

Treaty between Australia and the Hellenic Republic on Mutual Assistance in Criminal Matters

- 5.1 The Treaty between Australia and the Hellenic Republic on Mutual Assistance in Criminal Matters, done at Athens on 4 July 2002, is similar to several others already in place between Australia and other countries. It is based on the Australian Model Mutual Assistance in Criminal Matters Treaty, although there are some minor technical variations, which will be discussed later in this chapter.¹
- 5.2 Mutual Assistance treaties allow law enforcement agencies to obtain information and evidence needed for investigating and prosecuting serious crime. Australia began negotiating a network of such treaties in the 1980s. The Committee was advised that there are currently 20 such treaties in force, four are awaiting entry and enforcement, and negotiations are continuing with several other countries. Existing treaties are mainly with countries in Western Europe, the Americas, and East Asia.²
- 5.3 The Committee understands that mutual assistance in criminal matters is a relatively modern form of international cooperation, covering a broad range of assistance for criminal investigation and prosecution and the pursuit of the proceeds of crime. It is a streamlined and expanded form of the traditional process of court to court assistance through letters of request.³

1 Information about the proposed treaty action is taken from the National Interest Analysis, tabled in conjunction with the treaty text on 27 August 2002, and a public hearing held in Canberra on 23 September 2002.

2 M. Manning, *Transcript of Evidence*, p.3.

3 J. Blackburn, *Transcript of Evidence*, p.2.

- 5.4 In Australia, the formal requesting or granting of international assistance in criminal matters is governed by the *Mutual Assistance in Criminal Matters Act 1987* (“the Act”). Under the Act the Australian Government is able to give effect to bilateral mutual assistance treaties with other countries. The Attorney-General's Department clarified that, while mutual assistance can be requested under the Act, a country is not obliged to provide it. Therefore a treaty, providing legal obligations on both parties, makes the process both more certain and more efficient. This treaty will impose obligations on both parties to cooperate to the extent that they can and within the limitations contained in both the treaty and the Australian legislation.
- 5.5 The Committee has been advised that this treaty will enable Australia and Greece to assist each other in the investigation and prosecution of serious crime including offences relating to taxation, customs duties, foreign exchange control and other revenue matters. This assistance includes:
- taking evidence and obtaining statements;
 - providing documents and other records;
 - executing requests for search and seizure;
 - locating and preventing any dealing in, transfer or disposal of proceeds of crime and enforcing orders in relation to such proceeds;
 - making persons (including prisoners) available to give evidence or assist investigations; and
 - serving documents.
- 5.6 It does not include the arrest or the enforcement of verdicts, the execution of criminal judgements imposed by the courts of the treaty partner, the transfer of persons in custody to serve sentences or the extradition of any person.
- 5.7 Assistance may be refused where the request relates to an offence which carries the death penalty. Australia’s position on the provision of assistance in relation to offences carrying the death penalty (as set out in amendments, which commenced in 1997, to section 8 of the Act) was made clear to Greece in the course of the negotiations. Although Greece abolished the death penalty for ordinary crimes in 1993 it still retains the death penalty for certain military crimes.
- 5.8 Further, the obligation to provide assistance under the terms of the treaty is qualified by certain internationally accepted exceptions. These include an obligation to refuse assistance in cases involving political or military offences or where there are substantial grounds for believing that the

request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of that person's race, sex, religion, nationality or political opinions. Assistance may also be refused where the Requested State considers that granting assistance would seriously impair its sovereignty, security, national interest or other essential interests. This will be discussed later in this chapter.

- 5.9 Both the treaty and the Act provide a very broad discretion to determine whether the provision of assistance is overruled in the interests of Australia to do so. The discretion lies with in the Attorney-General. It is exercised either by the Attorney-General, by the Minister for Justice and Customs or by delegates within the Attorney-General's Department.
- 5.10 The Committee understands that, while there are many matters in the treaty that are already covered by the Act, in many cases, a treaty arrangement will make the process more efficient. The Committee also recognises that there are some countries which, in the absence of a treaty, cannot provide the mutual assistance that Australia requests. The Committee was advised that there is a continuing relationship with Greece in terms of both extradition and mutual assistance.
- 5.11 The Committee was advised that information on the proposed Treaty has been provided to the States and Territories through the Commonwealth-State Standing Committee on Treaties' Schedule of Treaty Action, and that no negative response to the Treaty has been received.

Variations from similar treaties

- 5.12 The Attorney-General's Department advised of some variations from the Model Treaty. One relates to article 17.3, a provision which states:

The Requested State shall, to the extent permitted by its law, give effect to a final order forfeiting or confiscating the proceeds of crime made by a court of the Requesting State.⁴

- 5.13 The Attorney-General's Department advised that, in some cases, Greek law permits confiscation of the proceeds of crime for which no-one has been convicted. At this time Australia would not be able to enforce such orders under the treaty, and this appears to be a point of incompatibility of law.⁵

4 J. Blackburn, *Transcript of Evidence*, p.2.

5 *ibid.*

Operation and evaluation of Mutual Assistance treaties

- 5.14 The Committee requested information about the procedure that would apply to an actual request under the treaty. Officials from the Attorney-General's Department gave some examples as to how information would be requested and obtained. The Committee was advised that a request would need to be accompanied by sufficient information about the identity of the persons concerned and the nature of the matter under investigation to give a reasonable guarantee of bona fides.
- 5.15 The Committee requested specific information in order to gain a quantifiable understanding of the role and operation of this type of treaty, given that it would almost invariably involve dealing with people who are engaged in significant criminal activity involving the transfer of funds or substances between countries.
- 5.16 The Department agreed that collection of such quantifiable data would be a worthwhile way to evaluate the efficacy and effectiveness of the process, but that it was not available at this stage.⁶
- 5.17 The Committee understands that regulations will be made under the Act to provide that the Act applies to Greece, subject to the Treaty. The text of the Treaty will be set out in the Regulations.⁷ There will be no changes to the existing roles of the Commonwealth and the States and Territories as a consequence of implementing the Treaty.

Sovereignty

- 5.18 The Committee raised concerns about what might constitute a breach of sovereignty. In response, the Attorney-General's Department commented that:

it is conceivable that a foreign government's investigation might happen to cross over with some form of security investigation of our own where it might potentially threaten that investigation if we were to disclose evidence to that country or to take the particular action that they requested at the time when they wanted it done.⁸

6 J. Blackburn, *Transcript of Evidence*, p.11.

7 National Interest Analysis, paragraph 18.

8 M. Manning, *Transcript of Evidence*, p.6.

- 5.19 The Department further advised that while it is probably not a complete description of the possibilities, it would be an example of the sort of potential issue that might arise. The Committee accepts that this would not be a usual event, and that a number of grounds for refusal are already set out in Section 8 of the Act, including specific reference to where:
- the provision of the assistance could prejudice an investigation or proceeding in relation to a criminal matter in Australia;
 - the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Australia);
 - the provision of the assistance would impose an excessive burden on the resources of the Commonwealth or of a State or Territory; and/or
 - it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

Relation to other treaty obligations

- 5.20 With respect to the place of this treaty in a broader law enforcement framework, Ms Blackburn stated that this form of treaty was 'the primary process by which information for the purpose of investigation and prosecution is obtained'.⁹ Other methods included extradition treaties as well as other law enforcement cooperation arrangements at the operational level between law enforcement agencies. These were described as forming part of a 'web' of arrangements from the operational level to the very formal process of extradition.¹⁰
- 5.21 Mr Manning also referred to the value of mutual assistance treaties in the context of differing jurisdictions in different states:

The amount of direct assistance between law enforcement agencies varies to some extent, depending on the legal system of the countries concerned. As a general statement, it would be fair to say that civil law countries such as Greece tend to have a more judicially supervised process of investigation; therefore it is more difficult to get informal assistance and, for that reason, the mutual assistance process whereby we can make a formal request is a more important part of the cooperative process.¹¹

9 J. Blackburn, *Transcript of Evidence*, p.11.

10 Ibid.

11 M. Manning, *Transcript of Evidence*, p.11.

- 5.22 The Department stated that this treaty has no relationship to the ICC obligations. The mutual assistance obligations to the International Criminal Court are contained in the International Criminal Court legislation and the Statute of Rome, which established the court. This treaty and the Commonwealth Mutual Assistance in Criminal Matters Act specifically exclude provision of assistance for the prosecution of political or military offences.

Confidentiality

- 5.23 The Committee was advised that, under the terms of the treaty, the Requesting Party may request that each Party, subject to its law, keep confidential the requests it receives for assistance and its responses to such requests (Article 9.1), as well as information it receives in response to a request under the Treaty (Article 9.2). The Requesting State must not use evidence obtained, or information derived therefrom, for purposes not stated in the request without the consent of the Requested State (Article 9.3).
- 5.24 The Committee expressed concerns about these confidentiality provisions. The Department clarified that the confidentiality provisions of the treaty have no impact on providing information on the number of requests received and responded to, the number granted and the number refused.¹² The Committee was advised that such information is regularly provided in public forums. Confidentiality provisions are specifically designed to apply to individual requests, which quite often are seeking information as part of an ongoing investigation. Disclosure of such operational information could impair the completion of that operation. The confidentiality aspect is consistent with similar treaties in existence.
- 5.25 Despite the length of time between the commencement of the negotiations and their conclusion, the Committee agrees that this proposed treaty action will make mutual assistance in criminal matters between Australia and Greece more efficient.

12 J. Blackburn, *Transcript of Evidence*, p.7.

Recommendation 6

The Committee concurs with the views expressed by the Attorney-General's Department in the National Interest Analysis and recommends ratification of the treaty.

