

Agreement between Australia and the Republic of India on Social Security

Introduction

- 2.1 This chapter considers the *Agreement between Australia and the Republic of India on Social Security* which was tabled in the Commonwealth Parliament on 10 February 2015.

Background

- 2.2 Australia has a network of bilateral social security agreements which close gaps in social security coverage for people who migrate between countries. The agreements are designed to improve access to income support for people whose adult lives are, or have been, divided between Australia and the other country. The main beneficiaries of these agreements are age pensioners, although they apply to any type of benefit, pension or allowance within the scope of the legislation.¹
- 2.3 Australia currently has 29 such agreements in place and pays out approximately \$348 million per year to around 60 000 people living in partner countries. Additionally, Australia pays out approximately \$96 million to people living in Australia who claim entitlements under the

1 National Interest Analysis [2015] ATNIA 2 with attachment on consultation *Agreement between Australia and the Republic of India on Social Security*, done at Canberra on 18 November 2014 [2014] ATNIF 31 (hereafter referred to as 'NIA'), paragraphs 4 and 9.

agreements. Partner countries pay approximately \$985 million per year to around 231 000 people living in Australia.²

- 2.4 Twenty-eight per cent of Australia's total population was born overseas. Of the top 10 countries of birth, the number of Australian residents born in India has increased most significantly in the last decade, trebling from 132 800 in 2004 to 397 200 in 2014:

This represents 1.7 per cent of the Australian population. India has been the top source country of new migrants under the migration program in 2011–12 and 2012–13, with the majority of permanent arrivals coming in the skilled stream category. The median age of Indian born Australians is quite young at 33.2 years of age.³

Overview and national interest summary

- 2.5 According to the NIA, the Agreement should provide enhanced access to Australian and Indian retirement benefits for people in both countries and greater portability of these benefits between the two countries. Portability of benefits allows for the payment of a benefit from one country to a person in another country. Enhanced access to benefits is an underlying principle of bilateral social security agreements where the responsibility for providing benefits is shared.⁴
- 2.6 Under the Agreement, residence in one Party's territory will not affect a person's entitlement to benefits under the legislation of the other Party. People who move between Australia and India will be able to do so confident that their rights to benefits are recognised in both countries. For Australia, the Agreement generally covers the age pension and superannuation guarantee. For India, the Agreement covers old age and survivors' pension for employed persons and Permanent Total Disability pension for employed persons.⁵
- 2.7 The NIA suggests that the Agreement will facilitate business between Australia and India by ensuring employers and employees do not have 'double liability' in respect of the same work of an employee. For example, when an employee from one Party is temporarily seconded to work in the

2 Mr Peter Anthony Hutchinson, Director, International Agreements, Eligibility and Participation, Policy Branch, Department of Social Services (DSS), *Committee Hansard*, Canberra, 16 March 2015, p. 2.

3 Ms Alanna Foster, Branch Manager, Eligibility and Participation Policy Branch, Department of Social Services (DSS), *Committee Hansard*, Canberra, 16 March 2015, p. 1.

4 NIA, para 5.

5 NIA, para 6.

territory of the other, the employee and/or their employer will not need to make compulsory pension or superannuation contributions in both countries. In the Australian context, the Agreement will exempt employers and/or employees already making superannuation guarantee contributions in Australia, from the requirement to make compulsory social security contributions in India. Similarly, Indian employers will be exempt from the requirement to make superannuation guarantee contributions for employees sent to work temporarily in Australia, provided they continue to make contributions in India.⁶

- 2.8 The NIA maintains that the Agreement will serve to reinforce Australia's political, business and strategic interests. Further, the NIA states that it is expected to bring economic and social benefits to Australia and facilitate business links between the two countries by reducing costs. It is also expected to maximise the foreign income of Australian residents, which would have positive flow-on effects within the Australian economy. The NIA concludes that it should further strengthen bilateral relations between Australia and India and provide choices in retirement for individuals who migrate to Australia or India during or after their working lives.⁷

Reasons for Australia to take the proposed treaty action

- 2.9 The NIA states that the Agreement will allow residents of Australia and India to move between the two countries knowing that their rights to benefits are protected. Also under the Agreement, individuals may be eligible for benefits from both Australia and India if they meet certain criteria and have resided and/or worked in both countries during their working lives.⁸
- 2.10 According to the NIA, the Agreement will provide substantial benefits to Australian businesses operating in India. The NIA estimates that removing the double liability for superannuation contributions will reduce costs to businesses by around \$10 million a year. The NIA also states that removal of superannuation guarantee 'double liability' will result in a reduction in Australian taxation revenue of an estimated \$4.8 million over the first three years of operation of the Agreement.⁹
- 2.11 The Department of Social Services (DSS) estimates that, in the first three years of the Agreement, approximately 150 people living in India will

6 NIA, para 7.

7 NIA, para 8.

8 NIA, para 11.

9 NIA, para 12.

claim Australian pensions with a value of around \$1.8 million. Indian pensions will be payable in Australia under the Agreement, but it is difficult to estimate the number of pensions payable.¹⁰

- 2.12 The Committee queried the reliability of the estimates in the NIA. DSS conceded that it is difficult to accurately determine either the number of people who will claim entitlements under the Agreement or the total cost. However, the Department said that estimates are calculated on the assumption that all those eligible will claim an entitlement:

... we do try to look at what has happened in previous experiences. What we have found is that sometimes there are over estimates sometimes underestimates. It is very hard to learn from the experience of one country how it is going to apply to another country. The estimates themselves are based on data – hard data; the best available data we have – based on immigration arrivals and departures, and then we apply a range of assumptions to that data. The assumptions are based on the best available data and are run by the Department of Finance as well and agreed with Finance as part of the estimates process.¹¹

- 2.13 DSS use a range of means to communicate the benefits of such agreements including targeted department publications and media advertisements. Additionally, eligible individuals will be encouraged to apply for reciprocal pensions when they apply for an Australian pension:

... it is a requirement in the social security law already that somebody who is claiming an Australian pension must make a claim for a foreign pension they might have any entitlement to. So the Department of Human Services actually will identify people who were born in India or who may have lived in India according to their own records. At the time of the agreement's implementation, they will write out to those people and invite them to claim an Indian pension for example.¹²

10 NIA, para 13.

11 Mr Hutchinson, DSS, *Committee Hansard*, Canberra, 16 March 2015, p. 4.

12 Mr Hutchinson, DSS, *Committee Hansard*, Canberra, 16 March 2015, p. 2.

Obligations

- 2.14 **Part I (Articles 1-5)** sets out general provisions. **Article 1** contains definitions and **Articles 2 and 3** respectively set out the legislative and personal scope of the Agreement. **Article 4** obliges the Parties to ensure equal treatment of people covered by the Agreement, with respect to eligibility for and payment of benefits. **Article 5** provides that benefits are payable to persons who are residents of, and in, the territory of either Party.¹³
- 2.15 **Part II (Articles 6-11)** concerns coverage and contains provisions to avoid double liability for superannuation contributions in respect of the same work of an employee. **Article 8** provides that where a person whose employment is subject to the laws of one Party is temporarily seconded to work in the territory of the other Party, the person and/or their employer will be subject only to the legislation of the first Party. **Article 10** allows the relevant government authority of each Party, specified in **Article 1(b)** of the Agreement (the Competent Authorities), or institutions they have designated, specified in **Article 1(c)** (the Competent Institutions), to agree in writing to modify the application of **Part II** in respect to a particular person or category of persons.¹⁴
- 2.16 **Part III (Articles 12-14)** applies to benefits payable by Australia. Under **Article 1**, a benefit is defined as ‘a benefit, pension or allowance’ provided for in the legislation of a Party, excluding (in the case of Australia) ‘any benefit, payment or entitlement under the law concerning the superannuation guarantee’. **Article 2** makes it clear that the Agreement only applies to Australian social security law related to the age pension and the law concerning the superannuation guarantee.¹⁵
- 2.17 **Part III:**
- **(Article 12)** obliges Australia to regard residents of India, and Australian residents who are temporarily in India, as Australian residents and as being present in Australia, for the purpose of claiming the benefit, provided the person has been a resident of Australia for at least 12 months at some time in his or her working life;
 - **(Article 13)** provides that with certain limitations periods of insurance in India (being periods of contributions used to acquire the right to a benefit under Indian legislation, or periods deemed equivalent will be regarded as periods of

13 NIA, para 14.

14 NIA, para 15.

15 NIA, para 16.

residence in Australia for the purpose of meeting any minimum qualifying period of residence for the benefit; and

- **(Article 14)** specifies how the rate of the Australian benefit (i.e. age pension) will be calculated under the Agreement and how this applies to a person who is living inside or outside Australia.¹⁶

2.18 **Part IV (Articles 15–16)** applies to benefits payable by India. Certain periods of Australian working-life residence will be taken into account by India for the purpose of meeting minimum insurance periods under Indian legislation, provided the periods do not overlap with the person's periods of insurance accumulated in India **(Article 15)**. The rate of pension from India will generally be based on a person's period of insurance accumulated in India **(Article 16)**.¹⁷

2.19 **Part V (Article 17–23)** sets out various obligations relating to the administration of the Agreement, including:

- for the Parties to consider the date a claim is lodged in one country as the date of lodgement in the other country **(Article 17(2))** and, in certain circumstances, to consider a claim for a benefit from one country as a claim for the corresponding benefit from the other country **(Article 17(3))**;
- for the Parties to guarantee payment of benefits in the event that currency transfer controls are imposed by either country **(Article 18(1))** and without deductions for government administrative fees or charges **(Article 18(2))**;
- for the Competent Authorities and Competent Institutions of each Party to assist each other to exchange information and to protect the confidentiality of personal data, and to communicate and accept documents in any of the official languages of either Party **(Article 19)**;
- for the Competent Authorities to conclude an Administrative Arrangement to implement the proposed Agreement **(Article 20)**;
- for the Competent Authorities to exchange annual statistics on the payments granted under the Agreement **(Article 21)**; and
- for the Competent Authorities to resolve, to the extent possible, any differences which arise in interpreting or applying the proposed Agreement according to its spirit and fundamental principles **(Article 22(1))** and for the Parties to meet to review the proposed Agreement upon request by either Party **(Article 23)**.¹⁸

16 NIA, para 17.

17 NIA, para 18.

18 NIA, para 19.

- 2.20 **Part VI (Articles 24–26)** contains transitional and final provisions. **Article 24** precludes payment for any period prior to the date on which the proposed Agreement enters into force (**Article 24(1)**), but ensures that Indian periods of insurance and periods of Australian residence completed before the Agreement enters into force will be taken into account when determining entitlements to benefits under the Agreement (**Article 24(2)**).¹⁹
- 2.21 **Article 24** also provides that the Agreement will not apply in respect to periods of insurance which were liquidated by the granting of a lump sum payment or the reimbursement of contributions (**Article 24(3)**) and that the double superannuation liability provisions of **Articles 7(2)** and **8(2)** apply from the date of entry into force of the Agreement, even if an employee from one Party was seconded to work in the territory of the other before the Agreement entered into force (**Article 24(4)**).²⁰
- 2.22 **Articles 25** and **26** respectively set out the arrangements for the entry into force of the Agreement and its termination.²¹
- 2.23 The Agreement does not contain a specific provision in relation to amendment of the Agreement or for the negotiation of future legally binding instruments. In the absence of specific procedures, the Parties may amend the Agreement by mutual agreement at any time in accordance with **Article 39** of the *Vienna Convention on the Law of Treaties*.²²
- 2.24 **Article 23** obliges the Parties to meet to review the proposed Agreement within six months of the request of either Party.²³
- 2.25 Any future amendment to the Agreement, whether arising out of review of the Agreement by the Parties under **Article 23** or arising out of ad hoc mutual agreement to change the Agreement under **Article 39** of the *Vienna Convention on the Law of Treaties* would be subject to Australia's domestic treaty-making process.²⁴
- 2.26 The Agreement contains no specific provisions for withdrawal from or denunciation of the Agreement by either Party, but contains instead a termination provision (**Article 26**). **Article 26(1)** provides that it will remain in force until terminated by either Party giving 12 months' written notice to the other through the diplomatic channel. Any termination of the

19 NIA, para 20.

20 NIA, para 21.

21 NIA, para 22.

22 NIA, para 28.

23 NIA, para 29.

24 NIA, para 30.

Agreement by Australia would be subject to Australia's domestic treaty-making process.²⁵

- 2.27 In the event of termination, **Article 26(2)** preserves the rights of those who are receiving benefits under the Agreement, those who have lodged claims and would have been entitled to receive benefits under the Agreement, and certain employees and/or employers to whom the double superannuation liability provisions of **Articles 7(2)** and **8(2)** of the Agreement apply.²⁶

Implementation

- 2.28 The NIA states that the *Social Security (International Agreements) Act 1999* (Cth)(the Act) gives effect in domestic law to relevant provisions of Australia's bilateral social security agreements which are set out in Schedules 1–30 of the Act. A new Schedule containing the full text of the Agreement with India will be added to the Act as a legislative instrument pursuant to regulations made under **Sections 8** and **25** of the Act following tabling of the Agreement and consideration of the Agreement by the Joint Standing Committee on Treaties (JSCOT).²⁷
- 2.29 Pursuant to **Section 27(1)(e)** of the *Superannuation Guarantee (Administration) Act 1992* (Cth) and **Regulation 7AC** of the *Superannuation Guarantee (Administration) Regulations 1993* (Cth), the provisions of Australia's bilateral social security agreements relating to double superannuation coverage are automatically given effect in Australian domestic law once the relevant agreement is added as a separate Schedule to the *Social Security (International Agreements) Act 1999*. The combined effect of **Section 27(1)(e)** and **Regulation 7AC** is that payment of salary or wages to an employee who has been sent temporarily to work in Australia will not give rise to a superannuation guarantee obligation for the overseas employer, provided that a relevant scheduled social security agreement is in place.²⁸

25 NIA, paragraphs 31–33.

26 NIA, para 34.

27 NIA, para 23.

28 NIA, para 24.

Costs

- 2.30 According to the NIA, the Agreement was funded in the 2014–15 Federal Budget at a net cost of \$11.7 million over the forward estimates period.²⁹
- 2.31 Department costs incurred by DSS, the Department of Human Services (Centrelink) and the Australian Taxation Office (ATO) total \$5.04 million over the forward estimates period, and are primarily one-off set-up costs related to implementation of the Agreement.³⁰
- 2.32 In addition to departmental expenses, there is a revenue cost of \$4.8 million over the forward estimates period associated with the superannuation double coverage provisions. Administered costs for DSS are estimated to be \$1.8 million over the forward estimates period.³¹

Conclusion

- 2.33 The Committee acknowledges that bilateral social security agreements are becoming increasingly important in today's mobile world as growing numbers of people live and work across national boundaries. It is essential that benefits are portable and that both employers and employees are not disadvantaged.
- 2.34 The Committee supports Australia's ratification of the Agreement and recommends that binding treaty action be taken.

Recommendation 1

- 2.35 **The Committee supports the *Agreement between Australia and the Republic of India on Social Security* and recommends that binding treaty action be taken.**

29 NIA, para 25.

30 NIA, para 26.

31 NIA, para 27.

