

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No. 194

Issued by the authority of the Attorney-General

Extradition Act 1988

Extradition (Vietnam) Regulation 2013

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 Regulation gives effect in Australian domestic law to the *Treaty between Australia and the Socialist Republic of Vietnam on Extradition*, signed at Canberra on 10 April 2012 (the Treaty). The Treaty establishes a formal bilateral framework for Australia and Vietnam to make and receive extradition requests to and from each other in relation to extradition offences. An extradition offence is an offence against a law of a foreign country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months. A copy of the Treaty is set out in Schedule 1 to the Regulation. The Regulation applies the Act to extradition requests received from Vietnam subject to the Treaty.

As with all of Australia’s extradition treaties, the Treaty contains a range of internationally accepted human rights safeguards. Under the Treaty, extradition shall be refused for requests made for the purpose of prosecuting or punishing a person on account of that person’s race, ethnic origin, gender, language, religion, nationality, political opinion or other status; where the person whose extradition is sought would be subjected in the Requesting State to torture or the extradition offence carries the death penalty and the Requesting State has provided no undertaking that this punishment will not be carried out. Extradition may also be refused if the request relates to a political offence, a purely military offence, or the extradition of the person would be unjust or oppressive, or, in exceptional cases, if because of the personal circumstances of the person sought, the extradition would be incompatible with humanitarian considerations.

The Regulation commences on the day on which the Treaty enters into force. Article 20(1) of the Treaty provides that the Treaty will enter into force thirty days after the date of receipt of the later diplomatic note between the Contracting States notifying the other Contracting Party that their respective requirements for the entry into force of the Treaty have been complied with.

Consultation outside the Australian Government was not undertaken for this legislative instrument as it relates to criminal justice and law enforcement matters and does not have direct, or substantial indirect, effects 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 131 tabled on 28 November 2012. The Regulation is detailed in the Attachment.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Details of the *Extradition (Vietnam) Regulation 2013*

Item 1 – Name of Regulation

This item provides that the title of the Regulation is the *Extradition (Vietnam) Regulation 2013*.

Item 2 – Commencement

This item provides that the Regulation commences on the date the Treaty enters into force. Article 20 of the extradition treaty sets out when the extradition treaty enters into force and provides that the Treaty shall enter into force 30 days after the date on which the parties have notified each other that their domestic process for the implementation of the treaty has been completed.

Item 3 – Authority

This item provides that the Regulation is made under the *Extradition Act 1988*.

Item 4 – Definition

This item defines terms used in the Regulation. In this regulation:

- (1) references to the word *Act* will be interpreted as being references to the *Extradition Act 1988*
- (2) references to the words *extradition treaty* will be interpreted as meaning the Treaty between Australia and the Socialist Republic of Vietnam on Extradition, done at Canberra in Australia on 10 April 2012 and set out in Schedule 1 to the Regulation
- (3) references to the word *Vietnam* will be interpreted as meaning the Socialist Republic of Vietnam.

Item 5 – Declaration that Vietnam is an extradition country

Australia can only extradite a person to an extradition country, or to New Zealand, under the special procedures set down in the Act. Section 5 of the Act provides that an ‘extradition country’ is any country (other than New Zealand) that is declared by the regulations to be an extradition country; or any colony, territory or protectorate of a country, or a territory for the international relations of which a country is responsible, that is declared by regulations to be an extradition country.

This item provides that Vietnam is an extradition country for the purposes of section 5 of the Extradition Act. The effect of the item is that Australia can receive extradition requests from Vietnam in relation to extradition offences as defined under the treaty as offences which are punishable under the laws of both Parties by imprisonment for a maximum period of at least one year or by a more severe penalty.

Item 6 – Application of Act

The Extradition Act provides the legal framework for extradition to and from Australia. This item provides that the Extradition Act applies to Vietnam, subject to the Treaty for the purposes of paragraph 11(1)(a) of the Act. This means that any request received from Vietnam for extradition offences will be determined in accordance with the Extradition Act, subject to any modifications necessary to meet the requirements of the Treaty. For example,

paragraph 22(3)(e) of the Act provides that an eligible person is only to be surrendered to a foreign country subject to a section 11 treaty limitation such as the grounds for refusal which may apply in a treaty. In this case there are a range of mandatory and discretionary grounds for refusal in the Treaty which modify the application of the Act including that a person shall not be surrendered to a foreign country where the Requested Party considers that the extradition of the person would be unjust or oppressive.

Schedule 1 – Treaty on Extradition between Australia and the Socialist Republic of Vietnam

This schedule contains the text of the Treaty.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

2. Extradition is a key international crime cooperation tool. It is the process by which one country sends a person to another country to face criminal charges or serve a sentence. The *Extradition Act 1988* (Extradition Act) provides the legislative basis for extradition in Australia. Under the Extradition Act, Australia can only accept extradition requests from countries that have been declared by regulation to be ‘extradition countries’ for the purpose of the Extradition Act.

3. The *Extradition (Vietnam) Regulation 2013* (the Regulation) will give effect in Australian domestic law to Australia’s obligations under the *Treaty between Australia and the Socialist Republic of Vietnam on Extradition*, done at Canberra on 10 April 2012 (the Treaty). The Regulation will apply the Extradition Act to Vietnam by declaring that country to be an ‘extradition country’ for the purposes of the Extradition Act.

4. The effect of the Regulation is to allow Australia to make and receive extradition requests to and from Vietnam for extradition offences. Extradition offences are offences against a law of a foreign country for which the maximum penalty is imprisonment for a period of not less than 12 months or a more severe penalty.

Human rights implications

5. This legislative instrument implements Australia’s obligations under the Extradition Treaty and does not impact on Australia meeting its human rights obligations. Extradition can engage a range of human rights, including the right to a fair hearing, the right to liberty, the right to life and the prohibition on torture and cruel, inhuman or degrading treatment or punishment and rights to equality and non-discrimination. However, Australia’s extradition regime contains a number of human rights safeguards to ensure that the regime meets both international criminal justice obligations and human rights obligations. These safeguards and protections are contained in the current Treaty, and Australia’s Extradition Act and will apply to extradition requests made by Vietnam under the Treaty. The safeguards in the Extradition Act and the Treaty are set out in detail below.

Extradition Process

6. The extradition process in Australia contains three broad stages. Firstly, there is a Ministerial discretion, under section 16 of the Extradition Act, to accept an extradition request. For an extradition request to be accepted, the person must be an extraditable person in relation to the extradition country. To be an extraditable person, the country seeking extradition must have a warrant in force for the arrest of the person, the relevant offence must be an extradition offence and the person must be outside of the country making the extradition request.

7. The second step in the process is for a magistrate to determine whether the person is eligible for surrender under section 19 of the Extradition Act. A person is only eligible for surrender if:

- the necessary documents are produced

- any additional requirements imposed by regulations are met
- the conduct amounts to an offence in both countries, and
- the magistrate is satisfied there are no substantial grounds for believing there is an extradition objection.

8. The Treaty being implemented by this Regulation includes a requirement at Article 6 that the request for extradition be accompanied by a range of documents including a statement of each offence for which extradition is sought, a statement of the conduct which is alleged against the person in respect of each offence for which extradition is sought, the text of the laws establishing each offence and describing the penalty which may be imposed, a statement regarding any applicable time limitations, the details necessary to establish the identity and nationality of the person sought and a statement of the current location of the person, if known.

9. An extradition objection includes the following (section 7 of the Extradition Act):

- where the extradition offence is a political offence
- where the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions
- where the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, sex, sexual orientation, religion, nationality or political opinions
- where the offence for which the person is sought is a military offence, but not a criminal offence, and
- where the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence.

10. Where the person is found eligible for surrender by the magistrate, the third step in the process is for the Minister to make a determination regarding whether the person should be surrendered under section 22 of the Extradition Act. The Extradition Act provides that a person must not be surrendered where (subsection 22(3)):

- there is an extradition objection (as set out above) in relation to the relevant offence
- there are substantial grounds for believing that he or she would be in danger of being subjected to torture, or
- the requesting country has not given an assurance that the person sought will only be tried for the offences contained in the extradition request.

11. Further, paragraph 22(3)(c) of the Extradition Act provides that where an offence is punishable by a penalty of death, Australia cannot extradite a person unless an undertaking is given by the requesting party that:

- the person will not be tried for the offence
- if the person is tried for the offence, the death penalty will not be imposed on the person, or
- if the death penalty is imposed on the person, it will not be carried out.

12. This is consistent with the right to life under the ICCPR and the Second Optional Protocol to the ICCPR.

13. The human rights protections outlined above will apply to any request for extradition received from Vietnam. The Treaty also contains additional mandatory exceptions to extradition at Article 3 including where the person whose extradition is sought has, according to the law of the Requesting Party, become immune from prosecution or punishment by reason of lapse of time.

14. The Treaty also contains discretionary exceptions to extradition including where (Article 3):

- a prosecution in respect of the offence for which extradition is sought is pending in the Requested Party against the person, and where
- the Requested Party, while taking into account the seriousness of the offence and the interests of the Requesting Party, considers that the extradition of the person would be unjust or oppressive, or, in exceptional cases, because of the personal circumstances of the person sought, the extradition would be incompatible with humanitarian considerations.

15. The Australian Government has made public statements about the meaning of ‘unjust or oppressive’. The Government has confirmed it interprets these terms to include the trial process, including the likelihood the person will have access to a fair trial (taking into account Article 14 of ICCPR), prison conditions upon surrender, and the health of the person sought, including any specific medical condition that requires ongoing treatment.

16. There is also a broad discretion under section 22 of the Extradition Act to refuse surrender. This discretion, as well as the discretionary ground for refusal in the Treaty outlined above, provides an additional mechanism to refuse extradition in circumstances where there are legitimate human rights concerns such as the person’s access to a fair trial, including trial in absentia. The person subject to extradition also has the opportunity to make representations regarding any human rights concerns. In considering whether a person should be surrendered, those matters raised by the person the subject of the extradition request will be considered.

17. In circumstances where a person believes that human rights concerns were not adequately considered in the extradition process, they may seek review under the Extradition Act or under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution. The grounds upon which a court may find a legal error in administrative decision-making offer human rights protections. For example, if a court found that the Attorney-General did not consider Australia’s obligations under Article 7 of the International Covenant on Civil and Political Rights (ICCPR) when they had been raised by a person in his or her representations, this could constitute a breach of procedural fairness and/or a failure to have regard to relevant considerations. If a court found that the Attorney-General had misunderstood the nature of Australia’s obligations under Article 7 of the ICCPR, this could constitute an error of law and such a finding would provide sufficient basis for a court to quash the surrender determination.

Remand

18. The Extradition Act also makes bail available, where there are special circumstances, to persons who have consented to extradition, have been determined eligible for surrender by a magistrate or are seeking review of the decision to surrender the person. This ensures that where circumstances justifying bail exist, the person will not be kept in prison during the extradition process. This is consistent with accepted international practice for a person to be held in administrative detention pending extradition proceedings.

19. The current presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed in extradition matters and Australia’s international

obligations to secure the return of alleged offenders to face justice. Unfortunately, reporting and other bail conditions are not always sufficient to prevent individuals who wish to evade extradition by absconding. In extradition cases there is an increased risk of persons absconding before they can be surrendered to the requesting foreign country. If a person who has been remanded on bail absconds during extradition proceedings, it jeopardises Australia's ability to extradite the person which in turn would impede Australia's treaty obligations to return a person to the requesting country. Ultimately, it can also lead to a state of impunity where a person can disappear and continue to evade law enforcement authorities. The validity of Australia's process of remanding a person during extradition proceedings has been confirmed by the High Court in *Vasiljković v Commonwealth* [2006] HCA 40.

20. The Regulation does not alter any of the human rights safeguards that are already contained in Australia's extradition regime.

Conclusion

While Australia's Extradition regime engages with some human rights, it does so in a reasonable and proportionate way and does not operate to limit or restrict those rights. As such, the Regulation is compatible with human rights.

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