

Administrating Depa
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Statutory Rules 1993 No. *L* 1

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Mutual Assistance in Criminal Matters (Republic of Portugal) Regulations

I, THE GOVERNOR-GENERAL of the Commonwealth of Australia,
acting with the advice of the Federal Executive Council, make the
following Regulations under the *Mutual Assistance in Criminal
Matters Act 1987*.

Dated *L* 1993.

15 September/

L **BILL HAYDEN**
Governor-General

By His Excellency's Command,

L
Attorney-General

M. LAVARCH/

Citation

1. These Regulations may be cited as the Mutual Assistance in Criminal Matters (Republic of Portugal) Regulations.

Commencement

2. These Regulations commence on 17 October 1993.

Interpretation

3. In these Regulations:

“Act” means the *Mutual Assistance in Criminal Matters Act 1987*;
“Treaty” means the Treaty between Australia and the Republic of Portugal done at Lisbon on 4 July 1989, a copy of the English text of which is set out in the Schedule.

Application of the Act

4. The Act applies in relation to the Republic of Portugal subject to such limitations, conditions, exceptions or qualifications as are necessary to give effect to the Treaty.

SCHEDULE

Regulation 3

TREATY BETWEEN AUSTRALIA AND THE REPUBLIC OF PORTUGAL ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

AUSTRALIA and the REPUBLIC OF PORTUGAL DESIRING to make more effective the cooperation of the two countries in combating crime by extending to each other the widest measure of mutual assistance in criminal matters, HAVE AGREED as follows:

ARTICLE 1

(Scope of Application)

1. The Contracting Parties shall, in accordance with this Treaty, grant to each other assistance in investigations or proceedings in respect of offences within the jurisdiction of the judicial authorities of the Requesting Party at the time when assistance is requested.

241/

SCHEDULE—continued

2. This Treaty does not apply to arrests, the enforcement of sentences or offences under military law which are not offences under ordinary criminal law.

ARTICLE 2

(Dual Criminality)

1. Assistance may be given even if the offence is not an offence under the law of the Requested Party, except in the case of a request for search and seizure of property. In such a case it shall be necessary that the offence in respect of which assistance is requested shall also be an offence under the law of the Requested Party.

2. In relation to fiscal offences, assistance may also be given if the acts or omissions constituting the offence amount to an offence of the same nature under the law of the Requested Party. Assistance may not be refused on the grounds that the law of the Requested Party does not impose the same kind of tax or duty or does not contain a tax or duty, customs or exchange regulation of the same kind as the law of the Requesting Party.

3. For the purpose of this Article, in determining whether an offence is an offence under the laws of both Contracting Parties it shall not matter whether the laws of the Contracting Parties place the acts or omissions constituting the offence within the same category of offence or denominate the offence by the same terminology.

ARTICLE 3

(Refusal of Assistance)

1. Assistance shall be refused if the Requested Party considers that:

- a) the request relates to a political offence or an offence connected with a political offence; or
- b) to comply with the request would impair its sovereignty, security, ordre public or its other essential interests; or

SCHEDULE—continued

- c) there are substantial grounds for believing that the request for assistance has been made to facilitate the prosecution of a person on account of that person's race, sex, religion, nationality or political opinions or that that person's position may be prejudiced for any of these reasons.
2. Assistance may be refused if the Requested Party considers that there are any other substantial grounds that would make the granting of assistance unreasonable.
3. Before refusing to grant a request for assistance the Requested Party shall consider whether assistance may be granted subject to such conditions as it deems necessary. If the Requesting Party accepts assistance subject to these conditions, it shall comply with the conditions.
4. The Requested Party shall promptly inform the Requesting Party of a decision of the Requested Party not to comply in whole or in part with a request for assistance and the reasons for that decision.

ARTICLE 4

(Law Applicable)

Requests for assistance shall be carried out in accordance with the law of the Requested Party and in the manner requested by the Requesting Party insofar as it is not incompatible with the law of the Requested Party.

ARTICLE 5

(Execution of Requests)

1. In response to a request, the Requested Party:
 - a) shall send certified copies of the documents unless the Requesting Party expressly requests the originals;

SCHEDULE—continued

- b) may refuse or postpone the delivery of material or original documents if its law does not permit it, or if the material or documents are required for proceedings within its jurisdiction; and
 - c) shall notify the Requesting Party of the results of the request, and, if requested, of the proposed date and place of execution of the request, and the entitlement, if any, of persons to be present.
2. The Requesting Party shall return the material and documents provided in a response to a request as soon as possible unless the Requested Party, without prejudice to its rights or the rights of third parties, waives its return.

ARTICLE 6

(Service of Documents)

1. The Requested Party shall serve judicial decisions or any other documents relating to proceedings which are transmitted to it for that purpose by the Requesting Party.
2. The Requested Party may effect service of any document by mail or, if the Requesting Party so requests, in any other manner required by the law of the Requesting Party which is not inconsistent with the law of the Requested Party.
3. The Requested Party shall forward to the Requesting Party proof of service of the documents. If service cannot be effected, the Requesting Party shall be so informed and advised of the reasons.

ARTICLE 7

(Appearance of Witnesses or Experts)

1. If the Requesting Party requests the assistance of the Requested Party in obtaining in the territory of the Requested Party the evidence of witnesses or experts, the Requested Party shall, subject

SCHEDULE—continued

to its laws, arrange for the evidence of that witness or expert to be obtained.

2. Where the Requesting Party seeks the attendance of a witness or expert in its territory, it may request the Requested Party to assist in making that person available. The Requested Party shall, if satisfied that:

- a) satisfactory arrangements for the security of the person are made;
- b) the person whose attendance is sought consents; and
- c) any coercive measures or penalties specified in the summons shall be without effect if the person does not consent;

effect service of the summons.

3. A request for service of a summons under paragraph 2 of this Article shall state the allowances, travelling and subsistence expenses payable and shall be made so that it is received within 45 days before the date on which the person is to appear. In urgent cases the Requested Party may waive the requirement of 45 days.

ARTICLE 8

(Appearance of Persons in Custody)

1. If the Requesting Party seeks the attendance as a witness in its territory of a person who is in custody in the territory of the Requested Party, the Requested Party shall, if satisfied that:

- a) there are no serious reasons for opposing the transfer; and
- b) the person in custody consents;

transfer that person, in custody, to the Requesting Party.

2. The Requesting Party shall, subject to paragraph 3 of this Article, hold the transferred person in custody and return that person in custody to the Requested Party either:

- a) within the period fixed by the Requested Party; or

SCHEDULE—continued

b) when the attendance of the person is no longer required.

3. Where the sentence imposed on a person transferred under this Article expires whilst the person is in the territory of the Requesting Party, that person shall be set at liberty and thereafter treated as a person referred to in Article 7.

4. A person in custody who does not consent to be available to give evidence pursuant to this Article shall not, by reason thereof, be liable to any penalty or be submitted to any coercive measure.

ARTICLE 9

(Immunities and Privileges)

1. Any person who attends in the territory of the Requesting Party pursuant to Article 7 and 8 shall not:

- a) be detained, prosecuted, or punished by that Party for any offence or be subject to any civil suit in the territory of that Party in respect of any act or omission which preceded that person's departure from the territory of the Requested Party; or
- b) without that person's consent, be required to give evidence in any proceeding other than the proceeding to which the request relates.

2. The immunity provided for in paragraph 1 of this Article shall cease if the person voluntarily remains in the territory of the Requesting Party more than 45 days after the date on which the presence of that person is no longer required or, having left, has voluntarily returned.

3. A person present in the territory of the Requesting Party pursuant to a request under Articles 7 and 8 shall not be subject to prosecution based on the testimony given but shall be subject to the laws of that Party in relation to the refusal to give evidence and giving evidence which is untrue.

SCHEDULE—continued

4. Notwithstanding paragraph 3 of this Article a person who is required to give evidence pursuant to a request for assistance may decline to give evidence where either:

- a) the law of the Requested Party would permit that person to decline to give evidence in similar circumstances in proceedings which originated in the territory of the Requested Party; or
- b) where the law of the Requesting Party would permit the person to decline to give evidence in such proceedings in the territory of the Requesting Party.

5. Where a person giving evidence in the territory of one Party claims that there is a right to decline to give evidence under the law of the other Party, a certificate of that other Party shall conclusively determine that issue.

ARTICLE 10

(Proceeds of Crime)

1. The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of the crime alleged are located within its jurisdiction and shall notify the Requesting Party of the results of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

2. The Requested Party shall, if its laws permit, arrange for a confiscation order relating to the proceeds of crime or any other measure having similar effect made by a Court of the Requesting Party to be given effect.

3. Where the Requesting Party notified its intention to seek the enforcement of a confiscation order or a similar measure, the Requested Party shall take such measures consistent with its law to prevent any dealing in, transfer or disposal of, the property which is or may be affected by those orders.

SCHEDULE—continued

4. Proceeds confiscated pursuant to this Treaty shall be retained by the Requested Party, unless otherwise mutually decided in a particular case.
5. In the application of this Article the rights of bona fide third parties shall be respected under the law of the Requested Party.
6. This Article also applies to property used in the commission of the offence.

ARTICLE 11

(Information on Sentences and Criminal Records)

1. The Parties shall, as far as possible, notify each other of any penalties of imprisonment imposed on the nationals of the other Party.
2. Either Party may request details of the criminal record of a person. The Requesting Party shall state the reasons for the request. The Requested Party shall grant the request insofar as its authorities can obtain this information in accordance with its law.

ARTICLE 12

(Central Office)

1. Each Party shall designate a Central Office to send and receive requests and other communications relating to mutual assistance pursuant to this Treaty.
2. A Central Office receiving a request for assistance shall refer it to the appropriate authorities for execution and shall transmit the response or results of the request to the Central Office of the other Party.

SCHEDULE—continued

3. The Central Office of Australia shall be the Attorney-General's Department, Canberra and the Central Office of the Republic of Portugal shall be the Procuradoria-Geral da República, Lisbon.

ARTICLE 13

(Requirements for the Request for Assistance)

1. A request for assistance shall be signed by the Central Office and shall include the following:

- a) the name of the authority on whose behalf the request is made;
- b) a precise description of the assistance requested;
- c) a statement of the offence to which the request relates, a brief description of the acts or omissions constituting the offence and information on the date and place where it occurred;
- d) to the extent possible, the identity and nationality of the person or persons who are the subject of the investigation or proceeding referred to in the request;
- e) in cases of service of judicial decisions or any other documents or notifications the name and address, if known, of the person to be served or notified;
- f) any requirement for authentication;
- g) details of any particular procedure or requirement that the Requesting Party wishes to be followed including confidentiality and time limits to be observed.

2. The Requesting Party shall send additional information required by the Requested Party as necessary to execute the request.

ARTICLE 14

(Authentication)

Where authentication is requested, material or documents are authenticated for the purpose of this Treaty if:

SCHEDULE—continued

- a) it purports to be signed or certified by a Judge, Magistrate or officer in or of the Sending Party; and
- b) it purports to be sealed with an official or public seal of the Sending Party or of a Minister of State, or of a Department or officer of the Government, of the Sending Party.

ARTICLE 15

(Language)

Requests, supporting documents and other communications made pursuant to this Treaty shall be in the language of the Requesting Party and accompanied by a translation into the language of the Requested Party.

ARTICLE 16

(Other Assistance)

This Treaty shall not derogate from obligations subsisting between the Contracting Parties whether pursuant to other treaties or arrangements or otherwise nor prevent the Contracting Parties providing assistance to each other pursuant to other treaties or arrangements.

ARTICLE 17

(Protecting Confidentiality and Restricting Use of Evidence and Information)

1. The Requested Party, if so requested, shall keep the application for assistance, the contents of a request and its supporting documents, and the fact of granting of such assistance, confidential.

SCHEDULE—continued

If the request cannot be executed without breaching confidentiality, the Requested Party shall so inform the Requesting Party which shall then determine whether the request should nevertheless be executed.

2. The Requesting Party, if so requested, shall keep confidential evidence and information provided by the Requested Party, except to the extent that the evidence and information is needed for the investigation and proceeding described in the request.

3. The Requesting Party shall not use evidence obtained, nor information derived therefrom, for purposes other than those stated in a request without the prior consent of the Requested Party.

ARTICLE 18

(Expenses)

The Requested Party shall meet the cost of executing the request for assistance except that the Requesting Party shall bear:

- a) the fees, allowances and expenses relating to the conveying of persons pursuant to Article 7 and expenses related to the conveying of persons in custody pursuant to Article 8;
- b) the allowances and expenses incurred in conveying custodial or escorting officers; and
- c) where required by the Requested Party, exceptional expenses incurred in executing the request.

ARTICLE 19

(Resolution of Doubts)

Any doubts and difficulties arising out of the application and interpretation of this Treaty shall be resolved by consultation between the Contracting Parties.

SCHEDULE—continued

ARTICLE 20

(Entry into Force and Termination)

1. This Treaty shall enter into force thirty days after the date on which the Contracting Parties have notified each other in writing that their respective requirements for the entry into force of this Treaty have been complied with.
2. This Treaty shall apply to any Territory under the Administration of the Republic of Portugal thirty days after the date of notification by the Republic of Portugal to Australia that the constitutional requirements for the entry into force of the Treaty in relation to that Territory have been complied with.
3. Either Contracting Party may terminate this Treaty by notice in writing at any time and it shall cease to be in force on the one hundred and eightieth day after the day on which notice is given.

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

DONE at Lisbon on the fourth day of July One thousand nine hundred and eighty nine in English and Portuguese, both texts being equally authentic.

MICHAEL TATE
For
Australia

J. FERNANDO NOGUEIRA
For
the Republic of Portugal

NOTE

1. Notified in the *Commonwealth of Australia Gazette* on

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1993.

22 September