



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON TREATIES

Reference: Treaty tabled on 4 April 2000

MONDAY, 8 MAY 2000

CANBERRA

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JOINT COMMITTEE ON TREATIES

Monday, 8 May 2000

Members: Mr Andrew Thomson (*Chair*), Senator Cooney (*Deputy Chair*), Senators Bartlett, Coonan, Cooney, Ludwig, Mason, Schacht and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Byrne, Mrs Elson, Mr Hardgrave, Mrs De-Anne Kelly and Mr Wilkie

Senators and members in attendance: Senators Bartlett, Cooney, Mason and Tchen and Mr Adams, Mr Baird, Mr Bartlett, Mr Byrne, Hardgrave and Andrew Thomson

Terms of reference for the inquiry:

Review of treaties tabled on 4 April 2000.

WITNESSES

**ARMSTRONG, Ms Zena, Director, West Europe Section, Americas and Europe Division,
Department of Foreign Affairs and Trade.....1**

**HUTCHINSON, Mr Peter Anthony, Director, International Agreements 2, Department of Family
and Community Services.....1**

MARTINI-PIOVANO, Mr Giancarlo, Director, Co.As.It (Italian Assistance Association)1

**MASON, Mr David, Executive Director, Treaties Secretariat, Legal Branch, International
Organisations and Legal Division, Department of Foreign Affairs and Trade1**

**McWILLIAM, Mr John, Assistant Secretary, International Branch, Department of Family and
Community Services.....1**

PAYMAN, Ms Sama, Principal Legal Officer, Attorney General’s Department.....1

**WHALAN, Mr Jeff, Deputy Secretary, Community and Business Strategy, Department of Family
and Community Services.....1**

WOOD, Ms Mary Ruth, Legal Officer, Attorney-General’s Department.....1

Committee met at 10.03 a.m.

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MARTINI-PIOVANO, Mr Giancarlo, Director, Co.As.It (Italian Assistance Association)

CHAIR—I declare the committee meeting open. As part of our review of Australia's international treaty obligations the committee will look at the social security treaty with Italy which was tabled in both houses of parliament on 4 April this year. Before we hear from representatives from the Department of Family and Community Services and a representative from the Italian Assistance Association to give evidence as part of our review of this proposed treaty action, I point out that the camera in front of you, in case you had not noticed it, is from SBS Television. They have asked permission to take some file footage of the committee at work, not specifically about the hearing today. They are interested in the deliberations and the astonishing burdens the committee shoulders as far as parliamentary processes are concerned.

The committee does not require evidence to be given under oath, but the proceedings, having started formally, are legal proceedings of the parliament, so they warrant the same respect as proceedings of the House or the Senate; hence any false or misleading evidence is a very serious matter. Could I ask one of your number, perhaps from the departments represented, to make an opening statement. We will then ask the representative of the Italian Assistance Association to make a statement, and then we will have questions from members.

Mr Whalan—Thank you, Mr Chairman and committee members. I have policy oversight of international issues in the department. The International Branch, for which my colleague Mr McWilliam is responsible, has carriage of Australia's social security agreement program. The treaty action that we are here to discuss today is between Australia and the Republic of Italy and covers a proposal to enter into a new agreement on social security to replace the current agreement which was signed in 1986.

As you will note from the national interest analysis, the proposed agreement was signed in September 1993. It was passed by the Australian parliament in 1994 but, unfortunately, it has not been implemented yet because of delays in Italy's parliamentary processes. There are two treaty actions being proposed. The first is the lodgment of Australia's instrument of ratification to bring the 1993 agreement into force, and the second is an exchange of notes which will amend and clarify the 1993 agreement.

As I have mentioned, Australia already has a social security agreement with Italy. This agreement is working well and provides benefits for more than 41,000 former Italian residents in Australia, and over 15,000 former Australian residents now in Italy. The agreement with Italy is Australia's largest shared responsibility agreement. The other agreements of this type are with Canada, Spain, Malta, the Netherlands, Ireland, Portugal, Austria and Cyprus.

Under the current agreement, Italy pays about \$166 million per annum into Australia while Australia pays about \$48 million per annum into Italy. Consistent with the current agreement with Italy and Australia's other shared responsibility agreements, this proposed agreement with Italy will allow people to lodge claims from the other country, help people meet minimum qualifying requirements for benefits, overcome time limitations on portability of payments if people live in either country, apply a special income testing regime for Australia, and provide avenues for mutual administrative assistance to help the determination of correct entitlements.

What are the major changes in this agreement? This agreement is substantially the same as the previous agreement. The changes, though, are, first of all, that the disability support pension is limited to severely disabled people. People assessed as having no capacity to work, or no prospects of rehabilitation within the next two years, are considered to be disabled, and that is consistent with the tightening of eligibility that happened more than a decade ago in Australia. Secondly, spouse carer payments are extended to partners of either sex. Thirdly, the income test concession on Italian contributory pensions is extended to people who receive their pension without the help of the agreement, and to income received by non-pensioner partners. Fourthly, the portability provisions are aligned with domestic law. Lastly, payments to a small number of widows will be restored.

The second part of the consideration today is the amending note. In 1997 officials met to discuss changes required to the unratified 1993 agreement. The text of a note containing these changes has been agreed with Italy and has been tabled with the NIA. Briefly, the note will update some terminology and clarify the operation of the income-testing provisions. In terms of consultation, the Italian community in Australia, through the Patronati, has been kept informed about the progress with implementation of this agreement which, as I mentioned, was signed in 1993. In December 1999 the text of the new agreement and an information paper was sent to Patronati representatives throughout Australia, a range of other community organisations, and state and territory governments. Comments on the new agreement were invited, and they have been included in the national interest analysis which has been provided to you.

In conclusion, Mr Chairman, the government considers that the new agreement with Italy will continue to bring benefits to individuals and to Australia, as the current agreement does. The new agreement contains all the major features of the current agreement and, when implemented, will bring into effect long overdue changes. Subject to the views of the committee, and the

timely completion of the necessary actions of both countries, the Department of Family and Community Services and Centrelink aim to implement the agreement from 1 October 2000. I note that date—1 October 2000—is different from the date in the national interest analysis, which was 1 August, and that is due to some processes taking longer than we had expected.

Mr Martini-Piovano—Mr Chairman, social security agreements are a vital, essential part of Australia's commitment to safeguard welfare rights, maintain credible access to payments, and assert the international standard in terms of social security protection. Social security agreements are an essential element of a new global environment and are central to Australian foreign policy commitment. We believe that a social security agreement with Italy has proven to be a successful social and political link with Italy and Europe. International agreements have established a mature relationship with Italy, reinforcing the area of bilateral and multilateral cooperation between Australia, Italy and Europe.

The current social security agreement has made it possible for clients who had limited Italian contribution or limited Australian residence to obtain a proportional pension by virtue of a totalisation mechanism. The main focus of the agreement was to grant a proportional pension payment to persons who otherwise would not have had social security protection.

Pension payments from Italy are subject to Centrelink's income test, although some exclusions apply, and therefore reduces Australian pension payments. It also takes in article 18 of the reciprocal fiscal agreement between Italy and Australia, which represents a further incentive for Australia. INPS is currently paying more than 50,000 pensions to Australia. Some are autonomous and therefore they are not part of the agreement between Italy and Australia. The estimate varies. I have heard \$160 million mentioned; our estimate is that it is about \$200 million.

Under the current agreement it is no longer necessary to return to Australia in order to claim an Australian pension. Australian residents can claim an Italian pension from Patronati or Centrelink offices. The Australian pension is subject to the limitation of the proportional portability legislation of 25 years minimum residence, which reduces the payment. The international office has proved to be a key element in the agreement's success. The constant attention to customer relations, the liaison with INPS offices in Italy and the Italian Patronati in Australia has made it possible for the agreement to have a positive impact on Australian society.

The revised social security agreement contains important changes and the Italian-Australian community have been supporting ratification of its implementation. Since the negotiations took place in 1993, we are aware of the need to take into consideration changes in the domestic legislation that may have an impact on the international agreement, and therefore support the principle of an exchange of notes. The revised agreement should be implemented as soon as possible. Every effort should be made in order to accelerate the process of exchange of notes, particularly when the notes are only minor technical amendments.

The new aspect of this revised agreement is that the pension for B widows would be reinstated with arrears. Some of the benefits which the Italian government pays, especially family allowances, are not taken into consideration by a means test. So it is not a major change. Therefore, particularly when the notes are of a minor technical nature, they have not been

addressed in legislative changes that have taken place in both countries since 1993. We believe the information contained in the national interest analysis is accurate in terms of minor additional costs to Australia which are a consequence of the revised agreement. That does not indicate the additional increase which the Italian parliament estimates to be in the order of \$3 million per year on the part of the Italian government.

I would like to mention something that also concerns the Italian community. I would like to refer to the net gain that we made as a result of the social security agreement between Italy and Australia. Since the implementation in 1998, this has been in the order of up to \$100 million, \$150 million or \$200 million a year. Furthermore, the Italian government has contributed approximately \$2 million per year to the Patronati to provide assistance to Italian pensioners, thus reducing the pressure on social security offices. The Australian government has also received a direct benefit through the reduction of Australian pensions as a result of the means test and an increase in personal tax payments. I believe this amount is in the order of between \$10 million and \$20 million a year.

I know that it is not part of this committee's role, but we would like to see some of this money directed to the Italian community, especially when considering our increasingly ageing population. For instance, in Victoria, there are over 30,000 Italian migrants over the age of 65 and 50,000 over the age of 60. In terms of the services provided by this government and the previous government, it is very limited. There are 110 community care packages which are specifically allocated to the Italian community, five day-care centre facilities, 40 linkage services under HACC for 40 clients, and 90 nursing home beds. I hope this committee acknowledges the positive result, especially financially, of the agreement, and also acknowledges the need for specific services for our community.

Mr BAIRD—I am interested that we have the cost to Italy, for instance, which was previously \$229 million a year, while Australia is paying \$71 million a year. In terms of the net cost to Australia, what do we see that being as a result of these changes?

Mr McWilliam—The net cost of the changes is shown at page 11 of the national interest analysis, which shows the financial implications. Those are the incremental costs. In the first year the total expenditure is about \$2½ million and then it is between \$300,000 and \$400,000 in the ensuing years.

Mr BAIRD—What was the impetus for the changes? Was it requested by the Italian government or was it our assessment of the changes that were necessary?

Mr McWilliam—There were two reasons. Firstly, a lot of our agreements do need updating from time to time. They become a bit outdated. Also, there were some changes particularly in relation to Australia wanting to restrict the agreement to people with severe disabilities because of the changes that had occurred in domestic legislation.

Mr BAIRD—Is this in line with agreements we have with other countries?

Mr McWilliam—Yes. We have made similar changes to our agreements with other countries and are negotiating similar changes where they still exist with other countries.

Mr BAIRD—Is there something unique in this that is different, for example, from our relationship with the UK?

Mr McWilliam—There are very different agreements with the UK and Italy. With Italy, we have a shared responsibility agreement. With the UK, it is a quite different agreement.

Mr Whalan—It is probably better to say that the UK is the odd one out and there is nothing unusual in this agreement with respect to the general class of agreements.

Mr HARDGRAVE—Chairman, I am still reflecting on earlier efforts by this department before the committee, and this is about 100,000 miles in front of where you were at one time previously. I give a bouquet for the consultation procedures and also for the explanation of a complex series of arrangements. Thank you very much for the clarity of that. What has actually changed since 1992 when domestic legislation trashed the widow B for these Italian recipients? We are changing, through this agreement, that set of circumstances for those people. I have no argument with that. I just want to know why, in 1992, domestic legislation made it difficult for them to have access to what we are now giving them—and backdating it, paying arrears. What has actually changed? Is it a change of heart or is it because this agreement has been six or seven years coming?

Mr Hutchinson—I cannot speak from personal experience, not having been involved with negotiations back in 1992, but I understand the Italian government insisted on the payments to widows being included in the scheme and as a condition of finalising this agreement.

Mr HARDGRAVE—That was the Italian government's initiative as a reaction to the decision taken by the then government in 1992 to end that?

Mr Hutchinson—Yes.

Mr HARDGRAVE—Okay, it was a restoration of their rights. Backdating it, though?

Mr Hutchinson—And backdating payments to the date that they were last paid.

Mr HARDGRAVE—Do you know whether that is the first time that has been done?

Mr Hutchinson—It is certainly the first time in an agreement context that I can think of that it has been done.

Mr HARDGRAVE—So we are actually paying seven years of widow B pension to people in a lump sum at some stage?

Mr Hutchinson—That is correct.

Mr HARDGRAVE—How many people are going to benefit from that?

Mr Hutchinson—We are not sure of the exact number but our records indicate that there were 97 widow pensioners cancelled. Centrelink International Services in Hobart will be working with the Italian government. They have agreed to assist Centrelink in this process. We will be following up with those widows individually and assessing their circumstances over the last seven or eight years—

Mr Whalan—Our best estimate is between 70 and 80.

Mr HARDGRAVE—So what happens then to, say, the estates of those 20, 30 who may not be with us any more? In other words, do we look at some sort of pro rata arrangements to the estates because there has been a disenfranchisement of their circumstance as a result of domestic legislation, and now this treaty is backdating payments to some but not to others because they have died?

Mr Hutchinson—Yes, at this stage we are not envisaging paying to the estates of deceased widows on the basis of an agreement with the Italian government. Our social security system is a needs based system and therefore we agreed to restore these widows on the basis that they were in need. Of course, the delay has been unfortunate but that has been outside our control.

Mr HARDGRAVE—There may well have been a widow, one of those 97 from 1992, who arguably could have been in need until last week when she passed away. If you want to look at it from a total justice point of view, I suspect there is a reasonable argument that someone may care to try on down the track. Have you anticipated that?

Mr Hutchinson—Yes, we have. We will have to clarify that and we will probably need to seek further legal advice on the position under the agreement.

Mr HARDGRAVE—It is not the forum, necessarily, but I would say there is a moral concern about not paying for someone whose circumstances were changed by legislation but which is now being repaired by this agreement, just because they died. I am just saying there is a moral obligation to someone's estate or circumstance, if nothing else—a token circumstance, anyway.

CHAIR—You have checked with Victoria. Have you checked with the Italian community in the rest of Australia when you say that the treaty is suitable?

Mr Martini-Piovano—In Australia we have a working party formed by all the Patronatis and also Co.As.It. Therefore, we have regular meetings. As I said before, at one stage the Australian government—and I am talking about the early eighties—did not want to hear about the agreement. It was something that the Italian community wanted for protection, especially for the people who went back to Italy. The working party had many meetings in the past—not now, because the system is running smoothly—with Social Security, especially with the international branch in Hobart, on a regular basis, and also was an observer at the negotiations between Italy and Australia. Therefore, the Italian community is supporting the social security agreement. I think there has been some quite reasonable benefit out of this.

Senator COONEY—And the community thinks that the changes are an advantage?

Mr Martini-Piovano—Minor changes were mentioned with respect to disability pensions, because there has been a change here and also a change in Italy, so that has to be adjusted. The question of the widow pension B was something that was more of a moral issue, because we are talking about fewer than 100 widows. The Australian government decided in 1992 to scrap that payment. There is a question of the so-called family supplement which at one stage was considered part of the means test, but now it is not any more. The supplement is a sort of benefit which the Italian government gives in terms of supporting the family. But, in any case, that does not influence the means test. In actual fact, at the end of the year, you have to take into consideration what sort of taxes you pay. That is the reason why I am saying that there is a net benefit on the part of the Australian government in this agreement.

Senator MASON—Mr McWilliam, you mentioned that Canada, Spain, Cyprus, Malta and the Netherlands had similar agreements to this. Mr Baird picked this up in his questioning. Are there any substantial differences between this agreement and the agreements with those nations?

Mr McWilliam—No, they are very similar. There might be minor changes in terms of coverage on the basis of reciprocity but essentially they are similar in character.

Senator MASON—It follows the same template?

Mr McWilliam—Yes, that is right.

Senator MASON—In the national interest analysis, articles 23 and 24 talk about the privacy of information collected for social security purposes. Mr McWilliam, I think I should direct the question to you: are you satisfied that Italian law—and I assume that means perhaps in this context European Union law—sufficiently protects the privacy of Australian citizens in the transmission of information?

Mr McWilliam—Yes. In our experience with the way in which the agreement has operated, we have not had any concerns raised about that, as far as I am aware.

Mr BYRNE—With respect to the disability support pension, what proportion of the overall pension payments that we are making does it actually form? How many people are we paying a disability support pension to?

Mr Hutchinson—We are paying at the moment 476 disability support pensions in Italy. That is out of a total of 15,099 under the agreement.

Mr BYRNE—And how many people are going to be affected by the changes, the tightening up of the disability support pension?

Mr Hutchinson—Because it is applying only to future claimants, all current claimants will retain their qualification; it will not affect many at all. It will affect very small numbers. It is the number of grants each year that it affects.

CHAIR—That brings to a conclusion this morning's evidence on this issue. The committee will adjourn shortly for a private meeting about various other issues, among which is an

interesting question of treaty law. We would not mind a bit of informal guidance on the issue. Would you mind, Mr Mason, Ms Payman and Ms Wood from Attorney-General's and the foreign affairs departments, remaining for a little while. We wanted to ask you a few questions about the role of local governments in Australia versus treaty obligations. For the rest of this morning's witnesses, thank you kindly. Mr Martini-Piovano, thank you kindly for coming.

I do not know whether other members have material in front of them for the private meeting, but the reason why I proposed this ad hoc extension of the public meeting is that we have had an interesting letter from the National Council of Women, pointing out that Australia is a party to a number of conventions regarding the suppression of slave traffic, traffic in women and even the convention on the elimination of discrimination against women, which apparently, in their view, given that we are parties to these agreements, imposes an obligation on Australia to suppress prostitution.

Although there is no Commonwealth legislation implementing this obligation, this letter points out that there are a number of local governments in Australia that have gone ahead and legalised it as a matter of their planning powers. This letter points out that prima facie this offends against these obligations. We know what the case is where a state government of Australia passes legislation which offends against a Commonwealth government obligation under a treaty and the strange position that the Commonwealth is not acting illegally but it is under an obligation to point this out to the state. But it does not have an obligation, legally speaking, to intervene and change the law and override it. What would be the position with a local government? Where do local governments fit into the federal-state thing if they offend against a treaty? If this letter is right, and we go away and figure out whether or not we are a party to these treaties, an article of a treaty may say: 'Any person who, to gratify the passions of others, has hired, even with her consent, a woman or a girl who is a minor for immoral purposes, shall be punished.' Others talk about an obligation to 'suppress prostitution'. If the Commonwealth has an obligation under this treaty to do that and local governments in Australia are doing the opposite, what happens?

Mr Mason—Mr Chairman, I would have thought that, in terms of general principle, it would be as you have characterised the situation where a state does such a thing. It is only the Commonwealth government that is taking responsibility for and obligations under an international treaty, a bilateral treaty. The Commonwealth government is therefore held accountable for implementing the treaty faithfully. But, as you pointed out, with regard to a state, it is not illegal for it to be acting in a certain way. If it says that it believes it is in full concurrence with the terms of the treaty, then there is no mechanism where you can legally challenge its assurance that that is the case.

I do not know the detail of what you have just referred to, but one of the clauses you referred to was where there was a minor involved. I would have thought that all Commonwealth and local government legislation would prohibit prostitution where there is a minor involved. I would imagine in this case that the Commonwealth government would claim that its laws—and by 'its laws' it means not only its own laws but the laws of states and local governments—are consistent with the obligations under the treaty. Indeed, in international treaty law, it has to say that. It has to be able to make that claim in order to be able to ratify the treaty.

CHAIR—Can you clarify that?

Mr Mason—When the Commonwealth government ratifies a treaty as distinct from signing it, or when it signs it, the Commonwealth government is saying that it is politically and morally committed to the terms of the treaty, but not legally. It is not legally committed until it is able to satisfy itself that the domestic laws of Australia and the domestic requirements, such as the committee process, have all been met. In ratifying a treaty, it is therefore saying that those domestic requirements have all been met. Under international law, that is what it is doing. In this instance that you are citing, the Commonwealth government is in effect saying that it believes domestic law is consistent with the terms of the treaty. If that were challenged by other people, then it would endeavour to point out how that was the case, including in the manner that I indicated a moment ago about minors.

Mr HARDGRAVE—Looking at the dates on these things—1951, 1933, 1946, 1950, 1949, and 1965, which is the most recent one of all the treaties mentioned in this lady's letter—probably at that time we did have a suppressed prostitution circumstance. I would have thought things have moved on. No-one has ever referred the liberalisation of laws against these treaties. The Spanish keep quoting the treaty of Utrecht of 1704, which gives them fishing rights over Newfoundland. What is the status of these treaties? Have they been supplanted? Have they been referred to? Have they been relevant or checked? I think there are a tremendously exciting set of possibilities in this letter. But what is the status?

Ms Payman—It needs to be looked at. I cannot answer that question.

Mr HARDGRAVE—I think we need to get a report on that.

Ms Payman—If there is another treaty which is inconsistent with those earlier ones, then it does override it. I really do not have enough information to be able to answer that question.

CHAIR—We should point out to you that we wrote to the Attorney-General regarding a particular treaty a fair while ago. It was about drugs—the International Narcotics Control Board. Do you remember that we wrote a letter with certain legal questions which we wanted the Attorney-General's Department to answer? Sadly, 'No appearance, Your Worship.' We have not had an answer yet. I assume that it could be stuck in the minister's office, which is hard to believe, as it would have gone straight to the department. Could you please chase it up? The Attorney-General's Department is there to answer these legal questions. We will do the same with this, after we have a private meeting, and try to get formal clarification of the role of a local government which has offended against a grave treaty obligation.

Resolved (on motion by **Mr Hardgrave**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 10.41 a.m.

