

**DEPARTMENT OF FOREIGN AFFAIRS AND TRADE
CANBERRA**

TREATY BETWEEN

AUSTRALIA

AND

THE PEOPLE'S REPUBLIC OF CHINA

ON

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Canberra, 3 April 2006

**Not yet in force
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TREATY BETWEEN AUSTRALIA AND THE PEOPLE'S REPUBLIC OF CHINA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

Australia and The People's Republic of China (hereinafter referred to as "the Parties")

DESIRING to extend to each other the widest measure of cooperation to combat crime, on the basis of mutual respect for sovereignty, equality and mutual benefit,

Have decided to conclude this Treaty and have agreed as follows:

ARTICLE 1 SCOPE OF APPLICATION

1. The Parties shall, in accordance with this Treaty, grant to each other the widest measure of mutual assistance in connection with investigations, prosecutions and proceedings related to criminal matters.
2. Criminal matters shall also include matters connected with offences against a law relating to taxation, customs duties and other revenue matters.
3. Such assistance shall include:
 - (a) taking of evidence or obtaining statements from persons;
 - (b) providing documents, records and articles of evidence;
 - (c) locating and identifying persons;
 - (d) execution of requests for search and seizure;
 - (e) measures to locate, restrain and forfeit the instruments and proceeds of crime;
 - (f) seeking the consent of persons and making arrangements for such persons to give evidence or to assist in criminal investigations in the Requesting Party and, where such persons are in custody, arranging for their temporary transfer to the Requesting Party;
 - (g) serving documents relating to criminal matters;
 - (h) obtaining and providing expert evaluations;
 - (i) conducting inspections or examining sites or objects to the extent that it is not inconsistent with the laws of the Requested Party;
 - (j) notifying results of criminal proceedings and supplying criminal records;

- (k) exchanging information on law; and
- (l) any other forms of assistance consistent with the objects of this Treaty which is not inconsistent with the laws of the Requested Party.

4. Assistance shall not include:

- (a) the extradition of any person;
- (b) the execution in the Requested Party of criminal judgments, verdicts or decisions rendered in the Requesting Party except to the extent permitted by the laws of the Requested Party and this Treaty;
- (c) the transfer of the sentenced person for serving sentences; and
- (d) the transfer of criminal proceedings.

5. The provisions of this Treaty shall not create any right on the part of any private person to obtain or exclude evidence pursuant to this Treaty.

ARTICLE 2

OTHER ARRANGEMENTS

This Treaty shall not derogate from obligations subsisting between the Parties pursuant to other international agreements, nor shall it prevent the Parties providing assistance to each other pursuant to other international agreements or otherwise.

ARTICLE 3

CENTRAL AUTHORITIES

1. For the purpose of this Treaty, the Central Authorities designated by the Parties shall communicate directly with each other for matters concerning mutual legal assistance.

2. The Central Authorities referred to in paragraph 1 of this Article shall be the Commonwealth Attorney-General's Department for Australia and the Ministry of Justice for the People's Republic of China.

3. Should either Party change its designated Central Authority, it shall inform the other Party of such change through diplomatic channels.

4. Requests for assistance shall be made and received through the Central Authorities.

ARTICLE 4

REFUSAL OR POSTPONEMENT OF ASSISTANCE

1. Assistance shall be refused if:
 - (a) the request relates to the prosecution or punishment of a person for an offence that is regarded by the Requested Party as:
 - (i) a political offence, or
 - (ii) an offence which only constitutes a military offence;
 - (b) the request relates to the prosecution of a person for an offence in respect of which the offender has been finally convicted, acquitted or pardoned or has served or is serving the sentence imposed by the Requested Party;
 - (c) there are substantial grounds for believing that the request for assistance has been made for the purpose of prosecuting or punishing a person on account of that person's race, sex, religion, nationality or political opinions or that the person's position may be prejudiced for any of these reasons; or
 - (d) the Requested Party is of the opinion that the request, if granted, would prejudice its sovereignty or security.
2. Assistance may be refused if:
 - (a) the request relates to acts or omissions which would not constitute an offence under the laws of the Requested Party;
 - (b) provision of the assistance sought could prejudice an investigation, prosecution or proceeding in the Requested Party;
 - (c) the request relates to the investigation, prosecution or punishment of a person for an offence in respect of which a penalty may be imposed which may be in conflict with the essential interests of the Requested Party; or
 - (d) the Requested Party is of the opinion that the execution of the request would prejudice its national interest or other essential interests.
3. The Requested Party may postpone providing assistance if execution of a request would interfere with an ongoing investigation, prosecution or proceeding in the Requested Party.

4. Before refusing to grant a request for assistance or postponing its execution, the Requested Party shall consider whether assistance may be granted subject to such conditions as it deems necessary. If the Requesting Party accepts assistance subject to conditions, it shall comply with those conditions.

5. If the Requested Party refuses or postpones provision of assistance, it shall inform the Requesting Party of the reasons for the refusal or postponement.

ARTICLE 5 FORM AND CONTENT OF REQUESTS

1. A request shall be made in writing and affixed with the signature or seal of the Central Authority of the Requesting Party. In urgent situations, a request may be made by any other means capable of producing a written record under conditions allowing the Requested Party to establish authenticity. In such cases, the Requesting Party shall confirm the request in writing promptly thereafter unless the Requested Party agrees otherwise.

2. Documents or materials supporting a request for assistance involving the use of compulsory measures or the forfeiture of proceeds of crime shall be affixed with the signature or seal of, or be certified by, a competent authority of the Requesting Party.

3. A request for assistance shall include the following:

- (a) the purpose of the request and a description of the assistance sought;
- (b) the name of the competent authority conducting the investigation, prosecution or proceedings to which the request relates;
- (c) a description of the nature of the criminal matter including a statement of the relevant laws;
- (d) a description of the acts or omissions or matters alleged to constitute the offence;
- (e) details of any particular procedure or requirement that the Requesting Party wishes to be followed, including a statement as to any requirements for admissibility of evidence in the Requesting Party;
- (f) the requirements, if any, of confidentiality and the reasons therefore; and
- (g) the time limit within which the request is desired to be executed.

4. Requests for assistance, to the extent necessary and insofar as possible, shall also include the following:

- (a) information on the identity, nationality and location of the person or persons who are the subject of the request, or are otherwise relevant to the execution of the request;
- (b) information as to the allowances and expenses to which a person invited to be present in the Requesting Party to give evidence or assist in investigation will be entitled;
- (c) a description of the place or object to be inspected or examined;
- (d) a description of the place to be searched and any property to be seized;
- (e) any information that would assist with locating or restraining or freezing of the instruments or proceeds of crime;
- (f) information about the subject matter on which persons are to be examined or questioned, including any questions to be put; and
- (g) such other information which may facilitate execution of the request.

5. Requests and supporting documents made under this Article shall be in the language of the Requesting Party and accompanied by a translation into the language of the Requested Party.

6. If the Requested Party considers that the information in the request is not sufficient to enable it to deal with the request, it may request additional information.

ARTICLE 6 EXECUTION OF REQUESTS

1. The Requested Party shall promptly execute a request for assistance in accordance with its laws. Insofar as it is not contrary to its laws, the Requested Party may execute the request for assistance in the manner requested by the Requesting Party.

2. When the request concerns the transmission of documents or records, the Requested Party may transmit certified copies or photocopies thereof. However, where the Requesting Party explicitly requires transmission of originals, the Requested Party shall meet such requirement to the extent possible.

3. The Parties may reach agreement to use video link conference to obtain oral testimony in particular situations, to the extent that it is possible and would not violate the laws of either Party.

4. The Requested Party shall promptly inform the Requesting Party of circumstances, when they become known to the Requested Party, which are likely to cause a significant delay in responding to the request.

5. If it becomes apparent that the execution of a request requires expenses of an extraordinary nature, or would impose an excessive burden on the resources of the Requested Party, the Parties shall consult to determine the terms and conditions under which the request can be executed.

6. If, in the opinion of the Requested Party, the execution of a request would endanger the personal safety and other legitimate rights and interests of any witness or law enforcement officer, or any person related to or associated with them, the Parties shall consult to determine the terms and conditions under which the request can be executed.

7. The Requested Party shall promptly inform the Requesting Party of the outcome of the execution of the request. If the assistance requested can not be provided, the Requested Party shall inform the Requesting Party of the reasons.

ARTICLE 7

RETURN OF DOCUMENTS, RECORDS OR ARTICLES OF EVIDENCE TO THE REQUESTED PARTY

Where required by the Requested Party, the Requesting Party shall return to the Requested Party the documents, records or articles of evidence provided under this Treaty as soon as possible.

ARTICLE 8

CONFIDENTIALITY AND RESTRICTION OF USE OF EVIDENCE AND INFORMATION

1. The Requested Party shall keep confidential a request, including its contents, supporting documents and any action taken in accordance with the request, if so requested by the Requesting Party. If the request cannot be executed without breaching such confidentiality, the Requested Party shall so inform the Requesting Party which shall then determine whether the request should nevertheless be executed.

2. The Requesting Party shall keep confidential the information and evidence provided by the Requested Party, if so requested by the Requested Party, or shall use such information or evidence only under the terms and conditions specified by the Requested Party.

3. The Requesting Party shall not use any information or evidence obtained under this Treaty for any purposes other than those stated in the request without the prior consent of the Requested Party.

ARTICLE 9 SERVICE OF DOCUMENTS

1. The Requested Party shall, in accordance with its laws and upon request, use its best endeavours to effect service of documents that are transmitted by the Requesting Party. However, the Requested Party shall not be obligated to effect service of a document which requires a person to appear as the accused.

2. The Requesting Party shall transmit any request for the service of a document requiring the appearance of a person before an authority in the territory of the Requesting Party no less than sixty days before the scheduled appearance unless, in urgent cases, the Requested Party has agreed to a shorter period of time.

3. The Requested Party shall, after effecting service, provide the Requesting Party with proof of service that shall include the description of the date, place, and manner of service, and be affixed with the signature or seal of the authority which served the document.

ARTICLE 10 TAKING OF EVIDENCE

1. Where a request is made for the purpose of a proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall, upon request, take evidence from persons and transmit it to the Requesting Party.

2. For the purposes of this Treaty, the giving or taking of evidence shall include the taking of oral testimony and the production of documents, records or other material.

3. Insofar as it is not contrary to the laws of the Requested Party, the Requested Party shall permit the presence of such persons as specified in the request during the execution of the request, and shall allow such persons to pose questions to the person from whom evidence is to be taken, in a manner agreed to by the Requested Party. For this purpose, the Requested Party shall promptly inform the Requesting Party of the time and place of the execution of the request.

4. A person who is required to give evidence in the Requested Party under this Article may decline to give evidence where either:

- (a) the law of the Requested Party permits that witness to decline to give evidence in similar circumstances in proceedings originating in the Requested Party; or
- (b) the law of the Requesting Party permits that witness to decline to give evidence in such proceedings in the Requesting Party.

5. If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Central Authority of that Party shall, upon request, provide a certificate to the Central Authority of the Requested Party as to the existence of that right. In the absence of evidence to the contrary, the certificate shall provide sufficient evidence as to the existence of that right.

ARTICLE 11

OBTAINING OF STATEMENTS OF PERSONS

The Requested Party shall, upon request, endeavour to obtain statements of persons for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the Requesting Party.

ARTICLE 12

TRANSFER OF PERSONS IN CUSTODY TO GIVE EVIDENCE OR ASSIST IN INVESTIGATIONS

1. The Requested Party may, at the request of the Requesting Party, temporarily transfer a person in custody in its territory to the Requesting Party to give evidence or assist in

investigations, provided that the person so consents and the Parties have previously reached a written agreement on the conditions of the transfer.

2. If the person transferred is required to be kept in custody under the laws of the Requested Party, the Requesting Party shall hold that person in custody and shall promptly return the person to the Requested Party as soon as the person's presence is no longer required in the territory of the Requesting Party.

3. Where the Requested Party advises the Requesting Party that the transferred person is no longer required to be held in custody, that person shall be set at liberty and be treated as a person referred to in Article 13.

4. For the purpose of this Article, the person transferred shall receive credit for service of the sentence imposed in the Requested Party for the period of time served in the custody of the Requesting Party.

ARTICLE 13

AVAILABILITY OF OTHER PERSONS TO GIVE EVIDENCE OR ASSIST IN INVESTIGATIONS

1. The Requesting Party may request the assistance of the Requested Party in obtaining a person's consent to:

- (a) appear as a witness in proceedings in relation to a criminal matter in the Requesting Party unless that person is the accused; or
- (b) assist in investigations in relation to a criminal matter in the Requesting Party.

2. The Requested Party shall, if satisfied that suitable arrangements for that person's security will be made by the Requesting Party, invite the person to consent to appear as a witness in proceedings or to assist in investigations. The Requested Party shall promptly inform the Requesting Party of the person's response.

ARTICLE 14

PROTECTION OF PERSONS GIVING EVIDENCE OR ASSISTING IN INVESTIGATIONS

1. Subject to paragraph 2, where a person is in the Requesting Party pursuant to a request made under Articles 12 or 13:

- (a) that person shall not be investigated, detained, prosecuted or punished or subjected to any other restriction of personal liberty in the Requesting Party, for any offence, in respect of any act or omission which preceded the person's departure from the Requested Party;
- (b) that person shall not, without that person's consent, be required to give evidence in any proceeding or to assist in any investigation other than the proceeding or investigation to which the request relates; and
- (c) that person shall not be subject to any civil suit to which the person could not be subjected if the person were not in the Requesting Party.

2. Paragraph 1 of this Article shall cease to apply if that person, being free to leave, has not left the Requesting Party within a period of thirty days after that person has been officially notified that the person's presence is no longer required or, having left, has voluntarily returned.

3. A person appearing in the Requesting Party pursuant to a request made under Articles 12 or 13 shall be subject to the law of that Party relating to contempt, perjury and the making of false declarations but shall not otherwise be subject to prosecution based on such evidence.

4. The competent authority which seeks the appearance of a witness from the Requested Party for the purpose of giving evidence shall ensure that the witness is properly instructed regarding responsibilities and obligations to the court so as to ensure that the witness is not subjected to contempt or similar proceedings.

5. A person shall not be subject to any penalty or mandatory restriction of personal liberty for declining to give evidence or to assist in investigations in accordance with Articles 12 or 13.

6. This Article shall not affect the obligation to return a person transferred in custody, as provided in Article 12.

ARTICLE 15

PROVISION OF PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

1. The Requested Party shall provide copies of documents and records that are open to public access as part of a public register or otherwise, or that are available for purchase by the public.

2. The Requested Party may provide copies of any official document or record. The Requested Party may, in its discretion, deny a request pursuant to this paragraph entirely or in part.

ARTICLE 16 ADMISSIBILITY OF EVIDENCE

Insofar as it is not contrary to the laws of the Requested Party, any documents or materials provided in response to a request under this Treaty shall be provided in such form as may be requested by the Requesting Party in order to make them admissible according to the laws of the Requesting Party.

ARTICLE 17 CERTIFICATION AND AUTHENTICATION

Any documents transmitted in accordance with this Treaty shall not require any form of authentication or certification unless this Treaty otherwise provides.

ARTICLE 18 SEARCH AND SEIZURE

1. The Requested Party shall, to the extent its laws permit, execute a request for search, seizure and delivery of any documents or materials to the Requesting Party if the request includes information justifying such action under the laws of the Requested Party.

2. The Requested Party shall provide the Requesting Party with such information as may be requested concerning the result of any search, the place and circumstances of seizure and the subsequent custody of any documents or materials seized.

3. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized documents or materials which are delivered to the Requesting Party.

ARTICLE 19
INSTRUMENTS AND PROCEEDS OF CRIME

1. The Requested Party shall, upon request, make inquiries as to whether any instruments or proceeds of a crime, including any bank accounts, are located within its jurisdiction and shall notify the Requesting Party of the results of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the reasons for its belief that such instruments or proceeds may be located in the Requested Party's jurisdiction.
2. Where any instruments or proceeds of crime are found, or believed to be located in the jurisdiction of the Requested Party, the Requested Party shall, at the request of the Requesting Party, take such measures as are permitted by its laws to prevent any dealing in, transfer or disposal of those instruments or proceeds of crime including, but not limited to, giving effect to a court order of the Requesting Party.
3. At the request of the Requesting Party, the Requested Party may, to the extent permitted by its laws and under the terms and conditions agreed to by the Parties, transfer all or part of the instruments or proceeds of crime, or the proceeds from the sale of such assets to the Requesting Party.
4. In applying this Article, the legitimate rights and interests of the Requested Party and bona fide third parties shall be respected under the laws of the Requested Party.
5. In this Treaty "instruments of crime" means any property used in or intended to be used in, or in connection with, the commission of an offence.
6. In this Treaty "proceeds of crime" means any property suspected or found by a court to be property derived or realized, directly or indirectly, from the commission of an offence or which represents the value of property and other benefits derived from the commission of an offence.

ARTICLE 20
SUPPLY OF CRIMINAL RECORDS

If a person is being investigated or prosecuted in the Requesting Party, the Requested Party shall provide, upon request, that person's criminal record in the Requested Party.

ARTICLE 21
EXCHANGE OF INFORMATION ON LAW

The Parties shall, upon request, furnish each other with the laws in force or the laws that used to be in force and information on judicial practice in their respective countries related to the implementation of this Treaty.

ARTICLE 22
NOTIFICATION OF RESULTS OF PROCEEDINGS
IN CRIMINAL MATTERS

Upon request, a Party may inform the other Party of the results of the criminal proceedings to which the request for assistance relates.

ARTICLE 23
SUBSIDIARY ARRANGEMENTS

The Central Authorities of the Parties may enter into subsidiary arrangements consistent with the purposes of this Treaty and with the laws of both Parties.

ARTICLE 24
REPRESENTATION AND EXPENSES

1. Unless otherwise provided in this Treaty, the Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
2. The Requested Party shall meet the cost of executing the request for assistance except that the Requesting Party shall bear the following:
 - (a) allowances or expenses for persons to travel to, stay in and leave from the Requesting Party under Articles 12 or 13 in accordance with the standards or regulations of the place where such allowances or expenses have been incurred;

- (b) expenses for persons to travel to, stay in and leave from the Requested Party under Article 10(3);
- (c) following consultation under Article 6(5), expenses of an extraordinary nature that the Requesting Party has agreed to pay;
- (d) expenses and fees of experts; and
- (e) expenses and fees of translation and interpretation.

3. The Requesting Party shall, upon request, pay in advance the expenses, allowances and fees it shall bear.

ARTICLE 25 CONSULTATION AND SETTLEMENT OF DISPUTES

1. The Parties shall consult promptly, at the request of either, concerning the interpretation, application or implementation of this Treaty either generally or in relation to a particular case.
2. Any dispute arising out of the interpretation, application or implementation of this Treaty shall be resolved through consultation by diplomatic channels if the Central Authorities of the Parties are themselves unable to reach agreement.

ARTICLE 26 ENTRY INTO FORCE

1. Each Party shall inform the other by diplomatic note when all necessary steps have been taken under its laws for entry into force of this Treaty. This Treaty shall enter into force upon the thirtieth day from the date of the later diplomatic note.
2. This Treaty applies to any requests presented after its entry into force even if the relevant acts or omissions occurred before this Treaty enters into force.

ARTICLE 27 AMENDMENT

1. This Treaty may be amended at any time by written agreement between the Parties. Any such amendment will enter into force in accordance with the same procedure prescribed in Article 26(1) and will form part of this Treaty.

2. Any amendment will be without prejudice to the rights and obligations arising from or based on this Treaty before or up to the date such amendment enters into force.

ARTICLE 28
TERMINATION

1. Either Party may terminate this Treaty by notice in writing through diplomatic channels at any time and this Treaty shall cease to be in force on the one hundred and eightieth day after the day on which notice is given.

2. Termination of this Treaty shall be without prejudice to the rights and obligations arising from or based on this Treaty and to the completion of any requests made pursuant to this Treaty before or up to the date of termination.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Treaty.

DONE at Canberra on the third day of April two thousand and six, in duplicate in English and Chinese, both texts being equally authentic.

FOR THE GOVERNMENT OF AUSTRALIA	FOR THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA
Alexander Downer Minister for Foreign Affairs	Li Zhaoxing Minister of Foreign Affairs

AGREED MINUTES

Negotiation of the Treaty between Australia and the People's Republic of China on Mutual Legal Assistance in Criminal Matters were held from 6 to 10 March 2006, in Canberra, Australia.

The Australian Delegation was led by Ms Joanne Blackburn, First Assistant Secretary, Criminal Justice Division, Attorney-General's Department. The Chinese delegation was led by Dr Xu Hong, Counsellor, Department of Treaty and Law, Ministry of Foreign Affairs. Details of the members of the Australian and Chinese delegations for the negotiations appear in Annexes I and II respectively.

The negotiations were held in a friendly atmosphere and in a spirit of mutual understanding and cooperation. The delegations reached agreement on all articles in the Treaty.

At the conclusion of the negotiations, the leaders of the two delegations initialed the text of the Treaty on Mutual Legal Assistance in Criminal Matters. A copy of the initialed text of the Treaty on Mutual Legal Assistance in Criminal Matters is at Annex III.

Both the Australian side and the Chinese side note that each country enjoys the right to determine its legal system at its own discretion, and cooperate with other countries on the basis of equality and mutual benefit. The differences in legal systems should not become obstacles for cooperation between countries.

The Australian side, reinforcing its wish to undertake effective mutual legal assistance in accordance with the Treaty on Mutual Legal Assistance in Criminal Matters, notes that the imposition of the death penalty may be in conflict with the essential interests of Australia. The Chinese side acknowledges the above position of the Australian side.

Both the Australian side and the Chinese side agree that if either country wishes to consider refusal of a request on the grounds of conflict with its essential interests, consultation will be undertaken to enable cooperation to take place on terms and conditions which would not be inconsistent with those essential interests.

The two sides believe that the conclusion of this Treaty will strengthen their cooperation in fighting terrorism, transnational organised crime, corruption and other serious crimes, and foster the growth and development of the bilateral relationship.

The two delegations agree that they will make their best efforts to ensure that the necessary domestic procedures are completed to enable the Treaty on Mutual Legal Assistance in Criminal Matters to be signed during the visit of Premier Wen Jiabao to Australia in early April 2006.

The Chinese delegation would like to express its appreciation to the Australian delegation for the excellent arrangements, spirit of cooperation, and constructive approach to these negotiations.

FOR THE AUSTRALIAN DELEGATION	FOR THE CHINESE DELEGATION
(Joanne Blackburn)	(Dr Xu Hong)

Canberra, 10 March 2006.

AUSTRALIAN DELEGATION

Ms Joanne Blackburn
First Assistant Secretary
Criminal Justice Division
Attorney-General's Department

Head of Delegation

Ms Robin Warner
Assistant Secretary
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