

National Interest Analysis [2010] ATNIA 28

with attachment on consultation

**Second Protocol
to the Agreement Between Australia and the Republic of Austria
on Social Security,
done at Vienna on 17 February 2010**

[2010] ATNIF 4

NATIONAL INTEREST ANALYSIS – CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and Timing of Proposed Treaty Action

1. The treaty action proposed is to bring into force the Second Protocol to amend the existing Agreement between Australia and the Republic of Austria on Social Security done at Canberra on 1 April 1992, as amended by the Protocol (the First Protocol) done at Vienna on 26 June 2001 (the Agreement).
2. Pursuant to Article IV of the Second Protocol, the Second Protocol will enter into force on the first day of the third month following the month in which the last of the diplomatic notes are exchanged by Austria and Australia notifying each other that all matters necessary to give effect to the Protocol have been finalised. The Protocol is expected to enter into force in the first half of 2011.

Overview and national interest summary

3. Australia's social security agreements are bilateral treaties which close gaps in social security coverage for people who migrate between countries. The agreements do this by overcoming barriers to pension payment in the domestic legislation of each country, such as citizenship, minimum contributions or residence requirements and restrictions on claiming from outside the country.
4. The Second Protocol complements and amends Australia's existing Social Security Agreement with Austria, under which both countries share responsibility for providing social security coverage for people who move between these countries.
5. The Second Protocol will facilitate business between Australia and Austria through the inclusion of double coverage provisions which will ensure that compulsory pension/superannuation contributions do not need to be made into both countries' systems when an employee is seconded to work in the other country temporarily. In the Australian context, this Protocol will exempt relevant employers and employees from making compulsory social security contributions in Austria if superannuation guarantee contributions continue to be made in Australia. Similarly, relevant Austrian employers will be exempted from making superannuation guarantee contributions for employees sent to work temporarily in Australia provided relevant social security contributions continue to be made in Austria.
6. The Second Protocol includes new data protection provisions proposed by Austria which are in line with European Union standards to protect personal data communicated under the Agreement.
7. It also includes an amendment to the portability period for the Australian Disability Support Pension to bring it in line with domestic legislation.
8. The Second Protocol will consolidate the economic and social benefits to Australia under the Agreement and facilitate business links between the two countries by removing unnecessary costs.

Reasons for Australia to take the proposed treaty action

9. Under current arrangements, compulsory contributions under the legislation of both Australia and Austria may be required when an employee is sent from one country to the other to work temporarily. The Second Protocol will reduce costs of doing business in both countries by providing that, generally, the employer and/or employee need to contribute only to the relevant pension/superannuation scheme in their home country.

10. The Second Protocol to the Agreement between Australia and Austria on social security incorporates the same principles as Australia's other social security agreements that include 'double coverage' provisions, namely the Social Security Agreements with Belgium, Chile, Croatia, Finland, Germany, Greece, Ireland, Japan, Korea, the Netherlands, Norway, Portugal, Switzerland and the United States. The recently signed Agreements (not yet in force) with the Czech Republic, the Former Yugoslav Republic of Macedonia, and Poland also contain equivalent provisions and are the subject of separate National Interest Analyses.

Obligations

11. The Second Protocol places reciprocal obligations on both Australia and Austria. Article III comprises the substantive amendments to the Agreement. Subparagraphs 1(a) to (d) amend certain definitions contained in Articles 1 to 5 of the Agreement. These amendments are in line with Australia's other social security agreements and clarify the operation of the double coverage provisions. In particular, the Second Protocol updates the definition of legislation in subparagraph 1(c) of the Agreement, to include Australia's superannuation guarantee laws.

12. Paragraph 2 of Article III replaces paragraph 1 of Article 2 of the Agreement (Legislative Scope) to insert the relevant references to the laws concerning the superannuation guarantee for Australia. It also updates the social security payments included in the scope of the Agreement to remove the reference (for Australia) to 'wife pensions' as this pension is gradually being phased out and there have been no new grants possible since 1 July 1995.

13. Paragraph 3 of Article III updates provisions in Article 4 of the Agreement relating to Equality of Treatment. Subparagraph 3(a) replaces paragraph 1 of Article 4 to extend its application to refugees and stateless persons, as well as to nationals. Subparagraph 3(b) replaces paragraph 3 of Article 4 of the Agreement to provide that the equal treatment provisions do not apply to provisions of Austrian legislation concerning the apportionment of insurance burdens resulting from agreements with third States.

14. Paragraph 4 of Article III updates provisions of Article 5 of the Agreement regarding equivalence of territories. Subparagraph 4(a) updates paragraph 1 of Article 5 of the Agreement. It provides that where a provision of domestic legislation specifies that entitlement to a benefit is contingent on residing in the territory of that Party, that provision will not be applicable where a person lives in the territory of the other Party. This is necessary to implement double coverage. Subparagraph 4(b) updates the provisions of 4(a) and 4(b) of Article 5 of the Agreement by providing that 'add-ons' such as rent assistance to assist Australian pensioners with additional living costs, are only payable outside Australia according to Australian social security law. Subparagraph 4(c) also reduces the portability period of Disability Support Pension for persons who are not severely disabled from 26 weeks to 13 weeks, in line with Australian domestic legislation.

15. Paragraph 5 of Article III inserts a new Part 1A into the Agreement after Article 5 to deal with the avoidance of double coverage. These provisions are consistent with those in Australia's other social security agreements. Article 5a provides that generally, a person who works in the territory of a Party is subject to that Party's legislation. Articles 5b to 5e deal with exceptions to the general principle in Article 5a. Article 5b provides that a person

who is 'posted' by an employer for less than 5 years in the territory of the other Party, will be subject to the legislation of the sending Party. Articles 5c and 5d set out the special considerations applying to members of diplomatic missions and consular posts and government officials. Government officials who are sent to the territory of the other Party are considered to be resident in the territory of the sending Party for the purposes of legislation. Article 5e allows the 'Competent Authorities', by agreement in writing, to specify exceptions from the provisions of Articles 5a to 5d for certain persons or categories of persons, in the interest of those persons.

16. Paragraph 6 of Article III inserts a new paragraph 5a into Article 7 of the Agreement, applying the provisions of existing paragraphs 4 and 5 for a period of 26 weeks where a person is temporarily absent from Australia in line with Australia's domestic legislation

17. Paragraphs 7 and 8 of Article III delete Article 8 and paragraph 4 of Article 17 of the Agreement. These provisions deal with the Australian 'wife pension' which has had no new grants since 1 July 1995, and confidentiality of information, which is superseded by new Article 18a.

18. Paragraph 9 of Article III inserts a new Article 18a into the Agreement to deal with data protection requirements. These requirements are more detailed than previously, consistent with European Standards and with data protection provisions in Australia's other social security agreements. Under subparagraph 1(a), personal data may be communicated between the Competent Authorities of each Party for the purposes of the Agreement but subparagraph 1(b) provides that the data must be treated as confidential in the same manner as like information obtained under domestic legislation. Subparagraph 1(d) imposes obligations on communicating bodies to ensure that data communicated is up-to-date and accurate (with a duty to delete or correct inaccurate data), and to ensure that the communication is necessary and proportionate having regard to the purpose of the communication.

19. Subparagraphs 1(e) and (f) concern freedom of information. Subparagraph 1(e) provides that people are able to request information about the data relating to them which has been communicated or processed and that such information must be given without undue delay and, in principle, free of charge. That person also has the right to have any inaccurate data corrected. Subparagraph 1(f) enshrines the right of 'data subjects', whose rights to accurate data have been violated, to receive compensation and to have the matter decided by an independent authority.

20. Subparagraph 1(i) imposes an obligation on both the communicating and receiving body to provide effective personal data protection.

21. Paragraph 10 of Article III inserts a new paragraph 3 into Article 19 of the Agreement, which excludes the new Part 1A from the operation of the arbitration provisions in Paragraph 2 of the Agreement, in line with superannuation guarantee policy.

22. Article IV contains transitional and final provisions for the Second Protocol. Paragraph 2 provides that the Agreement shall continue to apply to persons in receipt of the Australian 'wife pension' as at the date of entry into force of the Second Protocol. Paragraph 3 extends the double coverage provisions contained in the Second Protocol to employees who were sent and have been working in the other country before the date of entry into force of the Protocol.

Implementation

23. The *Social Security (International Agreements) Act 1999* gives effect in domestic law to relevant provisions of social security agreements that are scheduled to the Act. A new

Schedule containing the full text of the Second Protocol will be added to the *Social Security (International Agreements) Act 1999* pursuant to sections 8 and 25 of that Act.

24. Relevant provisions of social security agreements relating to double superannuation coverage are automatically given effect, in domestic law, once the agreement is scheduled to the *Social Security (International Agreements) Act 1999*. This is pursuant to paragraph 27(1)(e) of the *Superannuation Guarantee (Administration) Act 1992* and regulation 7AC of the *Superannuation Guarantee (Administration) Regulations 1993*, which together provide 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.

Cost

25. The financial implications of this Protocol are estimated to be nil or negligible over the forward estimates period.

Regulation Impact Statement

26. The Office of Best Practice Regulation within the Department of Finance and Deregulation has advised that a Regulation Impact Statement is not required.

Future Treaty Action

27. The Second Protocol does not provide for the negotiation of any related treaties or deal with possible amendments to it. It may be amended at any time by agreement between the Parties in accordance with Article 39 of the *Vienna Convention on the Law of Treaties*.

28. Any such amendments to this Protocol or the Agreement would be subject to Australia's domestic treaty-making process, including tabling and consideration by the Joint Standing Committee on Treaties.

Withdrawal or denunciation

29. Paragraph 4 of Article IV of the Second Protocol provides that the Protocol will remain in force indefinitely, unless terminated by either party through giving twelve months' written notice, or unless the Agreement is terminated. Article IV also provides that, if the Protocol only is terminated, it shall continue to apply for all persons who were subject to its provisions before the termination, provided those persons continue to satisfy the required criteria.

30. Any termination of this Protocol or the Agreement would be subject to Australia's domestic treaty-making process, including tabling and consideration by the Joint Standing Committee on Treaties.

Contact Details

International Agreements
International Branch
Department of Families, Housing, Community Services and Indigenous Affairs

ATTACHMENT ON CONSULTATION

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CONSULTATION

31. Treasury consulted a range of organisations as part of the treaty process.
32. Letters and an information sheet outlining the Agreement were sent to each group on 14 April 2010 seeking their views and asking for a response by 7 May 2010.
33. No formal responses were received by Treasury.
34. The organisations Treasury consulted were:
 - Institute of Chartered Accountants in Australia
 - Australian Chamber of Commerce and Industry
 - Industry Funds Forum Inc
 - A.C.T.U.
 - Council of Small Business Organisations of Australia
 - Association of Superannuation Funds of Australia
 - Investment and Financial Services Association
 - CPA Australia
35. The State and Territory Governments FaHCSIA consulted were:
 - ACT Chief Minister's Department
 - QLD Department of Premier and Cabinet
 - VIC Department of Premier and Cabinet
 - NT Department of Chief Minister
 - SA Department of Premier and Cabinet
 - TAS Department of Premier and Cabinet
 - WA Federal Affairs
 - NSW Intergovernmental & Regulatory Reform Branch