Appellate proceedings**

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

SCHEDULE 2—continued

- (a) an error on a question of law invalidating the decision; or
- (b) an error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27

Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

SCHEDULE 2—continued

- (a) the identification and location of persons;
- (b) the taking of testimony and the production of evidence;
- (c) the service of documents;
- (d) the arrest or detention of persons;
- (e) the surrender or the transfer of the accused to the International Tribunal.

Article 30**The status, privileges and immunities of the International Tribunal**

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31**Seat of the International Tribunal**

The International Tribunal shall have its seat at The Hague.

Article 32**Expenses of the International Tribunal**

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33**Working languages**

The working languages of the International Tribunal shall be English and French.

SCHEDULE 2—continued

Article 34

Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE SENATE TO THE BILL AS INTRODUCED

54082 Cat. No. 94 4471 7

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

OUTLINE

The purpose of this Bill is to enable Australia to comply with binding international obligations which were imposed by the United Nations Security Council on 25 May 1993, when it adopted resolution 827. That resolution established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and adopted the Statute of the International Tribunal.

The Statute imposes obligations on Member States 'to co-operate with the International Tribunal in the investigation and prosecution' of accused persons and to comply 'with any request for assistance or an order issued by a Trial Chamber'. Such requests may involve, among other things, the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest and detention of persons, and the surrender of accused persons to the Tribunal.

The Bill contains provisions enabling Australia to comply with these international obligations. In particular, the Bill provides for the following matters:

- the arrest and surrender of persons to the Tribunal (Part 3);
- other forms of assistance to the Tribunal, including the taking of evidence and production of documents or other articles; search and seizure; the giving of evidence at hearings, or assisting in investigations, in foreign countries where the Tribunal is sitting; and service of process (Part 4);
- the sitting of the Tribunal in Australia (Part 5);
- the enforcement of forfeiture orders made by the Tribunal (Part 6); and
- search and seizure and arrest provisions for the purposes of the Bill (Part 7).

FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. However, there are possible implications for Commonwealth agencies which may be affected by the legislation. There may be significant resource implications for the AFP, and cost and resource implications might arise if the Tribunal decides to sit in Australia.

These costs are unable to be quantified at all at this stage (as the extent to which the legislation will be used in Australia cannot be determined).

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 12 months to determine the extent to which the legislation has been utilised and to assess the resource implications.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

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

Clause 2: Commencement

2. This clause provides that clauses 1 and 2 commence on the day the Act receives the Royal Assent, and the remaining provisions commence on a day to be fixed by proclamation or 6 months after Royal Assent, whichever is the earlier.

Clause 3: The objects of this Act

3. This clause sets out the underlying basis of the Act, which is to enable the Commonwealth to co-operate with the Tribunal in the investigation and prosecution of persons accused of committing Tribunal offences. The various heads of assistance covered by the Act are listed.

Clause 4: Definitions

4. This clause defines words and expressions used in the Act.

Clause 5: Some Territories to be regarded as States

5. This clause provides that the Australian Capital Territory, the Northern Territory and Norfolk Island are to be regarded as States for the purposes of this Act (other than clause 6), and are not to be regarded as Territories.

Clause 6: External Territories

6. This clause extends the Act to each external Territory.

PART 2 - REQUESTS BY THE TRIBUNAL FOR ASSISTANCE

Clause 7: Tribunal may request assistance

7. This clause provides that requests made to Australia by the Tribunal are to be made to the Attorney-General, or to a person authorised by the Attorney-General.

Without limiting the types of requests which can be made, the clause sets out the expected types of requests in respect of an investigation or prosecution the Tribunal is conducting or proposing to conduct.

Clause 8: Form of requests

8. This clause provides that a request must be in writing, and sets out the types of information that the Tribunal should provide in its request. However, the clause specifically states that failure to provide such information does not invalidate a request.

PART 3 - SURRENDER OF PERSONS TO THE TRIBUNAL

Division 1 - Arrest of persons

Clause 9: Notice by Attorney-General

9. This clause provides for the Attorney-General to give a notice that a request for surrender has been received from the Tribunal. The clause makes it clear that the Attorney-General does not have a discretion in the issue of this notice. The preconditions for the issue of the notice are that the Attorney-General receives from the Tribunal a request for surrender of a person, and an arrest warrant in relation to the person issued by the Tribunal or a copy of that warrant authenticated by the Tribunal. The issue of the notice is the first stage in the process of surrender to the Tribunal.

Clause 10: Issue of warrants

10. This clause sets out the procedure for the issue of an arrest warrant in relation to a person.

11. Sub-clause (1) provides that a magistrate is required to issue an arrest warrant, in the statutory form, if an application is made on behalf of the Tribunal for issue of a warrant pursuant to a notice by the Attorney-General that a surrender request has been received from the Tribunal (under clause 9).

12. Sub-clause (2) provides for the issue of an arrest warrant otherwise than pursuant to a notice under clause 9. It recognises that there may be circumstances of urgency requiring arrest before the Tribunal has formally requested surrender and therefore before the Attorney-General has issued a clause 9 notice. The magistrate is required to issue an arrest warrant if an application is made on behalf

of the Tribunal for issue of a warrant, and the application is accompanied by a copy of an arrest warrant issued by the Tribunal, and the application contains a statement to the effect that circumstances of urgency necessitate the issue of a warrant prior to receipt of a notice under clause 9.

13. Sub-clause (3) requires a magistrate to send to the Attorney-General, without delay, a report stating whether the magistrate has issued the warrant.

Clause 11: Cancellation of warrants

14. This clause provides for the Attorney-General to direct the cancellation of arrest warrants in certain circumstances. If a person has not been arrested under a warrant, the Attorney-General must direct a magistrate to cancel the arrest warrant if:

- the Attorney-General is satisfied that a request for surrender which would oblige the Attorney-General to issue a notice under clause 9 will not be received from the Tribunal. (This applies in provisional arrest circumstances, where an arrest is effected in urgent circumstances, but, for some reason, the Tribunal does not follow that up with a request for surrender); or
- the Attorney-General considers for any other reason that the warrant should be cancelled. (This course could be adopted if the Attorney-General considered that, in the light of information, he would exercise his or her discretion to refuse surrender of the person).

15. Where the person has been arrested, clause 13 gives the Attorney-General the same powers in respect of release of the person as this sub-clause gives in respect of cancellation of the warrant.

Clause 12: Remand

16. This clause requires that persons arrested pursuant to a warrant issued under clause 10 be given certain information, and permits magistrates to remand such persons.

17. Sub-clause (1) provides that persons arrested under a warrant must, as soon as practicable:

- be given a written notice specifying the Tribunal offence in respect of which the arrest warrant was issued and describing the conduct that is alleged to constitute the offence; and

- be brought before a magistrate.

18. Sub-clause (2) provides that a person who has been arrested shall be remanded in custody or on bail for sufficient time to enable the Attorney-General to make a surrender determination, and, if appropriate, to enable a magistrate to remand a person in custody under clause 20 following the issue of a surrender warrant.

19. Sub-clause (3) provides that a person shall not be granted bail unless there are exceptional circumstances. Such a provision is considered necessary because experience has shown that there is a very high risk of persons sought for surrender to another country absconding.

20. Sub-clause (4) is related to sub-clause (3). It is designed to prevent 'bail-shopping' amongst magistrates. If a person is refused bail, he or she is not entitled to make applications to other magistrates for release on bail.

Clause 13: Release from remand on the Attorney-General's direction

21. This clause provides for the Attorney-General to direct a magistrate to order that a person who has been arrested and remanded be released from custody or discharged from bail if the Attorney-General is satisfied that a surrender request that would oblige the Attorney-General to issue a notice under clause 9 will not be received from the Tribunal, or if the Attorney-General considers for any other reason that the remand should cease. The Attorney-General has similar powers in clause 11 in relation to cancellation of warrants of arrest.

Clause 14: Release from remand after certain periods

22. This clause provides for release from remand in certain circumstances where a person has been arrested pursuant to a warrant issued under sub-clause 10(2) (before receipt of the Attorney-General's notice under clause 9).

23. Sub-clauses (1) and (2) oblige a magistrate to order the release of a person, or the discharge of recognisances, where the Attorney-General's notice under clause 9 is not received within 45 days after arrest and the magistrate is not satisfied that the notice will be given within a reasonable period.

24. Sub-clauses (3) and (4) oblige a magistrate to order the release of a person, or the discharge of recognisances, where the Attorney-General's notice has not been

received within the reasonable period determined by the magistrate following the 45 day period.

Clause 15: Application for search warrants

25. This clause provides for the application for search warrants where a person has been arrested under a warrant issued under clause 10.

26. Sub-clause (1) sets out the procedures, where a person has been arrested under a warrant, for the application for a search warrant to search premises. If a police officer has reasonable grounds for suspecting that evidential material relating to a Tribunal offence in respect of which the warrant was issued is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause (3)) will be, at any premises, the police officer may, by an information on oath setting out the grounds for that suspicion, apply for the issue of a search warrant in relation to the premises to search for the material. (Part 7 deals with the issuing and effect of search warrants).

27. Sub-clause (2) is in similar terms to sub-clause (1) except that it covers the application for search warrants in relation to persons.

Division 2 - Surrender of persons

Clause 16: Surrender determination by Attorney-General

28. This clause provides for the Attorney-General to determine whether a person remanded under Division 1 is to be surrendered to the Tribunal.

29. The Attorney-General must determine to surrender the person unless he or she is satisfied that there are exceptional circumstances. In considering whether there are exceptional circumstances, the Attorney-General must give the person a reasonable opportunity to provide documents showing exceptional circumstances, and the Attorney-General must consider any documents so provided.

30. The Attorney-General is required to make a determination on the person's surrender as soon as practicable after the person has been remanded under Division 1.

Clause 17: Release from remand on refusal to surrender the person

31. This clause provides that where the Attorney-General has determined not to surrender the person to the Tribunal, he or she must order the release of the person, or the discharge of the recognisances on which bail was granted.

Clause 18: Surrender warrants

32. This clause provides that, subject to clause 19, where the Attorney-General determines that a person is to be surrendered to the Tribunal, he or she shall issue a warrant, in writing in the statutory form, for the surrender of the person to the Tribunal.

Clause 19: Persons imprisoned under Australian law

33. The effect of sub-clause (1) (together with clause 18) is that where the Attorney-General determines that a person is to be surrendered and that person is serving a prison sentence in Australia for an offence against an Australian law, the Attorney-General shall nevertheless issue a surrender warrant. However, a surrender warrant is not to be issued unless the Attorney-General is satisfied that the Tribunal has given adequate undertakings, if required, in relation to the return of the person to Australia to serve the remainder of the sentence once the person is no longer required to be detained by, or on the order of, the Tribunal and in relation to the custody of the person while travelling, and while in other countries, for the Tribunal's purposes.

34. Sub-clause (2) makes it clear that parolees and licensees are not to be regarded as serving a sentence of imprisonment.

Clause 20: Detention following surrender warrants

35. This clause provides that if the Attorney-General issues a surrender warrant, the person must be brought as soon as practicable before a magistrate, who must remand the person in custody for such time as is necessary to enable the surrender warrant to be executed.

Clause 21: Content of surrender warrants

36. This clause provides that a surrender warrant must provide the necessary directions and authorisations to permit the person to be surrendered to be transported in custody to a specified person who is an officer of the Tribunal or

other person authorised by the Tribunal, and to authorise that specified person to transport the person in custody to a place specified by the Tribunal (which may be a place out of Australia if the Tribunal is sitting out of Australia or a place in Australia if the Tribunal is sitting in Australia) for the purpose of surrendering the person to a person appointed by the Tribunal to receive the person.

Clause 22: Execution of surrender warrants

37. This clause provides for the execution of surrender warrants according to their tenor.

Clause 23: Release from remand

38. This clause permits the Federal Court or a Supreme Court to release a person who is still in custody in Australia 2 months after a surrender warrant was first liable to be executed. However, where the court is satisfied that the warrant has not been executed (the person has not been delivered into the custody of the Tribunal) because of danger to life or prejudice to health, or for any other reasonable cause, it shall not order release.

Clause 24: Effect of surrender to Tribunal on person's terms of imprisonment

39. This clause provides in effect that the time a federal or Territory prisoner spends in the custody of the Tribunal is to count towards the person's federal sentence. It mirrors clause 38, which provides for similar treatment where the federal or Territory prisoner is a witness (but not an accused person) or otherwise assisting the Tribunal.

Clause 25: Expiry of Australian sentences while under Tribunal detention

40. This clause applies to a person who was serving a sentence of imprisonment in respect of an offence against an Australian law at the time of surrender. It provides that where the person's sentence expires while the person is being detained by, or on the order of, the Tribunal, the Attorney-General must inform the Tribunal of the expiry and that the undertakings referred to in clause 19 (if the Tribunal was required to give such undertakings) are no longer required to be complied with.

PART 4 - OTHER FORMS OF ASSISTANCE TO THE TRIBUNAL

Division 1 - Taking evidence etc.

Clause 26: Attorney-General may authorise taking of evidence etc.

41. This clause enables the Attorney-General, if requested by the Tribunal, to authorise an Australian magistrate to take evidence and have documents and articles produced for the purpose of transmission to the Tribunal for the purposes of a proceeding before, or an investigation conducted by, the Tribunal. The Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

Clause 27: Taking of evidence

42. This clause sets out the procedures to be followed by a magistrate in taking evidence.

Clause 28: Producing documents or other articles

43. This clause sets out the procedures to be followed by a magistrate in relation to the production of documents or other articles.

Clause 29: Legal representation

44. Sub-clause (1) permits the person to whom the proceeding or investigation relates to be present or to be represented in cases where evidence is being taken under clause 27.

45. Sub-clause (2) enables a magistrate conducting a proceeding under either clause 27 or 28, or both, to permit the following to have legal representation: the person to whom the proceeding or investigation relates; any other person giving evidence or producing documents or other articles; and the Tribunal.

Clause 30: Form of certificates

46. This clause requires a certificate by a magistrate under sub-clause 27(2) or 28(2) to state whether particular persons were present when the evidence was taken or the documents or other articles produced.

Clause 31: Compellability of persons to attend etc.

47. Sub-clause (1) permits the magistrate to use the relevant compulsory powers of the jurisdiction in which the evidence, etc is being taken to require the attendance of witnesses. This sub-clause also ensures that the witness will have the same protections as a witness in a domestic proceeding.

48. Sub-clause (2) provides that the person to whom the proceeding or investigation relates cannot be compelled to give evidence.

49. Sub-clause (3) provides that the person to whom the proceeding or investigation relates cannot be compelled to answer questions or produce documents, articles, etc if the person could not be compelled to answer those questions or produce those documents by the Tribunal.

Clause 32: Tribunal immunity certificates

50. This clause provides for an authenticated Tribunal immunity certificate (defined in sub-clause (2)) to be admissible in proceedings under this Division as prima facie evidence of matters stated in the certificate.

Division 2 - Search and seizure

Clause 33: Attorney-General may authorise applications for search warrants

51. This clause provides for the Attorney-General to authorise a police officer to apply to a magistrate for issue of a search warrant where the Tribunal has made a request compliance with which may involve the issue of a search warrant in relation to evidential material, and there are reasonable grounds to believe that the material is in Australia. ('Evidential material' is defined in clause 4, as a thing relevant to a Tribunal offence, including such a thing in electronic form). The Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

Clause 34: Applications for search warrants

52. This clause provides for applications for search warrants where a police officer has been authorised under clause 33.

53. Sub-clause (1) applies to applications for a search warrant to search premises. If an authorised police officer has reasonable grounds for suspecting that the evidential material is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause (3)) will be, at any premises, the police officer may, by an information on oath setting out the grounds for that suspicion, apply for the issue of a search warrant in relation to the premises to search for the material. (Part 7 deals with the issuing and effect of search warrants).

54. Sub-clause (2) is in similar terms to sub-clause (1) except that it covers the application for search warrants in relation to persons.

Division 3 - Giving evidence at hearings, or assisting in investigations, in foreign countries

Clause 35: Persons giving evidence or assisting (other than prisoners)

55. Sub-clause (1) permits the Attorney-General, if so requested by the Tribunal, to make arrangements for the travel to a foreign country of a person (other than a prisoner) to give evidence at a hearing in connection with a proceeding before the Tribunal or to assist an investigation being conducted by the Tribunal. Before such arrangements may be made, there must be reasonable grounds to believe that the person can give evidence relevant to the proceeding or assist the investigation, and the Attorney-General must be satisfied both that the person has consented to giving evidence or assisting in the foreign country and that the Tribunal (if required by the Attorney-General) has given an adequate undertaking that the person will be returned to Australia according to arrangements agreed to by the Attorney-General.

56. Sub-clause (2) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

Clause 36: Prisoners giving evidence or assisting

57. Sub-clause (1) sets out the circumstances in which the clause will apply. These are that the Tribunal requests the attendance in a foreign country of a federal or State prisoner who is in Australia (whether or not in custody) at a hearing in connection with a proceeding before the Tribunal or to assist an investigation being conducted by the Tribunal. There must be reasonable grounds

to believe that the person can give evidence relevant to the proceeding or assist the investigation, and the Attorney-General must be satisfied both that the person has consented to giving evidence or assisting in the foreign country and that the Tribunal (if required by the Attorney-General) has given adequate undertakings in respect of the matters referred to in clause 37.

58. Sub-clause (2), which applies if the prisoner is being held in custody, permits the Attorney-General, in his or her discretion, to direct that a federal prisoner be temporarily released from custody to travel to the foreign country to give evidence at the proceeding or to assist the investigation. It also requires the appropriate State approvals to be sought in relation to State prisoners and joint federal/State prisoners to enable the transfer of such prisoners to the foreign country. The Attorney-General is also empowered to make arrangements for the relevant travel of the prisoner under escort.

59. Sub-clause (3) provides that the travel to a foreign country of federal or joint federal/State prisoners who have been released from custody on parole or under licence will be subject to the obtaining of such federal or State approvals, authorities or permissions as may be required for the travel.

60. Sub-clause (4) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

61. Sub-clause (5) defines "parole" and "parole decision" for the purposes of the clause.

Clause 37: Undertakings relating to prisoners

62. This clause specifies the nature of the undertakings that the Tribunal may be required to give in relation to a request for a prisoner to give evidence or assist an investigation in a foreign country. The undertakings are:

- that, in relation to any prisoner, the prisoner will be returned to Australia in accordance with arrangements agreed to by the Attorney-General;
- that, in relation to a prisoner who is being held in custody in Australia, appropriate arrangements will be made for the prisoner to be kept in custody in the foreign country; and the prisoner will not be released from such custody unless the Attorney-General notifies the Tribunal that the prisoner is

entitled to be released under Australian law; and, if the prisoner is so released, the person's accommodation and other expenses in the foreign country will be paid for by the Tribunal until such time as the Tribunal decides that the person is no longer required to give evidence in the proceeding, or to assist the investigation, to which the request relates.

Clause 38: Effect of removal to foreign country on prisoner's terms of imprisonment

63. This clause in effect gives a prisoner credit for time spent in custody overseas.

Division 4 - Custody of persons in transit

Clause 39: Transit

64. Sub-clause (1) provides that a person may be transported through Australia in the custody of another person, if a person is to be transported in custody from a foreign country through Australia to another foreign country for the purpose of giving evidence in a proceeding before the Tribunal, or giving assistance in relation to an investigation being conducted by the Tribunal, or being surrendered to the Tribunal.

65. Sub-clause (2) provides that if an aircraft or ship by which the person is being transported lands or calls at a place in Australia, the Attorney-General may direct the person to be held in custody pending continuation of the person's transportation.

66. Sub-clause (3) permits the Attorney-General to direct that the person being held in custody in Australia pursuant to sub-clause (2) be returned to the original country if the person's transportation is not continued within a reasonable time.

Division 5 - Service of process

Clause 40: Service of process

67. This clause permits the Attorney-General to arrange for the service of a process relating to a proceeding before, or an investigation conducted by, the Tribunal, if so requested by the Tribunal. However, the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

PART 5 - SITTINGS OF THE TRIBUNAL IN AUSTRALIA

Clause 41: Tribunal sittings in Australia

68. This clause enables the Tribunal to sit in Australia for the purpose of performing its functions, including the taking of evidence, the conducting or continuing of a proceeding before the Tribunal, or the giving of judgment in a proceeding before the Tribunal.

Clause 42: Tribunal's powers while sitting in Australia

69. This clause provides that the Tribunal's powers whilst sitting in Australia will be such powers as are prescribed by regulations. The clause recognises that such matters will be the subject of separate agreements between the Commonwealth and the Tribunal. The clause provides that the regulations implementing such agreements may apply, adopt or incorporate, with or without modification, the rules of procedure and evidence adopted under Article 15 of the Statute of the Tribunal.

Clause 43: Contravention of Tribunal orders etc.

70. This clause provides for offences of knowingly or recklessly contravening an order that the Tribunal makes, or of otherwise knowingly or recklessly hindering the Tribunal in the performance of its functions, while sitting in Australia. It is considered necessary for the effective exercise of the Tribunal's powers and performance of its functions while sitting in Australia.

PART 6 - FORFEITURE OF PROCEEDS OF TRIBUNAL OFFENCES

Clause 44: Requests for enforcement of forfeiture orders

71. Sub-clause (1) enables the Attorney-General to authorise the Director of Public Prosecutions to apply for registration, in a specified court, of a forfeiture order (defined in clause 4 as an order or declaration made by the Tribunal for forfeiture of property in respect of a Tribunal offence, or evidencing forfeiture of property under the Tribunal's Statute or rules) against property believed to be located in Australia where the Tribunal so requests and the Attorney-General is satisfied that a person has been convicted by the Tribunal of the Tribunal offence to which the order relates and that there is no further appeal available in the Tribunal against that conviction and order.

72. Sub-clause (2) provides that the specified court shall be the Supreme Court of the State or Territory where the property is believed to be located.

73. Sub-clause (3) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying the non-compliance.

Clause 45: Registration of order

74. Sub-clause (1) provides that, where the DPP is authorised to apply for registration of a forfeiture order and the DPP so applies, the court must register the order and give or publish notice of the registration to specified persons in the manner and within the time the court considers appropriate.

75. Sub-clauses (2) and (3) provide for the required form of the Tribunal forfeiture order when an application is made to register such an order. There must be a copy (which may be a facsimile copy) of the appropriate order sealed by the Tribunal.

Clause 46: Effect of order

76. Sub-clause (1) provides that a registered forfeiture order has effect and may be enforced as if it were a forfeiture order made under the Proceeds of Crime Act 1987 at the time of registration.

77. Sub-clause (2) provides that a registration of a facsimile of a sealed copy ceases to have effect after 21 days unless the sealed copy has been registered by then.

PART 7 - SEARCH, SEIZURE AND POWERS OF ARREST

Division 1 - Search warrants

Clause 47: When search warrants can be issued

78. Sub-clause (1) sets out the situations in which a magistrate may issue a warrant to search premises. An application must be made under sub-clause 15(1) or 34(1), and the magistrate must be satisfied by information on oath that there are

reasonable grounds for suspecting that there is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause 3) will be, any evidential material at the premises.

79. Sub-clause (2) is in similar terms to sub-clause (1), except that it relates to the issue of a warrant authorising an ordinary search or a frisk search (defined in clause 4) of a person.

80. Sub-clause (4) provides that if the person 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.

81. Sub-clause (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 particulars and outcomes of all previous applications 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.

82. Sub-clause (6) provides that a magistrate in 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. This recognises that there is no resident magistrate in the Jervis Bay Territory.

83. Sub-clause (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).

Clause 48: Content of warrants

84. Sub-clause (1) sets out the matters which must be specified in a warrant.

85. Sub-clause (2) ensures that the 7 day (or 48 hour) limit on the duration of warrant (referred to in paragraph (e) of sub-clause (1)) does not prevent the issue of further warrants for the same premises or person.

86. Sub-clause (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 evidential material, other than the evidential material for which the warrant was specifically issued, which is found or things 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 committing a Tribunal offence or 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.

87. Sub-clause (4) sets out the additional matters which the magistrate is to specify in a warrant that relates to a person. Paragraph (a) is in similar terms to paragraph (3)(a), and it requires the magistrate to specify that the warrant authorises the seizure of things other than the evidential material for which it was specifically issued in certain circumstances. Paragraph (b) requires the magistrate to state whether a frisk or ordinary search is authorised.

Clause 49: The things authorised by a search warrant in relation to premises

88. Sub-clause (1) sets out the activities authorised by a warrant to search premises.

89. Sub-clause (2) obliges those executing a warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed.

Clause 50: The things authorised by a search warrant in relation to a person

90. Sub-clause (1) sets out the activities authorised by a warrant to search a person.

91. Sub-clauses (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 51: Restrictions on personal searches

92. This clause provides that a search warrant can not authorise either a strip search or a search of a person's body cavities.

Clause 52: Warrants may be issued by telephone etc.

93. 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 53: Formalities relating to warrants issued by telephone etc.

94. This clause sets out the procedures if a magistrate issues a warrant under clause 52. 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 completed form of warrant and if the information had not been sworn, the sworn information. 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 2 - Provisions relating to execution of search warrants

Clause 54: Availability of assistance and use of force in executing a warrant

95. 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 55: Copy of warrant to be shown to occupier etc.

96. 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 of the premises or the person being searched. The clause covers the different situations and the manner in which this should be done.

Clause 56: Specific powers available to officers executing warrants

97. This clause sets out specific powers available to officers executing warrants in relation to premises, including the taking of photographs (including video recordings) in certain circumstances, and the completion of the execution of a warrant after particular interruptions to such execution.

Clause 57: Use of equipment to examine or process things

98. 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 58: Use of electronic equipment at premises

99. This clause provides for the use of electronic equipment at premises. The executing officer or an officer assisting (who under clause 4 may be 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 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. The seizure of printouts or duplicate disks is encouraged wherever possible.

100. The executing officer or officer assisting may secure the equipment by locking it up or guarding it 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. This period may be extended in certain circumstances.

Clause 59: Compensation for damage to electronic equipment

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

Clause 60: Copies of seized things to be provided

102. 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 no original material was seized under sub-clause 58(2) or if possession of the thing seized could constitute an offence against an Australian law.

Clause 61: Occupier entitled to be present during search

103. 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 62: Receipts for things seized under warrant

104. This clause requires receipts to be issued for things seized under a warrant or moved pursuant to sub-clause 57(2). It is possible for two or more items to be listed on the same receipt, so that police would not be required to identify absolutely every item individually where those items can be adequately identified by a class description.

Division 3 - Stopping and searching conveyances

Clause 63: Searches without warrant in emergency situations

105. This clause applies where a police officer suspects on reasonable grounds that evidential material is in an aircraft, vessel or vehicle. The police officer must also suspect that it is necessary to seize the material to prevent concealment, loss or destruction and that it is necessary to act without the authority of a search warrant

because the circumstances are so serious and urgent. Under such circumstances, the police officer may stop, detain and search the conveyance, and seize the material.

106. If in the course of the search the police officer finds other evidential material or a thing relevant to an offence against an Australian law, it may be seized to prevent its concealment, loss or destruction if the circumstances are so serious and urgent.

107. The police officer is required to exercise his or her powers subject to clause 63, which provides various safeguards.

Clause 64: How a police officer exercises a power under section 63

108. This clause sets out the manner in which a police officer may exercise powers under clause 63.

Division 4 - Arrest and related matters

Clause 65: Power to enter premises to arrest person

109. This clause 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 sub-clause (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. Sub-clause (2) states the general rule that entry to domestic premises to effect arrest should not be conducted at night. It precludes a police officer entering a dwelling house (defined in sub-clause (3)) to arrest a person between 9 pm and 6 am on the following day unless the police officer believes on reasonable grounds that it would not be practicable to arrest the person in any place at another time, or that it is necessary to prevent the concealment, loss or destruction of evidential material.

Clause 66: 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 67: Persons to be informed of grounds of arrest

112. This clause provides for a person to be informed, at the time of arrest, of the Tribunal offence in respect of which he or she is being arrested, or if the arrest is under clause 78 or 79, to be informed of the reason for arrest. This does not require a technical statement of the terms of the offence or the reason but merely of its substance. This requirement does not apply if the arrested person should, in the circumstances, know the substance of the Tribunal offence or reason, or if the arrested person's actions make it impracticable.

Clause 68: Power to conduct a frisk search of an arrested person

113. This clause provides that a police officer may, upon or soon after arrest, conduct a frisk search (quick running of the hands over the person's outer garments) and seize any seizable items (anything that would present a danger to a person or that could be used to assist a person to escape). The police officer must suspect on reasonable grounds that it is prudent to ascertain if the arrested person is carrying any seizable item.

114. 'Frisk search' and 'seizable item' are defined in clause 4, and pursuant to clause 73 must, if practicable, be conducted by a person of the same sex.

Clause 69: Power to conduct an ordinary search of an arrested person

115. This clause provides that a police officer may, upon or soon after arrest, conduct an ordinary search and seize any evidential material relating to the Tribunal offence to which the person's custody relates or seizable items. The police officer must suspect on reasonable grounds that the person is carrying such items.

116. 'Ordinary search' is defined in clause 4 and means a search of a person, or of articles in the person's possession, that may include requiring the removal of specified outer clothing, gloves, shoes and hat and an examination of those items. Clause 73 requires such a search to be conducted, where practicable, by a person of the same sex as the person to be searched.

Clause 70: Power to conduct search of arrested person's premises

117. This clause provides that a police officer who arrests a person at premises, or who is present at such an arrest, may seize things in plain view at those premises

which the police officer believes to be evidential material relating to the Tribunal offence to which the person's custody relates or seizable items.

Clause 71: Power to conduct an ordinary search or strip search

118. This clause details the circumstances in which an ordinary search or a strip search may be conducted. ('Ordinary search' and 'strip search' are defined in clause 4). The provision does not confer power to take any body samples or search body cavities but only to examine the body surface for things such as bruises, scratches and identifying marks.

Clause 72: Rules for conduct of strip search

119. This clause sets out the procedure to be followed whenever a strip search is conducted as an incident of arrest.

Division 5 - General

Clause 73: Conduct of ordinary searches and frisk searches

120. This clause provides that both ordinary searches and frisk searches must, if practicable, be conducted by a person of the same sex as the person being searched. It also provides that only police officers may take part in ordinary or frisk searches of persons under this Part.

Clause 74: Announcement before entry

121. 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 75: Offence for making false statements in warrants

122. This clause creates an offence of knowingly making a false or misleading statement in an application for a warrant under this Part. The maximum penalty for an offence under this clause is imprisonment for 2 years.

Clause 76: Offences relating to telephone warrants

123. This clause creates offences arising from the preparation, and execution, of a form of warrant obtained by telephone or other electronic means under clause 52. It is an offence for a person to name a magistrate in a form of warrant under clause 52 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 give 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.

Clause 77: Retention of things seized

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

125. A police officer who seizes a thing is required to deliver it into the custody and control of the Commissioner of Police of the Australian Federal Police, who is required to *retain the thing pending any direction from the Attorney-General* as to the manner in which it is to be dealt with. The Commissioner is also required to inform the Attorney-General when a thing has been so delivered, and to comply with any direction that the Attorney-General gives under sub-clause (3) about how to deal with the thing (which may include a direction that the thing be sent to the Tribunal).

126. Sub-clause (5) imposes a restriction on the power to retain a thing indefinitely, by requiring the Attorney-General to direct the Commissioner to return the thing in certain circumstances.

PART 8 - MISCELLANEOUS

Clause 78: Arrest of persons escaping from custody

127. This clause permits the re-arrest of persons who have escaped from any custody authorised by the Act and permits the return of such persons to the originally authorised custody.

Clause 79: Arrest of person released on bail

128. This clause enables a police officer to arrest without warrant a person who refuses or fails to comply with a condition of a recognisance upon which the person was remanded on bail under the Act, or who the police officer believes on reasonable grounds is preparing to contravene such a condition.

Clause 80: Aiding persons to escape, etc.

129. This clause provides for the application of certain sections of the Crimes Act 1914 to enable prosecution of persons who assist, aid, etc the person's escape. It provides that sections 46 (Aiding prisoner to escape), 47A (Rescuing a prisoner from custody etc) and 48 (Harbouring etc an escapee) of the Crimes Act 1914 will apply (so far as they are relevant) to persons aiding, rescuing, harbouring, etc prisoners/escapees under the Act.

Clause 81: Arrangements with States

130. This clause permits the making of arrangements between the Commonwealth and the individual States (including the Northern Territory, the Australian Capital Territory and Norfolk Island) for the administration of the Act and in particular to permit magistrates in those places to perform functions conferred on magistrates under the Act.

131. Arrangements made under this power are required to be published in the Gazette.

Clause 82: Delegation

132. This clause permits the Attorney-General to delegate his or her powers under the Bill, apart from powers under Part 3 and the power under subclauses 26(3), 33(2), 35(2), 36(4), 40(2) and 44(3) (power to decide not to comply with a request by the Tribunal) to an officer of the Attorney-General's Department.

Clause 83: Act not to limit other provision of assistance

133. This clause makes it clear that this Act will not prevent the provision of any assistance to the Tribunal which may be provided otherwise than under this Act.

Clause 84: Regulations

134. This clause provides for a general regulation-making power.

1993-94

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
THE SENATE

Presented and read a first time

(Attorney-General)

A BILL

FOR

**An Act to make certain amendments relating to the
*International War Crimes Tribunal Act 1994***

The Parliament of Australia enacts:

Short title

1. This Act may be cited as the *International War Crimes Tribunal (Consequential Amendments) Act 1994*.

5 **Commencement**

2.(1) Sections 1 and 2 commence on the day on which this Act receives the Royal Assent.

(2) Subject to subsection (3), section 3 and the Schedule commence on a day to be fixed by Proclamation.

International War Crimes Tribunal
(Consequential Amendments) No. , 1994

(3) If section 3 and the Schedule do not commence under subsection (2) within 6 months after the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.

Consequential amendments

3. The Acts referred to in the Schedule are amended as set out in the Schedule. 5

SCHEDULE

Section 3

AMENDMENTS OF ACTS

Administrative Decisions (Judicial Review) Act 1977

Schedule 1:

After paragraph (r), insert:

“(ra) decisions under the *International War Crimes Tribunal Act 1994*.”

Director of Public Prosecutions Act 1983

Paragraph 6(1)(k):

After “*Extradition Act 1988*” insert “, the *International War Crimes Tribunal Act 1994*”.

Paragraph 9(6A)(b):

After “*Extradition Act 1988*” insert “, the *International War Crimes Tribunal Act 1994*”.

Migration Act 1958

After subparagraph 54A(a)(i):

Insert:

“(ia) the *International War Crimes Tribunal Act 1994*; or”.

After subparagraph 54C(b)(i):

Insert:

“(ia) the *International War Crimes Tribunal Act 1994*; or”.

Proceeds of Crime Act 1987

Division 2A of Part II:

Omit the heading, substitute:

“*Division 2A—Registered foreign and international forfeiture orders*”.

Section 23:

Repeal the section, substitute:

Registered foreign and international forfeiture orders

“23.(1) If:

- (a) a foreign forfeiture order is registered in a court in Australia under the Mutual Assistance Act; or

SCHEDULE—continued

(b) an order is registered in a court in Australia under section 46 of the *International War Crimes Tribunal Act 1994*;

Division 2 applies in relation to the order as if subsections 19 (5) and 20 (3), (4), (5) and (6) and sections 21 and 22 were omitted.

“(2) If:

(a) a foreign forfeiture order against property is registered in a court in Australia under the Mutual Assistance Act; or

(b) an order against property is registered in a court in Australia under section 46 of the *International War Crimes Tribunal Act 1994*;

the property may, subject to section 23A, be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General or of a person authorised by the Attorney-General in writing for the purposes of this subsection.”.

After subsection 23A(1):

Insert:

“(1A) This section also applies if a court registers under section 46 of the *International War Crimes Tribunal Act 1994* an order against property.”.

Subsection 23A(2):

After “registering the” insert “foreign or international forfeiture”.

Paragraph 23A(2)(a):

Omit “serious”, substitute “or international”.

Subsection 23A(3):

(a) Omit “serious”, substitute “or international”.

(b) After “which the foreign” insert “or international”.

Subsection 23A(4):

After “foreign” insert “or international”.

Paragraph 23A(7)(a):

(a) Omit “serious”, substitute “or international”.

(b) After “which the foreign” insert “or international”.

Subparagraph 23A(7)(b)(ii):

Omit “serious”, substitute “or international”.

Subsection 23A(8):

After “foreign” insert “or international”.

SCHEDULE—continued

Section 23A:

Add at the end:

“(12) In this section:

‘foreign or international forfeiture order’ means:

(a) the foreign forfeiture order mentioned in subsection (1) in relation to which this section applies; or

(b) the order mentioned in subsection (1A) in relation to which this section applies;

as the case may be;

‘foreign or international offence’ means:

(a) a foreign serious offence; or

(b) a Tribunal offence within the meaning of the *International War Crimes Tribunal Act 1994*;

as the case requires.”.

Subparagraph 34C(1)(a)(ii):

After “forfeiture order” insert “, an order registered under section 46 of the *International War Crimes Tribunal Act 1994*”.

Telecommunications (Interception) Act 1979

Paragraph 5B(g):

Omit “or”.

Section 5B:

Add at the end:

“; or (i) a proceeding under Division 1 of Part 4 of the *International War Crimes Tribunal Act 1994*.”.

NOTE ABOUT SECTION HEADING

1. On the commencement of section 3 of this Act, the heading to section 23A of the *Proceeds of Crime Act 1987* is altered by inserting “or international” after “foreign”.

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL WAR CRIMES TRIBUNAL (CONSEQUENTIAL
AMENDMENTS) BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)

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INTERNATIONAL WAR CRIMES TRIBUNAL (CONSEQUENTIAL
AMENDMENTS) BILL 1994

OUTLINE

The International War Crimes Tribunal (Consequential Amendments) Bill 1994 amends certain Commonwealth Acts consequential upon the enactment of the International War Crimes Tribunal Bill 1994.

FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue. The financial impact of the International War Crimes Tribunal Bill 1994 is addressed in the explanatory memorandum for that Bill.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

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

Clause 2: Commencement

2. This clause provides that clauses 1 and 2 commence on Royal Assent, and the remaining provisions commence on a day to be fixed by proclamation or 6 months after Royal Assent, whichever is the earlier.

Clause 3: Consequential amendments

3. This clause provides that the Acts set out in the Schedule are amended as provided in the Schedule.

SCHEDULE - Amendments of Acts

Administrative Decisions (Judicial Review) Act 1977

New paragraph (ra) in Schedule 1

4. This amendment is to the effect that decisions under the *International War Crimes Tribunal Act 1994* are not to be subject to review under the *Administrative Decisions (Judicial Review) Act*. The reason for this amendment is that Australia has binding international obligations, imposed by the United Nations Security Council, to quickly and effectively comply with requests for assistance by the Tribunal established by the United Nations Security Council (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991).

Director of Public Prosecutions Act 1983

Paragraph 6(1)(k)

5. The purpose of this amendment is to enable the Director of Public Prosecutions to appear in proceedings under the *International War Crimes Tribunal Act 1994*.

Paragraph 9(6A)(b)

6. The purpose of this amendment is to enable the Director of Public Prosecutions to grant indemnities to persons who are to give evidence for the purpose of proceedings under the *International War Crimes Tribunal Act 1994*.

Migration Act 1958

7. The amendments to the *Migration Act 1958* simply facilitate the entry into Australia and subsequent departure of persons who are required in Australia for purposes connected with the *International War Crimes Tribunal Act 1994*.

Proceeds of Crime Act 1987

8. The amendments to the *Proceeds of Crime Act 1987* enable forfeiture orders (as defined in section 4 of the *International War Crimes Tribunal Act 1994*) registered under section 46 of the *International War Crimes Tribunal Act 1994* to be enforced as if they were forfeiture orders made under the *Proceeds of Crime Act 1987* at the time of registration (in accordance with section 47 of the *International War Crimes Tribunal Act 1994*). (This is consistent with the approach by which foreign forfeiture orders registered in a court in Australia under the *Mutual Assistance in Criminal Matters Act 1987* are dealt with).

Telecommunications (Interception) Act 1979

9. The effect of the amendment to the *Telecommunications (Interception) Act 1979* is to include proceedings under Division 1 of Part 4 of the *International War Crimes Tribunal Act 1994* (the taking of evidence, or production of documents or other articles in Australia for the purposes of, and at the request of, the Tribunal within the meaning of that Act) as 'exempt proceedings'. The purpose is to ensure that lawfully intercepted information can be used in such proceedings.

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

SENATE

INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

Second Reading Speech

Mr President, I move that this Bill be now read a second time.

The purpose of this Bill is to enable Australia to comply with binding international obligations which were imposed by the United Nations Security Council on 25 May 1993, when it adopted resolution 827. That resolution established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and adopted the Statute of the International Tribunal.

The decision to establish the Tribunal as an enforcement measure under Chapter VII of the United Nations Charter created, from 25 May 1993, an immediately binding obligation on UN Member States, including Australia, to take whatever action is necessary to implement the Security Council's decision and to meet the obligations imposed under the Statute of the International Tribunal. It is obviously desirable that Australia should be in a position to comply with requests for co-operation with the Tribunal as soon as they are received, and it is therefore important to have the legislation enacted as soon as possible.

The Statute imposes obligations on Member States 'to co-operate with the International Tribunal in the investigation and prosecution' of accused persons and to comply 'with any request for assistance or an order issued by a Trial Chamber'. Such requests may involve, among other things, the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest and detention of persons, and the surrender of accused persons to the Tribunal.

The Bill contains provisions enabling Australia to comply with these international obligations. It specifically provides for the handing over of accused persons to the Tribunal for trial; other forms of assistance to enable co-operation with the Tribunal in the investigation and prosecution of alleged offenders; the recovery and return of property and proceeds of crimes located within Australia; and the Tribunal to sit in Australia if it so desires. The aim was to keep the legislation as simple as possible, while still enabling us to meet our international obligations. The Bill adopts a minimalist approach, providing only for the mandatory obligations imposed by the Statute.

It was originally intended that the Bill would also provide for imprisonment in Australia of persons convicted by the Tribunal. We have been consulting with the States and Territories on this issue, as any persons will need to be imprisoned in State and Territory prisons. The matter has not been included in this Bill because not all States and Territories have responded on this issue, and imprisonment within Australia is not a mandatory obligation under the Statute. However, I recognise that it may be desirable to amend the legislation at an appropriate time, for example, when all the States and Territories have responded, and if the Tribunal commences proceedings against Australian citizens.

I now mention some important features of the Bill.

- Part 3 of the Bill covers the surrender aspect of our obligations. The Statute requires countries to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including ... the surrender or the transfer of the accused to the International Tribunal".

Although the *Extradition Act 1988* was used as a general model for Part 3 of the Bill, the Bill departs from that Act in a number of ways because of the different circumstances and purposes of the legislation. In this case, Australia has binding international obligations to comply with requests for assistance by the Tribunal, and as a result the mechanism for handing over of persons to the Tribunal is more streamlined and has less grounds of refusal than under the *Extradition Act*. The reason for this different approach stems from the unique nature of our international obligations.

One way in which this case differs from usual extradition situations is that the obligation to transfer accused persons to the Tribunal is derived not from a treaty-based obligation but from the duty of UN Member States to implement the decisions of the Security Council.

In addition, persons would be surrendered to an international body, rather than to another country. In any event, persons surrendered to the Tribunal will have the benefit of internationally recognised procedural and legal safeguards.

Furthermore, the Bill provides for the Attorney-General to have a residual discretion to refuse the surrender of a person in exceptional circumstances. Although exercise of this discretion may cause some embarrassment internationally, it does provide discretionary protection for Australian residents that may not be available under the Tribunal's safeguards.

- Parts 4 and 6 of the Bill provide for other types of assistance to enable Australia to co-operate with the Tribunal in the investigation and prosecution of alleged offenders, as required by the Statute.

Part 4 covers the taking of testimony and the production of evidence, the service of documents, search and seizure assistance, and assistance in relation to the giving of evidence at hearings, and assisting in investigations, in foreign countries.

It also appears that the Tribunal may make forfeiture or confiscation orders under the Statute and then seek to have those orders enforced in Australia. However, it will not be totally clear until the Tribunal develops its own rules of evidence and procedure exactly what kinds of orders, if any, the Tribunal may make in relation to the proceeds of crime. It is only envisaged at this stage that the Tribunal is likely to make forfeiture orders and therefore the Bill, in Part 6, includes provisions whereby such orders may be enforced in Australia. If the Tribunal determines at a later date that it will make restraining orders or pecuniary penalty orders which it might seek to have enforced in a particular country, or that it will issue information gathering orders, then it will be necessary at that time to amend the legislation.

Parts 4 and 6 are based upon corresponding provisions in the *Mutual Assistance in Criminal Matters Act 1987*. However, one major difference is the grounds on which a request may be refused. While the Mutual Assistance Act contains a number of such grounds, the Bill has only very limited grounds, namely that complying with the request would prejudice Australia's sovereignty, security or national interest, or that there are exceptional circumstances justifying the non-compliance. This is a direct result of the binding international obligations in this situation. Apart from this matter, the procedures in Parts 4 and 6 of the Bill are almost identical to those employed in similar situations under the *Mutual Assistance in Criminal Matters Act*.

- Part 5 of the Bill covers the possibility of the Tribunal sitting in Australia. Although this is considered to be a remote possibility, the provisions are necessary because the Security Council Resolution provides that while the Tribunal is to have its seat at the Hague, it may sit elsewhere when it considers it necessary for the efficient exercise of its functions.

While sitting in Australia, the Tribunal would be exercising the judicial power of the international community, not the judicial power of the Commonwealth. However, Commonwealth legislation is required to authorise the Tribunal to exercise coercive powers within Australia (such as to compel attendance, and to require production of evidence). The Security Council resolution does not compel Australia to automatically authorise the exercise of such powers. As a matter of comity, countries would expect agreements to be reached about the exercise of power in their territory by a foreign tribunal.

Part 5 of the Bill therefore enables the Tribunal to sit in Australia for the purpose of performing its functions, and provides that the Tribunal's powers while sitting in Australia will be such powers as are prescribed by regulations. Those regulations will implement agreements between the Commonwealth and the Tribunal about the powers that the Tribunal may exercise while sitting in Australia.

- The Bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. However, there are possible implications for Commonwealth agencies which may be affected by the legislation. For example, there may be resource implications for the Australian Federal Police, and cost and resource implications might arise if the Tribunal decides to sit in Australia.

These costs cannot be quantified at all at this stage, as they will depend upon the extent to which the legislation is used in Australia. However, the legislation will be reviewed after it has been in place for a period of 12 months to determine the extent to which it has been utilised and to assess the resource implications.

I present the explanatory memorandum to this Bill.

I commend the Bill to the Senate.

THE PARLIAMENT OF THE
COMMONWEALTH OF AUSTRALIA

SENATE

INTERNATIONAL WAR CRIMES TRIBUNAL
(CONSEQUENTIAL AMENDMENTS) BILL 1994

Second Reading Speech

Mr President, I move that this Bill be now read a second time.

This Bill is consequential upon the International War Crimes Tribunal Bill 1994. It makes consequential amendments to certain Commonwealth Acts.

- The amendment to the *Administrative Decisions (Judicial Review) Act* is to the effect that decisions under the *International War Crimes Tribunal Act 1994* will not be subject to review under the *Administrative Decisions (Judicial Review) Act*. The reason for this amendment is that Australia has binding international obligations, imposed by the United Nations Security Council, to quickly and effectively comply with requests for assistance by the International Tribunal, as I explained in my second reading speech on the *International War Crimes Tribunal Bill 1994*.
- The purpose of the amendments to the *Director of Public Prosecutions Act* is to enable the Director of Public Prosecutions to appear in proceedings, and to grant indemnities to persons who are to give evidence for the purpose of proceedings, under the *International War Crimes Tribunal Act*.
- The amendments to the *Migration Act* simply facilitate the entry into Australia and subsequent departure of persons who are required in Australia for purposes connected with the *International War Crimes Tribunal Act*.

- The amendments to the Proceeds of Crime Act enable forfeiture orders made by the International Tribunal and registered under the International War Crimes Tribunal Act to be enforced as if they were forfeiture orders made under the Proceeds of Crime Act at the time of registration. This is consistent with the approach by which foreign forfeiture orders registered in a court in Australia under the Mutual Assistance in Criminal Matters Act are dealt with.
- The effect of the amendment to the Telecommunications (Interception) Act is to ensure that lawfully intercepted information can be used in proceedings under Division 1 of Part 4 of the International War Crimes Tribunal Act. Those proceedings cover the taking of evidence, or production of documents or other articles in Australia for the purposes of, and at the request of, the Tribunal.
- The Bill is expected to have little impact on Commonwealth expenditure or revenue.

I present the explanatory memorandum to this Bill.

I commend the Bill to the Senate.

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL WAR CRIMES TRIBUNAL (CONSEQUENTIAL
AMENDMENTS) BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)

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INTERNATIONAL WAR CRIMES TRIBUNAL (CONSEQUENTIAL
AMENDMENTS) BILL 1994

OUTLINE

The International War Crimes Tribunal (Consequential Amendments) Bill 1994 amends certain Commonwealth Acts consequential upon the enactment of the International War Crimes Tribunal Bill 1994.

FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue. The financial impact of the International War Crimes Tribunal Bill 1994 is addressed in the explanatory memorandum for that Bill.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

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

Clause 2: Commencement

2. This clause provides that clauses 1 and 2 commence on Royal Assent, and the remaining provisions commence on a day to be fixed by proclamation or 6 months after Royal Assent, whichever is the earlier.

Clause 3: Consequential amendments

3. This clause provides that the Acts set out in the Schedule are amended as provided in the Schedule.

SCHEDULE - Amendments of Acts

Administrative Decisions (Judicial Review) Act 1977

New paragraph (ra) in Schedule 1

4. This amendment is to the effect that decisions under the *International War Crimes Tribunal Act 1994* are not to be subject to review under the *Administrative Decisions (Judicial Review) Act*. The reason for this amendment is that Australia has binding international obligations, imposed by the United Nations Security Council, to quickly and effectively comply with requests for assistance by the Tribunal established by the United Nations Security Council (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991).

Director of Public Prosecutions Act 1983

Paragraph 6(1)(k)

5. The purpose of this amendment is to enable the Director of Public Prosecutions to appear in proceedings under the *International War Crimes Tribunal Act 1994*.

Paragraph 9(6A)(b)

6. The purpose of this amendment is to enable the Director of Public Prosecutions to grant indemnities to persons who are to give evidence for the purpose of proceedings under the *International War Crimes Tribunal Act 1994*.

Migration Act 1958

7. The amendments to the *Migration Act 1958* simply facilitate the entry into Australia and subsequent departure of persons who are required in Australia for purposes connected with the *International War Crimes Tribunal Act 1994*.

Proceeds of Crime Act 1987

8. The amendments to the *Proceeds of Crime Act 1987* enable forfeiture orders (as defined in section 4 of the *International War Crimes Tribunal Act 1994*) registered under section 46 of the *International War Crimes Tribunal Act 1994* to be enforced as if they were forfeiture orders made under the *Proceeds of Crime Act 1987* at the time of registration (in accordance with section 47 of the *International War Crimes Tribunal Act 1994*). (This is consistent with the approach by which foreign forfeiture orders registered in a court in Australia under the *Mutual Assistance in Criminal Matters Act 1987* are dealt with).

Telecommunications (Interception) Act 1979

9. The effect of the amendment to the *Telecommunications (Interception) Act 1979* is to include proceedings under Division 1 of Part 4 of the *International War Crimes Tribunal Act 1994* (the taking of evidence, or production of documents or other articles in Australia for the purposes of, and at the request of, the Tribunal within the meaning of that Act) as 'exempt proceedings'. The purpose is to ensure that lawfully intercepted information can be used in such proceedings.

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

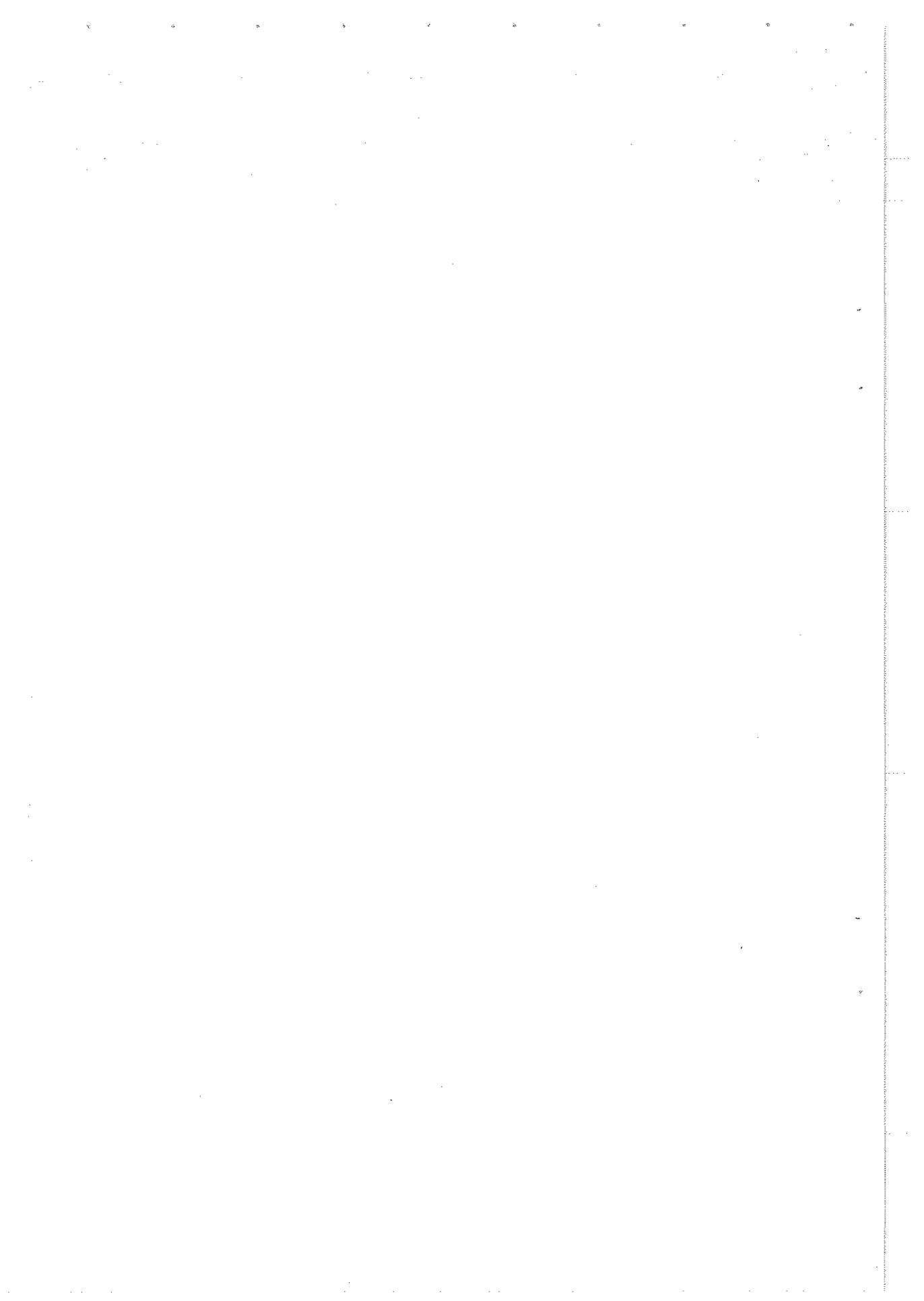
INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Michael Lavarch MP)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY
THE SENATE TO THE BILL AS INTRODUCED

54082 Cat. No. 94 4471 7



INTERNATIONAL WAR CRIMES TRIBUNAL BILL 1994

OUTLINE

The purpose of this Bill is to enable Australia to comply with binding international obligations which were imposed by the United Nations Security Council on 25 May 1993, when it adopted resolution 827. That resolution established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and adopted the Statute of the International Tribunal.

The Statute imposes obligations on Member States 'to co-operate with the International Tribunal in the investigation and prosecution' of accused persons and to comply 'with any request for assistance or an order issued by a Trial Chamber'. Such requests may involve, among other things, the identification and location of persons, the taking of testimony and the production of evidence, the service of documents, the arrest and detention of persons, and the surrender of accused persons to the Tribunal.

The Bill contains provisions enabling Australia to comply with these international obligations. In particular, the Bill provides for the following matters:

- the arrest and surrender of persons to the Tribunal (Part 3);
- other forms of assistance to the Tribunal, including the taking of evidence and production of documents or other articles; search and seizure; the giving of evidence at hearings, or assisting in investigations, in foreign countries where the Tribunal is sitting; and service of process (Part 4);
- the sitting of the Tribunal in Australia (Part 5);
- the enforcement of forfeiture orders made by the Tribunal (Part 6); and
- search and seizure and arrest provisions for the purposes of the Bill (Part 7).

FINANCIAL IMPACT STATEMENT

The Bill is expected to have little impact on Commonwealth expenditure or revenue in the short term. However, there are possible implications for Commonwealth agencies which may be affected by the legislation. There may be significant resource implications for the AFP, and cost and resource implications might arise if the Tribunal decides to sit in Australia.

These costs are unable to be quantified at all at this stage (as the extent to which the legislation will be used in Australia cannot be determined).

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 12 months to determine the extent to which the legislation has been utilised and to assess the resource implications.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

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

Clause 2: Commencement

2. This clause provides that clauses 1 and 2 commence on the day the Act receives the Royal Assent, and the remaining provisions commence on a day to be fixed by proclamation or 6 months after Royal Assent, whichever is the earlier.

Clause 3: The objects of this Act

3. This clause sets out the underlying basis of the Act, which is to enable the Commonwealth to co-operate with the Tribunal in the investigation and prosecution of persons accused of committing Tribunal offences. The various heads of assistance covered by the Act are listed.

Clause 4: Definitions

4. This clause defines words and expressions used in the Act.

Clause 5: Some Territories to be regarded as States

5. This clause provides that the Australian Capital Territory, the Northern Territory and Norfolk Island are to be regarded as States for the purposes of this Act (other than clause 6), and are not to be regarded as Territories.

Clause 6: External Territories

6. This clause extends the Act to each external Territory.

PART 2 - REQUESTS BY THE TRIBUNAL FOR ASSISTANCE

Clause 7: Tribunal may request assistance

7. This clause provides that requests made to Australia by the Tribunal are to be made to the Attorney-General, or to a person authorised by the Attorney-General.

Without limiting the types of requests which can be made, the clause sets out the expected types of requests in respect of an investigation or prosecution the Tribunal is conducting or proposing to conduct.

Clause 8: Form of requests

8. This clause provides that a request must be in writing, and sets out the types of information that the Tribunal should provide in its request. However, the clause specifically states that failure to provide such information does not invalidate a request.

PART 3 - SURRENDER OF PERSONS TO THE TRIBUNAL

Division 1 - Arrest of persons

Clause 9: Notice by Attorney-General

9. This clause provides for the Attorney-General to give a notice that a request for surrender has been received from the Tribunal. The clause makes it clear that the Attorney-General does not have a discretion in the issue of this notice. The preconditions for the issue of the notice are that the Attorney-General receives from the Tribunal a request for surrender of a person, and an arrest warrant in relation to the person issued by the Tribunal or a copy of that warrant authenticated by the Tribunal. The issue of the notice is the first stage in the process of surrender to the Tribunal.

Clause 10: Issue of warrants

10. This clause sets out the procedure for the issue of an arrest warrant in relation to a person.

11. Sub-clause (1) provides that a magistrate is required to issue an arrest warrant, in the statutory form, if an application is made on behalf of the Tribunal for issue of a warrant pursuant to a notice by the Attorney-General that a surrender request has been received from the Tribunal (under clause 9).

12. Sub-clause (2) provides for the issue of an arrest warrant otherwise than pursuant to a notice under clause 9. It recognises that there may be circumstances of urgency requiring arrest before the Tribunal has formally requested surrender and therefore before the Attorney-General has issued a clause 9 notice. The magistrate is required to issue an arrest warrant if an application is made on behalf

of the Tribunal for issue of a warrant, and the application is accompanied by a copy of an arrest warrant issued by the Tribunal, and the application contains a statement to the effect that circumstances of urgency necessitate the issue of a warrant prior to receipt of a notice under clause 9.

13. Sub-clause (3) requires a magistrate to send to the Attorney-General, without delay, a report stating whether the magistrate has issued the warrant.

Clause 11: Cancellation of warrants

14. This clause provides for the Attorney-General to direct the cancellation of arrest warrants in certain circumstances. If a person has not been arrested under a warrant, the Attorney-General must direct a magistrate to cancel the arrest warrant if:

- the Attorney-General is satisfied that a request for surrender which would oblige the Attorney-General to issue a notice under clause 9 will not be received from the Tribunal. (This applies in provisional arrest circumstances, where an arrest is effected in urgent circumstances, but, for some reason, the Tribunal does not follow that up with a request for surrender); or
- the Attorney-General considers for any other reason that the warrant should be cancelled. (This course could be adopted if the Attorney-General considered that, in the light of information, he would exercise his or her discretion to refuse surrender of the person).

15. Where the person has been arrested, clause 13 gives the Attorney-General the same powers in respect of release of the person as this sub-clause gives in respect of cancellation of the warrant.

Clause 12: Remand

16. This clause requires that persons arrested pursuant to a warrant issued under clause 10 be given certain information, and permits magistrates to remand such persons.

17. Sub-clause (1) provides that persons arrested under a warrant must, as soon as practicable:

- be given a written notice specifying the Tribunal offence in respect of which the arrest warrant was issued and describing the conduct that is alleged to constitute the offence; and

- be brought before a magistrate.

18. Sub-clause (2) provides that a person who has been arrested shall be remanded in custody or on bail for sufficient time to enable the Attorney-General to make a surrender determination, and, if appropriate, to enable a magistrate to remand a person in custody under clause 20 following the issue of a surrender warrant.

19. Sub-clause (3) provides that a person shall not be granted bail unless there are exceptional circumstances. Such a provision is considered necessary because experience has shown that there is a very high risk of persons sought for surrender to another country absconding.

20. Sub-clause (4) is related to sub-clause (3). It is designed to prevent 'bail-shopping' amongst magistrates. If a person is refused bail, he or she is not entitled to make applications to other magistrates for release on bail.

Clause 13: Release from remand on the Attorney-General's direction

21. This clause provides for the Attorney-General to direct a magistrate to order that a person who has been arrested and remanded be released from custody or discharged from bail if the Attorney-General is satisfied that a surrender request that would oblige the Attorney-General to issue a notice under clause 9 will not be received from the Tribunal, or if the Attorney-General considers for any other reason that the remand should cease. The Attorney-General has similar powers in clause 11 in relation to cancellation of warrants of arrest.

Clause 14: Release from remand after certain periods

22. This clause provides for release from remand in certain circumstances where a person has been arrested pursuant to a warrant issued under sub-clause 10(2) (before receipt of the Attorney-General's notice under clause 9).

23. Sub-clauses (1) and (2) oblige a magistrate to order the release of a person, or the discharge of recognisances, where the Attorney-General's notice under clause 9 is not received within 45 days after arrest and the magistrate is not satisfied that the notice will be given within a reasonable period.

24. Sub-clauses (3) and (4) oblige a magistrate to order the release of a person, or the discharge of recognisances, where the Attorney-General's notice has not been

received within the reasonable period determined by the magistrate following the 45 day period.

Clause 15: Application for search warrants

25. This clause provides for the application for search warrants where a person has been arrested under a warrant issued under clause 10.

26. Sub-clause (1) sets out the procedures, where a person has been arrested under a warrant, for the application for a search warrant to search premises. If a police officer has reasonable grounds for suspecting that evidential material relating to a Tribunal offence in respect of which the warrant was issued is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause (3)) will be, at any premises, the police officer may, by an information on oath setting out the grounds for that suspicion, apply for the issue of a search warrant in relation to the premises to search for the material. (Part 7 deals with the issuing and effect of search warrants).

27. Sub-clause (2) is in similar terms to sub-clause (1) except that it covers the application for search warrants in relation to persons.

Division 2 - Surrender of persons

Clause 16: Surrender determination by Attorney-General

28. This clause provides for the Attorney-General to determine whether a person remanded under Division 1 is to be surrendered to the Tribunal.

29. The Attorney-General must determine to surrender the person unless he or she is satisfied that there are exceptional circumstances. In considering whether there are exceptional circumstances, the Attorney-General must give the person a reasonable opportunity to provide documents showing exceptional circumstances, and the Attorney-General must consider any documents so provided.

30. The Attorney-General is required to make a determination on the person's surrender as soon as practicable after the person has been remanded under Division 1.

Clause 17: Release from remand on refusal to surrender the person

31. This clause provides that where the Attorney-General has determined not to surrender the person to the Tribunal, he or she must order the release of the person, or the discharge of the recognisances on which bail was granted.

Clause 18: Surrender warrants

32. This clause provides that, subject to clause 19, where the Attorney-General determines that a person is to be surrendered to the Tribunal, he or she shall issue a warrant, in writing in the statutory form, for the surrender of the person to the Tribunal.

Clause 19: Persons imprisoned under Australian law

33. The effect of sub-clause (1) (together with clause 18) is that where the Attorney-General determines that a person is to be surrendered and that person is serving a prison sentence in Australia for an offence against an Australian law, the *Attorney-General shall nevertheless issue a surrender warrant. However, a surrender warrant is not to be issued unless the Attorney-General is satisfied that the Tribunal has given adequate undertakings, if required, in relation to the return of the person to Australia to serve the remainder of the sentence once the person is no longer required to be detained by, or on the order of, the Tribunal and in relation to the custody of the person while travelling, and while in other countries, for the Tribunal's purposes.*

34. Sub-clause (2) makes it clear that parolees and licensees are not to be regarded as serving a sentence of imprisonment.

Clause 20: Detention following surrender warrants

35. This clause provides that if the Attorney-General issues a surrender warrant, the person must be brought as soon as practicable before a magistrate, who must remand the person in custody for such time as is necessary to enable the surrender warrant to be executed.

Clause 21: Content of surrender warrants

36. This clause provides that a surrender warrant must provide the necessary directions and authorisations to permit the person to be surrendered to be transported in custody to a specified person who is an officer of the Tribunal or

other person authorised by the Tribunal, and to authorise that specified person to transport the person in custody to a place specified by the Tribunal (which may be a place out of Australia if the Tribunal is sitting out of Australia or a place in Australia if the Tribunal is sitting in Australia) for the purpose of surrendering the person to a person appointed by the Tribunal to receive the person.

Clause 22: Execution of surrender warrants

37. This clause provides for the execution of surrender warrants according to their tenor.

Clause 23: Release from remand

38. This clause permits the Federal Court or a Supreme Court to release a person who is still in custody in Australia 2 months after a surrender warrant was first liable to be executed. However, where the court is satisfied that the warrant has not been executed (the person has not been delivered into the custody of the Tribunal) because of danger to life or prejudice to health, or for any other reasonable cause, it shall not order release.

Clause 24: Effect of surrender to Tribunal on person's terms of imprisonment

39. This clause provides in effect that the time a federal or Territory prisoner spends in the custody of the Tribunal is to count towards the person's federal sentence. It mirrors clause 38, which provides for similar treatment where the federal or Territory prisoner is a witness (but not an accused person) or otherwise assisting the Tribunal.

Clause 25: Expiry of Australian sentences while under Tribunal detention

40. This clause applies to a person who was serving a sentence of imprisonment in respect of an offence against an Australian law at the time of surrender. It provides that where the person's sentence expires while the person is being detained by, or on the order of, the Tribunal, the Attorney-General must inform the Tribunal of the expiry and that the undertakings referred to in clause 19 (if the Tribunal was required to give such undertakings) are no longer required to be complied with.

PART 4 - OTHER FORMS OF ASSISTANCE TO THE TRIBUNAL

Division 1 - Taking evidence etc.

Clause 26: Attorney-General may authorise taking of evidence etc.

41. This clause enables the Attorney-General, if requested by the Tribunal, to authorise an Australian magistrate to take evidence and have documents and articles produced for the purpose of transmission to the Tribunal for the purposes of a proceeding before, or an investigation conducted by, the Tribunal. The Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

Clause 27: Taking of evidence

42. This clause sets out the procedures to be followed by a magistrate in taking evidence.

Clause 28: Producing documents or other articles

43. This clause sets out the procedures to be followed by a magistrate in relation to the production of documents or other articles.

Clause 29: Legal representation

44. Sub-clause (1) permits the person to whom the proceeding or investigation relates to be present or to be represented in cases where evidence is being taken under clause 27.

45. Sub-clause (2) enables a magistrate conducting a proceeding under either clause 27 or 28, or both, to permit the following to have legal representation: the person to whom the proceeding or investigation relates; any other person giving evidence or producing documents or other articles; and the Tribunal.

Clause 30: Form of certificates

46. This clause requires a certificate by a magistrate under sub-clause 27(2) or 28(2) to state whether particular persons were present when the evidence was taken or the documents or other articles produced.

Clause 31: Compellability of persons to attend etc.

47. Sub-clause (1) permits the magistrate to use the relevant compulsory powers of the jurisdiction in which the evidence, etc is being taken to require the attendance of witnesses. This sub-clause also ensures that the witness will have the same protections as a witness in a domestic proceeding.

48. Sub-clause (2) provides that the person to whom the proceeding or investigation relates cannot be compelled to give evidence.

49. Sub-clause (3) provides that the person to whom the proceeding or investigation relates cannot be compelled to answer questions or produce documents, articles, etc if the person could not be compelled to answer those questions or produce those documents by the Tribunal.

Clause 32: Tribunal immunity certificates

50. This clause provides for an authenticated Tribunal immunity certificate (defined in sub-clause (2)) to be admissible in proceedings under this Division as prima facie evidence of matters stated in the certificate.

Division 2 - Search and seizure

Clause 33: Attorney-General may authorise applications for search warrants

51. This clause provides for the Attorney-General to authorise a police officer to apply to a magistrate for issue of a search warrant where the Tribunal has made a request compliance with which may involve the issue of a search warrant in relation to evidential material, and there are reasonable grounds to believe that the material is in Australia. ('Evidential material' is defined in clause 4, as a thing relevant to a Tribunal offence, including such a thing in electronic form). The Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

Clause 34: Applications for search warrants

52. This clause provides for applications for search warrants where a police officer has been authorised under clause 33.

53. Sub-clause (1) applies to applications for a search warrant to search premises. If an authorised police officer has reasonable grounds for suspecting that the evidential material is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause (3)) will be, at any premises, the police officer may, by an information on oath setting out the grounds for that suspicion, apply for the issue of a search warrant in relation to the premises to search for the material. (Part 7 deals with the issuing and effect of search warrants).

54. Sub-clause (2) is in similar terms to sub-clause (1) except that it covers the application for search warrants in relation to persons.

Division 3 - Giving evidence at hearings, or assisting in investigations, in foreign countries

Clause 35: Persons giving evidence or assisting (other than prisoners)

55. Sub-clause (1) permits the Attorney-General, if so requested by the Tribunal, to make arrangements for the travel to a foreign country of a person (other than a prisoner) to give evidence at a hearing in connection with a proceeding before the Tribunal or to assist an investigation being conducted by the Tribunal. Before such arrangements may be made, there must be reasonable grounds to believe that the person can give evidence relevant to the proceeding or assist the investigation, and the Attorney-General must be satisfied both that the person has consented to giving evidence or assisting in the foreign country and that the Tribunal (if required by the Attorney-General) has given an adequate undertaking that the person will be returned to Australia according to arrangements agreed to by the Attorney-General.

56. Sub-clause (2) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

Clause 36: Prisoners giving evidence or assisting

57. Sub-clause (1) sets out the circumstances in which the clause will apply. These are that the Tribunal requests the attendance in a foreign country of a federal or State prisoner who is in Australia (whether or not in custody) at a hearing in connection with a proceeding before the Tribunal or to assist an investigation being conducted by the Tribunal. There must be reasonable grounds

to believe that the person can give evidence relevant to the proceeding or assist the investigation, and the Attorney-General must be satisfied both that the person has consented to giving evidence or assisting in the foreign country and that the Tribunal (if required by the Attorney-General) has given adequate undertakings in respect of the matters referred to in clause 37.

58. Sub-clause (2), which applies if the prisoner is being held in custody, permits the Attorney-General, in his or her discretion, to direct that a federal prisoner be temporarily released from custody to travel to the foreign country to give evidence at the proceeding or to assist the investigation. It also requires the appropriate State approvals to be sought in relation to State prisoners and joint federal/State prisoners to enable the transfer of such prisoners to the foreign country. The Attorney-General is also empowered to make arrangements for the relevant travel of the prisoner under escort.

59. Sub-clause (3) provides that the travel to a foreign country of federal or joint federal/State prisoners who have been released from custody on parole or under licence will be subject to the obtaining of such federal or State approvals, authorities or permissions as may be required for the travel.

60. Sub-clause (4) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

61. Sub-clause (5) defines "parole" and "parole decision" for the purposes of the clause.

Clause 37: Undertakings relating to prisoners

62. This clause specifies the nature of the undertakings that the Tribunal may be required to give in relation to a request for a prisoner to give evidence or assist an investigation in a foreign country. The undertakings are:

- that, in relation to any prisoner, the prisoner will be returned to Australia in accordance with arrangements agreed to by the Attorney-General;
- that, in relation to a prisoner who is being held in custody in Australia, appropriate arrangements will be made for the prisoner to be kept in custody in the foreign country; and the prisoner will not be released from such custody unless the Attorney-General notifies the Tribunal that the prisoner is

entitled to be released under Australian law; and, if the prisoner is so released, the person's accommodation and other expenses in the foreign country will be paid for by the Tribunal until such time as the Tribunal decides that the person is no longer required to give evidence in the proceeding, or to assist the investigation, to which the request relates.

Clause 38: Effect of removal to foreign country on prisoner's terms of imprisonment

63. This clause in effect gives a prisoner credit for time spent in custody overseas.

Division 4 - Custody of persons in transit

Clause 39: Transit

64. Sub-clause (1) provides that a person may be transported through Australia in the custody of another person, if a person is to be transported in custody from a foreign country through Australia to another foreign country for the purpose of giving evidence in a proceeding before the Tribunal, or giving assistance in relation to an investigation being conducted by the Tribunal, or being surrendered to the Tribunal.

65. Sub-clause (2) provides that if an aircraft or ship by which the person is being transported lands or calls at a place in Australia, the Attorney-General may direct the person to be held in custody pending continuation of the person's transportation.

66. Sub-clause (3) permits the Attorney-General to direct that the person being held in custody in Australia pursuant to sub-clause (2) be returned to the original country if the person's transportation is not continued within a reasonable time.

Division 5 - Service of process

Clause 40: Service of process

67. This clause permits the Attorney-General to arrange for the service of a process relating to a proceeding before, or an investigation conducted by, the Tribunal, if so requested by the Tribunal. However, the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying non-compliance.

PART 5 - SITTINGS OF THE TRIBUNAL IN AUSTRALIA

Clause 41: Tribunal sittings in Australia

68. This clause enables the Tribunal to sit in Australia for the purpose of performing its functions, including the taking of evidence, the conducting or continuing of a proceeding before the Tribunal, or the giving of judgment in a proceeding before the Tribunal.

Clause 42: Tribunal's powers while sitting in Australia

69. This clause provides that the Tribunal's powers whilst sitting in Australia will be such powers as are prescribed by regulations. The clause recognises that such matters will be the subject of separate agreements between the Commonwealth and the Tribunal. The clause provides that the regulations implementing such agreements may apply, adopt or incorporate, with or without modification, the rules of procedure and evidence adopted under Article 15 of the Statute of the Tribunal.

Clause 43: Contravention of Tribunal orders etc.

70. This clause provides for offences of knowingly or recklessly contravening an order that the Tribunal makes, or of otherwise knowingly or recklessly hindering the Tribunal in the performance of its functions, while sitting in Australia. It is considered necessary for the effective exercise of the Tribunal's powers and performance of its functions while sitting in Australia.

PART 6 - FORFEITURE OF PROCEEDS OF TRIBUNAL OFFENCES

Clause 44: Requests for enforcement of forfeiture orders

71. Sub-clause (1) enables the Attorney-General to authorise the Director of Public Prosecutions to apply for registration, in a specified court, of a forfeiture order (defined in clause 4 as an order or declaration made by the Tribunal for forfeiture of property in respect of a Tribunal offence, or evidencing forfeiture of property under the Tribunal's Statute or rules) against property believed to be located in Australia where the Tribunal so requests and the Attorney-General is satisfied that a person has been convicted by the Tribunal of the Tribunal offence to which the order relates and that there is no further appeal available in the Tribunal against that conviction and order.

72. Sub-clause (2) provides that the specified court shall be the Supreme Court of the State or Territory where the property is believed to be located.

73. Sub-clause (3) provides that the Attorney-General must not comply with the request if, in his or her opinion, it would prejudice Australia's sovereignty, security or national interest, or there are exceptional circumstances justifying the non-compliance.

Clause 45: Registration of order

74. Sub-clause (1) provides that, where the DPP is authorised to apply for registration of a forfeiture order and the DPP so applies, the court must register the order and give or publish notice of the registration to specified persons in the manner and within the time the court considers appropriate.

75. Sub-clauses (2) and (3) provide for the required form of the Tribunal forfeiture order when an application is made to register such an order. There must be a copy (which may be a facsimile copy) of the appropriate order sealed by the Tribunal.

Clause 46: Effect of order

76. Sub-clause (1) provides that a registered forfeiture order has effect and may be enforced as if it were a forfeiture order made under the Proceeds of Crime Act 1987 at the time of registration.

77. Sub-clause (2) provides that a registration of a facsimile of a sealed copy ceases to have effect after 21 days unless the sealed copy has been registered by then.

PART 7 - SEARCH, SEIZURE AND POWERS OF ARREST

Division 1 - Search warrants

Clause 47: When search warrants can be issued

78. Sub-clause (1) sets out the situations in which a magistrate may issue a warrant to search premises. An application must be made under sub-clause 15(1) or 34(1), and the magistrate must be satisfied by information on oath that there are

reasonable grounds for suspecting that there is, or within 72 hours (48 hours if the application is made by electronic means - see sub-clause 3) will be, any evidential material at the premises.

79. Sub-clause (2) is in similar terms to sub-clause (1), except that it relates to the issue of a warrant authorising an ordinary search or a frisk search (defined in clause 4) of a person.

80. Sub-clause (4) provides that if the person 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.

81. Sub-clause (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 particulars and outcomes of all previous applications 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.

82. Sub-clause (6) provides that a magistrate in 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. This recognises that there is no resident magistrate in the Jervis Bay Territory.

83. Sub-clause (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).

Clause 48: Content of warrants

84. Sub-clause (1) sets out the matters which must be specified in a warrant.

85. Sub-clause (2) ensures that the 7 day (or 48 hour) limit on the duration of warrant (referred to in paragraph (e) of sub-clause (1)) does not prevent the issue of further warrants for the same premises or person.

86. Sub-clause (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 evidential material, other than the evidential material for which the warrant was specifically issued, which is found or things 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 committing a Tribunal offence or 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.

87. Sub-clause (4) sets out the additional matters which the magistrate is to specify in a warrant that relates to a person. Paragraph (a) is in similar terms to paragraph (3)(a), and it requires the magistrate to specify that the warrant authorises the seizure of things other than the evidential material for which it was specifically issued in certain circumstances. Paragraph (b) requires the magistrate to state whether a frisk or ordinary search is authorised.

Clause 49: The things authorised by a search warrant in relation to premises

88. Sub-clause (1) sets out the activities authorised by a warrant to search premises.

89. Sub-clause (2) obliges those executing a warrant to comply with limitations particularised in the warrant relating to the hours during which it may be executed.

Clause 50: The things authorised by a search warrant in relation to a person

90. Sub-clause (1) sets out the activities authorised by a warrant to search a person.

91. Sub-clauses (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 51: Restrictions on personal searches

92. This clause provides that a search warrant can not authorise either a strip search or a search of a person's body cavities.

Clause 52: Warrants may be issued by telephone etc.

93. 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 53: Formalities relating to warrants issued by telephone etc.

94. This clause sets out the procedures if a magistrate issues a warrant under clause 52. 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 completed form of warrant and if the information had not been sworn, the sworn information. 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 2 - Provisions relating to execution of search warrants

Clause 54: Availability of assistance and use of force in executing a warrant

95. 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 55: Copy of warrant to be shown to occupier etc.

96. 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 of the premises or the person being searched. The clause covers the different situations and the manner in which this should be done.

Clause 56: Specific powers available to officers executing warrants

97. This clause sets out specific powers available to officers executing warrants in relation to premises, including the taking of photographs (including video recordings) in certain circumstances, and the completion of the execution of a warrant after particular interruptions to such execution.

Clause 57: Use of equipment to examine or process things

98. 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 58: Use of electronic equipment at premises

99. This clause provides for the use of electronic equipment at premises. The executing officer or an officer assisting (who under clause 4 may be 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 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. The seizure of printouts or duplicate disks is encouraged wherever possible.

100. The executing officer or officer assisting may secure the equipment by locking it up or guarding it 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. This period may be extended in certain circumstances.

Clause 59: Compensation for damage to electronic equipment

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

Clause 60: Copies of seized things to be provided

102. 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 no original material was seized under sub-clause 58(2) or if possession of the thing seized could constitute an offence against an Australian law.

Clause 61: Occupier entitled to be present during search

103. 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 62: Receipts for things seized under warrant

104. This clause requires receipts to be issued for things seized under a warrant or moved pursuant to sub-clause 57(2). It is possible for two or more items to be listed on the same receipt, so that police would not be required to identify absolutely every item individually where those items can be adequately identified by a class description.

Division 3 - Stopping and searching conveyances

Clause 63: Searches without warrant in emergency situations

105. This clause applies where a police officer suspects on reasonable grounds that evidential material is in an aircraft, vessel or vehicle. The police officer must also suspect that it is necessary to seize the material to prevent concealment, loss or destruction and that it is necessary to act without the authority of a search warrant

because the circumstances are so serious and urgent. Under such circumstances, the police officer may stop, detain and search the conveyance, and seize the material.

106. If in the course of the search the police officer finds other evidential material or a thing relevant to an offence against an Australian law, it may be seized to prevent its concealment, loss or destruction if the circumstances are so serious and urgent.

107. The police officer is required to exercise his or her powers subject to clause 63, which provides various safeguards.

Clause 64: How a police officer exercises a power under section 63

108. This clause sets out the manner in which a police officer may exercise powers under clause 63.

Division 4 - Arrest and related matters

Clause 65: Power to enter premises to arrest person

109. This clause 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 sub-clause (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. Sub-clause (2) states the general rule that entry to domestic premises to effect arrest should not be conducted at night. It precludes a police officer entering a dwelling house (defined in sub-clause (3)) to arrest a person between 9 pm and 6 am on the following day unless the police officer believes on reasonable grounds that it would not be practicable to arrest the person in any place at another time, or that it is necessary to prevent the concealment, loss or destruction of evidential material.

Clause 66: 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 67: Persons to be informed of grounds of arrest

112. This clause provides for a person to be informed, at the time of arrest, of the Tribunal offence in respect of which he or she is being arrested, or if the arrest is under clause 78 or 79, to be informed of the reason for arrest. This does not require a technical statement of the terms of the offence or the reason but merely of its substance. This requirement does not apply if the arrested person should, in the circumstances, know the substance of the Tribunal offence or reason, or if the arrested person's actions make it impracticable.

Clause 68: Power to conduct a frisk search of an arrested person

113. This clause provides that a police officer may, upon or soon after arrest, conduct a frisk search (quick running of the hands over the person's outer garments) and seize any seizable items (anything that would present a danger to a person or that could be used to assist a person to escape). The police officer must suspect on reasonable grounds that it is prudent to ascertain if the arrested person is carrying any seizable item.

114. 'Frisk search' and 'seizable item' are defined in clause 4, and pursuant to clause 73 must, if practicable, be conducted by a person of the same sex.

Clause 69: Power to conduct an ordinary search of an arrested person

115. This clause provides that a police officer may, upon or soon after arrest, conduct an ordinary search and seize any evidential material relating to the Tribunal offence to which the person's custody relates or seizable items. The police officer must suspect on reasonable grounds that the person is carrying such items.

116. 'Ordinary search' is defined in clause 4 and means a search of a person, or of articles in the person's possession, that may include requiring the removal of specified outer clothing, gloves, shoes and hat and an examination of those items. Clause 73 requires such a search to be conducted, where practicable, by a person of the same sex as the person to be searched.

Clause 70: Power to conduct search of arrested person's premises

117. This clause provides that a police officer who arrests a person at premises, or who is present at such an arrest, may seize things in plain view at those premises

which the police officer believes to be evidential material relating to the Tribunal offence to which the person's custody relates or seizable items.

Clause 71: Power to conduct an ordinary search or strip search

118. This clause details the circumstances in which an ordinary search or a strip search may be conducted. ('Ordinary search' and 'strip search' are defined in clause 4). The provision does not confer power to take any body samples or search body cavities but only to examine the body surface for things such as bruises, scratches and identifying marks.

Clause 72: Rules for conduct of strip search

119. This clause sets out the procedure to be followed whenever a strip search is conducted as an incident of arrest.

Division 5 - General

Clause 73: Conduct of ordinary searches and frisk searches

120. This clause provides that both ordinary searches and frisk searches must, if practicable, be conducted by a person of the same sex as the person being searched. It also provides that only police officers may take part in ordinary or frisk searches of persons under this Part.

Clause 74: Announcement before entry

121. 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 75: Offence for making false statements in warrants

122. This clause creates an offence of knowingly making a false or misleading statement in an application for a warrant under this Part. The maximum penalty for an offence under this clause is imprisonment for 2 years.

Clause 76: Offences relating to telephone warrants

123. This clause creates offences arising from the preparation, and execution, of a form of warrant obtained by telephone or other electronic means under clause 52. It is an offence for a person to name a magistrate in a form of warrant under clause 52 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 give 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.

Clause 77: Retention of things seized

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

125. A police officer who seizes a thing is required to deliver it into the custody and control of the Commissioner of Police of the Australian Federal Police, who is required to retain the thing pending any direction from the Attorney-General as to the manner in which it is to be dealt with. The Commissioner is also required to inform the Attorney-General when a thing has been so delivered, and to comply with any direction that the Attorney-General gives under sub-clause (3) about how to deal with the thing (which may include a direction that the thing be sent to the Tribunal).

126. Sub-clause (5) imposes a restriction on the power to retain a thing indefinitely, by requiring the Attorney-General to direct the Commissioner to return the thing in certain circumstances.

PART 8 - MISCELLANEOUS

Clause 78: Arrest of persons escaping from custody

127. This clause permits the re-arrest of persons who have escaped from any custody authorised by the Act and permits the return of such persons to the originally authorised custody.

Clause 79: Arrest of person released on bail

128. This clause enables a police officer to arrest without warrant a person who refuses or fails to comply with a condition of a recognisance upon which the person was remanded on bail under the Act, or who the police officer believes on reasonable grounds is preparing to contravene such a condition.

Clause 80: Aiding persons to escape, etc.

129. This clause provides for the application of certain sections of the Crimes Act 1914 to enable prosecution of persons who assist, aid, etc the person's escape. It provides that sections 46 (Aiding prisoner to escape), 47A (Rescuing a prisoner from custody etc) and 48 (Harbouring etc an escapee) of the Crimes Act 1914 will apply (so far as they are relevant) to persons aiding, rescuing, harbouring, etc prisoners/escapees under the Act.

Clause 81: Arrangements with States

130. This clause permits the making of arrangements between the Commonwealth and the individual States (including the Northern Territory, the Australian Capital Territory and Norfolk Island) for the administration of the Act and in particular to permit magistrates in those places to perform functions conferred on magistrates under the Act.

131. Arrangements made under this power are required to be published in the Gazette.

Clause 82: Delegation

132. This clause permits the Attorney-General to delegate his or her powers under the Bill, apart from powers under Part 3 and the power under subclauses 26(3), 33(2), 35(2), 36(4), 40(2) and 44(3) (power to decide not to comply with a request by the Tribunal) to an officer of the Attorney-General's Department.

Clause 83: Act not to limit other provision of assistance

133. This clause makes it clear that this Act will not prevent the provision of any assistance to the Tribunal which may be provided otherwise than under this Act.

Clause 84: Regulations

134. This clause provides for a general regulation-making power.