

International Association of Judges – Third Study Commission 2024

Questionnaire

Answers for Australia – IAJ conference South Africa

In 2024, the Third Study Commission of the International Association of Judges (IAJ) intends to study *the rapid evolution of illicit drug manufacturing and the challenges this unstoppable process poses to successful prosecution*.

Question 1: Does Australia have legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year – chemical substances and essential equipment possibly used in illicit drug manufacturing and trafficking, including importing, exporting, for domestic distribution and use and private sector due diligence. Please explain.

1. Australia is a federation, and legislative power is vested in both the federal government (Commonwealth) and six state governments. Australia also has two self-governing territories (the Australian Capital Territory and the Northern Territory) which possess legislative power.
2. At the Commonwealth level, the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 (Cth) (CTNDPS Act)* is intended to implement Australia's obligations under the 1988 Convention. The most directly relevant section when it comes to domestic distribution is s 9 of the *CTNDPS Act*, which reads:

9 Possession of equipment etc.

- (1) A person who has in his or her possession, in Australia, any substance listed in Table I or II in the Annex to the Convention, or any equipment or materials, knowing that the substance, equipment or materials are being used or are to be used in, or for, a dealing in drugs that:
 - (a) is referred to in paragraph 6(1)(a), (b) or (c); and
 - (b) constitutes an offence against:
 - (i) a law of the Commonwealth; or
 - (ii) a law of a State or Territory; or
 - (iii) a law of a foreign country;commits an offence against this section and is punishable, on conviction, by imprisonment for a period not exceeding:
 - (c) if the substance, equipment or materials are being used or are to be used in, or for, the manufacture, extraction or preparation of a psychotropic substance referred to in Part 2 of Schedule 3—5 years; or
 - (d) in any other case—10 years.
- (2) For the purposes of an offence against this section, absolute liability applies to the following physical elements of circumstance of the offence:
 - (a) that the possession is in Australia;

- (b) that the substance possessed is listed in Table I or II in the Annex to the Convention;
 - (c) that the dealing in drugs in which, or for which, the substance, equipment or materials are being used or are to be used is a dealing in drugs described in paragraphs (1)(a) and (b).
- 3. Section 6(1)(a)-(c) of the *CTNDPS Act* defines “dealing in drugs” as:
 - (a) the cultivation of opium poppy, coca bush or cannabis plant with the intention of producing narcotic drugs.
 - (b) the separation of opium, coca leaves, cannabis or cannabis resin from the plant from which they are obtained.
 - (c) the manufacture, extraction or preparation of a narcotic drug or psychotropic substance.
- 4. “Narcotic drug” or “psychotropic substance” are in turn listed in schedules 2 and 3 of the *CTNDPS Act*. The schedule noted that all substances specified in it are all also within the definition of narcotic drug or psychotropic substance in the 1988 Convention. Further, the definition of “Convention” in the *CTNDPS Act* also includes the 1988 Convention as amended in relation to Australia.¹
- 5. The *CTNDPS Act* also contains provisions relevant to controlling importation of scheduled substances. The definition of “dealing in drugs” in the *CTNDPS Act* includes² possession of scheduled substances or “any equipment or materials”, with the knowledge that they are being used or are to be used for a purpose set out in ss 6(1)(a)-(c). As such, the definition engages the following relevant provisions in controlling importation of scheduled precursors:
 - (a) Section 10: “dealing in drugs” on board of an Australian aircraft.
 - (b) Section 11: “dealing in drugs” on board an Australian ship.
 - (c) Section 12: “dealing in drugs” outside Australia, provided that the conduct also constituted an offence against the law of a foreign country and against the law of an Australian state / territory if it were committed within the latter’s borders.
 - (d) Section 13: “dealing in drugs” outside Australia with the view of a dealing of drugs in Australia, on board an Australian aircraft in flight outside Australia, or

¹ *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990 (Cth)* s 3 (definition of “Convention”) (*CTNDPS Act*).

² *CTNDPS Act* s 6(1)(g).

on board an Australian ship at sea that constituted an offence against the laws of the Commonwealth, state, or territory.

- (e) Section 14: Conspiracy, attempts, and aiding or abetting a dealing of drugs in an Australian state or territory that constitutes an offence against the law of the relevant state or territory by conduct committed outside Australia.

6. Aside from the *CTNDPS Act*, the 1988 Convention also finds force in the provisions of the *Criminal Code Act 1995 (Cth) (Commonwealth Criminal Code)*.³ The *Commonwealth Criminal Code* represents the main consolidation of federal criminal law in Australia.

7. Across all Australian jurisdictions, it is also an offence to use or have within one's possession a precursor unless authorised to do so.⁴ For example, in the state of New South Wales, s 24A of the *Drug Misuse and Trafficking Act 1985 (NSW) (DMTA)* states:

24A Possession of precursors and certain apparatus for manufacture or production of prohibited drugs

- (1) A person who has possession of—
 - (a) a precursor, or
 - (b) a drug manufacture apparatus,
 - intended by the person for use in the manufacture or production, by that person or another person, of a prohibited drug is guilty of an offence.
- (2) Nothing in this section renders unlawful the possession of a precursor or drug manufacture apparatus for use in the manufacture or production of a prohibited drug by—
 - (a) a person licensed or authorised to do so under the *Poisons and Therapeutic Goods Act 1966*, or
 - (a1) a person acting under a poppy licence under the *Poppy Industry Act 2016*, or
 - (b) a person acting in accordance with an authority granted by the Director-General of the Department of Health where the Director-General is satisfied that the manufacture or production of the prohibited drug is for the purpose of scientific research, instruction, analysis or study.

8. Further, the possession of a drug precursor above a certain quantity per se is also prohibited by s 24B of the *DMTA*. It is still a defence that the person had the precursor in their possession for the purposes of an activity that is not unlawful, or that the defendant otherwise has a reasonable excuse.⁵

³ LexisNexis, *Halsbury's Laws of Australia* (online at 28 June 2024) 130 Criminal Law 'VI Drug and Other Offences' [130-11020]

⁴ Thomson Reuters, *The Laws of Australia* (online at 28 June 2024) 10 Criminal Offences '10.6 Drug Offences' [10.6.360].

⁵ *Drug Misuse and Trafficking Act 1985 (NSW) s 24B(2)(a)-b (DMTA)*

9. “Precursors” for the purposes of the *DMTA* are in turn prescribed in a delegated legislation made under authority granted by the *DMTA*.⁶ As of 2024, this is the *Drug Misuse and Trafficking Regulation 2021* (NSW), which prescribes the prohibited precursors and drug-manufacturing apparatuses.⁷
10. Importation and exportation of precursors are regulated by the Commonwealth. It is a federal criminal offence under the *Criminal Code 1995* (Cth) (*Commonwealth Criminal Code*) for a person to export or import a “border-controlled precursor”,⁸ with three tier of offences and penalties depending on the quantity of said precursors.⁹ Separately, importation and exportation of certain precursors could also be an offence under the *Customs Act 1901* (Cth).¹⁰
11. However, under Federal law, the exportation and importation of some types of precursors are permitted with a license.¹¹ Permits are issued by the Commonwealth Office of Drug Control, which issued its first Compliance and Enforcement Framework for 2023-2025 in March 2023.¹² Conduct relating to precursors that would contravene the *Commonwealth Criminal Code* would not be illegal if it is justified or excused by another Commonwealth law.¹³

Question 2: Does your country have specific legislation on precursors control?

12. There are specific legislative provisions on precursors control across the Federal, state, and territory level.
13. A table of legislation that specifically prohibits precursors, the date of the adoption of said provisions, and the date the provisions were last amended are as follows:

⁶ See *DMTA* ss 24A(3), 24B(3) (definition of “precursor”) (*DMTA*).

⁷ See *Drug Misuse and Trafficking Regulation 2021* (NSW) regs 4(1),(4) and sch 1-4 (*DMT Regulation*). The *DMT Regulation* also independently prohibits of sales of certain precursors without certain procedures and records being followed: regs 5-6.

⁸ *Criminal Code 1995* (Cth) ss 307.11-307.13 (*Commonwealth Criminal Code*).

⁹ The definition and the differing quantities are prescribed in the *Criminal Code Regulation 2019* (Cth) item 16.

¹⁰ For example, the *Criminal Code and Customs Legislation Amendment (Precursors and Drugs) Regulations 2020* (Cth) prescribed a few precursors as “Tier 1” goods under the *Customs Regulation 2015* (Cth). Importation and exportation of “Tier 1” goods is a criminal offence under the *Customs Act 1901* (Cth) (*Customs Act*): see s 233BAA. See also a general prohibition of importing and exporting prohibited goods in s 233 of the *Customs Act*.

¹¹ See *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 5; *Customs (Prohibited Exports) Regulations 1958* (Cth) reg 10AB.

¹² Office of Drug Control, *Compliance and Enforcement Framework 2023-2025* (Guidance Material, March 2023).

¹³ See *Commonwealth Criminal Code* s 10.5. Cf s 313.1 (Note 2).

Commonwealth / Federal				
No	Name of Legislation / Delegated Legislation	Relevant Provisions	Date took effect (specific provisions)	Date of last amendment / update
1	<i>Crimes (Traffic in Narcotic Drugs and Psychotropic Substances Act) 1990</i>	ss 9-14	14 February 1993	10 March 2016
2	<i>Criminal Code Act 1995</i>	ss 307.11-13 s 308.2	6 December 2005	27 November 2015 (ss 307.11-13) 6 December 2005 (s 308.2) “Controlled precursor” last updated 10 August 2020 “Border-controlled precursor” last update 1 March 2024.
3	<i>Customs Regulation 2015</i> ¹⁴	reg 130, sch 7 Note: sch 7 is a consolidated list of “drugs” and “precursors”	1 April 2015	12 August 2020 (sch 7)
4	<i>Customs (Prohibited Imports) Regulations 1956</i>	reg 5, sch 4 Note: sch 4 is a consolidated table of “drugs” and “precursors”	14 December 1956 (generic restrictions of “drugs”).	13 December 2023 (reg 5) 21 February 2024 (sch 4)
5	<i>Customs (Prohibited Exports) Regulations 1958</i>	reg 10AB, sch 9	1 September 2002	1 September 2002
State/Territory				
1	<i>Criminal Code Act 2002</i> – Australian Capital Territory	ss 610- 614	6 March 2005 (ss 610, 611, 612, 613, 614) 24 April 2013 (s 612A)	6 March 2005 (ss 610, 611, 612). 24 April 2013 (ss 612A, 613) 31 January 2020 (s 614)
2	<i>Drug Misuse and Trafficking Act 1985</i> – New South Wales	s 24A s 24B	23 February 2001 (s 24A) 7 December 2007 (s 24B)	1 January 2017 (s 24A) Sch 1 and 4 precursors most recently updated on 27 August 2021.
3	<i>Drug Misuse and Trafficking Regulation 2021</i> – New South Wales	reg 6 reg 7	27 August 2021	27 August 2021
4	<i>Misuse of Drugs Act 1990</i> – Northern Territory	s 8A s 11X	1 August 2002 (s 8A) 18 July 2016 (s 11X)	18 July 2016 (ss 8A, 11X) List of “precursors” most recently amended 18 July 2016.
5	<i>Drug Misuse Act 1986</i> - Queensland	ss 9A-9D	27 April 2006 (s 9A) 1 June 2008 (ss 9B-9C)	29 April 2013 (s 9A) 9 December 2016 (ss 9B-9C, 9D)

¹⁴ Prohibition affected through generic prohibitions in the *Customs Act*.

			29 April 2013 (s 9D)	Schedule of “controlled substances” last updated on 1 December 2018.
6	<i>Controlled Substances Act 1984</i> – South Australia	ss 17A-17C s 33A s 33J s 33LB	10 September 2009 (ss 17A-17C, s 33LB) 3 December 2007 (ss 33A, 33J)	1 July 2011 (ss 17A-C, uncommented amendments for ss 17B and 17C) 1 April 2019 (ss 33A, 33J) 29 September 2022 (s 33LB) “s 17A” precursor last updated on 9 June 2011. “s 17C precursors” last updated on 1 July 2018. List of “controlled precursors” varied in 12 November 2017.
7	<i>Misuse of Drugs Act 2001</i> – Tasmania	s 10 s 11 s 20	1 June 2002	1 June 2002 List of precursors updated last on 3 August 2011.
8	<i>Drugs, Poisons and Controlled Substance Act 1981</i> – Victoria	s 71D ss 80J-80K ss 80L-M ss 80N-O	1 August 2017 (s 71D) 31 May 2010 (ss 80J-K, ss 80L-M, 80N-O)	23 October 2019 (s 71D). Relevant list of “controlled precursors” most recently updated on 18 July 2017. 31 May 2010 (ss 80J-K, ss 80L-M, 80N-O). Relevant list of precursors most recently updated on 24 October 2021
9	<i>Misuse of Drugs Act 1981</i> – Western Australia	ss 14 - 18	1 January 2005 (ss 14-18)	30 January 2017 (s 14) 1 January 2005 (ss 15-18) “Category 1 substances” list updated on 29 May 2019

Question 3: In your country, is an approval by a judge a pre-condition to launch investigations into a case of diversion and trafficking of precursors? Similarly, is a court order or approval by a judge required for effecting controlled or monitored deliveries?

14. Approval by a judge is not a pre-condition to launch investigations into a case of diversion and trafficking of precursors. This includes police investigations into drug offences which may involve the use of undercover officers in a controlled or monitored delivery (controlled operations). However, approval from a judge or magistrate may be required if an investigator applies for a warrant as part of the investigation, such as a search warrant or a surveillance device warrant. Discussed below, at paragraphs 19, 20 and 24 is the approval process for controlled operations.

Controlled operations (including controlled or monitored deliveries)

15. A controlled operation is an investigation where the investigator is authorised to engage in unlawful activities during the course of the investigation.¹⁵ This may include controlled or monitored deliveries. Authorisation functions to provide immunity from prosecution, and to displace the presumption that evidence obtained in the operation is inadmissible.¹⁶
16. Below is an outline of relevant State and Commonwealth laws which regulate controlled operations, including controlled or monitored deliveries.

Controlled operations - Relevant state provisions

17. In NSW, under s 16 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW), conduct on the part of police (or any authorised person) that would be otherwise illegal is not unlawful if authorised as part of an authorised operation.¹⁷
18. A controlled operation is defined in s 3 of the *Law Enforcement (Controlled Operations) Act 1997* (NSW), as an operation conducted for the purpose of—
 - (a) obtaining evidence of criminal activity or corrupt conduct, or
 - (b) arresting any person involved in criminal activity or corrupt conduct, or
 - (c) frustrating criminal activity or corrupt conduct, or
 - (d) carrying out an activity that is reasonably necessary to facilitate the achievement of any purpose referred to in paragraph (a), (b) or (c),being an operation that involves, or may involve, a controlled activity.
19. In NSW, a law enforcement officer for a law enforcement agency, such as the NSW Police Force, may apply to the chief executive officer of the agency for authority to conduct a controlled operation on behalf of the agency.¹⁸ Applications are not determined by a judge.
20. Similarly, in the ACT, the chief executive officer of the applying law enforcement agency provides authority to conduct a controlled operation on behalf of the agency.¹⁹

¹⁵ Brendon Murphy, 'Retrospective on Ridgeway: Governing principles of controlled operations' (2014) 38 Crim LJ 38 *Criminal Law Journal*, 38.

¹⁶ *Ibid.*

¹⁷ *Law Enforcement (Controlled Operations) Act 1997* (NSW), s 16.

¹⁸ *Law Enforcement (Controlled Operations) Act 1997* (NSW), s 5.

¹⁹ *Crimes (Controlled Operations) Act 2008* (ACT), s 9.

21. A controlled operation in the ACT is defined as an operation that is, or is intended to be, conducted for the purpose of obtaining evidence that may lead to the prosecution of a person for a relevant offence or be used in an investigation under the *Integrity Commission Act 2018*, and involves controlled conduct.²⁰

Controlled operations – relevant Commonwealth provisions

22. Pt IAB of the *Crimes Act 1914 (Cth)* similarly makes it not unlawful for law enforcement officers and authorised persons to commit offences in the course of a controlled operation.²¹ The provision is limited to drug offences under the *Criminal Code Act 1995 (Cth)* and other Commonwealth legislation.

23. A controlled operation is defined in the *Crimes Act 1914 (Cth)* as an operation that:
- (a) involves the participation of law enforcement officers; and
 - (b) is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence that has a federal aspect; and
 - (c) may involve a law enforcement officer or other person in conduct that would, apart from section 15HA, constitute a Commonwealth offence or an offence against a law of a State or Territory.²²

24. Judges are not authorising officers of controlled operations under Commonwealth law. An authorising officer of a controlled operation under the *Crimes Act 1914 (Cth)* is any of the following²³:

- (a) if the operation is a major controlled operation and the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police—the Commissioner or a Deputy Commissioner;
- (b) if the operation is not a major controlled operation, but the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police—any AFP authorising officer;
- (c) if the investigation of the offence to which the controlled operation relates is within the functions of the ACC—any ACC authorising officer;

²⁰ *Crimes (Controlled Operations) Act 2008 (ACT)*, dictionary.

²¹ *Crimes Act 1914 (Cth)*, Pt IAB.

²² *Crimes Act 1914 (Cth)*, s 15GD.

²³ *Crimes Act 1914 (Cth)*, s 15GF.

- (d) if the controlled operation relates to the investigation of a corruption issue (within the meaning of the Law Enforcement Integrity Commissioner Act 2006)—any ACLEI authorising officer.

Warrants

- 25. Approval from a judge or magistrate may be required if a police officer, in the course of an investigation, applies for a warrant such as a search warrant or a surveillance device warrant.
- 26. For example, in NSW, s47 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) sets out the power of police officers and other eligible applicants to apply to eligible judges for a search warrant.²⁴ Additionally, s 17 of the *Surveillance Devices Act 2007* (NSW) states that a law enforcement officer may apply to an eligible judge or magistrate for the issue of a surveillance device warrant if the law enforcement officer on reasonable grounds suspects or believes that—
 - (a) a relevant offence has been, is being, is about to be or is likely to be committed, and
 - (b) an investigation into that offence is being, will be or is likely to be conducted in NSW or in NSW and in one or more participating jurisdictions, and
 - (c) the use of a surveillance device is necessary for the purpose of an investigation into that offence to enable evidence to be obtained of the commission of that offence or the identity or location of the offender.²⁵
- 27. Similarly, in the ACT, a law enforcement officer may apply to an eligible judge or magistrate for the issue of a surveillance device warrant. S 11 of the *Crimes (Surveillance Devices) Act 2010* is worded similarly to the NSW equivalent.²⁶
- 28. Under Commonwealth law, a magistrate may issue a search warrant.²⁷ Additionally, a judge may issue a surveillance device warrant. Section 14 of the *Surveillance Devices Act 2004* (Cth) states that a law enforcement officer (or another person on his or her behalf) may apply to a judge for the issue of a surveillance device warrant if the law enforcement officer suspects on reasonable grounds that:

²⁴ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 47.

²⁵ *Surveillance Devices Act 2007* (NSW), s 17.

²⁶ *Crimes (Surveillance Devices) Act 2010* (ACT).

²⁷ *Crimes Act 1914* (Cth), s 3E.

- (a) one or more relevant offences have been, are being, are about to be, or are likely to be, committed; and
- (b) an investigation into those offences is being, will be, or is likely to be, conducted; and
- (c) the use of a surveillance device is necessary in the course of that investigation for the purpose of enabling evidence to be obtained of the commission of the relevant offences or the identity or location of the offenders.

Question 4: When a drug/precursor-related crime is being investigated in your country, does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?

29. No. Australia's mutual assistance system is governed by the *Mutual Assistance in Criminal Matters Act 1987* (Cth). Mutual assistance requests made by Australia to foreign countries are made by the First Assistant Secretary of the International Crime Cooperation Division under a delegation from the Attorney-General of Australia. The majority of requests are made on behalf of the Australian Federal Police (AFP) and the Cth Director of Public Prosecutions. A foreign state will also make a request for mutual assistance from Australia through the Attorney-General's Department. The requests to and from Australia must be in writing and satisfy s 11 of the *Mutual Assistance in Criminal Matters Act 1987* (Cth).²⁸ There is no judicial involvement in requests for information to investigate crime, including drug/precursor-related crime.

Question 5: Does Australia have legislation or court rules that relate to monitoring manufacture and distribution of precursors which are applicable over the entire national territory?

30. The *Commonwealth Criminal Code* can be said to be one such example. The *Commonwealth Criminal Code* applies nationally, without limiting or excluding the operation of applicable state or territory laws that is capable of operating concurrently with the *Commonwealth Criminal Code*.²⁹
31. Division 306 of the *Criminal Code* prohibits the "pre-trafficking" of controlled precursors. A person "pre-traffics" in a substance if the person³⁰:

²⁸ *Mutual Assistance in Criminal Matters Act 1987* (Cth), s 11.

²⁹ *Commonwealth Criminal Code* s 300.4

³⁰ *Commonwealth Criminal Code* s 306.1.

- (a) sells the substance believing that the person to whom it is sold, or another person, intends to use any of the substance to manufacture a controlled drug; or
 - (b) manufactures the substance, with the intention of using any of it to manufacture a controlled drug and with the intention of selling any of the drug so manufactured, or believing that another person intends to sell any of the drug so manufactured; or
 - (c) manufactures the substance, with the intention of selling any of it to another person and believing that the other person intends to use any of the substance to manufacture a controlled drug; or
 - (d) possesses the substance, with the intention of using any of it to manufacture a controlled drug and with the intention of selling any of the drug so manufactured, or believing that another person intends to sell any of the drug so manufactured.
32. As with exporting or importing a bordered controlled precursor, the offences of pre-trafficking are divided into three tiers based on the quantity of the precursors. For the “lowest” tier offence, pre-trafficking controlled precursors,³¹ certain presumptions are made regarding the person’s intention to use the substance to manufacture a controlled drugs if the person sold,³² manufactured,³³ or possessed³⁴ the substance without authorisation if such an authorisation is required by Commonwealth or state/territory law.
33. Indirectly, the *Narcotic Drugs Act 1967 (Cth) (NDA)* could also be said to be a national legislation on this subject. The *NDA* gives effect to certain Australian obligations under the *Single Convention on Narcotic Drugs, 1961*. It operates in a similar fashion to *Commonwealth Criminal Code*, applying nationally but leaving room for not-inconsistent state/territory law.³⁵
34. The *NDA* establishes a regime by which a person or a body corporate could apply for a manufacture license and a manufacture permit to manufacture a narcotic drug.³⁶
35. Manufacturing is defined in s 4(2) of the *NDA* as:

³¹ *Commonwealth Criminal Code* s 306.4.

³² *Commonwealth Criminal Code* s 306.5.

³³ *Commonwealth Criminal Code* s 306.6.

³⁴ *Commonwealth Criminal Code* s 306.8.

³⁵ *Narcotic Drugs Act 1967 (Cth)* s 7 (*NDA*).

³⁶ *Narcotic Drugs Act 1967 (Cth)* ss 11G, 12. See also ‘Manufacturing Narcotic Drugs in Australia’, *Office of Drug Control* (Web Page, 22 June 2022) <<https://www.odc.gov.au/narcotic-and-psychotropic-drugs/manufacturing-narcotic-drugs-australia>> (‘Manufacturing Narcotic Drugs in Australia’).

carrying out of any process by which the drug may be obtained, and includes the refining of a drug and the transformation of one drug into another drug, but does not include the separation of opium, coca leaves, cannabis or cannabis resin from the plants from which it is or they are obtained.

36. The Office of Drug Control (which regulates and monitors the cultivation, import, export and manufacture of controlled substances to comply with Australia's obligations under International Drug Conventions) for its part elaborated³⁷ that a manufacturing license allows one to undertake the following activities:
- (a) obtain a narcotic substance from a plant;
 - (b) obtain a narcotic from a synthetic process;
 - (c) transform a substance into a narcotic drug, including from one narcotic to another (e.g. morphine transformed into codeine);
 - (d) refine and/or change the concentration of a drug.
37. Presumably, the described processes may involve precursors.

Question 6: Does your country have legislation or court rules that establish as a criminal offence the manufacture, transport and distribution of essential equipment intended to be used for illicit drug manufacturing?

38. Yes. As noted above, s 9 of the *CTNDPS Act* makes in an offence for a person to possess equipment or materials that are being used or are to be used in, or for, a dealing in drugs in the sense of:
- (a) the cultivation of opium poppy, coca bush or cannabis plant with the intention of producing narcotic drugs;
 - (b) the separation of opium, coca leaves, cannabis or cannabis resin from the plant from which they are obtained;
 - (c) the manufacture, extraction or preparation of a narcotic drug or psychotropic substance;

provided that the dealing constitutes an offence against the laws of the Commonwealth, state or territory, or of a foreign country.

³⁷ 'Manufacturing Narcotic Drugs in Australia'.

39. Further, the definition of “dealing in drugs” in the *CTNDPS Act* also embraces the possession of equipment.³⁸
40. At a federal level, the *Commonwealth Criminal Code* makes it illegal for a person to possess any equipment that the person intends to use to manufacture a controlled drug, if the person intends to sell the drug or believes that another intends to sell any of the drug so manufactured.³⁹ Possession is defined non-exhaustively in s 300.2 of the *Commonwealth Criminal Code* as including:
- (a) receiving or obtaining possession of the thing;
 - (b) having control over the disposition of the thing (whether or not the thing is in the custody of the person); and
 - (c) having joint possession of the thing.
41. Arguably, the act of manufacturing, transport and distribution of essential equipment would involve at some stage “possessing” equipment under the *Commonwealth Criminal Code*.
42. There are also relevant state and territory provisions. For example, it is unlawful in the Australian Capital Territory to supply or possess equipment for manufacturing a controlled drug with the intention to use it to manufacture controlled drugs and with the intention selling the controlled drug or believing that the other person or someone else intends to sell any of the manufactured drugs.⁴⁰

Question 7: In respect of non-scheduled chemicals/ equipment, is the fact that they have been mis-declared before the Customs, sufficient to impute ‘knowledge’ on the part of the supplier of their being used for illicit drug manufacture?

43. The below answer assumes that the non-scheduled chemicals has been independently listed as a “border-controlled precursor”. It also assumes that the non-scheduled chemicals or equipment has been listed as a “Tier 1” goods under the *Customs Act*.
44. For some relevant offences,⁴¹ knowledge on the part of a supplier that the precursor or equipment is being used for illicit drug manufacture is not necessary. What is required is “recklessness”. That is, it is enough if the person, say, was aware of a substantial risk

³⁸ *CTNDPS* s 6(1)(g).

³⁹ *Commonwealth Criminal Code* s 308.4(1). See also *DMTA* s 24A(1)(b); *DMT Regulations* reg 7.

⁴⁰ *Criminal Code Act 2002* (ACT) ss 612-613. Cf the provision in *DMTA* s 24A(1)(b).

⁴¹ See, eg, *Commonwealth Criminal Code* s 307.13(1)(c), *Customs Act* s 233BAA(4)(b)

that the substance is a “border-controlled precursor” and, having regard to the circumstances known to the person, it is unjustifiable to take the risk.

45. However, for other offences, a knowledge that, at minimum, the chemicals or equipment are being used for a “dealing in drugs” appears to be required.⁴²
46. As such, if a substance or an equipment is “mis-declared” in the sense that the person had lied on the relevant customs declaration form as to their nature, the misdeclaration can be used to support a finding of guilt by either acting as corroboration of a case against the person or as evidence of “consciousness of guilt” on the part of the person, in some circumstances.⁴³

Question 8: In Australia, does domestic legislation include measures and/or civil, criminal and/or administrative sanctions to address non-scheduled chemicals and emerging precursors, namely those that are used as starting materials and/or intermediaries in the legitimate manufacture of substances in Table I and Table II of the 1988 Convention? If yes, which type of sanctions?

47. Yes. As noted above, *CTNDPS Act* essentially prohibits possession of any equipment or materials, knowing that the equipment or materials are being used or are to be used in or for, among other things, the manufacture, extraction or preparation of narcotic drug or psychotropic substance.⁴⁴ The section would therefore embrace substances beyond those listed in Table I or II in the Annex to the Convention”,⁴⁵ as the convention is amended from time to time. As such, the definition of “equipment or materials” would capture non-scheduled chemicals or emerging precursors in so far as the necessary nexus with dealing with drugs can be shown.
48. The penalty prescribed by s 9 is a criminal penalty, imprisonment.
49. The Federal government may also apply to seize property derived or realised from the offending or property used as an instrument in the offending: *Proceeds of Crime Act 2002* (Cth).⁴⁶

⁴² See, eg, *CTNDPS Act* s 13(1).

⁴³ *Edwards v The Queen* (1993) 178 CLR 193; *R v Ciantar* [2006] VSCA 263; 16 VR 26. For a specific case involving an offender lying in analogous circumstances of interviews by customs officers and police regarding heroin secreted in her shoes, see *R v Do* [2004] NSWCCA 137 at [8]-[13] (Hidden J, Sully and Hislop JJ agreeing).

⁴⁴ *CTNDPS Act* ss 6(1)(a), 9. See also s 6(1)(g).

⁴⁵ See, eg, *CTNDPS Act* s 9.

⁴⁶ Similar proceeds of crime legislation are also in force across different jurisdictions in Australia: see, eg, *Confiscation of Criminal Assets Act 2003* (ACT).

Question 9: Please elaborate on specific pieces of information and level of details that would allow you as a judge to act on information/intelligence/evidence received from counterparts in investigations related to new emerging drug precursor chemicals not under control in your country.

50. In Australia, the role of the judiciary in the investigation process is limited. As discussed above, the executive performs the criminal investigation process and the judiciary's role is limited to the issuing of warrants.

Question 10: Are there any specific provisions that allow you as judge to act on non-scheduled chemicals with no known legitimate uses? Would information from an international body, or a collection of information from other countries, that a chemical has no known legitimate use facilitate your work in any way?

51. Judges may be responsible for hearing matters in court which relate to non-scheduled chemicals with no known legitimate use. For example, as noted above, the *CTNDPS Act* prohibits possession of any equipment or materials, knowing that the equipment or materials are being used or are to be used in or for, among other things, the manufacture, extraction or preparation of narcotic drug or psychotropic substance.⁴⁷ The penalty prescribed by s 9 is a criminal penalty, imprisonment. Information from an international body, or a collection of information from other countries, that a chemical has no known legitimate use, may be of assistance for a judge who is hearing a matter involving non-scheduled chemicals with no known legitimate use.

Question 11: As a judge, if you receive a request for assistance in a drug/precursor-related crime from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), how is it relevant to your determination to ensure that basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected?

52. It is important that the rules of the Australian jurisdiction are complied with when providing mutual assistance in a drug/precursor-related crime to a foreign country, this includes acting in accordance with basic human rights, principles of natural justice and rules of procedural fairness. A clear example of this is the requirement for the extradition process (initiated at the request of a foreign state) to have appropriate human rights safeguards and opportunity for judicial review in respect of Australia's obligations under international human rights conventions such as the *International Covenant for Civil and*

⁴⁷ *CTNDPS Act* ss 6(1)(a), 9. See also s 6(1)(g).

Question 12: Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

53. An issue arose in a recent matter I presided over in Australia whereby the testimony of a witness had to be taken at short notice because the witness was about to leave for a jurisdiction for which Australia had no mutual assistance agreement. Issues of legal costs may arise in such a matter.
54. Additionally, I worked as a barrister at The Hague for approximately 3 years from 2003 at the International Criminal Tribunal for the former Yugoslavia (ICTY), dealing with alleged war crimes arising from the conflict in the early 90s. The lay witnesses I cross-examined from the former Yugoslavia were usually brought in person in The Hague.