

Agreement between Australia and the Republic of Austria on Social Security

Introduction

- 2.1 This chapter reviews the *Agreement between Australia and the Republic of Austria on Social Security* which was signed in Canberra on 12 August 2015 and tabled in the Parliament on 1 December 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 social security agreements overcome barriers to pension payments in the domestic legislation of each country, such as requirements on citizenship, minimum contributions, past residence history, and current country of residence.¹
- 2.3 Australia has 30 of these agreements in place. The Department of Social Services (DSS) informed the Committee that Australia is currently negotiating a number of similar agreements, including with Serbia and Bosnia-Herzegovina.² DSS explained that on occasion governments approach the Australian Government to negotiate the agreements, while

1 National Interest Analysis [2015] ATNIA 21 with attachment on consultation *Agreement between Australia and the Republic of Austria on Social Security*, done at Canberra on 12 August 2015 [2015] ATNIF 16 (hereafter referred to as 'NIA'), para 3.

2 Ms Mary McLarty, Branch Manager, Eligibility and Participation Policy, Social Policy Group, Department of Social Services (DSS), *Committee Hansard*, Canberra, 1 February 2016, p. 3.

at other times the relevant community either in Australia or the other country, lobby for such an agreement to be negotiated.³

- 2.4 Asked how countries are prioritised for these negotiations DSS described a process of analysis and consultation:

Essentially, the process would be that we ... do our own analysis of the likely costs and benefits. We brief government on that and we also seek input from the Department of Foreign Affairs and Trade and their views on which countries should be priorities. They may have a totally different perspective to the Department of Social Services. Then we would consult with Treasury also because the other side of our agreements, in terms of the two sorts of separate sides, are the pension side, which DSS is responsible for, and the avoidance of double coverage, which deals with the superannuation guarantee and is the responsibility of Treasury.⁴

- 2.5 Business and employees both benefit from the agreements. DSS indicated that Australian businesses may gain substantial savings from the arrangements, as in the case of the agreement with India:

... India had changed their system to make foreign workers contribute into their system, and the total contribution rate between employer and employee was about 24 per cent ... While there was a cap on that contribution rate for Indian workers, for foreigners there was no cap. So it was a significant impost for business.⁵

- 2.6 Both migrants to Australia and Australians working overseas benefit. Many migrants may have made substantial contributions to the social security system in their country of origin before moving to Australia. The agreements give them the opportunity to claim these contributions back.⁶ Likewise the increasing number of Australians working overseas have difficulty claiming contributions made to social security systems in other countries if these type of agreements are not in place:

A lot of Australian born people are working overseas more and more during their lives and what happens is they are having to contribute into a foreign system and without an agreement they cannot get the money back. In fact, our colleagues in the Department of Human Services had a gentleman contact them

3 Ms McLarty, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 3.

4 Mr Peter Hutchinson, Director, International Agreements, Eligibility and Participation Policy, Social Policy Group, Department of Social Services (DSS), *Committee Hansard*, Canberra, 1 February 2016, p. 3–4.

5 Mr Hutchinson, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 4.

6 Mr Hutchinson, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 4.

recently about the Indian agreement, which was just implemented, and he was expecting to get a refund of about \$200 000 ...⁷

Reasons for Australia to take the proposed treaty action

2.7 Australia and Austria signed an initial social security agreement in 1992. Since then the agreement has been amended to accommodate domestic legislative changes in both countries. As a result the current document has become cumbersome:

The current agreement ... is difficult to read and it is necessary to check for the amendments from the first protocol and the second protocol to get the full agreement.⁸

2.8 The new Agreement will consolidate the three existing documents, making it more accessible and easier to read.⁹

2.9 The Australian Bureau of Statistics (ABS) estimates that in 2014 there were 19 240 Austrian-born people in Australia, of whom 12 740 were aged over 60 years.¹⁰ DSS said that, under the current Agreement, Austria pays 3 868 people in Australia approximately \$14.4 million per annum, and Australia pays 864 people in Austria approximately \$4.8 million per annum.¹¹

Changes

2.10 For Australia, the following changes have been made:

- the portability period for the Australian disability support pension for non-severely disabled persons has been reduced from 13 weeks to four weeks, in line with domestic portability legislation;
- an amendment to the conditions under which a claim for a benefit of one party can be backdated to the date of lodgement of a claim for benefit of the other party; and
- clarification of the double coverage provisions in relation to self-employed workers.¹²

2.11 For Austria the changes ensure that the Agreement is consistent with European Union (EU) regulations on the free movement of EU citizens and calculation of pensions. The Agreement also defines Austrian periods

7 Mr Hutchinson, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 4.

8 Ms McLarty, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 1.

9 Ms McLarty, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 1.

10 Ms McLarty, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 1.

11 Ms McLarty, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 1.

12 Ms McLarty, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 1.

of insurance covered by the scope of the treaty as those made 'due to gainful activity', reflecting changes in Austrian legislation. It also includes, where necessary, periods of insurance in another country with which Austria has an agreement to meet the minimum contributory period required for an Austrian pension.¹³

2.12 For both countries, transitional provisions are included to ensure that persons paid under the provision of the previous agreements will continue to receive the same benefit at the same rate.¹⁴

2.13 The Committee queried if changes to the portability arrangements may make either country liable for increased benefit or pension payments, particularly if the payment was subject to a means test. DSS reassured the Committee that this would not happen as each country determines its own pension based on the individual's connection to the country's social security system:

I suppose that, if it worked the other way, it might actually have an impact on our payments because we have a means tested system but we are dealing with, in the case of Austria and the majority of our agreement partners, contributory systems where you get out what you put in. There is no means testing from their point of view, so they will just continue to pay what they would pay.¹⁵

2.14 More broadly, DSS explained that all countries were facing difficulties ensuring that their social security systems were sustainable. In many cases this involves reviewing eligibility periods, increasing the age for eligibility for the aged pension or changing the basis on which the aged pension is calculated. For Australia, this has recently meant increasing the Australian-working-life residence for overseas pensions:

Prior to July 2014, we paid pensions overseas on the basis of 25 years working life residents ... The change [to 35 years] was a change made to help improve the sustainability of our system ...¹⁶

Obligations

2.15 **Part I, (Articles 1 to 5)** of the proposed Agreement sets out general provisions. **Article 1** defines the terms used in the Agreement. **Articles 2**

13 NIA, para 9.

14 Ms McLarty, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 1.

15 Mr Hutchinson, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 3.

16 Mr Hutchinson, DSS, *Committee Hansard*, Canberra, 1 February 2016, p. 3.

and 3 respectively set out the legislative and personal scope of the Agreement. **Article 4** (Equality of treatment) obliges the Parties to ensure equal treatment of persons covered by the proposed Agreement with their nationals, with respect to eligibility for and payment of benefits. **Article 5** (Equivalence of Territories) provides that benefits are payable to, and may be claimed by, persons who are residents of or in the territory of either Party, subject to the restrictions specified. **Article 5 (7)** of the proposed Agreement reduces the portability period of an Australian Disability Support Pension for persons who are not severely disabled from 13 weeks to the period provided in the Australian social security legislation (currently four weeks in any 12 month period).¹⁷

- 2.16 **Part II, (Articles 6 to 10)** of the Agreement contains the provisions regulating which country's legislation shall apply when employees are seconded to work in the other country temporarily. **Article 7** (Special Provisions) provides that an employed person 'posted' for a period not exceeding five years, to the Territory of the other Party is subject to the legislation of the sending Party. **Article 8** (Members of Diplomatic Missions and Consular Posts) refers to members of diplomatic missions or consular posts and states that the Agreement does not affect the provisions of the relevant Vienna Conventions on Diplomatic or Consular Relations (1961 and 1963). **Article 9** (Government Officials) provides that officials sent by the Government of a Party to the territory of the other Party are subject only to the legislation of the first mentioned Party. **Article 10** (Exceptions) allows the relevant government authority of each Party, specified in **Article 1 (1) (c)**, to agree in writing to exceptions to **Part II**.¹⁸
- 2.17 **Part III, (Articles 11 and 12)**, applies to benefits payable by Australia and:
- (a) provides that with certain limitations, periods of insurance in Austria (being periods of contributions used to acquire the right to a benefit under Austrian legislation, or periods deemed equivalent) will be regarded as periods of residence in Australia for the purpose of meeting any minimum qualifying period of residence for the benefit (**Article 11**); and
 - (b) specifies how the rate of Australian benefits will be calculated under the proposed Agreement to a person who is living inside or outside Australia (**Article 12**).¹⁹
- 2.18 **Part IV, (Articles 13 and 14)**, applies to benefits payable by Austria and:

17 NIA, para 11.

18 NIA, para 12.

19 NIA, para 13.

- (a) provides that with certain limitations, periods of Australian working life residence (being periods of permanent residence in Australia between the age of 16 and pension age) will be regarded as periods of insurance in Austria for the purpose of meeting any minimum qualifying periods for an Austrian benefit (**Article 13**); and
- (b) specifies how the rate of Austrian benefits will be calculated (**Article 14**).²⁰

2.19 **Part V, (Articles 15 to 21)**, sets out obligations relating to administration of the proposed Agreement, including:

- (a) for the Parties to consider the date a claim is lodged in one country as the date of lodgement in the other country (**Article 15 (1)**);
 - (b) for the date of lodgement of a claim for a benefit from one Party to be regarded as the date of lodgement for a claim for a benefit from the other Party, providing the second claim is received within 12 months of the first claim (**Article 15(2)**);
 - (c) for the mutual recovery of any advance payments or overpayments made by either Party to the Agreement (**Article 16**);
 - (d) for the Parties to the Agreement to pay benefits without deductions for government administrative fees and charges (**Article 17(2)**);
 - (e) for the Competent Authorities to conclude an administrative Arrangement to implement the Agreement and to assist each other by, inter alia, communicating information needed to apply the Agreement and establishing liaison agencies (**Article 18**);
 - (f) reciprocity of any exemption from or reduction of taxes, stamp duty or fees provided in national legislation for any documentation required to be submitted for the application of the Agreement for both Parties and exemption from the need for authentication of such documents (**Article 19**);
 - (g) data protection requirements in line with EU and Australia's Privacy Act 1988 (Cth) standards and consistent with the provisions in Australia's other social security agreements (**Article 20**). The main principles are:
 - (i) personal data may be communicated between the competent authorities or institutions for the purposes of the proposed Agreement and any implementing arrangement;
 - (ii) data communicated is confidential;
 - (iii) receiving bodies shall provide information concerning the use of data, and the results achieved at the request of the communicating body;
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20 NIA, para 14.

- (iv) communicating bodies shall ensure data communicated is up-to-date and accurate and whether the communication is necessary and proportionate with regard to the purpose;
 - (v) people shall be able to request information about the data relating to them, in principle, free of charge and have any inaccurate data corrected;
 - (vi) any person whose rights to information, correction and deletion have been violated have the right to have the matter decided by an independent authority. Any data subject who has suffered damage as a result of unlawful processing of data is entitled to receive compensation according to domestic law;
 - (vii) personal data communicated shall be deleted if found to be inaccurate, unlawfully obtained or communicated or no longer needed;
 - (viii) authorities shall record the reason, contents and date of any communication or receipt of personal data and store electronic data for at least three years; and
 - (ix) both communicating and receiving bodies are obliged to provide effective personal data protection.
- (h) for the Competent Authorities to resolve, to the extent possible, any disagreements in connection with the application of this Agreement by mutual agreement. If a disagreement cannot be resolved within six months, the matter (other than matters concerning Part II of the Agreement) can be referred to binding arbitration by an arbitral body agreed by the Parties (**Article 21**).²¹

2.20 **Part VI, (Articles 22 to 24)**, contains transitional and final provisions for the proposed Agreement including:

- (a) precluding payment for any period prior to the date on which the Agreement enters into force (**Article 22 (1)**), but ensuring that Austrian 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 proposed Agreement (**Article 22 (2)**).
- (b) specifying that persons receiving benefits by virtue of the existing Agreement will, when this proposed Agreement comes into force, receive benefits by virtue of this Agreement (**Article 22 (4)**).²²

2.21 **Article 24** sets out the arrangements for the entry into force of the proposed Agreement and its termination.²³

21 NIA, para 15.

22 NIA, para 16.

Implementation

- 2.22 The *Social Security (International Agreements) Act 1999* (Cth) ('Act') gives effect in domestic law to relevant provisions of Australia's bilateral social security agreements. A new Schedule containing the full text of the Agreement with Austria will be added to the Act as a legislative instrument pursuant to **Sections 8** (Addition of new scheduled international social security agreements) and **25** (Regulations) of that Act.²⁴
- 2.23 Pursuant to **Section 27(1)(e)** of the *Superannuation Guarantee (Administration) Act 1992* and **Regulation 7AC** the *Superannuation Guarantee (Administration) Regulations 1993*, the provisions of Australia's 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 Act. 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 scheduled social security agreement is in place.²⁵
- 2.24 Following the passing of the new legislative instrument to the Act, the Agreement will enter into force under **Article 24(1)** on the first day of the third month following exchange of Notes by the Parties.²⁶

Costs

- 2.25 According to the NIA, the financial implications of the proposed Agreement are estimated to be nil or negligible over the forward estimates period.²⁷
- 2.26 However, the Committee noted that the cost of implementation for the Austrian social security agreement had been included in the budget for the agreement with Estonia which it recently examined.²⁸ The total cost for that agreement amounted to \$4.17 million over four years. The

23 NIA, para 17.

24 NIA, para 18.

25 NIA, para 19.

26 NIA, para 20.

27 NIA, para 21.

28 See Joint Standing Committee on Treaties (JSCOT), *Report 158: Treaty tabled on 10 February 2015*.

Department of Human Services (DHS) explained that the majority of the funding was going towards updating the Department's aging computer system.²⁹ The Committee asked for a breakdown of the funding as it pertained to both agreements:

Approximately 70 per cent of those costs are to update our computer system including automatic rate calculation updates, automatic totalisation rules, portability rules, prepopulation of bilingual Estonian liaison forms, updated foreign pension screening rules, updated new claimed lodgement rules, updated system workflows, development of a new management information system for overseas pensions paid into Australia, and the implementation of the Austrian agreement changes.³⁰

2.27 Asked where the money was being spent, DHS said that it was being distributed across national locations and various sections of the Department:

Seventy per cent of the costs going to ICT are being spent on ICT people in Canberra, Adelaide and Brisbane. The other 30 per cent is for administration belonging to project management for [the Older Australians and International Branch] – [the] international section is based in Hobart – project management, stakeholder management, technical requirements and so on. The rest of the service delivery costs belong to Centrelink International Services in Hobart, which manages the implementation of the agreement. Trained staff provide support and facilitate the claiming of overseas pensions.³¹

Conclusion

2.28 The Committee supports the ratification of the Agreement.

Recommendation 1

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

29 Ms Pam Saunders, National Manager, Older Australians and International Branch, Department of Human Services (DHS), *Committee Hansard*, Canberra, 1 February 2016, p. 2.

30 Ms Saunders, DHS, *Committee Hansard*, Canberra, 1 February 2016, p. 2.

31 Ms Saunders, DHS, *Committee Hansard*, Canberra, 1 February 2016, p. 2.

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