

**AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND  
THE GOVERNMENT OF THE HONG KONG SPECIAL  
ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA  
CONCERNING TRANSFER OF SENTENCED PERSONS,  
DONE AT HONG KONG ON 25 NOVEMBER 2005**

**Documents tabled on 29 November 2005:**

**National Interest Analysis [2005] ATNIA 19**

**with attachment on consultation**

**Text of the proposed treaty action**

**Background information:**

**Hong Kong political brief and fact sheet**

**List of other treaties with Hong Kong**

**List of treaties of the same type with other countries**

# NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

## SUMMARY PAGE

### **Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning transfer of sentenced persons, done at Hong Kong on 25 November 2005**

#### **Nature and timing of proposed treaty action**

1. As approved by the Executive Council on 18 August 2005, Australia proposes to enter into a bilateral treaty-level agreement, entitled *Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning transfer of sentenced persons* (the Agreement).
2. The Agreement was signed on 25 November 2005 at Hong Kong.
3. Article 16 of the Agreement provides that the Agreement will enter into force 30 days after an exchange of notes by which each party notifies the other that its domestic requirements for the Agreement's entry into force have been complied with. Australia's domestic requirements include tabling in both Houses of Parliament for 15 sitting days, consideration by the Joint Standing Committee on Treaties (JSCOT) and the making of Regulations under the *International Transfer of Prisoners Act 1997* to implement the Agreement in Australia.

#### **Overview and national interest summary**

4. The Agreement enables both Governments to exchange information about a prisoner's sentence, determine a prisoner's eligibility for transfer and agree upon appropriate terms of sentence enforcement following a prisoner's transfer.
5. Prisoners are called 'sentenced persons' in the Agreement (Article 1(c)). Those prisoners who are Australian citizens or persons otherwise permitted by Australian law to enter and remain indefinitely in Australia, provided they have community ties to Australia (Australians), are eligible to apply for transfer from Hong Kong to Australia (Article 4(c)). Those prisoners who are a permanent resident of Hong Kong or other person with 'close ties' to Hong Kong (Hong Kong nationals) are eligible to apply for transfer from Australia to Hong Kong (Article 4(b)).
6. Repatriating Australians incarcerated in Hong Kong has a number of benefits for Australia. It will:
  - relieve the hardship and burden on the relatives of the prisoner,
  - facilitate the prospects of that prisoner's rehabilitation, and
  - reduce the burden on Australian consular officials in Hong Kong.
7. Transferring Hong Kong nationals from Australia to Hong Kong also benefits Australia, because Australia will no longer have to pay the ongoing costs of those prisoners' incarceration.

## **Reasons for Australia to take the proposed treaty action**

8. The operation of Australia's domestic legislation and international arrangements entered into by Australia is called the international transfer of prisoners (ITP) scheme. Australia already has a legislative framework—described in paragraphs 22 to 26—in place for its participation in international prisoner transfers. Further, Australia has concluded a bilateral agreement with Thailand for the transfer of prisoners [2002] ATS 22 and is a Party to the Council of Europe *Convention on the Transfer of Sentenced Persons* [2003] ATS 6 (Council of Europe Convention). This latter agreement facilitates the transfer of prisoners between Australia and 56 other countries.
9. Hong Kong is not a party to any multilateral convention relating to the transfer of prisoners and we are not aware that it intends to become a party to any such convention in the near future. Accordingly, the negotiation of a bilateral agreement with Hong Kong is required in order to provide a basis on which Australia may engage in prisoner transfers with Hong Kong.
10. Over the past year there has been growing public pressure for Australia to capitalise on its well established ITP scheme by concluding bilateral ITP agreements with more of its regional neighbours. This pressure has come from a wide range of individuals and groups, including parliamentarians, media commentators, senior academics, human rights organisations, prisoner support groups, friends and families of prisoners, and prisoners themselves. In addition, Australia has also been approached by a number of countries about the possibility of Australian involvement in prisoner transfers. The negotiation of an ITP treaty with Hong Kong has been a particular priority. Hong Kong has a relatively high number of Australian nationals in its prisons (at 30 June 2005, the Department of Foreign Affairs and Trade (DFAT) reported five Australians sentenced to imprisonment in Hong Kong, another four who are in gaol awaiting trial or sentence and a further nine who have been arrested and are currently on bail).
11. It is difficult to estimate precisely the exact number of prisoners likely to enjoy the benefit of the Agreement after it enters into force, as this will depend on the number of Australians sentenced in Hong Kong from time to time and sentenced persons' personal interest in a transfer. An overall reduction in the number of Australians incarcerated in Hong Kong is likely. This would reduce the resource burdens placed on Australia's consular staff at the Consulate-General in Hong Kong, thereby providing significant financial savings. DFAT consular staff visit Australian prisoners on a regular basis and provide a range of resource intensive consular services.
12. From an international perspective there are also good reasons to expand Australia's ITP scheme. ITP is forming an increasingly important part of international cooperation in the administration of criminal justice. ITP treaties are a useful complementary tool to extradition treaties, as they enable Australians to be extradited overseas to face prosecution and sentencing, before being repatriated to serve the foreign sentence in an Australian gaol.
13. Most developed countries already participate in ITP schemes and have done so for some time. These countries include the United Kingdom, the United States of America, Canada and most European countries. The number of participating countries is continually increasing.
14. The Council of Europe Convention has been used to effectively implement the ITP scheme between Australia and Spain (five prisoners transferred), the Netherlands (five prisoners transferred), the United Kingdom (four prisoners transferred) and Israel (one prisoner transferred). Australia's ITP treaty with Thailand has already been used to repatriate three Australians. At 30 June 2005, Australia was processing an additional 79 applications for transfer out of Australia and 23 applications for transfer to Australia. These applications were made under both the Council of Europe Convention and Australia's ITP agreement with Thailand.

15. It is Australia's experience that the effectiveness of the ITP scheme is rapidly improving as an increasing number of countries become parties to the Council of Europe Convention and gain familiarity with the ITP scheme. Those countries who would not consider becoming parties to the Council of Europe Convention are expressing greater interest in bilateral ITP agreements.

16. Participation in ITP reflects the humanitarian, rehabilitative and social objectives of prisoner transfers while ensuring, so far as possible, that the original custodial sentence of a transferred prisoner is carried out. The rehabilitative benefits of transfer for Australian prisoners may include family support, access to rehabilitation, education, training and employment programs, work release, parole supervision, offender registration and supervision. Due to the risk of foreign prisoners fleeing the country, the general immigration policy applying to foreign prisoners is that conditional release—for example work release and parole supervision—is not available to non-citizens in prisons in Australia. They are further restricted from participating in rehabilitation programs where their English is considered insufficient to effectively comprehend and participate in a program. Transfer, importantly, enables prisoners to be considered for parole or other available gradual release or supervised release schemes available in their home country.

17. Since 1998, Hong Kong has concluded bilateral ITP treaties with seven other countries. As of 28 July 2005, Hong Kong had transferred a total of eight foreign prisoners out of Hong Kong; seven to the United Kingdom and one to Nigeria, under a one-off ad hoc arrangement. Four prisoners have been repatriated to Hong Kong, three from Thailand and one from the United States.

18. The Agreement provides for Australia to exercise considerable flexibility in considering prisoner transfers. The scope that this flexibility affords is in Australia's interests. Either Australia or Hong Kong could request a transfer of a prisoner under the Agreement (Article 5(2)(b)). Although an Australian prisoner in Hong Kong cannot directly request a transfer to Australia, he or she may express a desire to either Hong Kong or Australia to be transferred to Australia (Article 5(2)(a)). Prisoners would only be transferred if they, the Australian Government and the Hong Kong Government all gave informed consent to the transfer. Prisoners would need to satisfy several criteria to be eligible for transfer (Article 4). These conditions include that the prisoner's sentence is final and not subject to any appeal, that the prisoner has a right to reside in the receiving jurisdiction and that the prisoner has at least one year of their sentence remaining to be served at the time of the request to transfer. This final requirement may be waived by the agreement of Hong Kong and Australia (Article 4(d)(iii)).

## **Obligations**

19. The primary obligation imposed upon Australia under the proposed Agreement is to facilitate, in accordance with the Agreement, applications requesting the transfer of Australian prisoners to Australia and Hong Kong nationals serving prison sentences in Australia to Hong Kong.

20. Australia would be obliged to endeavour to inform prisoners of the substance of the Agreement (Article 5(1)), and to make requests on behalf of prisoners who have expressed a wish to be transferred (Article 5(2)). Australia would also be obliged to inform prisoners wanting to be transferred to Australia of any costs associated with the transfer, and that Australia may seek to recover these costs (Article 4(i)). Where a request is made for the transfer of a prisoner, being a Hong Kong national, to Hong Kong, Australia would be obliged to ensure that the Hong Kong national consents to the transfer voluntarily and with full knowledge of the legal consequences (Article 6(1)). In such circumstances, Australia would also be obliged to afford an opportunity, prior to the transfer, to Hong Kong to verify that the Hong Kong national has provided informed consent to the transfer (Article 6(2)).

21. Australia would be obliged to provide specified information to Hong Kong, upon request, before making a request for transfer of a prisoner to Hong Kong or taking a decision on whether or not to agree to the transfer of an Australian prisoner from Hong Kong (Article 5(5)). Where a request for transfer is made, either to or from Hong Kong, Australia would be obliged to provide specified information to Hong Kong to facilitate the transfer (Article 5(3) and (4)). Where Australia accepts a transferred prisoner from Hong Kong, it would also be obliged to provide information to Hong Kong concerning the enforcement of the sentence in Australia (Article 9). Australia would also be obliged to cooperate in facilitating the transit of prisoners to or from third States through its territory (Article 10).

22. Whilst Australia, where it receives an Australian prisoner transferred from Hong Kong, would be obliged to enforce the sentence as if it had been imposed in Australia, the sentence could not be made more severe than the sentence originally imposed by Hong Kong. Australia would also be obliged to modify or terminate the sentence as soon as it is informed of any decision by Hong Kong following the review, revision, modification or cancellation of the sentence or a decision by Hong Kong to grant pardon, amnesty or commutation of the sentence (Article 8(6)).

### **Implementation**

23. The legislative basis for Australia's participation in ITP is well established, having been developed through extensive consultation and co-operation with State and Territory authorities.

24. Regulations will be required under section 8 of the *International Transfer of Prisoners Act 1997* (the ITP Act) to enable Australia to give effect to obligations under the Agreement. This would then allow Australia to notify Hong Kong in writing that its domestic requirements have been fulfilled, with a view to bringing the treaty into force (Article 16). The ITP Act provides the legislative framework for Australia's participation in ITP. The ITP Act provisions can be enabled by either multilateral treaties, bilateral treaties or a less than treaty status arrangement. The ITP scheme has been in operation in Australia since September 2002.

25. On 23 March 2004, amendments to Australia's ITP Act came into operation. The legislative amendments allow semi-autonomous regions, such as Hong Kong, to be declared a transfer country with which Australia can enter into an agreement for the transfer of prisoners.

26. Many prisoners to be transferred out of Australia will have been sentenced for State and or Territory offences, and as only the States and the Northern Territory presently have prisons, all States and Territories have passed complementary legislation to participate in the ITP scheme. All States and Territories currently assist the Australian Government in actively progressing applications for ITP between their State or Territory and a number of countries.

27. The Australian Government has also concluded Administrative Arrangements to facilitate ITP with all Australian States and Territories except for South Australia. A draft arrangement is being considered by South Australia. The Arrangements set out the administrative protocols and arrangements for the transfer out of foreign prisoners who are held in gaol as either State or Federal offenders, and the transfer in (as federal prisoners) of Australians who were imprisoned overseas. The Australian Government has been liaising with South Australia to finalise the last outstanding Administrative Arrangement.

## **Costs**

28. Each prisoner transferred from Australia to Hong Kong will represent a cost saving of over A\$50,000 (the approximate annual cost of maintaining a person in prison in Australia) for each year the prisoner would otherwise have spent in a prison in an Australian State or Territory.

29. In light of Article 12(1)) of the Agreement, in relation to incoming prisoners, it has been agreed between the Commonwealth, the States and the Territories that:

- the Commonwealth will meet all general administrative costs involved in the processing of transfers, and
- the Government of the State or Territory to which a prisoner wishes to return will be responsible for meeting the costs of transporting the prisoner to Australia from the international point of departure, and for maintaining the prisoner in prison in Australia, and
- if the State or Territory Minister considers that an incoming prisoner is in a position to pay the costs associated with their transfer to Australia, they may seek reimbursement by the prisoner of such costs as a condition of the transfer.

30. The details of these domestic arrangements do not form part of the Agreement.

31. In relation to outgoing prisoners, it has been agreed with States and Territories that the costs of moving a prisoner within Australia would be borne by the Government of the State or Territory in which the prisoner is held before transfer. All other costs associated with the transfer, including the costs of transfer incurred from the international point of departure, would be borne by Hong Kong (Article 12(1)).

## **Regulation Impact Statement**

32. The Office of Regulation Review confirms that a Regulation Impact Statement is not required.

## **Future treaty action**

33. The Agreement is silent as to amendment. In the absence of an amendment provision, Article 39 of the Vienna Convention on the Law of Treaties would apply to allow amendment by agreement between the Parties. Any amendment to the Agreement would be effected in accordance with Australia's domestic treaty process requirements, including JSCOT scrutiny.

34. The Agreement does not provide for the negotiation of future legally binding instruments.

## **Withdrawal or denunciation**

35. Either party may terminate the Agreement by written notice at any time. The Agreement will cease to have effect three months from the date upon which notice is received (Article 16). Termination of the Agreement will not affect the sentence enforcement of any prisoners who have already transferred under the Agreement. Any withdrawal from the Agreement by the Australian Government would be affected in accordance with Australia's domestic treaty process requirements, including JSCOT scrutiny.

**Contact details**

Offender Justice and Management Section  
National Law Enforcement Policy Branch  
Criminal Justice Division  
Attorney-General's Department

**Agreement between the Government of Australia and the Government of the  
Hong Kong Special Administrative Region of the People's Republic of China  
concerning transfer of sentenced persons,  
done at Hong Kong on 25 November 2005**

## **CONSULTATION**

1. This proposed treaty action will have an impact on the States and Territories. The impact will be that States and Territories will be required to consider applications for:
  - the transfer of offenders, both incarcerated and on parole, from their States and Territories to Hong Kong, and
  - the transfer of prisoners from Hong Kong to a State or Territory of Australia.
2. The consensual nature of the ITP scheme ensures that States and Territories are involved in any transfers affecting them and that their consent will be sought to the transfer of any prisoner, or prisoner transferring to their jurisdiction from Hong Kong. Article 4(g) and (h) of the proposed agreement specifies that the consent of the relevant State or Territory must be obtained before any such transfer can occur.
3. In the case of outward transfers, federal prisoners may be transferred out of a State or Territory without the approval of that State or Territory. However, each State or Territory will assist in processing transfers of federal offenders, by providing reports on the prisoner's behaviour and progress through the prison system. The Australian Government works closely with States and Territories to process all applications under the ITP scheme.
4. The ITP scheme, since its inception in Australia in 2002, has received broad public support. With a number of high-profile Australians currently imprisoned abroad, the Australian public has become increasingly aware and expectant that ITP agreements can be negotiated to repatriate Australians to Australian gaols.
5. On 22 July 2005, Senator the Hon Christopher Ellison wrote to all State and Territory ministers with portfolio responsibility for implementation of the ITP scheme. Copies of these letters were provided to Standing Committee on Treaties members in each jurisdiction. The consultation letters asked for comments on the proposed treaty action.
6. No responses have been received to date.



## **BACKGROUND INFORMATION**

### **Political Brief on Hong Kong Special Administrative Region of the People's Republic of China**

#### **Political Overview**

1. Since 1 July 1997, Hong Kong has been a Special Administrative Region (SAR) of the People's Republic of China (PRC). The basis for its administration is the 1984 Sino-British Joint Declaration on the Question of Hong Kong (the "Joint Declaration") and the Basic Law of the Hong Kong Special Administrative Region (the "Basic Law"), which was enacted by the PRC's National People's Congress in 1990. These two instruments provide for Hong Kong to have "a high degree of autonomy" for fifty years, except in foreign affairs and defence. This includes largely independent executive, legislative and judicial powers.
2. Hong Kong has some autonomy in foreign affairs. The Basic Law provides for Hong Kong to maintain and develop international relations in a variety of areas, mainly related to the economy. Hong Kong is party to over 200 international agreements and is a member of the World Trade Organization (WTO) and the Asia Pacific Economic Cooperation forum (APEC). Article 13 and Chapter VII of the Hong Kong Basic Law provide the legislative authority for Hong Kong to negotiate, conclude and implement international agreements under the name Hong Kong, China. However, Hong Kong requires, and has obtained in this instance, the permission of the People's Republic of China to enter into and conclude bilateral agreements.
3. Under Hong Kong's "executive-led" system, a form of government substantially inherited from the British colonial administration, the Chief Executive leads the government, assisted by an appointed Executive Council. The Chief Executive is appointed by the PRC Central Government after election by an 800 member Election Committee. The Legislative Council, for which elections are held with a wider but still limited franchise, has the power to enact laws but cannot initiate financial legislation. The Basic Law provides for universal suffrage as an "ultimate aim" but does not specify when it will be implemented.

#### **Economic Overview**

4. Gross Domestic Product grew by 8.1 per cent in real terms in 2004 to US\$161.1 billion, and growth of 4.5 to 5.5 per cent is predicted in 2005. Riding on China's 35 per cent export growth, Hong Kong's merchandise re-exports rose 17.1 per cent, while services exports rose 14.5 per cent, reflecting strong offshore trade and inbound tourism, particularly from mainland China. The strong economic performance ended nearly six years of deflation.

#### **Bilateral Overview**

5. Australia has a close relationship with Hong Kong, based on extensive people-to-people connections and substantial economic links. Approximately 50,000 Australians live in Hong Kong, while about 90,000 people of Hong Kong descent live in Australia. The Australian business community in Hong Kong is well-organised and active. Education and tourism are strengthening these connections: Hong Kong is Australia's third-largest source of students and our tenth-largest source of tourists.
6. Despite its relatively small population of 6.9 million, Hong Kong was Australia's 12<sup>th</sup> largest merchandise export market (A\$2.73 billion) and 7<sup>th</sup> largest services market (A\$1.28 billion) in 2004. Australia had an A\$1.46 billion merchandise trade surplus with Hong Kong, and an A\$386 million services deficit.

7. Australian and Hong Kong Ministers have frequent contact, including in the WTO and APEC. Excellent relations at ministerial level are replicated by close day-to-day cooperation at official level, for instance on multilateral trade and economic issues, law enforcement and aviation.



# HONG KONG

Special Administrative Region  
of The People's Republic of China

Fact Sheet

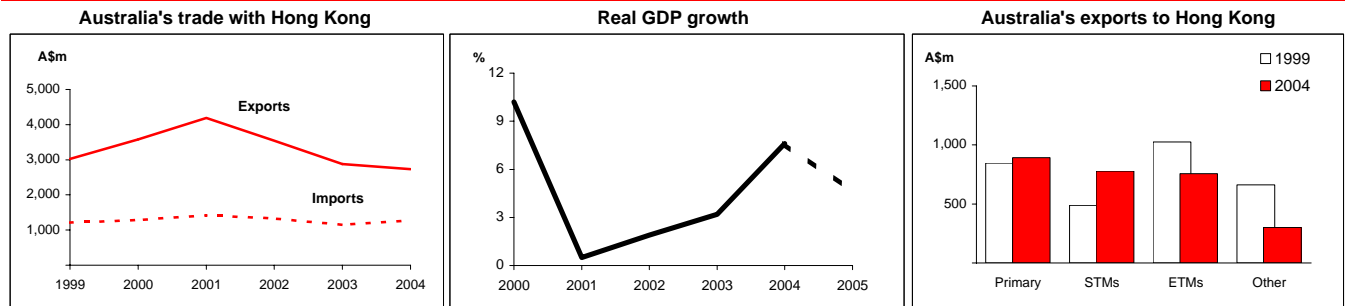
**General information:**

Fact sheets are updated biannually; May and September 2005

<b>Capital:</b>	Hong Kong	<b>Head of State:</b>	H.E. President Mr Hu Jintao
<b>Surface area:</b>	1 thousand sq km		
<b>Official languages:</b>	Chinese, English	<b>Head of Government:</b>	Chief Executive Mr Donald Tsang
<b>Population:</b>	7.0 million (2004)		
<b>Exchange rate:</b>	A\$1 = HK\$6.0895 (Feb 2005)		

**Recent economic indicators:**

	2000	2001	2002	2003	2004(a)	2005(b)
<b>GDP (US\$bn):</b>	165.4	162.8	159.9	156.7	161.1	166.5
<b>GDP per capita (US\$):</b>	24,829	24,238	23,486	22,740	23,085	23,584
<b>Real GDP growth (% change YOY):</b>	10.2	0.5	1.9	3.2	7.6	4.6
<b>Current account balance (US\$m):</b>	7,084	9,941	12,597	16,734	15,440	12,232
<b>Current account balance (% GDP):</b>	4.3	6.1	7.9	10.7	9.6	7.3
<b>Goods &amp; services exports (% GDP):</b>	145.5	140.8	152.1	172.2	193.4	211.2
<b>Inflation (% change YOY):</b>	-3.7	-1.6	-3.0	-2.6	-0.4	0.4
<b>Unemployment rate (%):</b>	5.0	5.1	7.3	7.9	6.7	6.1



**Australia's trade relationship with Hong Kong:**

<b>Major Australian exports, 2004 (A\$m):</b>		<b>Major Australian imports, 2004 (A\$m):</b>	
Crustaceans	299	Computer parts	102
Aluminium	256	Integrated circuits	87
Zinc	181	Telecommunications equipment	77
Pearls and gems	161	Printed matter	61
Medicaments (incl. veterinary)	115	Jewellery	58

Australian merchandise trade with Hong Kong, 2004:		Total share:	Rank:	Growth (yoy):
Exports to Hong Kong (A\$m):	2,732	2.3%	12th	-5.1%
Imports from Hong Kong (A\$m):	1,271	0.9%	22nd	10.7%
Total trade (exports + imports) (A\$m):	4,003	1.5%	16th	-0.6%
Merchandise trade surplus with Hong Kong (A\$m):	1,461			

Australia's trade in services with Hong Kong, 2004:		Total share:
Exports of services to Hong Kong (A\$m):	1,277	3.7%
Imports of services from Hong Kong (A\$m):	1,663	4.7%
Services trade deficit with Hong Kong (A\$m):	386	

**Hong Kong's global merchandise trade relationships:**

<b>Hong Kong's principal export destinations, 2004:</b>		<b>Hong Kong's principal import sources, 2004:</b>	
1 China	43.0%	1 China	41.8%
2 United States	16.5%	2 Japan	12.7%
3 Japan	5.2%	3 Taiwan	7.3%
4 United Kingdom	3.6%	4 South Korea	6.2%
5 South Korea	3.3%	5 United States	4.7%
11 Australia	1.2%	17 Australia	0.7%

Compiled by the Market Information and Analysis Section, DFAT, using the latest data from the ABS, the IMF and various international sources.

(a) all recent data subject to revision; (b) EIU forecast.

## **List of other treaties with Hong Kong**

Agreement between the Government of Australia and the Government of Hong Kong concerning Air Services.

[1993] ATS 28

Agreement with Hong Kong concerning the Promotion and Protection of Investments.

[1993] ATS 30

Agreement for the Surrender of Accused and Convicted Persons with the Government of Hong Kong.

[1997] ATS 11

Agreement between the Government of Australia and the Government of Hong Kong Concerning Mutual Legal Assistance in Criminal Matters.

[1999] ATS 20

**List of treaties of the same type with other countries.**

Agreement with the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences.

[2002] ATS 22

Council of Europe Convention on the Transfer of Sentenced Persons.

[2003] ATS 6