

# Report 117

Treaties tabled on 9 and 10 February, and 1 March 2011

Agreement between Australia and the Slovak Republic on Social Security

Agreement between the Government of Australia and the Government of the Republic of South Africa concerning the Co-Production of Films

Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia

Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons

Amendments to the Singapore–Australia Free Trade Agreement

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## Membership of the Committee

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Administrative Officers Heidi Luschtinetz

Dorota Cooley  
(to 28 April 2011)

Michaela Whyte  
(from 28 April 2011)



# Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



## List of abbreviations

ASEAN	Association of South East Asian Nations
DFAT	Department of Foreign Affairs and Trade
EAS	East Asia Summit
EU	European Union
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
FTA	Free Trade Agreement
ITP	International Transfer of Prisoners
NIA	National Interest Analysis
PRC	People's Republic of China
RIS	Regulation Impact Statement
SAFTA	Singapore–Australia Free Trade Agreement





## List of recommendations

### **2 Agreement between Australia and the Slovak Republic on Social Security**

#### **Recommendation 1**

The Committee supports the *Agreement between Australia and the Slovak Republic on Social Security* and recommends that binding treaty action be taken.

### **3 Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia**

#### **Recommendation 2**

The Committee supports the *Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia* and recommends binding treaty action be taken.

### **4 Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons**

#### **Recommendation 3**

The Committee supports the *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* and recommends that binding treaty action be taken.

### **5 Amendments to the Singapore–Australia Free Trade Agreement**

#### **Recommendation 4**

The Committee supports the *Amendments to Singapore–Australia Free Trade Agreement* and recommends that binding treaty action be taken.

## 6 Agreement with the Republic of South Africa Concerning the Co-production of Films

### Recommendation 5

The Committee supports the *Agreement with the Republic of South Africa Concerning the Co-Production of Films* and recommends that binding treaty action be taken.

## Introduction

### **Purpose of the report**

- 1.1 This report contains the Joint Standing Committee on Treaties' review of five treaty actions tabled on 9 and 10 February and on 1 March 2011.
- 1.2 These treaty actions are proposed for ratification and are examined in the order of tabling:
  - **Tabled 9 and 10 February 2011**
    - ⇒ *Agreement between Australia and the Slovak Republic on Social Security* (New York, 21 September 2010)
    - ⇒ *Agreement between the Government of Australia and the Government of the Republic of South Africa concerning the Co-Production of Films* (Pretoria, 18 June 2010)
    - ⇒ *Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia* (Hanoi, 23 July 2010)
    - ⇒ *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* (Sydney, 6 September 2007)
  - **Tabled 1 March 2011**
    - ⇒ *Amendments to Singapore–Australia Free Trade Agreement* (Singapore, 27 July 2009)
- 1.3 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.

- 1.4 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not be entailed.
- 1.5 Prior to tabling, major treaty actions are subject to a *National Interest Analysis* (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.
- 1.6 A *Regulation Impact Statement* (RIS), which provides a more detailed analysis of treaties requiring a more substantial review of domestic legislation or which have greater financial impact, may accompany the NIA.
- 1.7 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.
- 1.8 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:  
  
<[www.aph.gov.au/house/committee/jsct](http://www.aph.gov.au/house/committee/jsct)>

## **Conduct of the Committee's review**

- 1.9 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling and in the national press on 9 March 2011. Submissions were invited by 21 March 2011, with extensions available on request.
- 1.10 Invitations were made to all State Premiers, Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.
- 1.11 Submissions received and their authors are listed at Appendix A.
- 1.12 The Committee examined the witnesses on each treaty at public hearings held in Canberra on 25 and 28 February 2011, and on 25 March 2011.

- 1.13 Transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaty's tabling date, being:
- **9 February and 10 February 2011**  
<[www.aph.gov.au/house/committee/jsct/9february2011/hearings.htm](http://www.aph.gov.au/house/committee/jsct/9february2011/hearings.htm)>
  - **1 March 2011**  
<[www.aph.gov.au/house/committee/jsct/1march2011/hearings.htm](http://www.aph.gov.au/house/committee/jsct/1march2011/hearings.htm)>
- 1.14 A list of witnesses who appeared at the public hearings is at Appendix B.



# Agreement between Australia and the Slovak Republic on Social Security

## Introduction

- 2.1 The proposed *Agreement between Australia and the Slovak Republic on Social Security* (Agreement with the Slovak Republic) will allow for payment of social security entitlements accrued by individuals who have migrated between the party nations.<sup>1</sup>
- 2.2 Social security bilateral agreements generally aim to close gaps in social security coverage for such people. These gaps may arise because of domestic eligibility obligations, such as legal requirements for citizenship, minimum contributions, past residence history or current country of residence.<sup>2</sup> At present Australia has 24 similar agreements in place.<sup>3</sup>
- 2.3 The proposed Agreement with the Slovak Republic incorporates substantially the same principles as those in existing shared responsibility social security agreements held by Australia.<sup>4</sup>

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1 *National Interest Analysis* (NIA) [2011] ATNIA 1, Agreement between Australia and the Slovak Republic on Social Security, done at New York on 21 September 2010 [2010] ATNIF 42, paras 3 and 7.

2 NIA, para. 3.

3 Mrs Michalina Stawyskyj, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, p. 14.

4 Mrs Stawyskyj, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, p. 12.

- 2.4 Under the Agreement, residents of Australia and the Slovak Republic will be able to move between both countries with the knowledge that their rights to benefits are recognised in both countries. The Agreement will streamline the trans-national assessment processes, facilitate portability of pensions and accrued benefits, and provide greater choice to recipients in retirement.<sup>5</sup>
- 2.5 This Agreement covers the Australian and Slovak age pensions, and Slovak invalidity and survivors benefits. It also contains provisions to avoid 'double coverage' (exemptions for superannuation and pension requirements) for employees seconded for work in the other country.<sup>6</sup>
- 2.6 The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) estimates that the proposed Agreement with the Slovak Republic will provide substantial increases in foreign income to Australia. Specifically, this is because of the disparity between Slovak and Australian residency numbers and corresponding pension entitlements:

We are expecting around 520 Australian residents to claim a Slovakian pension and around 60 Slovak residents to claim an Australian pension, a total of about \$80,000 a year compared to a total of \$1.1 million for people claiming a Slovak Republic pension.<sup>7</sup>

## Benefits of the Agreement

- 2.7 Australia's social security laws stipulate that all claimants of pensions must take reasonable action to claim any foreign pension entitlement they may have.<sup>8</sup>
- 2.8 The proposed Agreement would establish a formal arrangement whereby such claims can be registered and overseen by Centrelink through its international branch in Hobart:

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5 NIA, paras 4–6.

6 Mrs Stawyskyj, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, p. 12, and see NIA para. 5.

7 Mrs Stawyskyj, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, p. 12, and see NIA, para. 10.

8 Mr Hutchinson, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, p. 12.



The claims, which might come from all over Australia, are sent through to Hobart and they are processed there and then forwarded to their counterparts in Slovakia. The usual arrangement is that the Slovakian authorities will notify both the individual concerned of the grant or rejection of the pension and also Centrelink.<sup>9</sup>

- 2.9 Department representatives estimated that Centrelink will be able to identify and assist roughly half of the 1 000 Slovakian-born people living in Australia and receiving the aged pension to access a Slovak pension. At present there are only 34 people able to obtain these entitlements.<sup>10</sup>
- 2.10 The agreement framework also contains dispute resolution provisions and those for termination of the Agreement if disputes are not resolved.<sup>11</sup>
- 2.11 The Committee was informed that Centrelink International has well tested procedures in place to address problems, for example, if payments are not made. These include specialised language services, with liaison for these processes formalised under a signed agreement between the Parties appended to the formal document.<sup>12</sup>
- 2.12 For those individuals moving between the party nations for employment, the Agreement's 'double coverage' provisions will ensure that pensions and superannuation contributions are not required under both systems at the same time:
- In the Australian context, the Agreement will exempt employers and/or employees from making compulsory social security contributions in the Slovak Republic if superannuation guarantee contributions continue to be made in Australia. Similarly, Slovak employers will be exempt from making superannuation guarantee contributions for employees sent to work temporarily in Australia provided contributions continue to be made in the Slovak Republic.<sup>13</sup>
- 2.13 In addition to maximising the income accessible to individuals on retirement, these 'double coverage' exemptions may also be expected to provide benefits to the Australian economy, supporting the development

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9 Mr Hutchinson, *Committee Hansard*, Canberra, 25 February 2011, pp. 12-13.

10 Mr Hutchinson, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, p. 12.

11 Dispute Resolution Articles 24 and 25, Termination at Article 28.

12 Mrs Stawyskyj, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, pp. 13-15.

13 NIA, para. 5.

of business links between the two countries and removing unnecessary costs.<sup>14</sup>

- 2.14 The Committee notes that the Slovak Republic is one of the best performing economies in the European Union, but that Australia's trade engagement with Slovakia is largely undeveloped at this stage.<sup>15</sup>

## Obligations

- 2.15 The general obligations of the Parties are in Part I (Articles 1 to 5) of the Agreement, which requires equal treatment of all eligible persons (Article 4) and removes restrictions based on residence in the other country (Article 5).
- 2.16 The Agreement creates obligations for Australia in relation to:
- social security law as it applies to or affects the age pension; and
  - the law concerning the superannuation guarantee.<sup>16</sup>
- 2.17 For the Slovak Republic it covers legislation regarding:
- age pensions;
  - invalidity pensions; and
  - pensions for widows, widowers and orphans.<sup>17</sup>
- 2.18 Part II of the Agreement (Articles 6 to 10) addresses 'double coverage' of exemptions for employers and employees. Article 8 specifies that only the legislation of the home country, with respect to compulsory pension or superannuation contributions, should apply where an employee is temporarily seconded to work in the other country.
- 2.19 Under Part III, key provisions establish the entitlements of split and former residents of the Slovak Republic to benefits payable by Australia, so that:
- Australia must regard residents of the Slovak Republic as Australian residents, and Australian residents temporarily in the Slovak Republic
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14 NIA, para. 6.

15 Department of Foreign Affairs and Trade, *Slovak Republic Country Brief*, pp. 1, 2.

16 Article 1 (a) (i); &(ii) covering the *Superannuation Guarantee (Administration) Act 1992*, the *Superannuation Guarantee Charge Act 1992* and the *Superannuation Guarantee (Administration) Regulations*.

17 Article 1 (b) (i), (ii), (iii) respectively.

as present in Australia, for the purpose of claiming the Australian age pension (Article 11); and

- ‘creditable periods’ in the Slovak Republic (periods for which contributions were paid and periods related to those contributions) are to be regarded as periods of residence in Australia, so as to meet the ten year qualifying period for the Australian age pension (Article 12).<sup>18</sup>

2.20 Article 13 specifies that benefits shall be paid in accordance with Australian legislation, after a qualifying period of 26 weeks. Part payment shall be made on the pension as calculated by:

...deducting the amount of the Slovak Republic benefit which that person is entitled to receive from the maximum rate of that Australian benefit.<sup>19</sup>

2.21 Part III Chapter 2 covers the reciprocal obligations of the Slovak Republic, based on creditable periods of ‘Australian working life residence.’ In particular:

- Article 14 provides that the eligibility of a person for a benefit be determined by totalising of Australian and Slovak creditable periods, and that these must not overlap; and
- Article 15 provides for calculation of benefits in the Slovak Republic if no totalisation occurs and if totalisation is required, with benefits not to be awarded for periods of less than 12 months.<sup>20</sup>

2.22 Part IV (Articles 16 to 25) sets out the administrative obligations, including requirements for lodgement of documents, payment of benefits, and recovery of overpayments. Exchange of Information and Mutual Assistance arrangements are established under Article 20, and provision for dispute resolution and review of the Agreement are at Articles 24 and 25 respectively.

2.23 Part V provides that the Agreement is entered into for an unlimited amount of time, but may be subject to termination by notification (Article 28 (3)).

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18 NIA, para. 13.

19 Article 13 (3) (b).

20 Article 14, then Article 15 (1) and for calculation, Article 15 (2) and (3) respectively.

## Implementation

- 2.24 The Agreement with the Slovak Republic will enter force on the first day of the third month in which diplomatic notes are exchanged with the parties.<sup>21</sup> The proposed commencement date, subject to Committee approval, is 1 January 2012.<sup>22</sup>
- 2.25 Implementation will follow introduction of a new Schedule into the *Social Security (International Agreements) Act 1999*, which gives effect in domestic law to the relevant provisions of the Agreement. The Schedule will contain the full text of the Agreement pursuant to Sections 8 and 25 of the current Act.<sup>23</sup>
- 2.26 Cost estimates in the *National Interest Analysis* indicate there will be a shortfall in funding for implementation of the Agreement in Australia initially. In 2009–10, \$2.4 million was allocated, with outgoing pensions to be reduced by \$0.6 million in the first year. Forward cost estimates are of a total of \$2.171 million, with set up-costs included.<sup>24</sup>

## Conclusion

- 2.27 The Committee supports the proposed social security agreement with the Slovak Republic. Bilateral agreements of this type provide reciprocal benefits to individuals with ties to both nations, whether gained through permanent migration or temporary secondment. The Agreement would optimise choice in retirement, increase retirement incomes and potentially facilitate family reunion.
- 2.28 The Agreement with the Slovak Republic may also create opportunities for greater economic engagement between our two nations. The Committee has noted that, among Europe Union nations transitioning from a controlled economy, the Slovak Republic has performed strongly, opening new opportunities for Australian businesses and investors.

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21 NIA, para. 2.

22 Mrs Stawyskyj, Department of Families, Housing, Community Services and Indigenous Affairs, *Committee Hansard*, Canberra, 25 February 2011, pp. 11, 12.

23 NIA, para. 17.

24 NIA, para. 19.

**Recommendation 1**

**The Committee supports the *Agreement between Australia and the Slovak Republic on Social Security* and recommends that binding treaty action be taken.**



# Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia

## Introduction

- 3.1 The proposed treaty action comprises minor amendments to the *Treaty of Amity and Cooperation in Southeast Asia* (the Treaty of Amity), done at Denpasar, Bali, on 24 February 1976.<sup>1</sup>
- 3.2 Australia was asked to accede to the Treaty of Amity by the Association of South East Asian Nations (ASEAN) as a condition of participation in the East Asia Summit (EAS) in April 2005. ASEAN has actively promoted accession to the Treaty to non-ASEAN members.<sup>2</sup>
- 3.3 The purpose of the Third Protocol is to broaden the category of High Contracting Parties under the Treaty of Amity to allow for accession by regional organisations representing sovereign states. The amendments also update limitations on dispute resolution powers to cover new non-regional High Contracting Parties.<sup>3</sup>
- 3.4 Australia signed the Third Protocol on 23 July 2010 during the ASEAN and EAS meeting in Hanoi, Vietnam. As at 9 December 2010, there were

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1 *Treaty of Amity and Cooperation in Southeast Asia*, done at Denpasar, Bali, 24 February 1976 (entered into force 21 June 1976).

2 *National Interest Analysis* (NIA) [2011] ATNIA 2, Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, done at Hanoi on 23 July 2010 [2010] ATNIF 39, paras 4, 5.

3 Article 3, see NIA, para. 12.

26 High Contracting Parties which are signatories to the Protocol, comprising 10 ASEAN and 16 non-ASEAN member states.<sup>4</sup>

- 3.5 According to the *National Interest Analysis*, Australia's ratification of the Third Protocol is of strategic importance to ensure continued beneficial engagement between Australia and ASEAN Member States. It will also underpin ASEAN's growing engagement with nations beyond the Asia-Pacific region, in particular, in the European Union (EU).<sup>5</sup>
- 3.6 ASEAN has specifically requested that Australia approve the amendments introduced by the Third Protocol.<sup>6</sup>

## The Treaty of Amity and international engagement

- 3.7 The Treaty of Amity is an agreement between ASEAN Member States, which sets out the fundamental principles governing their relationship.<sup>7</sup> These require:
- mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
  - the right of every State to lead its national existence free from external interference, subversion or coercion;
  - non-interference in the internal affairs of one another;
  - settlement of differences or disputes by peaceful manner;
  - renunciation of the threat or use of force; and
  - a commitment to effective co-operation among themselves.<sup>8</sup>

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4 The Association of South East Asian Nations (ASEAN) states are: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Republic of the Philippines, Singapore, Thailand and Vietnam. The non-ASEAN states are Australia, Bangladesh, People's Republic of China, Democratic People's Republic of Korea, East Timor, France, India, Japan, Mongolia, Pakistan, Papua New Guinea, Republic of Korea, Russian Federation, Sri Lanka, Turkey and the United States of America.

5 NIA, paras 3–6.

6 NIA, para. 4.

7 The ASEAN was established in 1967 on the signing of the ASEAN Declaration by founding members Indonesia, Malaysia, the Philippines, Singapore and Thailand. *Association of South East Asian Nations (ASEAN)*, Overview <<http://www.asean.org/64.htm>> viewed 13 May 2011.

8 *Treaty of Amity and Cooperation in Southeast Asia*, Article 2, and see ASEAN, Overview <<http://www.asean.org/64.htm>> viewed 13 May 2011.



3.8 While primarily focussed on regional co-operation, ASEAN has actively encouraged multilateral engagement with other nations through accession to the Treaty of Amity. The Preamble to the Treaty of Amity, at paragraph 5, recognises:

...the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony.

3.9 In 1987 a first Protocol to the Treaty allowed for the formal accession of non-member High Contracting Parties to the agreement, on consent of the other Member States.<sup>9</sup> The Second Protocol updated the ASEAN membership as at 28 July 1998.<sup>10</sup>

3.10 The convening of the first EAS in Kuala Lumpur on 14 December 2005 represented a further advance for international engagement with ASEAN. Major North Asian countries Japan, Korea, China and India, as well as Australia and New Zealand, were for the first time invited to participate in ASEAN's dialogue of co-operation.<sup>11</sup>

3.11 The Committee was informed that being a signatory to the Treaty of Amity is one of three preconditions to participation in the EAS. Members must also be a dialogue partner with ASEAN and have a substantial relationship with the association.<sup>12</sup>

3.12 As a dialogue partner with ASEAN since 1974, Australia was able to participate in the inaugural EAS, seen as a watershed for Australian engagement with the region. Mr John Fisher, Department of Foreign Affairs and Trade, advised :

Essentially, it [the EAS] became a forum through which Australia could play a key role and provide assistance to regional integration, including ensuring that to the extent possible that regional integration proceeds in a way which is consistent with our interests and the region's interests.<sup>13</sup>

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9 *Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia*, done at Manila, Philippines, 15 December 1987, Article 1.

10 *Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia*, done at Manila, Philippines, 25 July 1998, Article 1.

11 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 27.

12 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 28.

13 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 28

- 3.13 The EU, a regional organisation, now wishes to accede to the Treaty of Amity. This has ASEAN's support and has been listed as a priority in the 2007 *Nuremberg Declaration on EU-ASEAN Enhanced Partnership 'Plan of Action'*.<sup>14</sup>
- 3.14 The Committee was advised that the inclusion of regional organisations under the Third Protocol to the Treaty of Amity can be expected to foster closer engagement between ASEAN Member States and the EU, as the former achieve greater economic significance.<sup>15</sup>
- 3.15 At this time, however, no other regional organisation has indicated an intention to accede to the Treaty.<sup>16</sup>

### **Obligations under the Third Protocol**

- 3.16 The Third Protocol does not contain any additional obligations, but modifies and expands on those in the Treaty of Amity in three articles:
- Article 1 – amends Article 18, paragraph 3 of the Treaty of Amity to provide for accession of 'regional organisations whose members are only sovereign States'.<sup>17</sup>
  - Article 2 – amends Article 14, paragraph 2 of the Treaty of Amity to provide that High Contracting Parties outside of South-East Asia may participate in dispute resolution only if involved in the matter under dispute.<sup>18</sup>
  - Article 3 – determines that the Protocol shall be subject to ratification and shall come into force on the date the last instrument of ratification of the High Contracting Parties is deposited.
- 3.17 The Committee notes that Article 2 is a minor amendment in terminology to reflect the new membership, for regional organisations. The use of 'High Contracting Party' adjusts the First Protocol (1987) amendment to Article 14 to exclude representatives of the new non-regional member

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14 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 26.

15 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 26.

16 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 26.

17 NIA, para. 10.

18 NIA, para. 12.

'States' from participating in the Ministerial Council established for ASEAN dispute resolution.<sup>19</sup>

- 3.18 The Committee was advised that this exclusion is considered a proper limitation on the role of Australia and other non-ASEAN members, as ASEAN seeks to take a more active part in negotiation of regional disputes.<sup>20</sup>

## Implementation

- 3.19 Amendments to the Treaty of Amity require the consent of all Member States. The proposed changes to the Treaty of Amity are positive, but in effect minor, and are supported by both ASEAN and non-ASEAN High Contracting Parties.
- 3.20 As no additional obligations are imposed under the Protocol, legislation changes are not required and there are no financial costs associated with the Protocol.<sup>21</sup>

## Conclusion

- 3.21 The Committee is pleased to see the ASEAN is consolidating ties beyond the region.
- 3.22 The Committee supports the proposal to open accession to regional organisations under the *Treaty of Amity and Cooperation in South East Asia*, and recommends binding treaty action be taken.

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19 NIA, para. 12.

20 The recent dispute between Thailand and Cambodia regarding a temple site on the Thai-Cambodia border was cited as an example. Indonesia, as ASEAN chair, intervened. See Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 28.

21 NIA, para. 13.

**Recommendation 2**

**The Committee supports the *Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia* and recommends binding treaty action be taken.**

# Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons

## Introduction

- 4.1 The proposed *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* (the Treaty with the PRC) will allow Australian nationals imprisoned in China and Chinese nationals imprisoned in Australia to apply to serve the remainder of their sentences in their home country.<sup>1</sup>
- 4.2 Under the Treaty, Governments are to exchange information about a prisoner's sentence and imprisonment, determine a prisoner's eligibility for transfer, and come to agreed terms of sentence enforcement following the transfer.<sup>2</sup>
- 4.3 There are a number of mandatory requirements for the transfer of a prisoner to take place:
- the prisoner, the Chinese Government, the Australian Government and, in certain circumstances, a State or Territory Government, must all consent to the transfer;

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1 *National Interest Analysis (NIA) [2011] ATNIA 8, Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons, done at Sydney on 6 September 2007 [2007] ATNIF 27, para. 4.*

2 NIA, para. 4.

- following transfer, the sentence must be enforced in accordance with the original custodial sentence (as feasible);
  - the Transferring Party is to retain jurisdiction for the cancellation or modification of the prisoner's conviction and sentence; and
  - the Receiving Party agrees to bear the costs of transferring the prisoner, except those costs incurred exclusively in the territory of the Transferring Party.<sup>3</sup>
- 4.4 According to the Australian Bureau of Statistics prisoner census, at 30 June 2010 there were 174 people held in Australian prisons identifying as Chinese born. At 25 February 2011, 24 Australians were known to be imprisoned in China, and a further seven had been charged with offences.<sup>4</sup>
- 4.5 The Australian Government supports the ratification of the Treaty with the PRC, which it considers will reduce financial and emotional burdens for Australians with relatives imprisoned outside the country, enhance community protection opportunities for transferred prisoners in the home country, and reduce the requirement for resource intensive consular support in China.<sup>5</sup>

## Australia's International Transfer of Prisoners Scheme

- 4.6 Australia has an International Transfer of Prisoners (ITP) Scheme to facilitate the transfer of prisoners between Australia and foreign countries.<sup>6</sup>
- 4.7 Established in 2002, the ITP scheme aims to fulfil humanitarian, rehabilitative and social objectives while ensuring, as far as possible, that the original custodial sentence of a transferred prisoner is enforced.<sup>7</sup>
- 4.8 The Committee was informed that a substantial benefit of prisoner repatriation is to reinstate access to training and educational schemes, and to provide opportunities to enter conditional release schemes, such as

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3 NIA, para. 6

4 Ms Maggie Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 15.

5 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, pp. 15-16.

6 NIA, para. 8.

7 NIA, para. 8.

parole, licence, weekend, or home detention schemes at the end of a parole period. These are not available to foreign prisoners.<sup>8</sup>

- 4.9 To date some 63 prisoners have been transferred from Australia, and 15 returned to Australia under the ITP scheme. As at 31 January 2011 Australia was processing 45 applications for transfer out of Australia and 39 applications for transfer in.<sup>9</sup>
- 4.10 Australia's *International Transfer of Prisoners Act 1997* (ITP Act), provides the legislative framework for the ITP scheme.<sup>10</sup>
- 4.11 The Act is enabled by multilateral or bilateral treaties, such as the agreement with the PRC, as well as agreements of less than treaty status.<sup>11</sup> Once an agreement has been brought into force by regulations made under the ITP Act, the Act will apply to Australia's prisoner transfer relationship with the partner country subject to the provisions of the particular agreement.<sup>12</sup>
- 4.12 Most prisoners are sentenced under State and Territory legislation. To facilitate prisoner transfers under these treaties, the ITP Act provides for the setting of administrative protocols to regulate the transfer out of foreign offenders imprisoned in State and Territory institutions, and the transfer in, as Federal prisoners, of Australians imprisoned overseas.<sup>13</sup>
- 4.13 Australia currently has bilateral agreements with Cambodia, Vietnam, Thailand and Hong Kong, and is party to the Council of Europe's *Convention on the Transfer of Sentenced Persons* [2003], which allows for the transfer of prisoners between Australia and 60 other nations. Australia has also concluded arrangements with the United States for transfer of prisoners sentenced by military commissions.<sup>14</sup>

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8 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 16.

9 Prisoners left Australia for Canada, Greece, the Netherlands, the USA, France, Israel, Spain, Germany, Italy, Switzerland, the United Kingdom, and returned from Thailand, Spain, Hong Kong, the United Kingdom and the USA. NIA, para. 11.

10 NIA, para. 24.

11 NIA, para. 22.

12 NIA, para. 10.

13 NIA, para. 24.

14 NIA, para. 10.

- 4.14 The Australian Government has committed to expanding the ITP scheme to include more of Australia's regional partners in law enforcement co-operation.<sup>15</sup>
- 4.15 The Attorney-General's Department representative Ms Maggie Jackson informed the Committee that entering a bilateral treaty with China has been a long term ITP priority for the Government:
- At present China is not a party to any other bilateral or multilateral arrangements which would enable prisoner transfers between Australia and China. The proposed agreement with China would strengthen Australia's bilateral relationship with China; it would also be a tangible demonstration of Australia's commitment to law enforcement cooperation in the region.<sup>16</sup>
- 4.16 The Committee received supplementary advice from the Attorney General that China has signed a number of other bilateral agreements for international transfer of prisoners to date, and has ratified a treaty for this purpose with Spain.<sup>17</sup>

## Key obligations and protections for prisoners

- 4.17 The obligations proposed under the Treaty with PRC are substantially similar to those provided under the Council of Europe's *Convention on the Transfer of Sentenced Persons*, as reflected in the ITP Act.<sup>18</sup>
- 4.18 Article 2 sets out the General Provisions of the Treaty:
- (1) The Parties undertake to afford each other the widest measure of cooperation in respect of the transfer of sentenced persons in accordance with the provisions of this Treaty.
  - (2) The Parties may, in accordance with the provisions of this Treaty, transfer a sentenced person to each other to enforce the sentence imposed against the person in the territory of the Receiving Party.<sup>19</sup>

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15 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 14.

16 *Committee Hansard*, Canberra, 28 February 2011, p. 15.

17 Attorney-General's Department, *Supplementary Submission 2.2*.

18 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 15.

19 *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons*, done at Sydney on 6 September 2007 [2007] ATNIF 27, *passim*.



- 4.19 The Treaty with PRC does not oblige Australia to agree to the transfer of any prisoner. Key protections in the treaty are at:
- Article 4(e) – a prisoner’s transferral is conditional on the consent of all the Parties: the prisoner, and both the Australian and Chinese Governments; and
  - Article 9(1) – the prisoner must be fully informed in writing of the full legal consequences of transfer, and make a written statement confirming that their consent is voluntary and made with full knowledge as advised.
- 4.20 Additionally, transfers can only occur for crimes that exist in both jurisdictions. Article 4(a) states:
- A sentenced person may be transferred only if ...the conduct on account of which the sentence was imposed against the sentenced person also constitutes an offence under the laws of the Receiving Party.
- 4.21 Under Article 4(b) prisoners are eligible to apply to transfer from China to Australia, provided that they are Australian nationals and from Australia to China, provided that they are Chinese nationals. The Treaty may also apply to the transfer of a prisoner who is not a national of the Receiving Party in exceptional circumstances, as agreed by both Parties.
- 4.22 Articles 4(c) & (d) confirm, respectively, that prisoners must not be transferred if less than a year of their sentence is left to be served and that their conviction must be final and not subject to appeal.
- 4.23 Under the Treaty, requests to transfer can be initiated by the prisoner (Article 7(1)) or made by either party (Article 7(2)). There are a number of conditions, including:
- the Receiving Party must notify the other party in writing of the application for transfer (Article 7(1));
  - relevant information about the applicant is to be provided to authorities prior to a decision on the transfer being made (Article 8);<sup>20</sup> and
  - the Receiving Party has the opportunity to verify that the prisoner’s request complies with Article 9(1) requiring full knowledge of the consequences of transfer (Article 9.(2)).
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20 Article 8 requires that, in addition to the written transfer request, information is to include personal details, nationality, place of detainment, a certified copy of the judgment, sentence termination date and any relevant medical records with treatment plan.

- 4.24 Articles 11 and 12 require that the sentence be applied in full, as determined by the Transferring Party. However, Article 11(2) provides the Transferring Party jurisdiction to modify or cancel the sentence; and Article 12(2) states that if, subject to certain conditions, the sentence determined by the Transferring Party is 'by its nature or duration incompatible with the law of the Receiving Party':
- ... the Receiving Party may adapt the sentence in accordance with the sentence prescribed by its own domestic law for a similar offence.
- 4.25 Article 13(4) provides that either Party may choose to grant a pardon to the transferred person, subject to domestic laws.
- 4.26 Ms Jackson advised that the precise sentence to be served would normally be negotiated between the two governments prior to transfer so that the prisoner can give informed consent and the Receiving Party verify that consent. Only on a rare occasion would sentences be varied, or a pardon be granted, after transfer.<sup>21</sup>
- 4.27 The Committee notes that a possible area for negotiation under the Treaty with PRC could occur if sentences of excessive length were set. Ms Jackson cited occasions where Australia had negotiated non-parole periods for returning prisoners from Thailand equivalent to the term to be served for a similar crime in Australia.<sup>22</sup>
- 4.28 A potential concern under the Treaty was the lack of avenue for appeal should the transfers not be applied in agreed terms.
- 4.29 Under Article 4(d) negotiations under this agreement are final and hence not subject to appeal. The Committee was assured that any variations to the terms or conditions of the agreements would constitute a breach of the treaty and could be pursued through diplomatic channels.<sup>23</sup>

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21 *Committee Hansard*, Canberra, 28 February 2011, pp. 16, 17.

22 *Committee Hansard*, Canberra, 28 February 2011, p. 19.

23 Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 20.

## Implementation

- 4.30 The Treaty with PRC will enter force on the 30<sup>th</sup> day after notification from the Parties that domestic requirements have been met. On 13 May 2009 China notified Australia that it has such arrangements in place.<sup>24</sup>
- 4.31 As previously noted, in order to effect transfer of prisoners under bilateral agreements, regulations must be made under the ITP Act.<sup>25</sup>
- 4.32 In December 2008, required regulations were introduced declaring China a 'transfer country' under that Act.<sup>26</sup> These regulations were made prior to the Treaty entering into force to arrange the return of a seriously ill Australian citizen imprisoned in China. New regulations will be made to implement the Treaty under Section 8 of the ITP Act, on receiving Committee support for ratification.<sup>27</sup>
- 4.33 Once the Treaty enters into force, China will remain a transfer country under the ITP Act, but prisoner transfers will be conducted in accordance with the bilateral agreement.<sup>28</sup>
- 4.34 The required complementary State or Territory legislation has been passed to facilitate the treaty.<sup>29</sup> State or Territory Governments receiving sentenced persons from China, or sending them to China if sentenced under the laws of the State or Territory, must consent to any transfer.<sup>30</sup>
- 4.35 Under this Treaty, the Receiving Party is to pay the costs of the transfer.<sup>31</sup> The costs to Australia will thus be dependent on the numbers of prisoners. Transferral to China may result in annual savings per person of \$100 000 a year. Incoming prisoners' costs will be shared between State and Federal Governments.<sup>32</sup>

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24 NIA, para. 3.

25 NIA, para. 21.

26 International Transfer of Prisoners (China) Regulations 2008, Select Legislative Instrument 2008 No. 260, Royal Assent, 12 December 2008.

27 NIA, para. 21.

28 NIA, para. 13.

29 NIA, para. 23.

30 This requirement is not covered under the treaty being considered an internal matter. NIA, para. 25.

31 Under administrative arrangements with the States and Territories, prisoners may be required to pay some or all of the costs providing the prisoner accepts the transfer on that basis. Ms Jackson, Attorney-General's Department, *Committee Hansard*, Canberra, 28 February 2011, p. 15.

32 NIA, paras 27, 28.

## Conclusion

- 4.36 The Committee considers the proposed *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* will formalise and enhance rights and protections for transferring prisoners between Australia and the PRC.
- 4.37 The Committee notes that this agreement is the culmination of some effort on the part of the Australian Government and also that the Chinese Government had notified Australia of its readiness to implement the treaty some two years ago.
- 4.38 The long delay between China's notification and the tabling of this important treaty in the Australian Parliament is therefore of concern. While transfers between Australian and PRC prisons could be conducted under prior arrangements, the lack of a formal agreement may have resulted in unnecessary hardship for Australians held in China and their families.
- 4.39 The Committee supports the ratification of the Treaty with PRC and its prompt implementation.
- 4.40 The Committee also recommends the Attorney General should report on the delays in the internal processing of this and similar agreements with considerations for the future streamlining of that process.

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### Recommendation 3

**The Committee supports the *Treaty between Australia and the People's Republic of China concerning the Transfer of Sentenced Persons* and recommends that binding treaty action be taken.**

## Amendments to the Singapore–Australia Free Trade Agreement

### Introduction

- 5.1 The *Singapore–Australia Free Trade Agreement* (SAFTA) was ratified in February 2003.<sup>1</sup> Article 3 of Chapter 17 of SAFTA provides for a Ministerial Review of the Agreement one year after coming into force and then biennially thereafter.<sup>2</sup>
- 5.2 The amendments to SAFTA that constitute this amending treaty result from the second of these Ministerial Reviews. The second Ministerial Review was intended to build upon SAFTA to ensure the Agreement remained up to date and consistent with both countries' business needs, and that it took into account any changes to legislation or policy settings in both countries.<sup>3</sup>
- 5.3 SAFTA underpins bilateral trade relations between Australia and Singapore and is, according to the Department of Foreign Affairs and Trade (DFAT), regarded as a high quality free trade agreement by both countries.<sup>4</sup>

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1 *National Interest Analysis* (NIA) [2011] ATNIA 5, Amendments to Singapore–Australia Free Trade Agreement, done at Singapore on 27 July 2009 [2011] ATNIF 1, para. 1.

2 NIA, para. 14.

3 NIA, para. 3.

4 NIA, para. 4.

## Australia's trade with Singapore

- 5.4 DFAT regards the two way trade and investment between Australia and Singapore as significant. In 2010, Singapore ranked as Australia's seventh largest two way merchandise trading partner and Australia's largest Association of Southeast Asian Nations (ASEAN) trading partner. Singapore also ranked ninth as a destination for Australian investment overseas.<sup>5</sup>
- 5.5 The latest trade data (from the December 2010 quarter), indicates that 18.5 per cent of Australia's merchandise exports to ASEAN countries went to Singapore, while 27.6 per cent of merchandise imports from ASEAN countries came from Singapore. This represents a decline over the same quarter in 2009, when merchandise exports to Singapore constituted 26.1 per cent of ASEAN exports, and merchandise imports from Singapore constituted 28.8 per cent of ASEAN imports.<sup>6</sup>
- 5.6 Australian merchandise exports to Singapore were valued at \$5.046 billion Australian for the 2009/2010 financial year while, for the same year, imports from Singapore were worth \$10.899 billion Australian.<sup>7</sup>
- 5.7 Longer term data indicates that, since SAFTA came into force, the share of Australia's exports going to Singapore has remained relatively stable, while the share of Australia's exports going to other ASEAN countries, most notably Thailand, have increased.<sup>8</sup>

## Specific amendments

- 5.8 The DFAT argued that:

Bringing into force the proposed amendments arising from the second Ministerial Review will help to ensure that SAFTA remains a high-quality agreement and reflects Australia's most recent FTAs by remaining relevant to Australian and Singaporean businesses. It will also allow Australia and Singapore to build on the platform

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5 NIA, para. 4.

6 Australian Bureau of Statistics, *1350.0 - Australian Economic Indicators, May 2011*, Table 2.15.

7 Australian Bureau of Statistics, *1350.0 - Australian Economic Indicators, May 2011*, Table 2.14.

8 Australian Bureau of Statistics, *1350.0 - Australian Economic Indicators, May 2011, Graphs* <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/429E7F5A785B8037CA25788000195F52?opendocument>> viewed 18 May 2011.

provided by SAFTA. The proposed amendments represent a balanced package of outcomes for Australia and Singapore.<sup>9</sup>

- 5.9 The amendments relate to Chapters 6, 8, 10, and 13 of SAFTA.
- 5.10 Chapter 6 of SAFTA concerns government procurement, and requires Government entities in Australia and Singapore to accord to the suppliers of goods and services from the counterpart country no less favourable treatment than those applying to suppliers of goods and services in their own country.<sup>10</sup>
- 5.11 Annex 3(A) of SAFTA contains a list of Australian Government entities to which Chapter 6 applies. The Annex is proposed to be amended to reflect changes in the machinery of government in Australia since the first Ministerial Review of SAFTA. DFAT was at pains to point out that the changes did not grant Singaporean suppliers of goods and services any additional access to Australian Government entities.<sup>11</sup>
- 5.12 The Committee notes that while the amendment to Annex 3(A) is discussed in the *National Interest Analysis* (NIA) and is listed on the cover of the version of the Treaty tabled in Parliament, the amended Annex 3(A) is not included in the text of the Agreement.
- 5.13 The DFAT has advised the Committee that this error will be rectified and Annex 3(A) tabled in Parliament.
- 5.14 Chapter 8 of SAFTA deals with investment between the two signatories. The amending treaty introduces new commitments according minimum standards of treatment to each other's investors and prohibits the imposition of performance requirements.<sup>12</sup>
- 5.15 The new minimum standards include a commitment to accord investors from the counterpart country 'fair and equitable treatment' and 'full protection and security.' In this context, fair and equitable treatment means that investors will not be denied justice in criminal, civil or administrative proceedings in accordance with the principle of due process. Full protection and security means providing investors with the level of police protection required under international law.<sup>13</sup>

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9 NIA, para. 5.

10 NIA, para. 6.

11 NIA, para. 6.

12 NIA, para. 7.

13 Chapter 8, Article 4, *Amendments to Singapore-Australia Free Trade Agreement*, done at Singapore on 27 July 2009 [2011] ATNIF 1.

- 5.16 The prohibition on performance requirements will prevent either party from imposing conditions on the establishment, acquisition, operation, management or sale of an entity by an investor from the other party.<sup>14</sup>
- 5.17 Chapter 10 of SAFTA relates to telecommunications. The amending treaty removes a series of footnotes from Article 9.7 of the Chapter. The Article concerns interconnection between major suppliers, but DFAT argued that the removal of the footnotes will not affect Australia's obligations under SAFTA.<sup>15</sup>
- 5.18 According to DFAT, the footnotes were originally included in SAFTA because the Australian negotiators thought it desirable to include clarifying text explaining Australia's telecommunications regulatory regime. DFAT now believes such clarifications are not necessary.<sup>16</sup>
- 5.19 Chapter 13 of SAFTA relates to intellectual property. Since SAFTA was concluded in 2003, both Singapore and Australia have concluded free trade agreements with the United States of America. As a result of these agreements, the legislative frameworks governing intellectual property in both countries have been changed.<sup>17</sup> According to DFAT:
- The differences between Singapore and Australia's respective FTAs with the US mainly reflect our domestic laws and approaches to IP. The scope of some AUSFTA obligations is narrower than SUSFTA, where Australian law is narrower in its application. For example AUSFTA includes a narrower definition of 'rights management information' - that is it is 'electronic information', whereas SUSFTA is just 'information'. The narrower definition in AUSFTA reflects Australian law. Another example is on civil remedies, where the SUSFTA provides an opportunity for the right holder to elect between actual damages or pre-established damages. Australia did not agree to such provisions in AUSFTA as there is no system of pre-established damages in Australia. Instead, AUSFTA provides for 'additional damages'.<sup>18</sup>
- 5.20 However, despite these differences, DFAT argued that the Singaporean free trade agreement with the United States does not contain better terms
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14 Chapter 8, Article 5.

15 NIA, para. 7.

16 Department of Foreign Affairs and Trade, *Submission 7*, p. 2.

17 NIA, para. 9.

18 Department of Foreign Affairs and Trade, *Submission 7*, p. 4. The acronyms in this quote are as follows: FTA is Free Trade Agreement; IP is intellectual property; AUSFTA is *Australia-United States Free Trade Agreement*; and SUSFTA is *Singapore-United States Free Trade Agreement*.



for Singapore than Australia's free trade agreement with the United States does for Australia.<sup>19</sup>

- 5.21 The amending treaty reflects the changes to the Singaporean and Australian intellectual property regimes resulting from these free trade agreements.<sup>20</sup>

## Conclusion

- 5.22 The Committee is satisfied that the amendments contained in this treaty are largely machinery in nature and will not result in significant change to the degree of market access each country accords its counterpart.
- 5.23 However, the Committee notes that the NIA and the treaty text provided to the Committee for the inquiry do not seem to have been prepared thoroughly. For example, as already noted, the text of the amending treaty does not contain the list of Australian Government entities referred to at paragraph 6 of the NIA.
- 5.24 The lack of clarity on the reason for, and nature of, the amendments to SAFTA in the NIA made it necessary for the Committee to seek further clarification from DFAT on a number of issues.
- 5.25 The Committee is otherwise satisfied by the Department's representations indicating that the amending treaty is in Australia's national interest.

### Recommendation 4

**The Committee supports the *Amendments to Singapore-Australia Free Trade Agreement* and recommends that binding treaty action be taken.**

<sup>19</sup> *Amendments to Singapore-Australia Free Trade Agreement*, Department of Foreign Affairs and Trade, *Submission 7*, p. 4.

<sup>20</sup> NIA, para. 9.



# Agreement with the Republic of South Africa Concerning the Co-production of Films

## Introduction

- 6.1 The *Agreement between the Government of Australia and the Government of the Republic of South Africa concerning the Co-Production of Films* (the Co-production of Films Agreement) was signed in Pretoria on 18 June 2010.<sup>1</sup>
- 6.2 Co-production agreements are entered into under Australia's International Co-production Program, the intention of which is to foster cultural and industry development and cultural exchange between co-operating countries. Co-production agreements are individually negotiated with the aim of sustaining and developing Australian creative resources and production.<sup>2</sup>
- 6.3 Since the inception of the Program in 1986, 127 co-productions with a total budget of approximately \$1.16 billion Australian have gone into production.<sup>3</sup>
- 6.4 According to the Department of Prime Minister and Cabinet, this Agreement will be Australia's eleventh co-production agreement.

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1 *National Interest Analysis* (NIA) [2011] ATNIA 4, Agreement with the Republic of South Africa Concerning the Co-production of Films, done at Pretoria on 18 June 2010 [2010] ATNIF 40, para. 1.

2 NIA, para. 7.

3 NIA, para. 7.

Previous agreements include two non-treaty level memoranda of understanding with France and New Zealand, and eight treaties with:

- the United Kingdom;
- Canada;
- Italy;
- Ireland;
- Israel;
- Germany;
- Singapore; and
- China.<sup>4</sup>

6.5 In the context of the Co-production of Film Agreement, a co-production is defined as a film, including a television and video recording, animation and digital format production, which is approved by the relevant authorities and has been made by one or more Australian co-producers in conjunction with one or more South African co-producers (or in the case of a third country co-production, with a third country co-producer).<sup>5</sup>

## Film making in South Africa

6.6 In the post-apartheid era, South Africa's film industry has been recognised and actively supported by the South African Government as a sector with excellent potential for growth.<sup>6</sup>

6.7 Starting with an industry that employed around 4 000 people in 1995, the sector had grown to employ approximately 30 000 people by 2008. The growth has been based on both local and foreign film production levels over that period.<sup>7</sup>

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4 NIA, para. 7.

5 *Agreement with the Republic of South Africa Concerning the Co-production of Films*, done at Pretoria on 18 June 2010 [2010] ATNIF 40, Article 1.

6 NIA, para. 9.

7 NIA, para. 9.

6.8 According to the Department of Prime Minister and Cabinet:

The production of South African feature films, for example, increased from one film in 2000 to 24 films in 2009 with a total of 74 feature films produced between 2005 and 2009.<sup>8</sup>

6.9 The Department of Prime Minister and Cabinet attributes the growth in the South African film industry to the range of industry specific incentives offered by the South African Government, which are intended to attract foreign investment and to encourage the creation of local product with both domestic and broader international audience appeal.<sup>9</sup>

6.10 The most successful recent example of South African film co-production is the 2009 science fiction film 'District 9', which was a co-production between South Africa, New Zealand and Canada. The film was shot in South Africa and used South African actors. 'District 9' earned four Oscar nominations, paid for itself in its opening weekend, and went on to accrue \$115.5 million US in the United States alone.<sup>10</sup>

6.11 The best known Australian film about South Africa is the 1980 film 'Breaker Morant'. There was no South African participation in this film, which was filmed in South Australia.<sup>11</sup> However, Australian film makers have been active in South Africa as far back as the Boer War in 1900.<sup>12</sup>

## The Co-production of Films Agreement

6.12 The purpose of the proposed Agreement is to stimulate industry, employment, technical development and cultural exchange by facilitating film co-productions between Australia and South Africa. The Agreement provides a framework within which each country can co-operate to approve the making of feature films, television, video recordings, animations and digital format productions.<sup>13</sup>

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8 NIA, para. 9.

9 NIA, para. 11.

10 'District 9' (2009), *Internet Movie Database* < <http://www.imdb.com/title/tt1136608/> > viewed 18 May 2011.

11 'Breaker Morant' (1980), *Internet Movie Database* < <http://www.imdb.com/title/tt0080310/> > viewed 18 May 2011.

12 Kruger, Rayne, *Goodbye Dolly Grey: The Story of the Boer War*, Pan, 1959, p. 231.

13 NIA, para. 3.

- 6.13 The Agreement is based on the notion of reciprocity. In other words, each co-production should have a balance of financial and creative participation by both countries. Balance should extend to production costs, studio and laboratory usage, and the employment of nationals of both parties in major creative, performing, craft and technical positions related to film co productions made under the Agreement.
- 6.14 According to the *National Interest Analysis* (NIA), Australian-South Africa co-productions will:
- increase the output of high-quality productions by sharing equity investment with South Africa;
  - open up new markets both in South Africa and internationally for Australian film, television, animation and digital format productions;
  - share the risk (and cost) of film production;
  - establish links with South African production and distribution interests;
  - facilitate interchange between Australian and South African film makers, particularly those in the principal creative positions;
  - create employment opportunities for Australian industry personnel; and
  - strengthen existing diplomatic ties between Australia and South Africa.<sup>14</sup>
- 6.15 The Agreement provides that a project approved as an official co-production will be regarded as a national production of both Australia and South Africa, and will therefore be eligible to apply for any benefits or programs of assistance available in either country.<sup>15</sup>
- 6.16 In Australia, the main benefits available for co productions will be their eligibility to be treated as films with a significant Australian content that can therefore access the Australian Screen Production Incentive-Producer Offset under the *Income Tax Assessment Act 1997*, and qualify as 'Australian program content' for the purposes of the Australian Content Standard for commercial television broadcasting.<sup>16</sup>
- 6.17 Official co-productions will also be able to access direct film funding through Screen Australia. Similarly, in South Africa an official

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14 NIA, para. 8.

15 NIA, para. 5.

16 NIA, para. 9.

co-production will be considered a South African production for the purposes of official financial support and audiovisual regulation.<sup>17</sup>

6.18 In addition to the funding and tax benefits, official co-productions will be able to import into each country, free of duties and taxes, cinematographic and technical equipment for the making of co-productions. The Treaty also permits nationals of each country to enter and remain in the counterpart country for the purpose of making or exploiting a co-production.<sup>18</sup>

6.19 The Treaty also provides for monitoring of co-productions to ensure a balance of creative and financial participation has been met.<sup>19</sup>

6.20 The Department of Prime Minister and Cabinet expected the Agreement to result in a number of ancillary benefits to Australia and South Africa:

The historic and current links between the two countries should facilitate the development of co-productions which have cultural resonance with audiences in Australia and South Africa, and potentially with the international market more broadly. There is ongoing industry interest in the Agreement from both sides, and potential co production projects await its entry into force.<sup>20</sup>

6.21 In Australia, determining the status of co-productions and monitoring their development will be the responsibility of Screen Australia.<sup>21</sup> The cost of administering the Agreement and providing grants to co-productions will be met from existing funds.<sup>22</sup>

## Conclusion

6.22 According to the NIA, the Australian film industry:

...supported the negotiation of the Agreement from the outset, noting that as South Africa's film industry grew, so too would the mutual benefits for production activity and cultural exchange between the two countries. This Agreement will open up new

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17 NIA, para. 9.

18 Articles 7 and 8.

19 Articles 9 and 17.

20 NIA, para. 13.

21 NIA, para. 27.

22 NIA, para. 30.

markets for Australian films and enable a creative and technical interchange between film personnel. It also has the potential to increase the output of high-quality productions through the sharing of equity investment.<sup>23</sup>

- 6.23 The Committee believes this treaty will be important in restoring the cultural relationship between South Africa and Australia that, prior to the apartheid era, was such a significant part of Australian society.

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### **Recommendation 5**

**The Committee supports the *Agreement with the Republic of South Africa Concerning the Co-Production of Films* and recommends that binding treaty action be taken.**

**Kelvin Thomson MP**

**Chair**

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<sup>23</sup> NIA, para. 4.





## Appendix A — Submissions

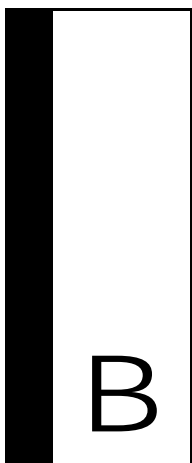
### Treaties tabled on 9 and 10 February 2011

- 1.1 Australian Patriot Movement
- 1.2 Australian Patriot Movement
- 1.3 Australian Patriot Movement
- 1.5 Australian Patriot Movement
- 2 Attorney-General's Department
- 2.2 Attorney-General's Department

### Treaties tabled on 1 March 2011

- 1 Australian Patriot Movement
- 7 Department of Foreign Affairs and Trade





## Appendix B — Witnesses

### Friday, 25 February 2011 - Canberra

Department of Families, Housing, Community Services and Indigenous Affairs

Mr Peter Hutchinson, Agreements Section Manager, International Branch

Mrs Michalina Stawyskyj, Branch Manager, International Branch

Department of Foreign Affairs and Trade

Mr John Fisher, Assistant Secretary, Indonesia and Regional Issues Branch,  
South-East Asia Division

Mr Ridwaan Jadwat, Director, ASEAN (Association of South East Asian  
Nations) and EAS (East Asia Summit) Section, Indonesia and Regional  
Issues Branch, South-East Asia Division

Mr David Mason, Executive Director, Treaties Secretariat, International  
Legal Branch

Department of Treasury

Mr Nigel Murray, Manager, Contributions Unit, Personal and Retirement  
Income Division

### Monday, 28 February 2011 - Canberra

Attorney-General's Department

Ms Maggie Jackson, First Assistant Secretary, International Crime  
Co-operation Division

Ms Muriel Joseph, Senior Legal Officer, Treaties, International Arrangements and Corruption Section, International Crime Co-operation Division

Ms Alexandra Taylor, Assistant Secretary, International Crime – Policy and Engagement Branch, International Crime Co-operation Division

#### Department of Foreign Affairs and Trade

Mr John Langtry, Assistant Secretary, East Asia Branch, North Asia Division

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

Mr Michael Sadleir, Director, Consular Operations (Asia and the Pacific)

#### Friday, 25 March 2011 - Canberra

#### Department of Foreign Affairs and Trade

Mr Matthew Barclay, Executive Officer, Malaysia, Brunei, Singapore Section, South-East Asia Bilateral Branch, South-East Asia Division

Mr Bassim Blazey, Assistant Secretary, South-East Asia Bilateral Branch, South-East Asia Division

Mr Warren Hauck, Director, Malaysia, Brunei, Singapore Section, South-East Asia Bilateral Branch, South-East Asia Division

Miss Emily Hill, Desk Officer, Southern and Central Africa Section, Africa Branch, Americas and Africa Division

Ms Karen Lanyon, Assistant Secretary, Africa Branch, Americas and Africa Division

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

#### Department of the Prime Minister and Cabinet, Office for the Arts

Dr Stephen Arnott, Assistant Secretary, Creative Industries and Sector Development Branch

#### Screen Australia

Mr Alexander Sangston, Senior Manager, Producer Offset and Co-production