

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 196

Issued by the authority of the Minister for Home Affairs

Extradition Act 1988

Extradition (India) Regulations 2010

Section 55 of the *Extradition Act 1988* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 5 of the Act defines an ‘extradition country’ to include a country that is declared by regulations to be an extradition country. Paragraph 11(1)(a) of the Act provides that regulations may apply the Act to a specified extradition country subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to a bilateral extradition treaty between Australia and that country, being a treaty a copy of which is set out in the regulations.

The Regulations give effect in Australian domestic law to the *Extradition Treaty between Australia and the Republic of India* (the Treaty), signed at Canberra on 23 June 2008. A copy of the Treaty is set out in Schedule 1 of the Regulations. The Regulations apply the Act to extradition requests received from the Republic of India (India) subject to the Treaty.

Australia’s extradition relationship with India was previously governed by the *Commonwealth Scheme for the Rendition of Fugitive Offenders 1966* (the London Scheme), an arrangement of less than treaty status which applies between members of the Commonwealth. The London Scheme is non-binding at international law and does not impose legal obligations on participants. The Treaty provides for binding obligations at international law and strengthens and clarifies Australia’s existing extradition relationship with India.

As with all of Australia’s extradition treaties, the Treaty contains a range of internationally accepted human rights safeguards. Under the Treaty, a request for extradition must be refused if the person sought may be subject to the death penalty, unless an undertaking is given that the death penalty will not be imposed or, if imposed, will not be carried out. The Treaty also provides that a request for extradition must be refused where it relates to the prosecution of a person for a military offence, which is not also an offence under the general criminal law.

The Treaty modernises and provides for more effective extradition arrangements between Australia and India. Under the London Scheme, the Requesting Party must provide a full brief of evidence of the alleged extradition offence sufficient to establish a prima facie case. The Treaty streamlines this process by providing for a less than ‘prima facie’ evidence approach to extradition.

Although Australia's standard practice is to use the 'no evidence' approach to extradition, India's domestic law does not accommodate this. Accordingly, Article 7(4) of the Treaty provides:

If the request relates to an accused person, it must also be accompanied by a warrant of arrest, or a copy thereof, issued by a Judge, Magistrate, or other competent authority in the territory of the Requesting State and such documents or other information required by the Requested State as would reasonably establish that the person sought has committed the offence for which extradition is requested and to establish that the person requested is the person to whom the warrant refers.

This provision reflects a similar evidentiary standard to that provided for in the *Treaty on Extradition between Australia and the United States of America*, as amended by the Protocol done at Seoul on 4 September 1990.

The reference in Article 7(4) of the Treaty to the provision of documents or other information required by the Requested State to establish the person requested is the person to whom the warrant refers is not intended to impose any obligation or requirement additional to the requirements of the Act, including with respect to the matters of which a magistrate is required to be satisfied in subsection 19(2) of the Act.

The Regulations commence on the day the Treaty enters into force for Australia. In accordance with Article 20 of the Treaty, the two countries must inform each other in writing of the completion of domestic implementation. The Treaty will enter into force thirty days after the date of the latter communication.

Consultation outside the Australian Government was not undertaken for this legislative instrument as it relates to criminal justice and law enforcement matters. The legislative instrument does not have a direct, or substantial indirect, effect on business and does not restrict competition. The Treaty was the subject of a public hearing by the Joint Standing Committee on Treaties, which recommended binding treaty action be taken in Report 110, tabled on 15 March 2010.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations are detailed in the attachment.

Details of the Regulations

Details of the *Extradition (India) Regulations 2010*

Regulation 1 names the Regulations.

Regulation 2 provides that the Regulations commence on the day the Treaty will enter into force.

Regulation 3 defines ‘Act’ to mean the *Extradition Act 1988* and ‘India’ to mean the Republic of India.

Regulation 4 declares India to be an extradition country.

Regulation 5 provides that the *Extradition Act 1988* applies to India subject to the Treaty.

Schedule 1 contains the text of the Treaty.