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The Parliament of the Commonwealth of Australia

# **Report 36**

**An Extradition Agreement with Latvia and an  
Agreement with the United States of America on Space Vehicle  
Tracking and Communication**

October 2000

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## **Membership of the Committee**

**Chair**            The Hon Andrew Thomson MP

**Deputy Chair**   Senator Barney Cooney

**Members**        The Hon Dick Adams MP            Senator Andrew Bartlett  
                         The Hon Bruce Baird MP            Senator Helen Coonan  
                         Kerry Bartlett MP                    Senator Joe Ludwig  
                         Anthony Byrne MP                    Senator Brett Mason  
                         Kay Elson MP                         Senator the Hon Chris Schacht  
                         Gary Hardgrave MP                    Senator Tsebin Tchen  
                         De-Anne Kelly MP  
                         Kim Wilkie MP

## **Committee Secretariat**

**Secretary**                    Grant Harrison

**Inquiry Secretary**         Marilyn Bassett

**Administrative Officer**     Lisa Kaida





## **Recommendations**

### **Agreement on Extradition between Australia and the Republic of Latvia**

The Committee supports the proposed *Agreement on Extradition with Latvia* and recommends that binding treaty action be taken [paragraph 2.63].

### **Agreement Concerning Space Vehicle Tracking and Communication Facilities**

The Committee supports the agreement to further amend and extend the *Agreement Concerning Space Vehicle Tracking and Communication Facilities with the United State of America* and recommends that binding treaty action [paragraph 3.15]





## Introduction

### Purpose of the report

- 1.1 This Report contains advice to Parliament on the review by the Joint Standing Committee on Treaties (the Committee) of the following proposed treaty actions, which was tabled on 15 August 2000<sup>1</sup>.
- 1.2 In Chapters 2 and 3 we report on the proposed:
  - *Agreement on Extradition between Australia and the Republic of Latvia*; and
  - *Amendments to the Space Vehicle Tracking and Communications Facilities Agreement with the United States of America*.

### Availability of documents

- 1.3 The advice in this Report refers to, and should be read in conjunction with, the National Interest Analysis (NIA) prepared for the proposed treaty actions. Copies of the NIAs are at Appendix B. The analyses were prepared for the proposed treaty actions by the Government agencies responsible for the administration of Australia's responsibilities under the treaties. The NIAs were tabled in Parliament as an aid to Parliamentarians when considering these proposed treaty actions.
- 1.4 Copies of the treaty actions and NIAs can also be obtained from the Treaties Library maintained on the Internet by the Department of Foreign

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<sup>1</sup> Senate Journal No. 130, 15 August 2000, p. 3059; House of Representatives, *Votes and Proceedings*, No 128, 15 August 2000, p. 1453

Affairs and Trade (DFAT). The Treaties library is accessible through the Committee's website at [www.aph.gov.au/house/committee/jsct](http://www.aph.gov.au/house/committee/jsct).

## **Conduct of the Committee's review**

- 1.5 Our review of the three treaties tabled on 15 August 2000 was advertised in the national press and on our web site. Submissions received in response to the invitation to comment in the advertisement are listed at Appendix C.<sup>2</sup>
- 1.6 We also took evidence at a public hearing held on 28 August 2000. A list of witnesses who gave evidence at the hearing is at Appendix D.
- 1.7 A transcript of the evidence taken at the hearing can be obtained from the database maintained on the Internet by the Department of the Parliamentary Reporting Staff ([www.aph.gov.au/hansard/joint/committee/comjoint.htm](http://www.aph.gov.au/hansard/joint/committee/comjoint.htm)), or from the Committee Secretariat.

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2 Our review of the three proposed treaty actions was advertised in *The Weekend Australian* on 19/20 August 2000, p. 18

## Extradition Agreement with Latvia

### Proposed treaty action

- 2.1 Extradition treaties are a mechanism for the surrender of persons wanted for prosecution or for imposition or enforcement of a sentence by one country to another. Extradition treaties are a reliable and effective means to grant or request the surrender of fugitives because such treaties create an obligation in international law to extradite and are designed to accommodate the domestic extradition regimes and procedures of both countries.<sup>1</sup>
- 2.2 Extradition treaties are also seen to benefit Australia by making Australia a less attractive haven for overseas criminals wishing to come to Australia to evade justice in their own countries.
- 2.3 In Australia, extradition arrangements are prescribed in the *Extradition Act 1988*, which enables the Government to negotiate bilateral extradition treaties. The principles in the Act have been given effect in a model extradition treaty which establishes a ‘no evidence’ basis for extradition. This means that requests for extradition need only be accompanied by a statement of the alleged offence, not by a body of evidence sufficient to establish a *prime facie* case against the accused.<sup>2</sup>

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<sup>1</sup> Unless otherwise noted, the material in this section was drawn from the *National Interest Analysis for the Extradition Agreement with Latvia*.

<sup>2</sup> A description of some of the legal concepts referred to in this Chapter is at Appendix E.

- 2.4 The major elements of this model have subsequently been reflected in the model extradition treaty developed by the United Nations.
- 2.5 Australia has modern ‘no evidence’ extradition treaties in place with 31 countries, with a further five agreements nearing completion. In addition, Australia regards itself as having succeeded to United Kingdom extradition treaties with a further 24 countries.<sup>3</sup> These agreements are known as ‘inherited agreements’. Since the passage of the *Extradition Act 1988*, successive Australian Governments have pursued a program of establishing ‘no evidence’ extradition agreements with new and emerging countries and modernising existing inherited agreements.
- 2.6 Modern extradition treaties generally require that the conduct in question constitutes a criminal offence for which the maximum penalty is at least 1 year’s imprisonment in both countries. They generally require production by the requesting country when an extradition is sort, of a written statement setting out the conduct constituting the offence but not evidence sufficient to establish a *prima facie* case against the fugitive.<sup>4</sup>
- 2.7 Modern extradition treaties include provisions for extradition requests to be refused. This includes the provision for a request to be refused on the grounds that the person is a national of the requested state.
- 2.8 In most respects the proposed *Extradition Agreement with Latvia* (the proposed Agreement) follows Australia’s model extradition agreement. The main variations from the text of the model are:
- the omission from Article 2 of a requirement that the alleged conduct was an offence in the requesting state when it occurred; and
  - a special provision reflecting Latvia’s extra-territorial jurisdiction over stateless former USSR citizens normally resident in Latvia.
- 2.9 Extradition arrangements between Australia and Latvia are currently governed by 1924 *Extradition Agreement between the United Kingdom and Latvia*, which Australia regards as an ‘inherited agreement’. Negotiations to modernise the 1924 Agreement began in late 1997, when Latvia made a request to Australia for assistance in relation to alleged World War II war crimes.<sup>5</sup>

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<sup>3</sup> Attorney General’s Department, *Submission No. 1*, p. i

<sup>4</sup> Attorney General’s Department, *Submission No. 1*, p.1

<sup>5</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR1

## Evidence presented

### Introduction

- 2.10 Our review focused mainly on:
- the requirement that Requesting States need provide only a statement setting out the conduct constituting the extraditable offence, rather than evidence sufficient to establish a *prima facie* case;
  - the mandatory and discretionary exceptions which allow extradition to be refused by the Requested State; and
  - the Australian Government's practice of applying extradition arrangements equally to citizens and non-citizens.

### No 'evidence' required

- 2.11 Like most of Australia's modern extradition agreements, the proposed Agreement with Latvia treats the determination of guilt as a matter for the courts of the Requesting State.<sup>6</sup>
- 2.12 Australia's inherited agreements require a Requesting State to provide sufficient evidence to support a request for extradition to establish a *prima facie* case against the fugitive. As noted above, Australia's practice since the passage of the *Extradition Act 1988*, and as reflected in the proposed Agreement, is to require a detailed statement of the alleged facts of the case. Section 19 of the Act sets out the requirement for supporting documents and Section 5 of the Act defines an 'extraditable offence'. Essentially, an offence is extraditable 'where the conduct in question constitutes an offence for which the maximum penalty is at least 1 year's imprisonment in both countries'.<sup>7</sup>
- 2.13 In this case, as in each of the 'no evidence' style of agreements negotiated by Australia, the imperative to modernise the extradition arrangements is

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<sup>6</sup> Of the 31 'modern' extradition agreements Australia has entered into, two require the provision of statements of 'probable cause' (the United States of America and the Republic of South Korea, reflecting the nature of their judicial systems) and only one requires evidence to establish a *prima facie* case (Hong Kong, as it has maintained its common law legal system and the purpose of the treaty was to substitute pre-existing Commonwealth arrangements). See Attorney-General's Department, (AGs), *Submission No. 1*, pp. 2-6

<sup>7</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR2

ease of administration. As described by Steven Marshall, a witness from the Attorney-General's Department:

The authorities in civil law countries such as Latvia have consistently found it very difficult to provide evidence in an admissible form in Australian courts to satisfy the [*prima facie*] requirement.<sup>8</sup>

2.14 The *prima facie* requirements of the 1924 Agreement would, for example, require Latvia to:

- produce a sufficient case to warrant committal for trial; and
- provide evidence in a form admissible under Australian law.<sup>9</sup>

2.15 Mr Marshall went on to describe the range of matters that a magistrate in an Australian court would consider when deliberating on a request for extradition:

\... there are fewer matters of which a magistrate has to satisfied in order to determine whether a person is extraditable [under a 'no evidence' style of agreement]. The magistrate would go to issues such as whether the double criminality requirement is satisfied (that is, whether the offences would be punishable by more than one year in prison in each State). There would be a number of other issues, such as the existence of a valid arrest warrant against the person. There are a range of matters which the magistrate should be satisfied of, but ... evidence would not be one of them.<sup>10</sup>

2.16 The 'no evidence' style of agreement has been endorsed by the Treaties Committee on a number of previous occasions, namely in relation to extradition agreements with Brazil, Hungary, Paraguay, South Africa, Turkey, Uruguay and Poland.<sup>11</sup>

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<sup>8</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August, 2000, p. TR4

<sup>9</sup> Some academics have noted that countries like Latvia, whose legal system is based on civil law principles, could only succeed in securing extradition from Australia by producing a case acceptable to Australia's common law legal system, and subject to evidentiary laws, totally unknown to them. (See E P Aughterson, *Extradition. Australian Law and Procedure*, Law Book Company Ltd, Sydney, 1995, p. 920)

<sup>10</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR3

<sup>11</sup> See JSCT, *First Report* (August 1996); *Tenth Report* (September 1997); *Thirteenth Report* (March 1998), *Nineteenth Report* (March 1999) and *Report 21, Five Treaties Tabled on 16 February 2000* (June 1999). See the *Tenth Report* (p.45) for an endorsement of the 'template' treaty approach.

- 2.17 While the ‘no evidence’ style of agreement has been designed to facilitate extradition, there are protections built into the arrangements. Decisions made by magistrates are reviewable by superior Courts and all requests for extradition are reviewed by a Government Minister (in Australia, the Minister for Justice) against numerous internationally accepted exemptions, both mandatory and discretionary.<sup>12</sup> In addition, decisions by the Minister for Justice to surrender a person for extradition, under Section 19 of the Extradition Act are themselves reviewable.
- 2.18 We received a number of written submissions expressing concern that the proposed treaty, and all of Australia’s modern extradition arrangements, have abandoned the requirement that Requesting States provide evidence sufficient to establish a *prima facie* case.<sup>13</sup>

## Mandatory and discretionary exemptions

- 2.19 Article 3.1 of the proposed Agreement provides that the general obligation to extradite is qualified by the following mandatory exception:
- extradition shall not be granted for political or military offences, or if there are substantial grounds for believing that the request has been made for prosecuting a person on account of their race, religion, nationality or political opinions.<sup>14</sup>
- 2.20 The proposed Agreement also allows a number of discretionary grounds for refusal of a request for extradition, for example:
- where the death penalty is applicable in the requesting country, unless there is an undertaking given by the Requesting State that the death penalty will not be carried out;
  - where the fugitive is a national of the Requested State. If extradition is refused in these circumstances, the Requesting State may require that the Requested State consider prosecuting the fugitive;
  - where the penalty for the alleged offence is cruel, inhuman or degrading; or
  - where the circumstances of the extradition would be unjust, oppressive or incompatible with humanitarian considerations.<sup>15</sup>

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<sup>12</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, pp. TR5-6

<sup>13</sup> Joan Michie, *Submission No. 2*, p.1 and Marie Leader, *Submission No. 3*, p.1

<sup>14</sup> See *NIA for the Extradition Treaty with Latvia*, p. 44

<sup>15</sup> Steven Marshall, (AG), *Transcript of Evidence*, 28 August 2000, p. TR8

- 2.21 In combination, these amount to a general discretion for the Minister for Justice, and the Minister's counterpart in Latvia, to refuse extradition if there are concerns about whether a fugitive would receive a fair trial if extradited, or if there are concerns on humanitarian grounds, about the age or health of the fugitive.<sup>16</sup>
- 2.22 In addition, the proposed Agreement allows that extradition may be refused if the person whose extradition is sought is a national of the Requested State. The Agreement goes on to provide that where the Requested State refuses to extradite a national of that State it shall, if the other State so requests, commence its own prosecution.<sup>17</sup>

## Treatment of Citizens

- 2.23 In broad terms, the proposed Agreement applies equally to citizens and non-citizens of Australia and Latvia. The only special provision dealing with citizens is that, described above, which allows extradition to be refused if the person whose extradition is sought is a national of the Requested State. This provision applies to both Australia and Latvia.
- 2.24 In practical terms, however, there is likely to be a difference in the way that this provision is administered.
- 2.25 We were advised by the Attorney-General's Department that it is common for civil law countries, like Latvia, to refuse to extradite their nationals.

It is very commonly the case that civil law countries that they regard their nationals as being subject to their criminal jurisdiction, even in respect of acts done outside the country as a normal matter of course. In Australian law we occasionally extend our jurisdiction to acts by Australians overseas, but in civil law countries it is pretty common that, at least in a case where the act done is criminal in the country where it is done, they regard themselves as having jurisdiction over their nationals, wherever they are, for criminal purposes.

The concomitant of that is that if their national is in their country they regard themselves as having the first right to try them in respect of a crime committed overseas and for the reason they refuse to extradite their nationals. It is commonly a feature of their

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<sup>16</sup> Steven Marshall, (AG), *Transcript of Evidence*, 28 August 2000, p. TR8

<sup>17</sup> See Article 2(a) of the *Extradition Agreement with Latvia*



constitutions, although sometimes it is merely an ordinary statute. It is very uncommon among common law countries.<sup>18</sup>

- 2.26 On the other hand, the policy of successive Australian Governments has been to treat citizens and non-citizens as equals in the administration of justice. This means that an extradition request in relation to Australian citizen would be treated no differently than an extradition request in relation to a non-citizen. This approach has been adopted for two main reasons:
- first, because one of the principles underpinning an extradition agreement is a fundamental acceptance that the judicial system in the other country has sufficient integrity to ensure that justice is carried out in a fair and humane manner;<sup>19</sup> and
  - secondly, because it is extremely difficult for the authorities in a civil law country to bring sufficient admissible evidence to bear in a Australian Court to allow a case to be tried on its merits.<sup>20</sup>
- 2.27 We were advised that, in the event that an Australian citizen is extradited to Latvia to face charges, he or she would be eligible for consular assistance, allowing the Australian Government to monitor the conduct of any proceedings.<sup>21</sup>
- 2.28 A number of submissions received expressed the view that the Australian Government should provide its citizens with a greater level of protection against false accusations than is provided by the proposed treaty.<sup>22</sup>
- 2.29 While Australian laws do not generally apply to offences alleged to have been committed overseas, the recent introduction of ability in criminal law

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<sup>18</sup> Michael Manning, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR9-10

<sup>19</sup> We were advised that it had been the practice of successive Australian Governments to enter into extradition agreements only when it is confident that the judicial system in the other country is sufficiently well developed to ensure a fair trial. (See Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR6

See also the statement in the submission from the Attorney-General's Department that 'There are a number of countries whose criminal justice systems give rise to serious concerns, but with which, from an Australian law enforcement perspective, it would be extremely useful to have extradition relations. It is our current assessment that it would be unacceptable, on human rights grounds, for Australia to surrender accused persons to these countries and that, accordingly, a reciprocal extradition relationship is not possible.'

See Attorney General's Department, (AGs), *Submission No. 1*, p. 1

<sup>20</sup> See Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR10

<sup>21</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR9

<sup>22</sup> Marie Leader, *Submission No. 2*. Joan Michie, *Submission No. 3*. Jane Howarth, *Submission No. 5*. Kathleen Styles, Jim Sinclair, John and Gloria Beavan, *Submission No. 6*

to prosecute child pornography offences committed by Australian citizens overseas suggests that extra-territorial application of Australian law is an increasing reality.

- 2.30 In considering the questions of how much evidence, if any, should be provided in support of a request for extradition and whether additional levels of protection should be provided to citizens as opposed to non-citizens, we sought advice from Professor Ivan Shearer, Challis Professor of International Law at the University of Sydney and an acknowledged expert in extradition law.

### Evidence from Ivan Shearer

- 2.31 In both a written submissions and in oral evidence, Professor Shearer expressed the view that the abandonment of the *prima facie* case requirement in Australia's extradition treaty and legislative policy was over-hasty and unwise. He further advised that:

“It is unjust that a person (especially an Australian citizen) may be extradited to a foreign country on the mere demand (albeit subject to certain safeguards) of that country's authorities and without any opportunity for an Australian court to examine the evidence. The alleged fugitive is not even permitted to present evidence of an alibi. The Act [*Extradition Act 1988*] is very tightly – indeed oppressively – drawn in this respect...”<sup>23</sup>

- 2.32 Professor Shearer expressed the view that the true mismatch between Australia and civil law countries is not that they do not understand Australia's requirement of a *prima facie* case but that Australia (together with other countries of the common law inheritance) has no rule or policy against the extradition of its citizens and does not have general jurisdiction over crimes committed by Australian citizens abroad. Whereas countries with a civil law heritage have such policies and powers that are at times included their constitutions.

- 2.33 In abandoning the requirement for evidence, Professor Shearer considered that an extraordinary situation exists where:

“... in extraditing from Australia to Canada or the United Kingdom, for example, the Australian courts must first find a *prima facie* case of guilt against the alleged fugitive, but in the case

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<sup>23</sup>

Ivan Shearer, *Submission No. 8*, p. 2

of Argentina, France, Italy, and most other non-Commonwealth countries extradition takes place without any judicial examination in Australia of the evidence alleged against the offender. This is truly an extraordinary situation, where we are more exacting of countries whose laws are essentially similar to our own and whose institutions we trust than with other countries very different from our own”<sup>24</sup>

- 2.34 However, Professor Shearer does not support the retention of the full *prima facie* case requirement as this has resulted in a high failure rate in extraditing fugitives. He submitted that a “modified prima facie case” would provide a middle ground between a *prima facie* case and ‘no evidence’. Such a middle ground would include a test of sufficient evidence to raise a reasonable cause to suspect the fugitive of having committed the offence and should be stated in a way so as to allow the magistrate to disregard the rules of evidence which is common in administrative statutes such as workplace relations legislation. The ‘no evidence’ arrangements, incorporated in the *Extradition Act 1988* provide magistrates, hearing an extradition case, no opportunity to consider the evidence.
- 2.35 Professor Shearer submitted that the “modified prima facie case” that requires evidence sufficient for a magistrate to be satisfied that there was ‘reasonable suspicion’ is one that would be well understood by civil law countries.
- 2.36 Where the Courts are prohibited under the legislation from considering evidence, as is the case under the *Extradition Act 1988* (unless specific regulations apply), then questions of justice rest with the Executive. Professor Shearer argues that in these circumstances extradition decisions can be hidden from public view and justice may not be seen to be done.
- 2.37 Professor Shearer advised that his ‘middle ground’ approach is a non-discriminatory solution to the issue of treatment of Australian citizens. Non-discrimination on the basis of “national or social origin” is a principle incorporated in Article 26 of the International Covenant on Civil and Political Rights, 1966.

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<sup>24</sup> Ivan Shearer, *Submission No. 8*, p. 3

## World War II War Crimes

- 2.38 We were advised that while the issue of World War II war crimes had relatively little effect on the content of the proposed Agreement, it did influence the timing and the pace of negotiations.<sup>25</sup>
- 2.39 A modern treaty with Latvia would almost certainly have been negotiated at some time in the near future as part of an ongoing program of establishing extradition relations with eastern European countries. However, the receipt by Australia of a request for mutual assistance from Latvia in late 1997 alerted the Attorney-General's Department to the possibility of an extradition request and to the problems in that regard which would be posed by the *War Crimes Act 1945*, as it then stood.<sup>26</sup>
- 2.40 Since 1989, the *War Crimes Act 1945* had included a special requirement for a requesting state to establish a *prima facie* case against a fugitive in World War II war crimes extradition cases. The *War Crimes Act 1945* was amended in December 1999 to remove this requirement.
- 2.41 The only effect of the war crimes issue on the content of the proposed Agreement is that there is no requirement in the treaty that the offence with which the fugitive has been charged must have been an offence under the law of the requesting country at the time of the alleged conduct.
- 2.42 This approach is consistent with several other treaties, including those with Germany and Italy, and is also consistent with Australia's retrospective criminalisation of World War II war crimes in its domestic legislation.<sup>27</sup>
- 2.43 Support for the principle that alleged war criminals should be brought to trial was expressed, or implied, in a number of the submissions and letters we received during our review.<sup>28</sup>

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<sup>25</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR3

<sup>26</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR3

<sup>27</sup> Steven Marshall, (AGs), *Transcript of Evidence*, 28 August 2000, p. TR3

<sup>28</sup> For example, a letter received from Asem Judeh (representing Deir Yassim Remembered/Australia) expressed support for all victims of crimes against humanity and for the principle that all war criminals should be brought to trial.

## Consideration of issues arising from the current extradition process

### Basic rule

- 2.44 It is mainly through the Treaties Committee that Parliament scrutinises the treaty making activities of the Government. We regard this responsibility most seriously. Treaties often commit Australia to enormous obligations, hence a high standard of proof is required before ratification should occur. As a basic rule, we will not agree to recommend ratification of a treaty unless satisfied that such ratification is in the national interest.
- 2.45 In our view it is important that any extradition arrangements put in place of the 1924 Agreement reflect the needs and interests of the whole Australian community, not just the imperatives of a particular situation.

### Balancing the competing interests

- 2.46 We are conscious of two competing interests in the debate over extradition arrangements:
- the need to ensure Australia does not become a haven for fugitives to evade justice for crimes committed outside Australia; and
  - the need to protect Australian citizens from unfair extradition in cases where they may be falsely accused of committing a crime in a foreign country.
- 2.47 This is not an easy balance to strike. In doing so, however, we are guided by the following considerations:
- (1) Australians enjoy the benefits of the common law, including the protections inherent in its rules of evidence, and these benefits ought not be cast aside without compelling reason;
  - (2) it is incongruous to maintain in Australian law, different standards of proof for extradition requests from Commonwealth countries (a prima facie case) and requests from countries with a civil law system (no evidence required); and
  - (3) it seems absurd to entrench in law, a regime that makes it easier to extradite an Australian to a jurisdiction with whose legal system he or she is unfamiliar – that is, a civil law country – yet more difficult to extradite he or she to a more familiar common law jurisdiction.

## Civil law countries

- 2.48 We reject the argument that Australia should relax completely its common law protections because civil law country governments allegedly find it difficult to understand our rules of evidence.
- 2.49 It is a simple matter for a civil law country seeking an extradition from Australia to engage an Australian solicitor and senior barrister to advise on how to prepare evidence to satisfy our rules of evidence. A government has a duty to stand up for its citizens' rights, not cast them aside when foreign governments prove incompetent in legal proceedings. Fairness to our own citizens ought to be the first consideration, not the last.

## Separation of powers and roles

- 2.50 We feel that an arrangement that places the fate of an Australian subject to an extradition request in the hands of a holder of a political office is inconsistent with Australian legal tradition.
- 2.51 We think it better to have the matter of an extradition decided by a magistrate and thereafter reviewable by the judicial system, rather than the political system. We ourselves are political office holders, and we value the doctrine of separation of powers. Moreover, we have not been provided with evidence sufficient to warrant the overturning of this most valuable element of common law constitutional principle.
- 2.52 There is ample authority to support the worth of separating executive from judicial power. One such authority, the eminent British jurist Lord Hailsham, puts it thus:
- “...responsibility for criminal evidence and procedure should not be left, as now, with the Home Secretary. Again and again, errors of judgement have been made partly as a result of popular and populist pressure, and partly from the inexperience in this field of ministers and civil servants.<sup>29</sup>”
- 2.53 This principle of separating executive from judicial power was not followed in the Extradition Act 1988. It was, in the opinion of Professor Ivan Shearer, “overhasty and unwise” and “was based on a fundamentally

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<sup>29</sup> Lord Hailsham of Marylebone, *On the Constitution*, Harper Collins, 1992. p. 59.

flawed premise.” We have considerable sympathy for this view. We have attached, as Appendix F, Professor Shearer’s opinion, and commend it to interested readers.

## The situation of Australian citizens

- 2.54 In the context of this proposed treaty a question arose: should different rules apply on one hand to Australian citizens and on the other hand to residents who do not have Australian citizenship? Again, this is no easy distinction to draw. Citizenship of Australia ought to confer on holders more than a public relations effect; it ought to carry some genuine protection at law, some real difference in rights along with some real difference in responsibilities. Extradition rules seem an appropriate area of law in which to provide some such protection against false accusation in a foreign country.
- 2.55 There is a valid argument that existing “no evidence” treaties take the efficiency principle too far and should be altered to provide the protection that an Australian citizen can rightly expect: that is, a modified *prima facie* test as proposed by Professor Shearer.
- 2.56 One option would be for the Australian Government to advise Latvia formally in an *interpretative declaration*<sup>30</sup> (contained in a diplomatic note and gazetted publicly at the time of ratification) that we will interpret Article 5(2)(a) of the Agreement, as requiring that a statement of acts or omissions must contain evidence sufficient to raise a reasonable suspicion that the accused person committed the offence specified in the extradition request. This statement of proof is roughly the same as what is required to justify an arrest warrant being issued in Australia.

## Reasonable suspicion

- 2.57 The evidentiary test proposed by Professor Shearer may be seen as fair and reasonable. Indeed, the difference between ‘*prima facie*’ and ‘reasonable suspicion’ has been clearly stated in common law by way of an appeal from Malaysia to the Privy Council in 1969<sup>31</sup> where it was held that suspicion could take into account matters that could not be put in

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<sup>30</sup> See Lord McNair, *The Law of Treaties*, 1961, p. 429-431, *Porter v Freudenberg* [1915] I KB 878-880.

<sup>31</sup> *Hussein v. Chong Fook Kam* [1970] AL 942

evidence, whereas prima facie proof consists of admissible evidence.<sup>32</sup> Such a straightforward test ought not to defeat the prosecutorial authorities of civil law countries.

## Conclusions and recommendations

- 2.58 Our review has highlighted a number of significant concerns about the operation of Australia's extradition arrangements, particularly about the 'no evidence' basis of these arrangements.
- 2.59 These issues warrant careful and extended consideration. We propose to conduct such consideration by undertaking, in the near future, a thorough review of Australia's extradition arrangements.
- 2.60 We note that the proposed agreement with Latvia is consistent with the terms of the Extradition Act, which like all legislation is binding for all Australians. We must take cognisance of the extradition requirements and processes described in the Act.
- 2.61 We have also endorsed Australia's model extradition arrangements on a number of previous occasions and it would be precipitous to seek to overturn these arrangements in advance of the thorough review we propose to undertake.
- 2.62 Accordingly, and having given no prior indication to the Government that we believe Australia's extradition arrangements should be reviewed, we do not propose to recommend against the Extradition Agreement with Latvia.

### **Recommendation 1**

- 2.63 **The Committee supports the proposed *Agreement on Extradition with Latvia* and recommends that binding treaty action be taken.**

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32 *Ibid* at 949 per Devlin L.J.



## **Agreement Concerning Space Vehicle Tracking and Communication Facilities**

### **Proposed treaty action**

- 3.1 Since the beginnings of Australia's cooperation with the US on space-related activities in 1957, there has been a succession of treaties between the two countries. The treaty action under consideration further amends and extends the latest Agreement, the 1980 Program Agreement, which provides for the establishment, operation and maintenance of NASA facilities in Australia.<sup>1</sup>
- 3.2 The treaty action proposes to continue the agreement for a further 10 years until 26 February 2010, confirming Australia's relationship with NASA and providing for continuing cooperation in space vehicle tracking and communication support.
- 3.3 The proposed amendment does not increase the scope of operation of the Program Agreement, nor impose new obligations on Australia. Rather, it updates and formalises the existing arrangements, confirming the basis for co-operation which is relevant to contemporary realities and future space development.<sup>2</sup>

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<sup>1</sup> NIA, *Agreement concerning Space Vehicle Tracking and Communication Facilities*, p. 1

<sup>2</sup> NIA, *Agreement concerning Space Vehicle Tracking and Communication Facilities*, p. 2

3.4 In addition, the proposed treaty action seeks to change:

- the co-operating agency responsible, on behalf of the Australian Government, to the Commonwealth Scientific and Industrial Research Organisation (CSIRO); and
- the definition of US personnel to “nationals of the United States of America”.

## Evidence presented

### Deep Space Network

3.5 We were informed that the facilities currently operating in Australia are the Canberra Deep Space Communication Centre at Tidbinbilla in the ACT, and a tracking and data relay satellite ranging system facility at Alice Springs in the Northern Territory. We were further informed that NASA’s ‘deep space network’ provides two-way communication links for the guidance and control of spacecraft and the relay of data and images.

3.6 NASA’s ‘deep space network’ consists of three complexes strategically located around the world in California, Spain and the Australian facility at Tidbinbilla. It provides information to assist in selecting landing sites for NASA space missions, determining the composition of the atmosphere and the surfaces of the planets, studying the star formation process, and imaging and investigation of asteroids and comets.

3.7 We were advised that NASA has spent in excess of \$A470m on space-related activities in Australia since 1960. Co-operation has also facilitated the transfer of technical and scientific knowledge and skills between Australia and the US<sup>3</sup>. Further evidence on the benefits to Australia from the co-operation arrangements were provided by the Department of Industry, Science and Resources:

...There are benefits in terms of our scientists’ access to equipment which allows them to further scientific study. There is an exchange of data with NASA in certain circumstances. There are also benefits in terms of simply the money that NASA spends in

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<sup>3</sup> Patricia Kelly, Department of Industry, Science and Resources, *Transcript of Evidence*, 28 August 2000, p. TR11

maintaining the facilities. There are spin-offs for the local area, which includes something like 70,000 tourists who visit this facility every year. Also there are Australian industry benefits in terms of contracts let to industry and skills that are developed in Australia that would not otherwise be available to us.<sup>4</sup>

- 3.8 In relation to the limitations on the purpose of the facilities we were advised that the 'deep space network' facilities are solely devoted to civilian site operations. The treaty specifies that the facilities are for space vehicle tracking and communications. The facilities are only able to communicate in certain parts of the electromagnetic spectrum which have been set aside specifically for space science activities.<sup>5</sup>

## Facilities Management

- 3.9 We were told that all activities conducted in Australia under this agreement are managed to ensure that they are consistent with Australia's interests and that CSIRO manages the facilities on behalf of NASA. There are around 135 engineers, technicians, operators and support staff located at the Tidbinbilla facility. NASA funds the total cost of the facilities. NASA is responsible for remediation works in relation to its facilities<sup>6</sup>.
- 3.10 The amendment, which nominated CSIRO as the Australian co-operating agency reflected the Government's decisions about the organisation of its space activities in 1996. It gave responsibility for project and operational space issues to the CSIRO and responsibility for space policy issues to the Department of Industry, Science and Resources<sup>7</sup>.
- 3.11 We were advised that the redefinition of US nationals resulted from a decision of the US government to standardise reference to its citizens in all treaties and that the move to refer to all its representatives as 'nationals' would include green card and legal residents as well as citizens.<sup>8</sup>

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<sup>4</sup> Patricia Kelly, Department of Industry, Science and Resources, *Transcript of Evidence*, 28 August 2000, p. TR12

<sup>5</sup> Dr Mirium Baltuck, NASA, *Transcript of Evidence*, 28 August 2000, TR17

<sup>6</sup> Patricia Kelly, Department of Industry, Science and Resources, *Transcript of Evidence*, 28 August 2000, p. TR11

<sup>7</sup> Patricia Kelly, Department of Industry, Science and Resources, *Transcript of Evidence*, 28 August 2000, p. TR12

<sup>8</sup> Patricia Kelly, Department of Industry, Science and Resources, *Transcript of Evidence*, 28 August 2000, p. TR12

## Consultation

- 3.12 The consultation process included all State and Territory Governments, the Australian Space Industry Chamber of Commerce, the ACT and Regional Chamber of Commerce, the Canberra Tourism and Events Corporation and the Tidbinbilla Bushfire Brigade.<sup>9</sup>
- 3.13 We received advice from the Parliamentary Secretary responsible for deep space communications and the Chief Minister of the Australian Capital Territory that the ACT will not be responsible for any restoration costs in the event of relocation or closure of the facilities. We understand that a Memorandum of Understanding is being developed between the parties to facilitate the arrangements.<sup>10</sup>

## Other Evidence

- 3.14 Committee members attended the unveiling of a new display at Honeysuckle Creek that recognises the role played by facilities in Australia in NASA's Apollo space missions and communications with the first landing on the moon. We also visited the Canberra Deep Space Communications complex at Tidbinbilla and gained an insight into the workings of the co-operating arrangement.

## Conclusions and recommendation

- 3.15 The evidence provided support for Australia's continuing role in managing NASA's deep space network facilities in Australia. We consider that Australia will benefit from the continued cooperation with the United States Government. We support the proposed amendments and extension of the agreement concerning space vehicle tracking and communication facilities.

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<sup>9</sup> NIA, *Agreement concerning Space Vehicle Tracking and Communication Facilities*, p. 5  
<sup>10</sup> Hon Warren Entsch, Parliamentary Secretary to the Minister for Industry, Science and Resources, *Submission No. 2*. Chief Minister, ACT, *Submission No. 1.1*.

**Recommendation 2**

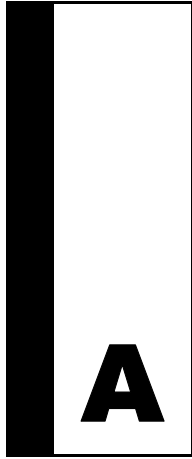
- 3.16 **The Committee supports the agreement to further amend and extend the *Agreement concerning Space Vehicle Tracking and Communication Facilities with the United States of America* and recommends that binding treaty action be taken.**

**ANDREW THOMSON MP**

Committee Chairman

11 October 2000





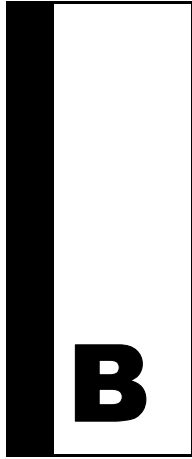
## **Appendix A - Extract from Resolution of Appointment**

The Resolution of Appointment for the Joint Standing Committee on Treaties allows it to inquire into and report on:

- (a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
- (b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and
- (c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.







## **Appendix B - National Interest Analyses**

### **Treaty on Extradition between Australia and the Republic of Latvia, done at Riga on 14 July 2000**

#### **NATIONAL INTEREST ANALYSIS**

##### **Date of Proposed Binding Treaty Action**

No date settled.

Article 16.1 of the proposed Treaty on Extradition between Australia and the Republic of Latvia (“the Treaty”) provides that the Treaty shall enter into force on the thirtieth day after receipt of the last notification by which the two countries have notified each other in writing that their respective requirements for entry into force of the Treaty have been complied with.

It is intended that Australia will notify Latvia as soon as practicable after Latvia’s notification is received and Australia’s domestic requirements for entry into force have been met, including the making of regulations under the *Extradition Act 1988* to implement the Treaty.

On the entry into force of the Treaty, it will replace the Treaty between the Latvian Republic and the United Kingdom of Great Britain and Ireland for the mutual extradition of fugitive criminals, done at Riga on 16 July 1924. (Article 16.2)

##### **Date of Tabling of the Proposed Treaty Action**

15 August 2000

### **Reasons for Australia to take the Proposed Treaty Action**

Extradition treaties are a mechanism for the surrender of persons wanted for prosecution or for imposition or enforcement of a sentence (“fugitives”) by one country to another. Extradition treaties are not always (depending on the law and practice of the particular country) the only means by which a country may request or grant the surrender of fugitives. However, they are a reliable and effective means of doing so, because such treaties create an obligation in international law to extradite and are designed to accommodate the domestic extradition laws and procedures of both countries.

Extradition treaties benefit Australia by providing a reliable and effective means of securing the return to Australia of persons overseas wanted for criminal prosecution, or imposition or enforcement of a sentence, in Australia, both at Commonwealth and State and Territory level. Extradition treaties also benefit Australia by making Australia a less attractive destination for overseas criminals wishing to evade justice in their own countries.

Extradition treaties also give effect to safeguards contained in Australia’s legislation (the Extradition Act); for example, the safeguards against extradition from Australia in violation of international human rights principles concerning discrimination and inhumane treatment.

There is no major disadvantage to Australia becoming a party to extradition treaties. The negotiation and conclusion of these treaties can, however, be a lengthy process.

Extradition relations between Australia and Latvia are currently governed by the Treaty between Great Britain and the Latvian Republic for the Mutual Extradition of Fugitive Criminals, done at Riga on 16 July 1924 (“the 1924 Treaty”). This inherited Treaty differs in several important respects from the style of extradition treaty now favoured by Australia. In particular, the 1924 Treaty provides for a specific list of extraditable offences and permits extradition of a fugitive wanted for prosecution only where evidence sufficient to justify the fugitive’s committal for trial (i.e. sufficient to establish a *prima facie* case) is provided by the requesting party.

In the operation of older style treaties these features give rise to two difficulties. First, extradition may not be available where the fugitive is charged with a serious offence not expressly listed in the treaty. Second, experience has shown that civil law countries, because they are unfamiliar with common law rules of evidence, commonly have great difficulty in presenting evidence in an admissible form and so may be unable to establish a *prima facie* case even on the basis of ample information. Because of these concerns the Extradition Act and the Australian Model Extradition Treaty (developed in the mid-1980s as a basis for our extradition treaty negotiations) provide that all conduct which is criminal

under the laws of both parties and carries a maximum penalty of at least one year's imprisonment is extraditable and that a foreign country requesting extradition from Australia need only present a detailed statement of alleged acts and omissions rather than evidence sufficient to establish a *prima facie* case. Over the last decade or more, Australia has replaced a substantial number of inherited United Kingdom extradition treaties with treaties of this newer type.

In the case of Latvia, in addition to the normal difficulties with the older style treaties, there were additional complications arising from the prolonged suppression of its independence after the treaty had entered into force. The Government was concerned that any extradition request received from Latvia would be likely to fail for technical reasons unrelated to the merits of the prosecution case in Latvia. This concern was accentuated by the possibility that an extradition request might be made in respect of World War II war crimes, which would raise particularly difficult evidentiary issues. Accordingly, it was decided to put in place a new extradition treaty between the two countries based on the Australian Model Extradition Treaty.

The proposed Treaty will add to Australia's network of modern (i.e. not inherited from the United Kingdom) bilateral extradition treaties. There are currently 31 of these treaties and five signed treaties awaiting entry into force.

### **Obligations**

The Treaty obliges Australia and Latvia to extradite to each other persons who are wanted for prosecution, or the imposition or enforcement of a sentence, for an extraditable offence. (Article 1) The Treaty provides that an extraditable offence is an offence which, at the time of the request, is punishable under the laws of both countries by imprisonment for a maximum period of at least one year or by a more severe penalty, irrespective of when the offence was committed. (Article 2.1 and Article 16.3) However, where a person is sought in order to enforce a sentence of imprisonment for such an offence, extradition shall be granted only if at least six months of imprisonment remain to be served. (Article 2.1)

The obligation to extradite is qualified by numerous internationally accepted exceptions, both mandatory and discretionary. The mandatory group includes the following exceptions, among others. Extradition shall not be granted for political or military offences or if there are substantial grounds for believing that the request has been made for the purpose of prosecuting a person on account of that person's race, religion, nationality or political opinions or that the person's position may be prejudiced for any of those reasons. (Article 3.1)

Among the discretionary exceptions are the following. Extradition may be refused for offences punishable by death under the law of the party requesting extradition ("the Requesting State"), unless the Requesting State gives such

assurances as the party to which the request is made (“the Requested State”) considers sufficient that the death penalty will not be carried out. Extradition may also be refused if the fugitive is a national of the Requested State (including, in the case of Latvia, stateless former USSR nationals who are permanent residents of Latvia), but if extradition is refused on grounds of the fugitive’s nationality the Requesting State may require that the competent authorities of the Requested State consider prosecuting the fugitive. Additionally, extradition may be refused if the penalty for the offence is cruel, inhuman or degrading or it appears to the Requested State that in the circumstances extradition would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment. (Article 3.2)

A request for extradition must be accompanied by authenticated supporting documents to establish matters such as the fugitive’s identity, dual criminality and the Requesting State’s right under its domestic law to prosecute and exercise custody over the fugitive. Where extradition is sought for the purpose of prosecution, or the fugitive was convicted in absentia, the Requesting State must provide an arrest warrant or equivalent (or a copy), a statement of the offences for which extradition is requested and of the acts or omissions alleged against the person in respect of each offence. Where extradition is sought of a convicted person, the Requesting State must provide evidence of the conviction and any sentence. In either case the text, or a statement, of the relevant law, including any law on limitation of proceedings and a statement of the punishment that can be imposed for the offence, a description and any other information relevant to the identity and nationality of the fugitive must also be included. (Articles 5 and 6)

If the Requesting State so requests, all property found in the Requested State which has been acquired as a result of the offence or may be required as evidence must also be surrendered if the extradition is granted, even if the extradition cannot be carried out. This obligation is subject to the Requested State’s laws and the rights of third parties. (Article 11)

The Requesting State can only prosecute an extradited person for offences for which extradition was granted (including other extraditable offences subject to the same or a lesser penalty and founded on the same facts) and cannot extradite the person to any other country, unless the Requested State consents to the prosecution or resurrender or the person fails to leave the Requesting State within 45 days of being free to do so or, having left, returns. This guarantee relates only to offences committed before the person was extradited. (Articles 12 and 13)

The Requested State must meet expenses incurred in its territory, viz. the cost of extradition proceedings and of arresting and detaining a person sought for

extradition. The Requesting State must meet the cost of transporting the person from the Requested State. (Article 15)

The proposed Treaty closely follows the text of the Australian Model Extradition Treaty. The main variations from that text are:

- omission from Article 2 of a requirement that the alleged conduct was an offence in the Requesting State when it occurred (which is not a requirement of Australian law), consistent with our approach in relation to a number of other countries, particularly including those where World War II war crimes may be an issue; and
- special provision in Article 3.2 (a) reflecting Latvia's extraterritorial jurisdiction over stateless former USSR citizens normally resident in Latvia.

In addition there are a number of minor differences of a purely technical character.

### **Costs**

There would be no direct financial costs to Australia in complying with the proposed Treaty. The Treaty does not require Australia to contribute to international organisations nor does it require the establishment of a new domestic agency in Australia. Expenses incurred in extradition cases conducted under the Treaty will be met, in Australia's case, from existing budgets, principally those of the Commonwealth Attorney-General's Department and the Commonwealth Director of Public Prosecutions.

### **Future Protocols etc.**

Article 16.4 provides a mechanism for amendment of the Treaty. The Treaty does not otherwise provide for the negotiation of future legally binding instruments.

### **Implementation**

In Australia extradition is governed by the Extradition Act ("the Act"). Under the Act the Australian Government is able to give effect to bilateral extradition treaties.

The Treaty will be given effect in Australian law by Regulations made under the Act by the Governor-General in Council. The Regulations will provide that the Act applies to Latvia subject to the Treaty, the text of which will be set out in the Regulations. The Regulations will commence when the Treaty enters into force.

There would be no changes to the existing roles of the Commonwealth and the States and Territories as a consequence of implementing the proposed Treaty.

**Consultation**

Information on the proposed Treaty was provided to the States and Territories through the Commonwealth-State Standing Committee on Treaties' Schedule of Treaty Action. In accordance with the international custom that bilateral treaty negotiations are treated as confidential between the parties, the substance of the Treaty was not disclosed before signature, although the fact that negotiations were proceeding was made public and was widely reported in the media. Public comment reported in the media and views expressed in correspondence between the public and relevant ministers has generally been supportive of conclusion of an extradition treaty with Latvia. Since signature, copies of the Treaty have been circulated to State and Territory Governments and Law Societies.

**Withdrawal or Denunciation**

Once in force the Treaty will provide that either party may terminate the Treaty by notice in writing at any time. The Treaty shall cease to be in force on the one hundred and eightieth day after the day on which notice is given. (Article 16.5)

**Contact Details:**

International Branch  
Criminal Law Division  
Attorney-General's Department

**Exchange of Notes, done at Canberra on 4 August 2000, constituting an Agreement between the Government of Australia and the Government of the United States of America to further amend and extend the Agreement concerning Space Vehicle Tracking and Communication Facilities of 29 May 1980, as amended**

**NATIONAL INTEREST ANALYSIS**

**Date of Proposed Binding Treaty Action**

For the proposed amendment and extension (the 2000 Amendment) of the 1980 Agreement with the United States of America (US) concerning Space Vehicle Tracking and Communication Facilities (the Program Agreement) to enter into force, Australia will need to advise the US that all domestic requirements for entry into force have been met. It is anticipated that Australia would be able to provide that advice as soon as practicable after 9 October 2000.

To ensure continuity of the Program Agreement, the 2000 Amendment will enter into force on the day of Australia's advice to the US but with retroactive effect from 26 February 2000. The executive power of the Commonwealth is sufficient to negotiate and enter into an Agreement with retroactive application.

**Date of Tabling of the Proposed Treaty Action**

15 August 2000

**Reasons for Australia to take the Proposed Treaty Action**

**Basis for Cooperation**

Australia's cooperation with the US on space-related activities began in 1957 with the establishment of facilities at Woomera in South Australia, to radio track US satellites. This was broadened to include additional scientific facilities set up by the US National Aeronautics and Space Administration (NASA) in 1960. Since then, the space vehicle tracking and communication relationship between Australia and the US has been the subject of a succession of treaties between the two countries. The treaty action under consideration further amends and extends the latest Agreement, the 1980 Program Agreement, which provides for the establishment, operation and maintenance of NASA facilities in Australia.

## **NASA's Deep Space Network**

NASA's scientific investigations of the solar system are accomplished primarily through the use of robotic spacecraft. Its Deep Space Network (DSN) provides the two-way communications link for the guidance and control of spacecraft and the relay of data and images. Managed and operated by the US Jet Propulsion Laboratory, it consists of three complexes strategically located around the world: at Goldstone in California, near Madrid in Spain, and at the Canberra Deep Space Communication Centre (CDSCC) located at Tidbinbilla in the Australian Capital Territory. NASA also maintains a Tracking and Data Relay Satellite Ranging System Facility at Alice Springs in the Northern Territory.

The DSN is also used to perform radio astronomy, radar and radio science experiments to improve knowledge of the solar system and the universe. It provides information to assist in selecting landing sites for NASA space missions, determining the composition of the atmospheres and the surfaces of the planets, studying the star formation process, and imaging and investigation of asteroids and comets.

All activities conducted in Australia under the Program Agreement are managed to ensure that they are consistent with Australian interests. The Commonwealth Scientific and Industrial Research Organisation (CSIRO) manages the facilities on behalf of NASA, with operational and maintenance activities contracted out to Australian industry. Approximately 135 engineers, technicians, operators and support staff are presently employed at the CDSCC by BAE SYSTEMS Ltd (the current contractor). NASA funds the total cost of the facilities, including the salaries and administrative costs of Australian Government personnel involved in the Program Agreement's management.

## **The 2000 Amendment**

The 2000 Amendment provides for the continuation of the Program Agreement until 26 February 2010, confirming Australia's long-standing relationship with NASA and providing for continuing cooperation in space vehicle tracking and communication support. NASA has spent in excess of \$A470 million on space-related activities in Australia since 1960. Cooperation with NASA has also facilitated the transfer of technical and scientific knowledge and skills between Australia and the US.

The 2000 Amendment does not increase the scope or operation of the Program Agreement, nor impose new obligations on Australia. Rather, it updates and formalises the existing arrangements, confirming the basis for cooperation between Australia and the US, which is relevant to contemporary realities and future space development.



The 2000 Amendment also continues existing arrangements for exchange of scientific data, facilitation of the entry and exit of US personnel through immigration barriers, and duty-free import of personal and household effects of US personnel. Taxation of US personnel continues to be governed by the 1982 Double Tax Agreement between Australia and the US.

The Agreement explicitly provides for further arrangements between NASA and the CSIRO, as the cooperating agencies, in respect of the establishment and operation of facilities. These arrangements encompass financing, constructing and installing new facilities, and disposing of or removing infrastructure and remediation work (where a facility is surplus to requirements). NASA is seeking to increasingly involve the highly skilled technical workforces located at its overseas facilities in systems engineering design and development work for the DSN. The Australian facilities have the opportunity to capture such work, which will generate additional revenue, significantly enhance scientific and technical capabilities, provide possible spin-offs to Australian industry, and open additional opportunities for local staff in the Australian-based NASA facilities.

NASA is currently entitled to an exemption from duties, taxes and like charges, including wholesale sales tax. The 2000 Amendment updates this to account for changes to Australia's taxation system and, in particular, the introduction of the Goods and Services Tax.

The obligations under the Program Agreement are changed by the 2000 Amendment to:

- establish the CSIRO as the cooperating agency on behalf of the Australian Government, replacing the Department of Science and the Environment (*Article 1*);
- amend the list of facilities to operate under the Program Agreement as the CDSCC at Tidbinbilla and the Tracking and Data Relay Satellite Ranging System at Alice Springs. The reference to Orroral Valley Tracking Station has been deleted due to its functions being consolidated at the CDSCC in 1985 (*Article 2(1)*);
- provide for further arrangements between NASA and the CSIRO, as the cooperating agencies, in respect of the responsibility for and financing of the disposal of or the removal of infrastructure and remediation work in the event a facility becomes surplus to requirements. The cooperating agencies can also enter into arrangements regarding the duration of the use of the facilities, the responsibility for and financing of the construction, installation and equipping of the facilities and other details relating to the establishment or operation of the facilities (*Article 3*);

- identify the *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income done at Sydney on August 6, 1982* as the basis for providing the exemption from Australian income tax for US personnel. This exemption is continued from the Program Agreement, however, *Article 8* has been simplified to refer to the relevant international convention (*Article 8(1)*);
- remove the exemption from Australian death and gift duties, given that they are no longer imposed in Australia (the previous *Article 8(2)*);
- define US personnel as “nationals of the United States of America” instead of “civilian citizens”. The US Government requested this change to standardise its reference to US personnel in international agreements (*Article 8(2)*, replacing the previous *Article 8(3)*);
- provide for a refund of indirect Australian federal taxes (which includes the Goods and Services Tax) in respect of equipment, materials, supplies and other property and services imported into or purchased in Australia, and which are certified as being for use in connection with the activities under the Program Agreement. The Program Agreement currently provides NASA with an exemption from sales tax. Section 62(c) of the *Tax Administration Act 1953* enables the Australian Government to provide NASA with a refund of indirect tax on the basis of its existing international obligation (*Article 9*);
- extend the scope of activities performed by Australian personnel to include systems engineering design and development (*Article 10*);
- provide that activities will be carried out by Australian personnel to the maximum extent practicable (*Article 11*);
- provide that communication services of Australian industry will be used by NASA in its activities to the maximum extent practicable (*Article 12(1)*);
- establish that the radio transmitting and receiving equipment at the facilities will be operated in accordance with the requirements of the relevant Australian authorities, presently the Australian Communications Authority (*Article 12(2)*);
- oblige the Australian Government to take all reasonable steps to protect, where possible, the frequencies for transmission and reception used by the facilities in Australia from harmful radio interference. This is to ensure non-interference with satellite communications and thus underpin the effective operation of the CDSCC (*Article 12(3)*);

- extend the period of operation of the Program Agreement to 26 February 2010 (*Article 13(1)*); and
- introduce a mechanism for termination of the Program Agreement in accordance with Australia's treaty making practice (*Article 13(2)*).

The Program Agreement will continue to provide for the exchange of information and data acquired through the operation of the facilities for the purposes of conducting scientific studies by either country (*Article 4*). Australia is obliged to facilitate the entry and exit of US personnel engaged in Australia for the conduct of activities under the Agreement. US personnel are granted entry and exit using Australian foreign government visas. Personal and household effects of US personnel will also continue to be exempt from import duty (*Article 7*).

US goods and equipment brought into Australia for the conduct of activities under the Program Agreement will continue to be exempt from customs duties and other like charges (*Article 9*). The Australian Government currently provides this exemption under Item 4 of the *Customs Tariff Act 1995*.

### **Costs**

No additional costs are anticipated as a consequence of this treaty action.

NASA funds the total cost of the establishment, operation and maintenance of space vehicle tracking and communication facilities in Australia through its contractual arrangements with the CSIRO. NASA is also responsible for remediation work in relation to its facilities. Any additional activities or the set-up of new infrastructure under the Program Agreement as further amended would not impose any costs on the Australian Government or the respective State and Territory Governments.

Under the Program Agreement, the Australian Government is obliged to grant NASA an exemption from duties, taxes and like charges, including wholesale sales tax. Where the Government is under such an obligation, Section 62(c) of the *Tax Administration Act 1953* enables the Commissioner of Taxation to make a refund of the indirect tax (that is, Goods and Services Tax). The *Taxation Administration Amendment Regulations 2000 (No.4)* were approved by the Federal Executive Council and came into force on 1 July 2000. These regulations provide a mechanism for NASA (amongst other organisations) to claim a refund of the Goods and Services Tax.

### **Future Protocols**

*Article 13* provides that cooperation can be further extended by agreement of the two Governments. Changes to the list of NASA facilities (*Article 2(1)*) can be made by agreement of the Governments (*Article 2(2)*).

### **Implementation**

Apart from the Regulations noted in 'Costs' above, no further implementation measures are required.

### **Consultation**

State and Territory Governments were advised of the 2000 Amendment through the Standing Committee on Treaties' Schedule of Treaty Action.

The Commonwealth Department of Industry, Science and Resources sought the views of Commonwealth Departments and the following:

#### **State and Territory Agencies**

Manager, Inter-governmental Relations, Chief Minister's Department, Australian Capital Territory (ACT) Government. The Chief Minister's Department also consulted the ACT Departments of Justice and Community Safety, Treasury and Infrastructure, and Environment ACT.

The Chief Minister's Department (ACT) suggested that the proposed amendments provide for reimbursement should the Australian Government be required to carry out any remedial work or disposal of infrastructure at surplus facilities. The requirement for remedial works was previously covered in the Cooperating Agency Arrangement between NASA and CSIRO (formerly Department of Science and Technology) and 'applied' when NASA withdrew from the facilities at the Honeysuckle Creek and Orroral Valley Space Tracking Stations in the ACT. At the request of the ACT Government, this provision is now included in the 2000 Amendment at *Article 3*.

The Chief Minister's Department (ACT) also requested that the scope of refund of taxes be defined such that state taxes would not be affected. The proposed 2000 Amendment refers to the refund of indirect Australian federal taxes to remove this

ambiguity (*Article 9(2)*). The Department was satisfied with the 2000 Amendment and had no further changes.

Director, Policy and Coordination, Department of the Chief Minister, Northern Territory Government.

The Department of the Chief Minister (Northern Territory) did not comment on the proposed Amendments.

The Commonwealth Department of Industry, Science and Resources also advised the following community organisations of the treaty action. To date, there has been no request for further information.

**Community and Industry Organisations**

The Australian Space Industry Chamber of Commerce

The ACT & Region Chamber of Commerce

Canberra Tourism & Events Corporation

The Tidbinbilla Bush Fire Brigade.

**Withdrawal or Denunciation**

Once in force, the 2000 Amendment introduces a termination clause (*Article 13(2)*) that allows either Government to terminate the Program Agreement. Termination would occur after consultations between both Governments have taken place and one year after written notice of termination is received by one party through the diplomatic channel.

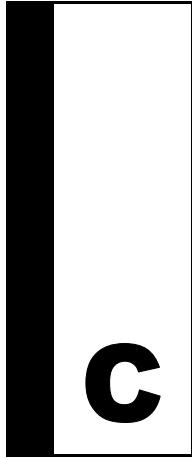
**Contact Details**

Space & Aerospace Industries Section

Services and Emerging Industries Division

Department of Industry, Science and Resources





## **Appendix C - Submissions**

### **Agreement on Extradition between Australia and the Republic of Latvia**

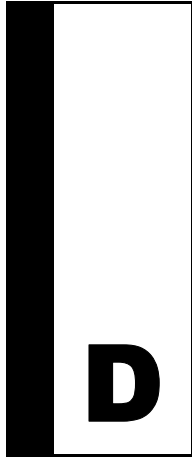
| <b>Submission No.</b> | <b>Organisation/Individual</b>                         |
|-----------------------|--|
| 1, 1.1                | Attorney General's Department                          |
| 2                     | Marie Leader   |
| 3                     | Joan Michie  |
| 4                     | Wally Andrew   |
| 5                     | Jane Howarth   |
| 6                     | Kathleen Styles, Jim Sinclair and John & Gloria Beavan |
| 7                     | Judith Townsend  |
| 8                     | Professor Ivan Shearer                                 |
| 9                     | Dr Chaikin   |

### **Agreement Concerning Space Vehicle Tracking and Communication Facilities**

|        |  |
|--------|--|
| 1, 1.1 | Chief Minister, Australian Capital Territory   |
| 2      | Hon Warren Entsch, Parliamentary Secretary to the Minister for Industry, Science and Resources |







## **Appendix D - Witnesses at Public Hearing**

**Monday, 28 August 2000, Canberra**

### **Department of Foreign Affairs and Trade**

Winfred Peppinck, Executive Director, Treaties Secretariat, Legal Branch

### **Attorney-General's Department**

Susan Downing, Senior Legal officer, Office of International Law

Stephen Bouwhuis, Senior Legal Officer, Office of International Law

### **Agreement on Extradition Between Australia and the Republic of Latvia**

Steven Marshall, Assistant Secretary, International Branch, Criminal Law Division, Attorney-General's Department

Michael Manning, Senior Legal Officer, International Branch, Criminal Law Division, Attorney-General's Department

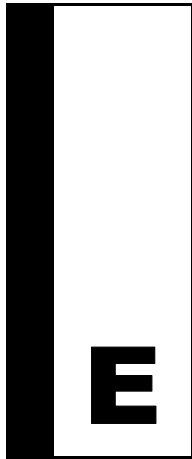
### **Agreement Concerning Space Vehicle Tracking and Communication Facilities**

Miriam Baltuck, National Aeronautics and Space Administration

Patrica Kelly, Head of Division, Services and Emerging Industries, Department of Industry, Science and Resources

Julie-Anne Price, Project Officer, Department of Industry, Science and Resources





## **Appendix E –Legal Concepts relevant to Extradition**

### **Brief background on some difference between common law and civil law countries.**

Adversarial and non-adversarial, or inquisitorial, as terms of expression have no precise meaning. In broad terms an adversarial system refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for advancing the dispute. This is done by the presentation of admissible evidence in accordance with the laws of evidence. The term ‘inquisitorial’ refers to civil code systems in which the judge has such primary responsibility. Civil code proceedings represent, in procedural theory, judicial prosecution as opposed to party prosecution.<sup>1</sup>

This means that in civil law countries the presiding judge has a more pro-active role in the conduct of the case and the calling/gathering of the evidence. In contrast, in common law practice, the judge will balance and weigh the admissible evidence presented by the parties.

In England the common law, ‘adversarial’ system developed in the Middle Ages and was exported into countries such as Australia, New Zealand and Canada. In Europe, civil law inquisitorial systems had their basis in Roman law. The Napoleonic codes were developed in the French civil law system, and the German

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<sup>1</sup> Australian Law Reform Commission Report 62 *Review of the federal civil justice system* August 1999 at p29

Civil Code in Germany. Civil law systems in Europe and Asia have generally styled themselves on either model.<sup>2</sup>

In civil matters the Australian Law Reform Commission (ALRC) sees that there is a significant degree of convergence in the practices in common law and civil code countries. For example, an indication of convergence in Australia is seen in the adoption of case management and managerial judging. In German civil procedure parties present the facts to the court and their lawyers have comparable roles to those in common law countries. The court may only consider those facts brought before it, and may not investigate on its own.

In private civil disputes in both models, the involvement of the parties in the presentation of the case extends to; initiating proceedings, determining the issues to be decided, investigating the case facts, selecting and presenting witnesses and other evidence. In common law systems, involvement of the parties also covers selecting and presenting experts (in civil code systems experts are appointed by the court), and presentation of oral evidence, argument and submissions by counsel at the hearing.<sup>3</sup>

The ALRC also points out that Australia has in many ways adopted features of the civil law systems particularly in the federal review tribunal system. This refers to the Administrative Appeals Tribunal and like bodies which have elements of non-adversarial procedures and practices in the interests of efficiency and a more informal process in the review of the merits of a decision.

The ALRC points out that the merits of adversarial systems factors are judicial impartiality, independence, consistency, flexibility, and some disadvantages are tactical manoeuvring, partisanship and the unreliability of witnesses, and the obscured focus of some hearings.

In Australia the rule against hearsay principally is designed to prohibit witnesses repeating statements made by others in order to establish the truth of those statements.

One question that arises in the debate is whether the adversarial system is most effective at arriving at the truth, when the main focus is to arrive at a decision or determination as to the dispute between the parties, which can be and is the primary focus of a hearing.

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<sup>2</sup> Ibid footnote 44

<sup>3</sup> Ibid at p 30 and footnote 51

Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties.<sup>4</sup>

The German laws of procedure do not encompass a hearsay rule of exclusion. All logically relevant evidence is admissible.<sup>5</sup>

To disregard hearsay evidence is generally considered as conflicting with the performance of one of the principal tasks of the criminal process, namely, to discover the truth of what happened.<sup>6</sup>

## Extradition and *Prima Facie* Case Requirements

As originally formulated, Australia's extradition laws and treaties required the requesting state to establish a *prima facie* case against the person as one of the pre-conditions which had to be met before an extradition request would be granted.

While the establishment of a *prima facie* case is no longer required under the *Extradition Act 1988*, section 11 of that Act does allow regulations to be made extending the Act to particular countries 'subject to such limitations, conditions, exceptions or qualifications as are necessary' to give effect to a treaty so that the requirement for a *prima facie* case is preserved<sup>7</sup>.

If, for this reason, a *prima facie* case needs to be met for extradition to a particular country then section 11(5)(b) of the *Extradition Act 1988* sets out the criteria which must be satisfied so that 'a single test is applied throughout Australia, regardless of the various criteria adopted for the purposes of domestic law in the several States and Territories.'<sup>8</sup>

A reference to the *prima facie* evidence text being satisfied is a reference to the provision of evidence that, if the conduct of the person constituting the extradition offence ... had taken place in the part of Australia referred to ...would, if uncontroverted,

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<sup>4</sup> A Mason 'The future of adversarial justice' *Paper 17<sup>th</sup> Annual AIJA Conference Adelaide 7 August 1999* quoted in *Australian Law Reform Commission Report 62 op cit* at p 32 footnote 61

<sup>5</sup> Heinrich Reiter Hearsay Evidence and Criminal Process in Germany and Australia *Monash University Law Review* Vol 10 June 1984 51 at 52

<sup>6</sup> *Ibid* at 54-55

<sup>7</sup> See EP Aughterson, *Extradition. Australian Law and Procedure*, Law Book Company Ltd, Sydney, 1995, p.217

<sup>8</sup> *ibid*, p.218

provide sufficient grounds to put the person on trial, or sufficient grounds for inquiry by a court, in relation to the offence<sup>9</sup>

Before the enactment of the *Extradition Act 1988*, Australia's extradition relationships were governed by the *Extradition (Foreign States) Act 1966* and the *Extradition (Commonwealth Countries) Act 1966*. In 1985, the Extradition (Foreign States) Act was amended in a number of ways. One of these amendments was the removal of the requirement that a *prima facie* case be established by the country seeking the surrender of a fugitive.<sup>10</sup> Some of the reasons for this amendment are set out below.

Before the 1985 amendments to the Extradition (Foreign States) Act, a requesting country had to do two things in order to satisfy the *prima facie* case requirement. The first was that it had to produce a sufficient case to warrant committal for trial. The second was that its evidence had to be in a form admissible under Australian law. As one writer commented:

Accordingly, foreign countries, particularly civil law countries, could only succeed in securing extradition from Australia by producing a case acceptable to a legal system, and subject to evidentiary laws, totally unknown to them.<sup>11</sup>

Further, it was said that the *prima facie* case requirement:

- enabled offenders to escape extradition on technical grounds rather than on the basis of the merits of their case, and
- resulted in lengthy and expensive extradition proceedings.

When new Australian extradition legislation was enacted in 1988 which replaced the Extradition (Foreign States) Act and the Extradition (Commonwealth Countries) Act there was, once again, no requirement for a *prima facie* case to be established.

## Prerogative writ

A prerogative writ is a traditional remedy in administrative law predating by many centuries, statutory regimes that enable a person to seek judicial review of an administrative decision.

The most common prerogative writs are *certiorari*, *mandamus* and *prohibition*. A writ of habeas corpus may also be sought and granted.

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<sup>9</sup> Section 11 (5) (b) *Extradition Act 1988*

<sup>10</sup> HF Woltring, 'Extradition law', *Law Institute Journal*

<sup>11</sup> *ibid*, p.920.

In brief, *certiorari* is sought when a person wants a decision quashed, *mandamus* is an order issued by a court to compel a public official to perform a public duty or exercise a statutory power, and *prohibition* is an order issued by a court requiring a public authority, official or lower court to stop or not commence some action.

*Habeas corpus* is an order requiring a person detaining another person to bring that person before a court so that the legality of their detention can be determined.

The prerogative writs have a wider application than statutory regimes. Among the benefits of prerogative writs is that they:

enable proceedings to test ... the legality of the initial arrest, or, at the other end of the process, the Attorney-General's decision to surrender the fugitive to the requesting state.

Further, in contrast to the review and appeal processes set out in the *Extradition Act 1988* there is no time limit on seeking a prerogative remedy.

On the other hand, there are limitations involved in the use of prerogative writs. For example, most are discretionary so that a writ may be refused not just on the merits of the case but as a result of other factors such as 'delay, the conduct of the parties and, perhaps, the availability of alternative review procedures.'<sup>12</sup>

## Australian Citizenship Eligibility Requirements

Generally, people are eligible for Australian citizenship when they have been present in Australia as a permanent resident for a total of two years in the previous five years, including 12 months in the two years immediately before they apply. While there are some exceptions, people seeking citizenship must:

- be a permanent resident and at least 18 years of age;
- be capable of understanding the nature of their citizenship application;
- have a basic knowledge of the English language;
- understand the responsibilities and privileges of Australian citizenship;
- be of good character; and
- be likely to live permanently in Australia or maintain a close and continuing association with Australia.<sup>13</sup>

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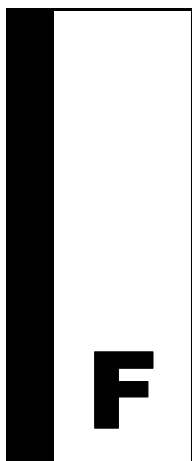
<sup>12</sup> See EP Aughterson, *Extradition. Australian Law and Procedure*, Law Book Company Ltd, Sydney, 1995, p.233

<sup>13</sup> Department of Immigration and Multicultural Affairs, *DIMA Fact Sheet 66 – Australian Citizenship*, [www.immi.gov.au](http://www.immi.gov.au) 18 September 2000









## **Appendix F - Submission on Extradition from Professor Ivan Shearer<sup>1</sup>**

### **Extradition treaties: The question of evidence of guilt**

I have been asked to express an opinion to the Joint Standing Committee on Treaties on a question that has arisen in relation to the proposed extradition treaty between Australia and Latvia.

I should preface my opinion by stating that I am presently in the United States occupying, on a visiting basis, the Stockton Chair of International Law at the United States Naval War College, Newport, Rhode Island. I am away from my extradition law files and ready access to Australian statutes and case law. I am therefore unable to footnote this opinion with detailed references. However, the relevant principles, and the history of the matter, are clear to me, since I have written on them in the past.

The question asked is "whether extradition treaties entered into by the Australian Government should have a higher standard of evidence required to satisfy an extradition request [in the case of Australian citizens] than that required under the Extradition Act, 1988, for non-citizens."

The Extradition Act of 1988 does not require any evidence at all of guilt to be produced by a requesting government against an alleged fugitive from justice, whether that person is an Australian citizen or not. The Act applies, however, subject to regulations made under the Act, so long as the regulations do not purport to enlarge the scope of extradition allowed under the Act. Thus regulations may restrict the scope of extradition in the case of particular countries, by making exceptions, qualifications, or modifications in relation to the kinds of offence covered, whether the requested state's own citizens are subject to

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<sup>1</sup> Professor Ivan Shearer, *Submission No. 8*.

surrender, evidence of guilt required, and other possible modifications. These restrictions most frequently arise from the particular provisions of treaties of extradition entered into by Australia with other countries (even though Australia tries so far as possible to secure acceptance of the pattern of its "model" treaty). Restrictions may also be contained in regulations giving effect to non-treaty arrangements (e.g. with Japan), and with the Member States of the Commonwealth (which have been designated en bloc by regulations under the Act).

Thus, regulations made under the Act may require evidence of guilt to be presented by certain requesting countries. It would be open to Australia to insert such a provision in its treaty with Latvia, assuming agreement by Latvia, confined to the citizens of the requested party. (It would hardly be diplomatic to propose a one-sided arrangement in this respect, unless Latvia's laws altogether preclude the extradition of its own citizens.)

The Act of 1988 made a radical change in the extradition law of Australia. Before 1988 extradition was covered by two separate Extradition Acts of 1966, one dealing with Commonwealth Countries, the other with Foreign States. Each piece of legislation equally required the presentation by the country requesting extradition of evidence sufficient to raise a prima facie case of guilt, that is, evidence which, if uncontradicted at the later trial, would be sufficient to convict the person of the offence charged. The test to be applied by an Australian court at the hearing of a request from a foreign country for extradition was whether, were the proceedings a preliminary hearing of a criminal offence committed in Australia, the evidence would be found sufficient by a magistrate to warrant committing that person for trial before a superior court and jury.

The requirement of the prima facie case, and its equation with the requirements for committal for trial in domestic criminal proceedings, familiar to all Australian criminal lawyers, was thought to be too onerous in the period following the Trimboli case, in about 1986. Clever lawyers, it was said, were getting fugitive criminals discharged because of the gaps in reliable evidence inherent in transmitting documents and sworn testimony from foreign countries to Australia. The rules of evidence, inherited by Australia from England, were said also to be too technical and difficult for foreign authorities to understand or comply with. Not that the Trimboli case had anything to do with evidence: in that case the fugitive escaped to Ireland with which Australia had no extradition treaty at the time. But in the ensuing hue and cry, when it was discovered that there were many gaps in Australia's coverage of extradition relations with foreign countries, the opportunity was seized by Australia of opening negotiations for a whole host of new extradition treaties in the period from 1987 onwards. It was then that it was proposed that a simplified "modern" model of the treaty should be adopted by Australia, dispensing with the prima facie case in the interests of efficiency and speed of handling requests, and so as to give reciprocity of treatment to those

foreign countries that did not apply - or even understand - the prima facie evidence requirement.

In my view the abandonment of the prima facie case requirement in Australia's extradition treaty and legislative policy was over-hasty and unwise. It is unjust that a person (especially an Australian citizen) may be extradited to a foreign country on the mere demand (albeit subject to certain safeguards) of that country's authorities and without any opportunity for an Australian court to examine the evidence. The alleged fugitive is not even permitted to present evidence of an alibi. The Act is very tightly - indeed oppressively - drawn in this respect. The fact that there has not been more public outcry against extradition of Australian citizens under this law and policy is to be explained by the exercise, on a number of occasions, of the Attorney-General's unreviewable discretion to refuse extradition of a citizen. Refusal on the ground of citizenship, the power to exercise which is contained both in the Act and in the relevant treaty, has in fact been exercised only where the Attorney-General thinks the case is weak or the requesting country's institutions are unreliable. An example is the Stanton case of a few years ago, involving the Philippines request for two Australian citizens on charges of murder.

These cases are largely hidden from public view. The Committee ought to ask for details of cases where the Attorney-General has exercised his discretion to refuse extradition of Australian citizens. The protection of a citizen's liberties should not, however, rest in the hands of an Attorney-General, however benevolent, but should be subject to transparent processes of law.

The change in the law and policy in 1988 was based on a fundamentally flawed premise, in my view. That premise was that most foreign countries apply an inquisitorial approach to the criminal law, as opposed to the accusatorial approach of countries of the English common law inheritance, such as Australia. Therefore, it is argued to follow those countries cannot easily meet the requirement of a prima facie case, or evidence sufficient for committal, since such a concept is not known to them.

While there is some force in this argument (although the problem is remediable in a way I shall suggest later), the premise is flawed because the very countries that follow the inquisitorial mode of criminal procedure are, for the most part, the countries that:

- (a) do not extradite their own citizens: and
- (b) exercise a general jurisdiction to prosecute their own citizens for crimes committed anywhere in the world (on what international law recognizes as the nationality basis of jurisdiction).

The true mismatch between Australia and these countries is not that they do not understand our requirement of a prima facie case, but that Australia (together with other countries of the common law inheritance) -

- (a) has no rule or policy against the extradition of its citizens; and
- (b) does not have general jurisdiction over crimes committed by Australian citizens abroad.

As a consequence, the reciprocity that was supposed to follow the new policy is not reciprocity at all. Foreign countries will continue to refuse to extradite their own citizens to Australia. The Australian Attorney-General may exercise a discretion under the Act of 1988 and the treaties to refuse extradition of Australian citizens, but less easily. For in the case of a refusal Australia cannot exercise the same nationality-based jurisdiction that foreign countries exercise over their own citizens to try them for offences committed abroad. A guilty Australian offender might therefore never be brought to justice. It is true that, as an afterthought, a section was added to the Act of 1988 enabling an offence to be prosecuted in Australia where the accused's extradition was refused on the grounds of nationality, but so far as I am aware it has remained a dead letter. It would be exceedingly difficult to conduct a prosecution in Australia on the basis of evidence collected and prepared in a foreign country where different standards of investigation and rules of evidence apply. The Committee should request information from the Attorney-General's Department on the application in practice of this provision.

It is relevant to point out that a strange anomaly presently exists in Australian extradition law as between foreign countries and Commonwealth countries. For the most part, the prima facie case requirement has been abolished in relation to foreign countries. In relation to Commonwealth countries, however, where non-treaty arrangements are based on the Commonwealth Law Ministers' Extradition Scheme, the prima facie case requirement is retained. Thus in extraditing from Australia to Canada or the United Kingdom, for example, the Australian courts must first find a prima facie case of guilt against the alleged fugitive, but in the cases of Argentina, France, Italy, and most other non-Commonwealth countries extradition takes place without any judicial examination in Australia of the evidence alleged against the offender. This is truly an extraordinary situation. where we are more exacting of countries whose laws are essentially similar to our own and whose institutions we trust than with other countries very different from our own.

With the above background I come to the central issue posed.

It could be suggested that the way out of the difficulty is to require a prima facie case to be proved against an Australian citizen whose extradition is requested by another country, but not if the alleged offender is the citizen of the requesting

country or of a third country. This is a superficially attractive proposal. I should certainly prefer it to the situation we now have. But it does raise a question of discrimination in the administration of justice. It may be objected that extradition is an administrative and not a judicial process, but there are important aspects of human rights and procedural fairness that arise in that process.

Australia is a party to the International Covenant on Civil and Political Rights, 1966. Several provisions of the Covenant prohibit various forms of discrimination, including on the basis of "national or social origin" and "other status": see articles 2(1), 14(1), 24(1), and 25. In the case of those articles, it is probable that foreign citizenship is not a prohibited ground of discrimination because article 25 would otherwise require that non-citizens be entitled to vote in elections or stand for various public offices open only to citizens. All countries make these distinctions.

Article 26 of the Covenant, however, is more broadly drawn and would appear to be relevant to legal proceedings including extradition proceedings:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status."

I should not like to express a decided opinion on whether this provision would prohibit the kind of discrimination involved in distinguishing citizens from non-citizens in extradition proceedings. In view of my recent election as a member of the UN Human Rights Committee, it would not be desirable for me to express a decided view on a matter that might come in future before the Committee from Australia or from some other country. But it is at least a question to which some thought should be given. In my opinion Australia should hesitate to introduce discriminatory provisions unless a very strong case can be made in favour of them. The fact that countries of the Civil Law tradition (Europe, Latin America, and parts of Africa and Asia) have long distinguished between citizens and non-citizens in extradition is not necessarily decisive. The legal bond between State and citizen under Roman law was held to prohibit absolutely the surrender of a citizen to a foreign power. That is well understood and might be held to be within a reasonable margin of appreciation in the application of norms of non-discrimination by Civil Law countries. But this was never the case under the English Common Law. Australia would in this respect be making a distinct departure from the previous law and practice not only of itself but of all other countries of the Common Law tradition.

Is there a middle ground, and a non-discriminatory solution? I believe there is. In my opinion the Act of 1988 should be changed to require that a requesting government produce evidence of guilt against citizen and non-citizen alleged fugitives alike. The legislative formula would deliberately avoid the terms "prima

facie case" or "committal for trial" or other language suggestive that the test to be applied by a magistrate in an extradition hearing is the same as that applied in domestic committal proceedings. That test has rightly been criticized as too exacting and too open to the taking by defence lawyers of technical objections. What is required is a test of sufficient evidence to raise a reasonable cause to suspect the fugitive of having committed the offence. It should also be stated in the language used in the provision that the magistrate shall not have regard to the rules of evidence in assessing the material before the court. I would leave the question of drafting the provision to the experts in the Office of Parliamentary Counsel. It may, however, be useful to look at the Canadian Extradition Bill of about 1979 (which was not proceeded with further for reasons not relevant to the present point) which adopted a "modified prima facie case" requirement along the lines I have suggested.

If there were such a change in the Act, would that mean that many of Australia's extradition treaties concluded after 1988 would have to be changed accordingly? I do not believe so. The treaties presently require that the requesting governments present a 'detailed statement' (or similar words) of the conduct alleged. It would not be stretching those provisions too far for Australia to require that those statements include sworn depositions from the principal witnesses. However, for the sake of avoiding doubt and to put requesting governments on notice of Australia's procedural requirements it would be desirable to include such a provision in the proposed treaty with Latvia, and in all subsequent treaties.

Ivan Shearer  
Challis Professor of International Law,  
The University of Sydney

28 September 2000