

National Interest Analysis [2017] ATNIA 1

with attachment on consultation

Agreement on Social Security between the Government of Australia and the Government of New Zealand

(Wellington, 8 December 2016)

[2017] ATNIF 1

NATIONAL INTEREST ANALYSIS – CATEGORY 2 TREATY

SUMMARY PAGE

Agreement on Social Security between the Government of Australia and the Government of New Zealand

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring into force the *Agreement on Social Security between the Government of Australia and the Government of New Zealand* done at Wellington on 8 December 2016 ('the Agreement'), which will replace the *Agreement on Social Security between the Government of Australia and the Government of New Zealand* done on 28 March 2001, as amended by an Exchange of Notes completed on 21 February 2002 [2002] ATS 12 (collectively, 'the current Agreement').
2. Pursuant to Article 27, the Agreement shall enter into force on 1 July 2017 provided that the Parties have notified each other by notes exchanged through the diplomatic channel that all matters necessary to give effect to the Agreement have been completed. Otherwise it shall come into force on the first day of the third month following the date of the last such notification.
3. When the Agreement enters into force, the current Agreement will terminate. Article 27 of the current Agreement and Article 26 of the new Agreement preserve the entitlements of those persons receiving benefits under the current Agreement.

Overview and national interest summary

4. Australia's social security agreements are bilateral treaties which close gaps in social security coverage for people who migrate between countries. The social security agreements do this by overcoming barriers to pension payment in the domestic legislation of each country, such as requirements on citizenship, minimum contributions, past residence history and current country of residence.
5. The provisions in Australia's 30 bilateral social security agreements are broadly similar. However, the Agreement between Australia and New Zealand is slightly different in recognition of the countries' close geographic and historical ties, and also in acknowledgement that both countries have non-contributory residence-based benefit systems.
6. The Agreement reaffirms the very positive and important role that freedom of trans-Tasman movement and a single Australia-New Zealand labour market play in the development of Closer Economic Relations between Australia and New Zealand.
7. The Agreement will continue to provide an appropriate basis for both countries to share responsibility for specified income support payments for people who have split their lives between Australia and New Zealand. It will also further strengthen bilateral relations between Australia and New Zealand and provide choices in retirement for individuals who migrate to Australia or New Zealand during or after their working lives.
8. The current Agreement with New Zealand is one of Australia's most significant and generates pension flows to Australia of about \$263 million a year (at June 2016). At the same time Australia paid a total of about \$71.5 million a year into New Zealand under the Agreement and the provisions in the

social security law of Australia which allow qualified Australian pensioners to be paid indefinitely during absences from Australia. Australia pays almost a further \$101 million a year to New Zealand citizens living in Australia under the current Agreement.

Reasons for Australia to take the proposed treaty action

9. Australia's bilateral social security agreements improve access to income support for people whose adult lives are, or have been, divided between Australia and the other country which is a Party to the Agreement. The main beneficiaries of these bilateral agreements are age pensioners.

10. The Trans-Tasman Travel Arrangement (TTTA) is an informal agreement between Australia and New Zealand which allows for the free movement of citizens of one country to the other. The arrangement came into effect in 1973, and allows citizens of each country to live and work in the other country, with some restrictions.

11. Under the TTTA, New Zealand citizens are not required to obtain a permanent visa in order to live and work in Australia. New Zealand citizens are able to enter and remain in Australia on a Special Category Visa (SCV), a temporary visa automatically issued to New Zealanders on arrival in Australia. The SCV is intended to provide more flexible travel arrangements and allow a New Zealand citizen to live, work or study in Australia lawfully.

12. In 2001, new arrangements for access to social security (and citizenship) by New Zealand citizens were announced. The Australian Government decided that New Zealand citizens who came to live and work in Australia subsequently would not have access to income support payments unless they formally migrated to Australia. Limited access to certain payments for these New Zealand citizens has been retained in the current Agreement.

13. Australia has a long history of Social Security Agreements with New Zealand starting in 1944. Revised Agreements have been implemented in 1949, 1987, 1989 and 1995. The current Agreement with New Zealand began operating on 1 July 2002. The Agreement takes account of changes that have occurred in both countries' welfare systems since the current Agreement commenced in 2002.

14. The Agreement continues to ensure that both countries share the financial responsibility for providing benefits. Australian payments in New Zealand are generally based on the proportion of the person's Working Age Residence (WAR) (defined as residence from age 20 until pension age) in Australia, and vice versa. Each country then 'tops up' payments for their residents, meaning that a person may be eligible for benefits from both countries if they lived in both countries during their working life and meet other eligibility criteria.

15. The Agreement clarifies that only New Zealand WAR can be used to meet the 10 year qualifying residence requirement for Disability Support Pension (DSP). In 2013 the Full Federal Court held, in *Mahrous* ([2013] FCAFC 75), that Article 12(4) of the current Agreement means that *any* residence in New Zealand (including before the age of 20) can be used to qualify a person for DSP. The original intention, agreed by both Parties, was that only WAR could be used.

16. The Agreement also takes account of the increase in the qualifying age for the Age Pension in Australia, which becomes 65.5 in July 2017 and continues to increase by six months every two years until it reaches 67 in July 2023. Without such an amendment, the cost sharing basis of the Agreement may be impacted, as New Zealand would be required to pay New Zealand Superannuation (the equivalent of Age Pension) in Australia even though the person could not qualify for Age Pension under Australian domestic legislation. The Agreement provides that, to claim Age Pension or New Zealand Superannuation, a person must have reached whichever pension age is higher at the time they claim.

17. Portability of payments in third countries under the Agreement is also aligned with and tied to portability provisions in the social security law of Australia. The current Agreement specifies that a payment under the Agreement is payable in a third country for 26 weeks, whereas under Australia's

social security law, Carer Payment is payable outside Australia for six weeks and DSP is generally payable outside Australia for four weeks in any 12 month period. The Agreement clarifies that the period that the relevant payment will be payable is determined by the social security law of Australia.

18. There are also a number of administrative and technical amendments and clarifications contained in the Agreement.

Obligations

19. Part I (Articles 1 to 5) of the Agreement sets out general provisions. Article 1 defines the terms used in the Agreement including the new definition for 'pension age'. The definition makes clear that to claim the Australian Age Pension or the New Zealand equivalent, a person must have reached whichever pension qualifying age is higher at the time they claim.

20. Articles 2 and 3 respectively set out the legislative and personal scope. Article 2 provides that the Agreement only applies (in relation to Australia) to the social security law relating to the following benefits: age pension, disability support pension, and carer payment in respect of the partner of a person who is in receipt of a disability support pension; and (in relation to New Zealand) the social security law and the Veteran's Support Act 2014 relating to the following benefits: New Zealand superannuation, veteran's pension and supported living payment. Article 2 further clarifies that for the purposes of the Agreement an Australian disability support pension and a New Zealand supported living payment shall be limited to cases where the person is severely disabled, the person was a resident of one of the Parties at the date they became severely disabled; and the person, prior to the date of severe disablement, was residing in the territory of the other Party for a period of not less than one year at any time.

21. Article 4 is a statement of principle, common to all bilateral social security agreements and obliges the Parties to ensure equal treatment of people covered by the Agreement, with respect to eligibility for and payment of benefits.

22. Article 5 contains residence definitions, and most importantly, modifies the social security law by including New Zealand citizens who hold a special category visa residing lawfully in Australia as Australian residents. This allows these people to claim the benefits covered by the Agreement.

23. Part II (Articles 6 to 10) of the Agreement covers the provisions relating to New Zealand benefits. Part III (Articles 11 to 13) of the Agreement covers the provisions relating to Australian benefits. These provisions allow people to claim payments whether they are in Australia or New Zealand. They also help claimants meet residence qualifying requirements and specify how payments will be calculated.

24. Article 11 allows residents of Australia or New Zealand who are temporarily in Australia or New Zealand to be regarded as Australian residents and in Australia, for the purpose of claiming benefits under the Agreement.

25. Article 12 clarifies that only New Zealand WAR can be used to qualify for DSP and addresses the Full Federal Court decision in *Mahrous* ([2013] FCAFC 75) by removing Article 12(4) from the current Agreement.

26. The method of calculating the rate of Australian benefits is set out in Article 13. The principle of the Agreement as put into effect by this Article (and Articles 9 and 10 for New Zealand) is that the two countries contribute to the pension to the maximum level that a person would be entitled to in the country in which they reside. The country of former residence pays a proportion of the pension based on the period lived in that country. The country of residence tops that pension up to the level that the claimant would otherwise be entitled to.

27. Part IV (Articles 14 through 16) of the Agreement contains common provisions on eligibility including the export of benefits between Australia and New Zealand and in third countries (Article 14),

payment of supplementary benefits and allowances (Article 15) and the procedure for resolving differing residence interpretations (Article 16).

28. Article 14 has been amended to remove the specified period of 26 weeks portability of payments in third countries. The Agreement aligns and ties portability provisions to the social security law of Australia.

29. Part V of the Agreement (Articles 17 to 22) sets out various obligations relating to the administration of the Agreement, including:

- a) requiring 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(4));
- b) requiring the competent authorities and competent institutions of each Party to assist each other to exchange information and to protect the confidentiality of personal data (Article 18);
- c) provisions for the recovery of overpayments (Article 19);
- d) clarifying that the competent institutions are not obliged to do anything at variance with the laws or administrative practices of either Party (Article 20);
- e) requiring the competent authorities to conclude administrative arrangements to implement the Agreement (Article 21); and
- f) provisions allowing payments in the currency of the Party making the payment and exempting payments from any government fees or charges (Article 22).

30. Part VI (Articles 23 to 27) of the Agreement contains provisions for dispute resolution, review of the Agreement, transitional arrangements, entry into force and termination provisions.

31. The Agreement provides that the competent authorities resolve, to the extent possible, any differences which arise in interpreting or applying the Agreement according to its spirit and fundamental principles (Article 23(1)), and for the Parties to meet to review the Agreement upon request by either Party (Article 24).

32. Article 26 of the Agreement (and Article 27 of the current Agreement) preserve the entitlements of those persons already receiving benefits under the current Agreement. Specifically, people granted DSP through use of residence in New Zealand at any age will be grandfathered, and people receiving payments outside Australia and New Zealand at implementation will continue to be entitled to 26 weeks portability.

33. Article 27 sets out the arrangements for the entry into force of the Agreement and its termination.

Implementation

34. 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.

35. The full text of the Agreement will be inserted as a new Schedule 3 to the Act, replacing the text of the current Agreement. This will be done as a legislative instrument pursuant to regulations made under Sections 8 and 25 of the Act.

36. Pursuant to Article 21 of the Agreement, the competent authorities of the Parties shall establish by means of administrative arrangements the measures necessary for the implementation of the Agreement.

Costs

37. Revision of the current Agreement was announced as a measure in the 2016-17 Budget. The Agreement is estimated to save approximately \$16.1 million over the first four full years.

Regulation Impact Statement

38. The Office of Best Practice Regulation ('OBPR') has been consulted in relation to the requirement for a Regulation Impact Statement (RIS). OBPR advised that the regulatory impacts of the Agreement with New Zealand are nil and the RIS requirements have been met (reference 16543).

Future treaty action

39. The Agreement does not contain a specific provision in relation to its amendment 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*.

40. Any future amendments to the Agreement, whether arising out of the review process set out under Article 24 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 requirements.

Withdrawal or denunciation

41. The Agreement contains no specific provisions for withdrawal from or denunciation of the Agreement by either Party, but contains instead a termination provision under Article 27.

42. Article 27(2) of the Agreement provides that it will remain in force until terminated by either Party giving 12 months' written notice to the other through the diplomatic channel or until entry into force of a later treaty between the Parties relating to the same subject matter.

43. In the event of termination, Article 27(3) preserves the rights of those who are receiving benefits under the Agreement and those who have lodged claims and would have been entitled to receive benefits under the Agreement.

44. Any termination of the Agreement by Australia would be subject to Australia's domestic treaty-making requirements.

Contact details

International Agreements
International and Means Test Policy Branch
Department of Social Services

ATTACHMENT ON CONSULTATION

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CONSULTATION

State and Territory Governments

45. State and Territory Governments were consulted through the biannual meeting of the Commonwealth-State-Territory Standing Committee on Treaties (SCOT) and no concerns were received.

Public Consultation

46. No public consultation has been undertaken as there are no major changes to the current Agreement, and nor are significant numbers of people affected.

47. The amendment clarifying that only New Zealand working age residence can be used to qualify a person for Disability Support Pension (DSP) restores the original policy intention of the current Agreement, as agreed by both countries.

48. Amendments to require claimants to meet the qualifying age for pension from both countries cater for pending changes in the qualifying age for the Age Pension, which begin from 1 July 2017. The qualifying age will increase in six-monthly increments from the current qualifying age of 65 until it reaches 67 by July 2023. This amendment aligns the Agreement with domestic provisions and ensures that people who wish to use the Agreement are eligible for the age pension from both countries, consistent with the cost-sharing principles underlying the Agreement.

49. The amendments to reduce the period of portability in third countries under the Agreement and align and tie them to Australia's social security law will make them consistent with the portability period applying to all other DSP and Carer Payment recipients.