GIR KNOW-HOW EXTRADITION

Australia

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GIR INSIGHT

1 Are extradition proceedings regulated by domestic legislation, treaties or both?

Extradition proceedings in Australia – both outgoing and incoming – are primarily governed by the Extradition Act 1988 (Cth) (Extradition Act).

Australia is also party to over two dozen bilateral treaties with foreign states on extradition. It is, further, party to numerous multilateral treaties that, inter alia, contain provisions with respect to extradition (eg, the United Nations Convention Against Transnational Organised Crime).

In terms of international cooperation, extradition treaties that Australia has inherited from the United Kingdom can also apply and Australia is, further, party to a number of non-treaty agreements on a bilateral and multilateral (eg, the London Scheme for Commonwealth countries) level.

In accordance with Australia's dualist approach to international law, these international instruments have effect in the Australian legal system through their incorporation in regulations to the Extradition Act.

General information regarding the Australian extradition process is contained on the extradition web page of the Attorney-General's Department International Crime Cooperation Central Authority.

2 Is there a central register of extradition treaties that your state has entered into?

Not as such. However, all relevant regulations to the Extradition Act, containing those relevant treaties, can be found on the website of the Federal Register of Legislative Instruments, by searching alphabetically for 'Extradition'.

More generally, the Commonwealth Department of Foreign Affairs and Trade maintains the online Australian Treaties Database, which contains all such agreements.

3 Do special extradition arrangements apply to certain foreign states, for example states that are geographically proximate, or politically, legally or economically closely linked?

Yes. The principal examples of this are New Zealand and, to a lesser extent, certain states that are members of the British Commonwealth of Nations (not including the United Kingdom though, which is subject to a different regime).

Extradition procedures in respect of New Zealand are uniquely covered in Part III of the Extradition Act. This process involves the Australian indorsement (or 'backing') of New Zealand arrest warrants.

Under this process, direct liaison between New Zealand and Australian police leads to an Australian magistrate indorsing the warrant (essentially endowing it with the authority of Australian law) where: (i) an application for such indorsement is made in the proper form, and (ii) an affidavit is presented to the effect that the person in question is suspected of being in, or on his or her way to, Australia.

Following arrest, the person can then contest their prospective extradition before a magistrate (and on review and appeal before superior courts) on the basis that: (i) the offence is trivial, (ii) the accusation was not made in good faith or in the interests of justice, (iii) a lengthy period of time has elapsed since the date of the alleged offence, or (iv) for any other reason, surrender to New Zealand would be unjust, oppressive or too severe a punishment. Unless one of the aforementioned grounds is made out, the person will be extradited.

The other class of states that receive somewhat different treatment under Australia's extradition regime comprises certain members of the British Commonwealth of Nations. The Extradition (Commonwealth countries) Regulations 2010 (Cth) covers several-dozen Commonwealth Nations and finds its basis in the London Scheme, an international agreement below treaty status.

Most notably, these Regulations dictate that extradition must be refused by Australia if the Attorney-General is satisfied that surrender to the foreign state would be unjust, oppressive or too severe a punishment. The Regulations also dictate that extradition requests must be supported by evidence that demonstrate prima facie evidence of guilt: a stricter standard than otherwise applies under the Extradition Act.

4 Is extradition possible to states that have no bilateral or multilateral extradition treaty with your state if they are party to an international convention?

Yes, insofar as that international convention creates obligations relating to extradition and is incorporated in regulations to the Extradition Act. A number of international conventions meet these criteria in Australian law. For example, both the International Convention for the Suppression of the Financing of Terrorism and the United Nations Convention against Transnational Organized Crime are incorporated in regulations to the Extradition Act that allow states parties to those conventions, under Australian law, to make extradition requests.

5 Is extradition possible to states that are not extradition treaty partners as an ad hoc arrangement?

Yes, although subject to certain qualifications.

Australia also uses numerous bilateral non-treaty agreements as the basis for the creation of regulations that enable extradition requests to be received from a particular foreign state (see, for example, Extradition (Croatia) Regulations 2004 (Cth)). These cannot be considered to be truly ad hoc though, as the relevant regulations must be in force prior to the receipt of an extradition request from the foreign state in question and apply to that nation more broadly, not just in respect of a particular request or situation.

6 For which offences is extradition from your state allowed?

Extradition from Australia is allowed for any offence that carries a maximum penalty of at least 12 months' imprisonment (or other deprivation of liberty). This is set out in the definition of 'extradition offence' in section 5 of the Extradition Act. The definition also extends to offences for which the maximum penalty is death (though see below) and those that do not carry a maximum penalty under the foreign state's law but are nevertheless listed in a relevant extradition treaty with Australia.

However, if the offence in question carries the death penalty, the person cannot be surrendered unless the Attorney-General is satisfied that 'there is no real risk that the death penalty will be carried out' (section 15B(3)(b) of the Extradition Act) or the requesting state has given an undertaking to Australia that the person will not be tried for that offence, if tried the death penalty will not be imposed, and (if the death penalty is imposed) it will not be carried out (section 22(3)(c) of the Extradition Act.

7 Is there a requirement for double (dual) criminality? How is this assessed?

Yes. Section 19(2)(c) of the Extradition Act expresses the test for double/dual criminality as follows:

> *[I]f the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia[.]*

Section 10(3) also provides elaboration, noting that where the relevant conduct consists of multiple acts or omissions, an assessment of dual criminality may have regard to all or just some of them. This section also requires differences in the denomination of categorisation of offences to be disregarded when assessing dual criminality.

The focus is therefore on assessing how the impugned conduct (or its equivalent) would be categorised under the applicable criminal law of Australia. In this regard the Federal Court has confirmed that 'it is not necessary to have complete identicality between offences in the two countries: it is sufficient to have in substance a duality of criminality' (see Harris v Attorney-General of the Commonwealth (1994) 52 FCR 386, 411D-E). Further, although there is no settled test in Australian case law, a line of jurisprudence has established that the 'equivalent conduct' aspect of the dual criminality test allows the 'transposition', 'translation or substitution of some factors' between the foreign state and Australia (Dutton v O'Shane (2003) 132 FCR 352, 367 [65], 369 [69]; Linhart v Elms (1988) 81 ALR 557, 571, 579-80, 585-86). This eases the burden for the requesting state when seeking to establish that the impugned conduct, in respect of its own system of criminal law, is, or would be, also criminalised in Australia.

This is assessed as part of proceedings before a magistrate or judge, under section 19 of the Extradition Act, to determine the person's eligibility for surrender.

8 How would your state deal with a request that includes an offence for which extraterritorial jurisdiction is claimed?

Generally, although perhaps arguably subject to some qualification, assertions of extraterritorial jurisdiction will not affect the acceptance and execution of extradition requests by Australia.

As a starting point, the question of whether the statement of alleged conduct produced by the requesting state in support of the extradition request establishes the commission of an offence against that country's criminal laws (and, therefore, within its jurisdiction) is not entertained by Australian courts as part of extradition litigation (section 3(a) of the Extradition Act; Zoeller v Federal Republic of Germany (1989) 23 FCR 282, 300).

The position might be less certain, however, in respect of some states in relation to which enhanced evidentiary support is required in relation to establishing the commission of the foreign offence/s (for example 'reasonable grounds for believing' (Extradition (United States of America) Regulations (Cth)) or a 'prima facie case' (Extradition (Commonwealth countries)

Regulations 2010 (Cth)). However, judicial comment has nevertheless been made about inquiry into the foreign state's jurisdiction being an impermissible task (see Griffiths v United States of America (2005) 143 FCR 182, 201 [98]). In any event, the authors are not aware of any ultimately successful challenge having been brought in Australia against an extradition request on this basis.

However, a number of extradition treaties to which Australia is party (for example, with the United States of America, France, India and South Africa) expressly permit the subject's surrender for offences over which extraterritorial jurisdiction is asserted 'if the laws of the Requested State provide for jurisdiction over such an offence committed in similar circumstances'. This suggests that, in certain circumstances, such considerations might factor into the decisions of the Australian government to accept a request and/or authorise the subject's ultimate surrender.

In terms of assessing dual criminality, courts have interpreted section 19(2)(c) of the Extradition Act, which directs attention to 'the conduct of the person ... or equivalent conduct, [if it] had taken place in the part of Australia where the proceedings are being conducted', as positing a question that removes any issues of extraterritorial jurisdiction from consideration (see Ngo v United States of America (2009) 177 FCR 411, 413; Rojas v United States of America [2019] FCA 22 [24]-[30]).

9 What must be included as part of a valid extradition request made by the foreign state?

Extradition requests to Australia must be made in writing (to the Attorney-General's Department International Crime Cooperation Central Authority) and must be accompanied by both the supporting documents mandated by the Extradition Act as well as any other documents required to be produced by the regulations applying to the requesting state.

The supporting documents, as defined in section 19(3) of the Extradition Act, include:

- where the person is accused of the offences: a copy of the arrest warrant;
- where the person has been convicted of the offence/s, evidence of: the conviction, the sentence or intended sentence, and the extent to which any sentence has not been carried out; snd
- for all cases, written statements setting out: a description of the offence and its applicable penalty, and the conduct constituting the offence.

Australia's general position on supporting documents is a 'no evidence' standard. While a statement of conduct is required, requesting states are not required to provide any proof of the allegations against the subject of the request.

The position is different, however, in respect of other nations that, by virtue of treaties or other agreements, must produce evidence that would satisfy the prima facie case (for example, Israel, Austria, Commonwealth countries) or 'reasonable grounds' tests in relation to the allegations (for example, the United States and India).

All documents must be 'duly authenticated', meaning they purport to be:

- signed by a judge, magistrate, or officer in/of the requesting state; and
- authenticated by the oath or affirmation or public seal of the requesting state or relevant government personnel.

For their contents to be appreciable in an Australian court, those originally in a language other than English must be translated. However, that translation itself must also be duly authenticated.

10 What are the stages of the extradition process?

The Full Federal Court (in Harris v Attorney-General (1994) 52 FCR 386) has described there being the following four stages in the process contained in the Extradition Act:

- Commencement, whereby the Attorney-General decides whether to accept an extradition request (section 16) or a provisional arrest warrant issued (section 12).
- Remand, whereby the subject of the request, once arrested, is taken before a magistrate and is remanded in custody or granted bail (section 15).
- Determination of eligibility for surrender, whereby a magistrate determines whether the statutory requirements have been met (for example necessary supporting documents have been produced, dual criminality is satisfied, and no extradition objection exists), such that the person is eligible for surrender to the requesting state (section 19).
- Executive determination as to surrender, whereby the Attorney-General exercises discretion to ultimately decide whether he person will be extradited to the requesting state (section 22).

11 If an initial political decision is required, what factors can be considered?

At the outset, the Attorney-General is required to exercise discretion whether or not to issue a notice stating that the extradition request has been received, thereby setting in motion the further procedures of the extradition process in the Australian legal system (section 16(1)).

In making this decision, the Attorney-General is required to form two opinions:

- That the person is an 'extraditable person'. In simple terms, this requires satisfaction of three criteria: (i) that the person is accused, or has been convicted (with sentence to be served), of a criminal offence, (ii) the offence is an 'extradition offence' – ie, punishable by at least 12 months' imprisonment, and (iii) the person is believed to be outside the country in question.
- That the person's status as such is in relation to the 'extradition country' that made the request. An extradition country essentially means a foreign nation (other than New Zealand, to which a separate regime applies) given this status by regulations to the Extradition Act.

Jurisprudence has also made clear that the ambit of necessary considerations in the exercise of this function by the Attorney-General's is to be construed strictly (see Matson v United States of America et al (2018) 260 FCR 187, 208-09).

12 Is provisional arrest, before the extradition request is received, possible?

Yes. An application for provisional arrest can be made on behalf of a requesting state under the same procedure as applicable to warrants following receipt of a full extradition request (section 12). This requires that an application be made in the prescribed form, which is accompanied by an affidavit that satisfies the magistrate that the person is an 'extraditable person' in respect of an 'extradition country'.

If, however, a person is arrested and placed on remand pursuant to a provisional warrant then at the end of a specified period, either, no extradition request has been received by Australia or the Attorney-General has not issued a notice of receipt (under section 16), the person must be released (section 17). The relevant time period is 45 days (plus five days where a decision of the Attorney-General is outstanding) or any different time period set by applicable regulations to the Extradition Act. These time frames can be extended for a 'reasonable' period, including in 'exceptional circumstances'.

A number of bilateral extradition treaties to which Australia is party also contain explicit procedures for the making of requests for provisional arrest.

13 Must a domestic arrest warrant be issued or can an Interpol red notice be used to carry out a provisional arrest?

A domestic arrest warrant, issued pursuant to the Extradition Act, is required to carry out a provisional arrest. Interpol red notices, in and of themselves, do not authorise arrests under Australian law.

14 What is required to apply for a domestic extradition arrest warrant?

Section 12 of the Extradition Act stipulates that a magistrate or judge shall issue an extradition arrest warrant upon receipt of the following documents:

- An application for the warrant, made in the prescribed statutory form (Form 4 of the Extradition Regulations 1988 (Cth)); and
- An affidavit deposing that the subject is an 'extraditable person' in relation to an 'extradition country' (the same criteria considered by the Attorney-General when deciding whether to issue a section 16 notice, stating that an extradition request has been received).

15 What rights does the requested person have while under arrest?

The Extradition Act does not bestow particular rights as such on the subject of an extradition request while they are under arrest.

In practice, a person's rights in this sphere derive from those provisions in the Extradition Act that enable the person to challenge the continuation of the process, for example, through seeking judicial review of the Attorney-General's decisions, applying for bail or contesting their eligibility for surrender.

Additionally, certain sub-aspects of the extradition process expressly or impliedly acknowledge, to a limited extent, a person's right to legal representation. First, a magistrate cannot accept a person's waiver of extradition processes without being satisfied that they at least had an 'adequate opportunity to be legally represented' (section 15A(5)(d)). Second, proceedings

before a magistrate to determine the person's eligibility for surrender cannot be conducted unless they have been afforded 'reasonable time in which to prepare' for same (section 19(1)(d)).

16 Is bail available in extradition proceedings?

Yes, however only in extremely limited circumstances.

Following their arrest, the subject of an extradition request can apply for bail (section 15 of the Extradition Act). Bail applications can also be made after: the subject consents to their surrender (section 18(2)(a)(i)), the person is found by a magistrate or Judge to be eligible for surrender (section 19(9)(a)), or following decisions on review or appeal of the determination of the person's eligibility for surrender (sections 21(2A)(b), 21(6)(f)).

17 If so, what are the factors that a court will take into account in deciding whether to grant bail?

In all relevant provisions, the Extradition Act stipulates that bail must not be granted 'unless there are special circumstances justifying' a grant of bail.

The High Court of Australia (in United Mexican States v Cabal (2001) 209 CLR 165) has interpreted this standard as requiring satisfaction of a two-stage test:

> *'the circumstances of the individual case are special in the sense that they are different from the circumstances that persons facing extradition would ordinarily endure'; and*
> *'there must be no real risk of flight'.*

The first criterion has been the subject of a good deal of litigation. Courts, including relatively recently the Full Federal Court (in Tsvetnenko v United States of America [2019] FCAFC 74), have emphasised the high bar that needs to be crossed to satisfy the 'special circumstances' test, although multiple factors can act in combination to meet the standard.

Special circumstances have been found to exist where the subject has been of advanced age and experiencing significant health difficulties, where there has been provable and specific harm to the wellbeing of the subject's family, and where the subject has had strong legal prospects of resisting extradition. On the other hand, business and community ties, as well as the hardships associated with incarceration, have been found to not meet the requisite standard for extradition bail.

The strictness of Australia's extradition bail laws have previously been the subject of adverse findings by the United Nations Human Rights Committee, in the 2014 decision of Griffiths v Australia, in respect of the right against arbitrary detention (article 9 of the International Covenant on Civil and Political Rights). The Tsvetnenko case, noted above, has also resulted in a further petition to the Human Rights Committee and it has been reported that a substantive ruling is expected in 2021.

18 Can the court impose conditions when granting bail? What conditions can be, and usually are, imposed?

Yes. Although the Extradition Act is silent on the types of bail conditions that can be imposed, conditions invariably include the surrender of the subject's passport and substantial property being put up as security. Other conditions can include a requirement as to the person's place of residence, undertakings to not approach points of international departure from Australia, and requirements to report to police. Importantly, the High Court in United Mexican States v Cabal (2001) 209 CLR 165 has made clear that risk of flight must be assessed without considering the effect of prospective bail conditions.

19 What bars can be raised to resist extradition?

Aside from the factors distinctly relevant to the Attorney-General's final decision on whether the subject is to be surrendered – eg, whether the person would be in danger of being subject to torture, whether there is a risk of the person receiving the death penalty etc – the main 'bars' that can be raised against extradition take the form of 'extradition objection[s]'. All 'extradition objection[s]' are mandatory bars to the subject's surrender to the requesting state. Section 7 of the Extradition Act sets out the objections:

- First, extradition is barred where prosecution or punishment is sought in relation to a political offence. This includes offences 'of a political character' but excludes those involving violence against a person, and other crimes such as aircraft hijacking, hostage taking and piracy.
- Second, extradition is barred where the person's surrender is actually sought in order to prosecute or punish them 'on account of his or her race, sex, sexual orientation, religion, nationality or political opinions or for a political offence'.
- Third, extradition is barred where 'the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty' by reason of any of the characteristics specified above in the second extradition objection.

- Fourth, extradition is barred where the alleged or equivalent conduct of the subject, if it had taken place in Australia, would have constituted an offence under military law, but not under ordinary civilian criminal law.
- Fifth, extradition is barred where the principle of double jeopardy (ne bis in idem) is offended.

This applies where the person 'has been acquitted or pardoned' or 'has undergone the punishment' provided by law, in Australia or the requesting country, in relation to the same offence or same conduct. Notably, some extradition regulations extend the application of this principle to proceedings that have been conducted in third states.

Where an 'extradition objection' is raised before a magistrate or judge when determining the person's eligibility for surrender, the relevant threshold is whether 'there are substantial grounds for believing' that the objection exists. It falls to the subject of the request to produce evidence establishing this to be the case (section 19(2)(d)).

The practical difficulties for a subject in producing sufficient evidence to establish the existence of an extradition object have been demonstrated through case law (Traljesic v Bosnia and Herzegovina (2017) 250 FCR 530).

In relation to the final decision on the subject's prospective surrender, the Attorney-General must be 'satisfied that there is no extradition objection in relation to the offence'.

20 Does your state extradite its own nationals and residents?

Yes. Nothing in the Extradition Act prohibits the surrender of Australian nationals, or inserts Australian nationality as a factor that must be considered at any stage of the extradition process.

However, many extradition treaties to which Australia is party contain provisions permitting the requested state to exercise discretion to refuse to surrender its own nationals. It is unclear whether any such provisions have, in practice, been used to refuse the extradition of Australian nationals.

In practice, there a multitude reported cases in which Australian nationals have been the subjects of outgoing extradition proceedings.

It was also recently held by the Federal Court – in Matson v Attorney-General[2020] FCA 1558 at [191]-[220] – that the subject's Australian citizenship and Indigenous heritage did not make the Attorney-General's decision to surrender him to the United States of America legally unreasonable.

21 Are potential breaches of human rights after extradition considered in the extradition process?

Human rights considerations at-large do not receive express consideration in the Australian extradition process. Moreover, Australia does not have a nationally legislated human rights act, nor are main international human rights treaties (such as the International Covenant on Civil and Political Rights) expressly incorporated within Australian domestic law as such.

Certain human rights, detailed as follows, are however incorporated within certain safeguards in the Extradition Act:

- the right to freedom from torture is of relevance to the Attorney-General's decision on the subject's potential surrender (section 22(3)(b));
- the right against arbitrary deprivation of life is applied by the prohibition on surrender in cases where the death penalty might be imposed or carried out (section 22(3)(c)); and
- various other rights contained in the International Covenant on Civil and Political Rights, such as the right of non-discrimination and the right against double jeopardy, are protected through the inclusion of 'extradition objection[s]' as detailed in question 19.

Additionally, a number of extradition regulations incorporate further considerations to the Attorney-General's ultimate decision-making process, often giving relevance to a wider range of human rights into play. The relevant provisions of these regulations, permitting the refusal of extradition, are cast in terms that refer, for example, to 'obligations under international treaties' (see Extradition (Malaysia) Regulations 2006 (Cth)) and where extradition would be 'unjust, oppressive or too severe a punishment' (Extradition (Commonwealth countries) Regulations 2010 (Cth)).

One aspect of Australia's extradition regime – bail – has been the subject of multiple petitions to (eg, outstanding petition by Eugeni Tsvetnenko), and at least one adverse finding by (case of Griffiths v Australia), the United Nations Human Rights Committee in respect of the right against arbitrary detention.

22 Can a person consent to extradition, and what is the procedure? Is consent irrevocable?

Yes. A person can elect to either consent to extradition or waive extradition procedures.

Consent (section 18) effectively removes the determination of the person's eligibility for surrender from the extradition process. A person's wish to consent to extradition must be given to a magistrate or judge who, unless believing it was not given

voluntarily, must inform the person of the effect of the decision and, subsequently notify the Attorney-General of this decision. The case then proceeds to the Attorney-General for a final decision on whether the person will be surrendered. The Extradition Actdoes not expressly state that consent is irrevocable.

Similarly, waiver (section 15A) is a course that sends the matter back to the Attorney-General for a decision on whether the subject is to be surrendered to the requesting state. However, in cases of waiver the Attorney-General is only required to consider a limited number of matters (section 15B). There is no requirement for a specialty assurance or considerations of 'extradition objections'. Further, a decision to waive extradition procedures is irrevocable (section 15A(5)(b)(i)).

23 Is there a speciality protection? How is it provided? Does it apply if a person consents to extradition?

Yes. The Attorney-General cannot decide that a person is to be surrendered to the requesting state unless a specialty assurance is given (section 22(3)(d) of the Extradition Act).

Such an assurance must provide that the person, if surrendered, will not be detained or tried for any offence other than those for which extradition is granted. It also prohibits extradition to a third country for offences allegedly committed before the date of the person's initial surrender.

Exceptions to these requirements include where the person is tried for an equal or lesser offence disclosed on the same facts or where the Attorney-General consents to the prosecution for additional offences (section 22(4)).

Specialty assurances can be made by virtue of a provision of the requesting state's domestic law, a provision of an applicable extradition treaty, or an undertaking given to Australia.

A specialty assurance is required if the person consents to extradition (section 18) but not if the person waives extradition (sections 15A, 15B).

24 If there is a political decision at the end of the extradition process, what factors can be considered?

In all cases, the final determination of whether a person is to be surrendered to the requesting state is made by the Attorney-General (sections 22 and 15B of the Extradition Act).

The statutory criteria of which the Attorney-General must be satisfied are as follows (section 22(3)):

- no 'extradition objection' exists in relation to the offence (eg, political prosecutions, where the person would face discrimination on prescribed grounds, where the offence exists under military but not civilian law, and double jeopardy);
- there are not substantial grounds for believing that, if surrendered, the person would be in danger of being subjected to torture;
- where the offence is punishable by death, an undertaking has been given to the effect that the death penalty will not be imposed or carried out on the person;
- a specialty assurance has been given by the requesting state;
- any grounds for refusal of surrender contained in applicable extradition regulations do not preclude surrender. As noted in question 21, some extradition regulations expressly bring further (often human rights) considerations into play; and
- in the Attorney-General's discretion, the person should be surrendered.

Recent jurisprudence has confirmed that, outside the mandatory considerations set out in the Extradition Act or applicable regulations, the Attorney-General has extremely board – 'unfettered' – discretion to take, or not take, matters into account when making this decision, provided the decision is made in good faith (see Alexander v Attorney-General (Cth) [2019] FCA 1829).

To successfully challenge the Attorney-General's decision, a person needs to demonstrate that it was legally unreasonable. This was recently considered in the Federal Court case of Matson v Attorney-General[2020] FCA 1558. In that case, it was held (at [191]-[220]) that the subject's Australian citizenship and Indigenous heritage did not make the Attorney-General's surrender decision unreasonable.

25 What ability is there to appeal against or judicially challenge decisions made during the extradition process? What are the requirements for any appeal or challenge?

All decisions, at least initially, made in the extradition process are administrative in nature. Therefore, challenge to them must be made by way of seeking judicial review, rather than appeal.

The decisions of the Attorney-General and magistrates or judges (in relation to bail) are amenable to judicial review under section 39B of the Judiciary Act 1903 (Cth) before the Federal Court. Such challenges must assert reasons for invalidating the original decision: most commonly jurisdictional error.

In relation to the determination of a subject's eligibility for surrender, the Extradition Act(section 21) specifically provides for the possibility of seeking a review of merits of the original decision (even though also administrative in character) by the Federal Court.

In all cases, decisions of the Federal Court can be appealed to the Full Federal Court. Decisions of the Full Federal Court can be appealed, with special leave, to the High Court, which sits at the apex of the Australian judicial system.

26 What are the time limits for the extradition process? How long does each phase of the extradition process take in practice?

The maximum permissible time frame (unless altered by regulations) between a person's provisional arrest and the making of a formal extradition request is 45 days (section 17 of the Extradition Act).

Outside situations of provisional arrest, there is no statutory time frame imposed on the Attorney-General to decide whether to issue a notice of receipt of an extradition request (section 16). In practice, the issuing of such a notice can take a number of months.

The Extradition Act does not specify a time frame in which a hearing to determine a person's eligibility for surrender must be held, only that the parties must be afforded 'reasonable time' to prepare for it (section 19(1)(d)). In practice, the filing of written submissions can take place over about two months prior to the hearing date. Once a decision is handed down by the magistrate or judge, parties have 15 days in which to file for a review before the Federal Court (section 21(1)).

In deciding (under sections 15B or 22) whether a person is ultimately to be surrendered, the Extradition Act requires the Attorney-General to act 'as soon as is reasonably practicable', but does not impose a specific time frame. Again, in practice these decisions can take some months.

Once the Attorney-General decides that a person is to be surrendered, there is a period of two months in which the extradition is to be effected, failing which the person can apply for release (section 26). This provision was recently tested in the Federal Court at first instance and on appeal in Reyes v United States of America. That case concerned an extended delay (beyond the two-month period following the Attorney-General's decision) in effecting the surrender of a person, where the outbreak of the covid-19 pandemic occurred within that time. Although some misgivings were expressed in relation to the actions of Australian and United States' authorities, it was ultimately found that there was reasonable cause for the delay in question and, accordingly, the application for release failed.

27 In what circumstances may parallel proceedings delay extradition?

The Extradition Act does not expressly contemplate the existence of parallel proceedings that may delay extradition. However, as a matter of practicality, there are numerous examples of potential such contemporaneous proceedings that would need to be finalised prior to extradition occurring (most obviously, domestic criminal proceedings for separate matters). In at least one case, the ongoing conduct of a domestic criminal prosecution appears to have delayed the finalisation of extradition proceedings (United States of America v Green [2009] FCA 638).

Further, if the subject were to be seeking asylum in Australia, it would be highly likely that these proceedings would need to be finalised prior to any decision by the Attorney-General to extradite the person (section 22). Most obviously in cases where the subject is seeking protection from the requesting state, a claim to asylum would raise at least one 'extradition objection': namely that the person would be punished or prejudiced at their trial on account of their 'race, sex, sexual orientation, religion, nationality or political opinions'. Moreover, the extradition of a person prior to the resolution of an outstanding asylum claim would potentially breach Australia's non-refoulement obligation under the Convention Relating to the Status of Refugees, as incorporated in domestic law through the Migration Act 1958 (Cth).

28 What provision is made for legal representation of the requesting state or the requested person?

The Extradition Act does not contain express provision for legal representation of the subjects of extradition requests, or the requesting state.

Particular aspects of the legislative regime (regarding waiver and preparation for an eligibility hearing) impliedly acknowledge the need for the subject to be legally represented. Also, in practice, the subjects of extradition requests never receive public legal aid to financially support such representation.

Many bilateral extradition treaties to which Australia is party expressly provide that Australia, where it is the requested state, must represent the interests of the requesting state in the extradition proceedings.

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Liam MacAndrews is an international criminal lawyer whose practice focusses on international and trans-national criminal law and cross-border investigations including extradition, mutual legal assistance and INTERPOL red notices.

Prior to joining Nyman Gibson Miralis, Liam worked in international criminal law at the United Nations-backed Extraordinary Chambers in the Courts of Cambodia.

Nyman Gibson Miralis is an international award-winning criminal defence law firm based in Sydney, Australia. For over 50 years it has been leading the market in all aspects of general, complex and international crime and is widely recognised for its involvement in some of Australia's most significant criminal cases. Our international law practice focuses on white-collar and corporate crime, transnational financial crime, bribery and corruption, international money laundering, cybercrime, international asset freezing or forfeiture, extradition and mutual assistance law. Nyman Gibson Miralis strategically advises and appears in matters where transnational cross-border investigations and prosecutions are being conducted in parallel jurisdictions, involving some of the largest law enforcement agencies and financial regulators worldwide. Working with international partners, we have advised and acted in investigations involving the USA, Canada, The United Kingdom, The European Union, China, Hong Kong, Singapore, Taiwan, Macau, Vietnam, Cambodia, Russia, Mexico, South Korea, British Virgin Islands, New Zealand and South Africa.

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