

DEPARTMENT OF FOREIGN AFFAIRS AND TRADE
CANBERRA

SECOND PROTOCOL

to the Agreement between Australia

and the Republic of Austria

on Social Security

(Vienna, 17 February 2010)

Not yet in force

[2010] ATNIF 4

Australia
and
the Republic of Austria

being desirous of amending and supplementing the Agreement on Social Security between them done at Canberra on the first day of April 1992, as amended by the Protocol between them done at Vienna on the twenty-sixth day of June 2001 have agreed as follows:

Article I

1. In this Protocol "Agreement" means the Agreement between Australia and the Republic of Austria on Social Security done on the first day of April 1992 at Canberra, as amended by the Protocol amending the Agreement between Australia and the Republic of Austria on Social Security, done on the twenty-sixth day of June 2001 at Vienna.

2. In the application of this Protocol any term defined in the Agreement shall, unless the context otherwise requires, have the same meaning.

Article II

In this Protocol "First Protocol" means the Protocol done on the twenty-sixth day of June 2001 at Vienna amending the Agreement between Australia and the Republic of Austria of 1 April 1992.

Article III

1.(a) In subparagraph 1(b) of Article 1 of the Agreement the words "in relation to Australia, the law specified in subparagraph 1 (a) of Article 2" shall be replaced by the words " in relation to Australia, the law specified in subparagraph 1(a)(i) of Article 2 except in relation to the application of Part 1A of the Agreement (including the application of other Parts of the Agreement as they affect the application of that Part) where it means the law specified in subparagraph 1(a)(ii) of Article 2";

(b) Subparagraph 1(c) of Article 1 of the Agreement shall be deleted and replaced by the following:

"(c) "competent authority" means,

in relation to Australia, the Secretary of the department responsible for the legislation specified in subparagraph 1(a)(i) of Article 2 except in relation to the application of Part I A of the Agreement (including the application of other Parts of the Agreement as they affect the application of that Part) where it means the Commissioner of Taxation or an authorized representative of the Commissioner; and

in relation to Austria, the Federal Minister responsible for the application of the legislation specified in subparagraph 1(b) of Article 2.”

(c) Subparagraph 1(h) of Article 1 of the Agreement shall be amended by inserting the words “but, for Australia, does not include any benefit, payment or entitlement under the law concerning the superannuation guarantee;” following the words “in addition to that benefit, pension or allowance;”.

(d) In paragraph 1 of Article 1 of the Agreement the following new subparagraphs (m), (n), (o) and (p) shall be inserted:

(m) “**Australia**” means Australia as defined in the legislation of Australia

(n) “**Austria**” means the Republic of Austria;

(o) “**Government**” for the purposes of Article 5d includes, in relation to Australia, the government of Australia including a political subdivision or local authority of Australia;”

(p) “**Party**” means Australia or Austria as the context requires.”

2. Paragraph 1 of Article 2 of the Agreement shall be deleted and replaced by the following:

“1. Subject to paragraph 2, this Agreement shall apply to:

(a) in relation to Australia:

(i) the Acts forming the social security law insofar as the law provides for, applies to or affects the following benefits:

- (A) age pension;
- (B) disability support pension;
- (C) carer payment;
- (D) benefits payable to widowed persons; and
- (E) double orphan pension.

(ii) with regard to Part I A only, the law concerning the superannuation guarantee (which at the time of signature of the Second Protocol is contained in the Superannuation Guarantee (Administration) Act 1992, the Superannuation Guarantee Charge Act 1992 and the Superannuation

Guarantee (Administration) Regulations) provided that this Agreement shall not extend the application of that law; and

(b) in relation to Austria:

(i) the legislation concerning pension insurance with the exception of the insurance for notaries; and

(ii) with regard to Part I A only, the legislation concerning sickness insurance and accident insurance.”

3.(a) Paragraph 1 of Article 4 of the Agreement shall be deleted and replaced by the following:

“(1) Unless otherwise provided in this Agreement, the following persons shall, in the application of the legislation of one Party, receive equal treatment with the nationals of this Party regarding eligibility for and payment of benefits:

(a) nationals of the other Party;

(b) refugees as defined in Article 1 of the Convention relating to the Status of Refugees dated 28 July 1951 and the Protocol to that Convention dated 31 January 1967, ordinarily resident in the territory of one Party;

(c) stateless persons as defined in Article 1 of the Convention relating to the Status of Stateless Persons dated 28 September 1954, ordinarily resident in the territory of one Party.”

(b) Paragraph 3 of Article 4 of the Agreement shall be deleted and replaced by the following:

“(3) Paragraph 1 shall not apply to the provisions of the Austrian legislation concerning the apportionment of insurance burdens resulting from agreements with third States.”

4.(a) Paragraph 1 of Article 5 of the Agreement shall be deleted and replaced by the following:

“(1) Unless otherwise provided in this Agreement, any provision of the legislation of one Party which requires that entitlement to or the payment of benefits is dependent on residence or presence in the territory of that Party shall not be applicable to persons who reside or stay in the territory of the other Party.”

(b) Subparagraphs 4(a) and (b) of Article 5 of the Agreement shall be deleted and replaced by the following:

“(a) Paragraph 1 shall not apply to any additional amount, increase or supplement such as rent assistance which is intended to assist Australian

pensioners with certain additional living costs and which is not payable indefinitely outside Australia. Such amounts shall be payable outside the territory of Australia only to the extent provided by the legislation of Australia.

(b) Paragraph 1 shall not apply to a claimant for a carer payment who has never been an Australian resident.”

(c) In paragraph 7 of Article 5 of the Agreement the words “for more than 26 weeks” shall be replaced by the words “for more than 13 weeks”.

5. After Article 5 of the Agreement the following new Part I A shall be inserted:

“PART I A

Provisions relating to applicable legislation

Article 5a General provisions

1. Subject to Articles 5b to 5e a person who is employed or self-employed in the territory of a Party is subject to the legislation of that Party. In relation to Austria, this shall also apply if the employer’s place of business is in the territory of the other Party.
2. In relation to Australia, a reference in this Part to an employee also includes their employer, in respect of work of the employee or remuneration paid for that work.

ARTICLE 5b Special provisions

1. An employed person who, usually is employed by an employer with an office in the territory of one of the Parties, is posted by this employer to the territory of the other Party to work on its account or for a related entity, shall be subject only to the legislation of the former Party as if the person continued to be employed in the territory of the former Party, on the condition that the person’s work does not exceed five years.
2. For the purposes of paragraph 1 an entity is a related entity of an employer if the entity and the employer are members of the same wholly or majority owned group.

ARTICLE 5c

Members of diplomatic missions and consular posts

This Agreement shall not affect the provisions of the Vienna Convention on Diplomatic Relations of 18 April 1961 or the Vienna Convention on Consular Relations of 24 April 1963.

ARTICLE 5d

Government officials

Government officials and equivalent personnel who are 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. These persons are, for this purpose, considered to be resident in the territory of this Party, even if they are located in the territory of the other Party.

ARTICLE 5e

Exceptions

In the interest of certain persons or certain categories of persons covered by this Part, the competent authorities can, by agreement in writing, specify exceptions to the provisions of Articles 5a to 5d.”

6. In Article 7 of the Agreement the following new paragraph 5a shall be inserted:
“5a The provisions in paragraphs 4 and 5 shall continue to apply for 26 weeks where a person temporarily leaves Australia.”
7. Article 8 of the Agreement shall be deleted.
8. Paragraph 4 of Article 17 of the Agreement shall be deleted.
9. After Article 18 of the Agreement the following new Article 18a shall be inserted:

“Article 18a

Data protection

(1) Insofar as personal data are communicated pursuant to this Agreement and subject to domestic law the following provisions shall apply taking into consideration other binding provisions of the respective Party:

- (a) For the implementation of this Agreement and the legislation referring thereto personal data may be communicated to the competent bodies of the receiving Party. The respective receiving body may not use

these data for other purposes. Onward transmission of personal data within the territory of the receiving Party to other bodies is admissible in conformity with the domestic law of the receiving Party insofar as it serves social security purposes or the purposes of the legislation specified in subparagraph 1(a)(ii) of Article 2 including related court proceedings. Even in the case of disclosure of information in public court proceedings or in judicial decisions confidentiality of personal data shall only be subject to those restrictions which are necessary to safeguard overriding legitimate interests of another person or overriding substantial public interests.

(b) Any personal data communicated in whatsoever form between the two Parties' responsible authorities, institutions and other bodies concerned pursuant to this Agreement or to any arrangement implementing this Agreement are treated as confidential in the same manner as like information obtained under the domestic law of the receiving Party. These obligations shall apply to all persons fulfilling tasks under this Agreement and also to persons bound themselves by the obligation of confidentiality.

(c) In specific cases the receiving body shall give information upon request of the communicating body about both the use of the personal data received and the results which have been achieved through the use of this personal data.

(d) The communicating body shall ensure that the personal data communicated is accurate and up-to-date. Before initiating any communication of personal data the communicating body has to examine whether or not the communication is necessary and proportionate with regard to the purpose of the communication in question. This is to be done with due consideration to prohibitions on communication existing in the relevant domestic law. In the case of communication of inaccurate data or data which was not permitted to have been communicated under the domestic law of the communicating Party the receiving body must be informed thereof without undue delay. The latter shall carry out the necessary deletion or correction of the data immediately. If the receiving body has reason to suppose that communicated data might be inaccurate or should be deleted, this body shall inform the communicating body thereof without undue delay.

(e) Every person concerned, who proves their identity in an appropriate manner, shall, upon request, be provided by the body responsible for the data processing with information about the data relating to them which have been communicated or processed, about their origin as far as possible, the recipients or categories of recipients of communications, the intended purpose of the use of the data as well as the legal basis of the communication of the data in a generally understandable form. The information shall be given without undue delay and, in principle, free of charge. Moreover the person concerned shall have the right to have incomplete or inaccurate data corrected and

unlawfully processed data deleted. Further procedural details relating to the enforcement of these rights are subject to domestic law.

(f) The Parties shall provide every data subject whose rights to information, correction and deletion have been violated with the right to have the matter decided by an independent authority. Furthermore, the Parties shall ensure that any data subject who has suffered damage as a result of an unlawful processing of data is entitled to receive compensation for the damage suffered from the body responsible for the processing in accordance with the respective Party's domestic law.

(g) Personal data communicated shall be deleted, if found to be inaccurate, or unlawfully obtained or communicated, or if lawfully communicated data are to be deleted at a later date pursuant to the domestic law of the communicating Party, or if the data is no longer needed for the purpose for which it was communicated and if there is no reason to suppose that the deletion could affect interests deserving protection of the person concerned in the field of social security or the legislation specified in subparagraph 1(a)(ii) of Article 2 of the Agreement.

(h) Both the communicating body and the receiving body shall be obliged to record the reason, contents and date of any communication or receipt of personal data as well as the communicating and receiving bodies. Data communicated online shall be logged using automated processes. The records and logs shall be stored for at least three years and may only be used for the purpose of monitoring compliance with the applicable provisions on data protection.

(i) Both the communicating body and the receiving body shall be obliged to effectively protect communicated personal data against accidental or unauthorised destruction, accidental loss, unauthorised access, unauthorised or accidental modification and unauthorised disclosure.

(2) The provisions of paragraph (1) of this Article shall apply accordingly to trade and business secrets.”

10. In Article 19 of the Agreement a new paragraph 3 shall be inserted:

“3. Paragraph 2 does not apply in relation to the application of Part 1 A of this Agreement.”

Article IV

1. Unless otherwise provided in this Article, this Protocol shall enter into force on the first day of the third month following the month in which the last of the notes are exchanged by the Parties through the diplomatic channel notifying each other that all matters as are necessary to give effect to this Protocol have been finalised.

2. Notwithstanding subparagraph 1(a)(i) of Article 2 of the Agreement as amended by this Protocol, the Agreement as amended by the First Protocol shall continue to apply to persons in receipt of Australian wife pension as at the date of entry into force of this Protocol.

3. Part 1 A of this Protocol shall also apply to employees who were sent before the date of entry into force of this Protocol. In the case of such persons who have been working in the territory of a Party prior to the entry into force of this Protocol, the period referred to shall be considered to begin on the date of entry into force of this Protocol.

4. Subject to paragraph 5, this Protocol shall remain in force until the expiration of twelve months from the date on which either Party receives through the diplomatic channel a written notice of termination of this Protocol from the other Party, or the Protocol shall terminate on the date the Agreement on Social Security between Australia and Austria terminates, whichever is the earlier.

5. In the event that this Protocol is terminated, but the Agreement is not terminated, only Part 1A of the Agreement (and other parts of the Agreement as they affect the application of that Part) shall terminate, but this Protocol shall continue to have effect in relation to all persons who, immediately before the date of termination, are subject only to the legislation of one Party by virtue of Part I A of the Agreement as inserted by this Protocol, provided that the person concerned continues to satisfy the criteria of that Part.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

DONE in two copies at Vienna on 17 February 2010 in the English and German languages, each text being equally authoritative.

For Australia:

Stephen Smith

Minister for Foreign Affairs

For the Republic of Austria:

Rudolph Hundstorfer

Federal Minister for Labour,
Social Affairs and Consumer
Protection