

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 197

Issued by the authority of the Minister for Home Affairs

Mutual Assistance in Criminal Matters Act 1987

Mutual Assistance in Criminal Matters (India) Regulations 2010

Section 44 of the *Mutual Assistance in Criminal Matters Act 1987* (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.

The Regulations give effect in Australian domestic law to the *Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters*, signed at Canberra on 23 June 2008 (the Treaty). Paragraph 7(2)(a) of the Act states that Regulations may provide that the Act applies to a specified foreign country subject to any mutual assistance treaty between that country and Australia that is referred to in the regulations. The Regulations apply the Act to the Republic of India, subject to the Treaty.

Australia's mutual assistance relationship with India was previously governed by the *Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth 1986* (the Harare Scheme), an arrangement of less than treaty status which applies between members of the Commonwealth. The Treaty modernises and streamlines the mutual assistance relationship between Australia and India and ensures that the domestic procedures of both countries are accommodated.

Once in force, the Treaty will create an obligation under international law for Australia and the Republic of India to provide each other with mutual legal assistance in criminal matters including search and seizure, service of documents, taking of evidence, arranging for witnesses to give evidence or assist in investigations, and assistance with the location, restraint and forfeiture of instruments and proceeds of crime.

The Treaty provides the framework within which Australia and the Republic of India will provide assistance to each other, including which authorities will make and receive requests, the information which will be required to support a request for assistance, the grounds on which a request for assistance could be refused, how requests for particular types of assistance will be managed, costs and other matters relating to mutual assistance and the operation of the Treaty.

As in all of Australia's mutual assistance in criminal matters treaties, the Treaty includes internationally accepted safeguards, including that assistance will not be granted where a request relates to the prosecution of a person for a military offence which is not also an offence under the general criminal law. The requested country will also have the discretion to refuse a request on the grounds specified in Articles 5(2) and 5(3). For example, a request may be refused if it relates to the prosecution of a person for an offence in respect of which the person has been tried and finally dealt with or pardoned. A request may also be refused if

there are substantial grounds to believe that it has been made for the purpose of prosecuting a person on account of his or her race, sex, religion, nationality or political opinion, or that person's position may be prejudiced for any of those reasons.

The Treaty would enable Australia to refuse assistance in death penalty matters.

Article 5(3)(d) provides that a request may be refused where it relates to the prosecution of a person for an offence in respect of which the punishment which might be imposed on the person may prevent the requested country from complying under its domestic laws.

Subsection 8(1A) of the Act obliges the refusal of assistance if a person is charged with, or convicted of, an offence that carries the death penalty unless special circumstances exist.

Subsection 8(1B) provides that the Attorney-General may refuse assistance if he or she believes that the provision of assistance may result in the death penalty being imposed.

Accordingly, the Treaty would enable Australia to refuse a request if compliance with that request would be in contravention of its legislation in relation to the death penalty.

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 commence on the day the Treaty enters into force for Australia.

In accordance with Article 23 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.

The Regulations are detailed in the attachment.

ATTACHMENT

Details of the *Mutual Assistance in Criminal Matters (India) Regulations 2010*

Regulation 1 names the Regulations.

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

Regulation 3 defines ‘Act’ to mean the *Mutual Assistance in Criminal Matters Act 1987* and ‘India’ to mean the Republic of India.

Regulation 4 provides that the *Mutual Assistance in Criminal Matters Act 1987* applies to India subject to the Treaty.

Schedule 1 contains the text of the Treaty.