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Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information

Introduction

4.1 The proposed treaty action is to bring into force the *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information* signed at Canberra on 27 August 2014.[1]

4.2 The Agreement is required for automation of the existing immigration information sharing process. According to the NIA, such automation is expected to enable increased speed, efficiency and volumes of exchanges. Australia and the United States currently share visa and immigration information under the *Memorandum of Understanding between the Australian Department of Immigration and Citizenship and the United States Department of Homeland Security and the United States Department of State for the purposes of Implementation of the High Value Data Sharing Protocol between the Nations of the Five Country Conference* (the MoU).[2]

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1 National Interest Analysis [2014] ATNIA 18 with attachment on consultation, *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information,* done at Canberra, 27 August 2014 [2014] ATNIF 23 (hereinafter referred to as 'NIA'), para 1.

2 NIA, para 4. Apart from Australia, the Five Country Conference members are: Canada, New Zealand, the United Kingdom and the United States of America.

Reasons for Australia to take the proposed treaty action

4.3 Bilateral Memoranda of Understanding governing immigration information exchange under the Five Country Conference (FCC) High Value Data Sharing Protocol were signed in 2009 and 2010 between Australia and each of the other FCC member countries. Under these original arrangements, up to 3 000 anonymised fingerprints per year may be sent to each of the other countries for checking against their respective biometric data holdings.[3]

4.4 Subsequent arrangements with the United States have enabled up to 20 000 fingerprints per year to be sent for checking. In the event there is a fingerprint match, agreed biographic information, immigration history and travel information is exchanged with the country that had the match. Such matches have uncovered identity and immigration fraud.[4]

4.5 The NIA explains that currently these checks are largely manual and the process typically takes one to two days. The Agreement will allow automation of the process, delivering increased speed, efficiency and volumes. When fully implemented, this system is expected to allow the Parties to send in excess of one million fingerprints per year for checking.[5]

4.6 United States law requires an Executive Agreement to allow automation of this process which corresponds to a treaty in Australia.[6]

4.7 Asked if there were plans to expand the arrangements to other countries besides the five currently involved, the Department of Immigration and Border Protection said that Australia is actively pursuing expansion of the program, particularly in the immediate region. A biometric hub is being constructed in Thailand under the Bali process and will be managed, on Australia's behalf, by the International Organisation for Migration (IOM).

> That will become a hub for other countries to voluntarily join in such exercises. We regard this as a really big success because of the number of countries involved under the Bali process. It is in a neutral country. It is going to be managed by a very well-regarded organisation. We have great hopes that a number of countries in the region will start to join in to protect the security of not just Australia but also their own borders.[7]

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3 NIA, para 8.

4 NIA, para 9.

5 NIA, para 10.

6 NIA, para 11.

7 Mr Gavin McCairns, First Assistant Secretary, Risk, Fraud and Integrity Division, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 12.

Obligations

4.8 The scope of the Agreement is to specify the terms, relationships, responsibilities, and conditions for the regular sharing of Information between the Parties for the purposes set out in **Article 2B**. 'Information' is defined in **Article 1B** as data collected, maintained or generated on Nationals of a Third Country, and Nationals, including citizens, of the Parties seeking authorisation to travel to, work in, or live in Australia or the United States. 'Information' also includes other data relevant to the immigration laws of the respective Parties, such as compliance with visa conditions.[8]

4.9 The purpose of the Agreement outlined in **Article 2B** is to assist in the administration and enforcement of the respective immigration laws of the Parties by:

- using Information in order to enforce or administer the respective immigration laws of the Parties;
- furthering the prevention, detection, or investigation of acts that would constitute a crime rendering an individual inadmissible or removable under the laws of the Party providing the Information; and
- facilitating a Party's determination of eligibility for a visa, admission, or other immigration benefit, or of whether there are grounds for removal.[9]

4.10 **Article 2(C)** provides that a Party shall only provide Information about its own nationals in response to a specific request, where such Information is relevant and necessary to support an identified immigration decision in the other Party. **Article 2(D)** provides that a Party shall only provide Information about a national of the other Party in response to a specific immigration matter to which the individual is directly tied. In both cases, Information shall only be provided if the sharing of such Information is compatible with domestic law and policy.[10]

4.11 Under **Article 2E**, no provision in the Agreement shall be interpreted in a manner that would restrict practices relating to the sharing of information that are already in place between the two Parties. **Article 2F** provides that the Agreement does not affect rights, privileges or benefits that exist independently of the Agreement.[11]

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8 NIA, para 12.
9 NIA, para 13.
10 NIA, para 14.
11 NIA, para 15.

4.12 **Article 5A** provides that the Parties may use and disclose Information to assist in the effective administration and enforcement of each Party's respective immigration laws; to prevent immigration fraud; to identify threats to national or public security related to immigration or travel systems; and in immigration enforcement actions. Information may only be used for any other purpose with the prior consent of the Party transmitting that Information. **Article 5B** provides that the Parties are obliged to ensure that domestic authorities which are provided with Information obtained under the Agreement, only use or disclose that Information in a manner consistent with the Agreement. Under **Article 5C**, Information can only be disclosed for other purposes with the prior written consent of the Party supplying the Information.[12]

4.13 **Article 5C(i)(b)(1)** requires that the Party disclosing the Information make best efforts to ensure that the disclosure: could not cause the Information to become known to any government, authority or person from which the subject of the Information is seeking or has been granted protection:

- in Australia under domestic laws implementing Australia's obligations under the Convention relating to the Status of Refugees (the '1951 Refugee Convention')[13]; the Protocol relating to the Status of Refugees 1967 (the '1967 Protocol)[14]; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[15]; or the International Covenant on Civil and Political Rights (ICCPR)[16]; or
- in the United States under domestic laws implementing US obligations under the 1967 Protocol or the CAT.[17]

4.14 **Article 5C(i)(b)** also provides that disclosure not occur where it is reasonably foreseeable that the subject of the Information may become eligible for protection, or if the disclosure may place the subject of the Information, or their family members at risk of refoulement or any other type of harm under the 1951 Refugee Convention, 1967 Protocol or the CAT.[18]

4.15 **Article 5D** clarifies that **Article 5** shall not be interpreted to preclude the use or disclosure of Information as required under domestic law.[19]

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12 NIA, para 16.
13 [1954] ATS 5.
14 [1973] ATS 37.
15 [1989] ATS 21.
16 [1980] ATS 23.
17 NIA, para 17.
18 NIA, para 18.
19 NIA, para 19.

4.16 **Article 6A** provides that a Party may decline to provide all or part of the Information requested where that Party determines that to do so would be inconsistent with its domestic law or detrimental to its national sovereignty, national security, public order, or other important national interest. **Article 6B** affirms that the Agreement shall be implemented consistent with the Parties' obligations under human rights treaties, including the ICCPR and the CAT; and any domestic legislation implementing those treaties.[20]

4.17 **Article 7** deals with access, correction and notation of data. It provides that nothing in the Agreement interferes with a Party's domestic law obligations with respect to requirements to provide data subjects with information about and access to the data or their right to request rectification of data. This is intended to guarantee fair processing with respect to data subjects.[21]

4.18 **Article 8** requires the Parties to have appropriate technical and organisational measures in place to protect shared Information from accidental or unlawful destruction, accidental loss, or unauthorised disclosure, alteration, access or any unauthorised form of processing. The Parties shall use and disclose personal Information fairly and in accordance with their respective laws. These matters will be further dealt with under Implementing Arrangements developed by the Parties in accordance with **Article 4** of the Agreement. Any material accidental or unauthorised access, use, disclosure, modification or disposal of Information must be notified to the other Party within 48 hours after the receiving Party becomes aware of that event.[22]

4.19 **Article 9** provides for the retention, archiving and disposal of Information in accordance with applicable domestic law. Data is to be retained only for as long as is necessary for the specific purpose for which it was provided and as required under domestic law.[23]

4.20 **Article 11** requires the Parties to consult regularly on the implementation of the provisions of the Agreement. This includes the requirement to notify the other Party of any substantive or material change to its laws that would fundamentally alter its ability to comply with the Agreement. This notification is to occur within fourteen (14) days. **Article 11** also provides that in the event of a dispute regarding the interpretation of application of

20 NIA, para 20.
21 NIA, para 21.
22 NIA, para 22.
23 NIA, para 23.

the Agreement, the Parties shall consult each other to seek to resolve the dispute.[24]

4.21 **Article 12** provides that if the Parties cannot come to a mutually satisfactory resolution of a dispute through consultation, they should address the dispute through diplomatic channels.[25]

4.22 Under **Article 13**, the Parties may amend the Agreement by mutual agreement, in writing. Any amendment to the Agreement would be subject to Australia's domestic treaty process.

4.23 **Article 13** also provides for a Party to terminate the Agreement at any time by giving notice in writing to the other Party. The termination shall be effective 90 days after the date of the notice. Termination of the Agreement shall not release the Parties from their obligations under **Articles 5, 7, 8** and **9** in relation to Information exchanged pursuant to the Agreement. Therefore, termination would not release either Party from its obligations concerning the protection, use, disclosure, access to, correction, notation, retention, archiving and disposal of Information already exchanged.[26]

Implementation

4.24 According to the NIA, the Agreement will not require changes to national laws or regulations. Current biographic and biometric information exchange under the FCC Protocol is authorised under the *Migration Act 1958* and the *Privacy Act 1988*. This authorisation is unaffected by increasing the volume of data exchanged through automated, point-to-point checking between biometric systems.[27]

4.25 The NIA states that the Agreement will not change existing roles of the Australian Government or the state and territory governments.[28]

4.26 The NIA advises that it is intended that detailed Implementing Arrangements will be negotiated at the agency level to establish operational procedures and safeguards in relation to the exchange, storage and retention of Information, consistent with the obligations set out in **Articles 3** and **4** of the Agreement. It is envisaged that these arrangements will be signed by agency heads and will not be legally binding, but will

24 NIA, para 24.
25 NIA, para 25.
26 NIA, paras 35 and 36.
27 NIA, para 26.
28 NIA, para 27.

simply describe the operational implementation of the binding obligations of the Agreement itself.[29]

4.27 The Agreement as a whole is made within the context of the Parties' obligations under the ICCPR and the CAT. **Article 6B** relevantly provides that the Agreement shall be implemented consistently with the Parties' obligations under those treaties and any domestic legislation implementing those treaties, as applicable. In addition, under **Article 3**, the Parties agree that where Information is provided through processes set out in Implementing Arrangements, it is to be provided consistently with the respective domestic laws of the Parties. This would include laws relating to the protection of privacy.[30]

4.28 Protocols have been put in place to ensure that privacy laws for both countries will be complied with. The Department of Immigration and Border Protection stressed that the process is anonymised and is 'data matching' not 'data sharing':

> It is just a number. The reason for this is … that the privacy laws of both countries would come into effect. You are not allowed to go fishing for data … So [the match] in and of itself … allows us then to ask the other country—and them to ask us—for the biographic information attached to that.[31]

4.29 A privacy impact statement is in place and will be regularly reviewed and updated to accommodate any new developments as the new process is implemented.[32] Additionally, the Department is confident that the safeguards that have been put in place to protect against accidental or unlawful disclosure or use of the information are secure:

> We are required to have certain protections in place under the protective security manual and the ISP, the technical security manual on a whole-of-government basis. Our gateways are required to be accredited to a certain level. For this particular solution we have two levels of encryption—at a transport layer and at a higher messaging layer. So we have got strong encryption in two places and we also have some of our own procedures. For

29 NIA, para 28.

30 NIA, para 29.

31 Mr McCairns, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 13.

32 Mr McCairns, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, pp. 13–14.

> example, we have our own assurance checklist that we complete on a regular basis and we exchange these with our partners …[33]

Costs

4.30 The NIA states that the Agreement does not contain any specific financial commitments. Under **Article 10**, each Party shall bear the expenses incurred by its authorities in implementing the Agreement.[34]

4.31 The NIA advises that capital funding has been allocated for 2014–15 to continue system design and development of interoperability between Australia's biometric system and the biometric systems of other FCC countries, and to share data under the Agreement. This capability is occurring under the broader biometrics programme being implemented by the Department of Immigration and Border Protection. Maintenance of the capability will also occur under the Department's broader biometrics programme.[35]

4.32 Ongoing operation of the capability will be largely automated and those parts which require manual intervention will be handled under existing resourcing of the Department's identity resolution area for its wider biometrics programme.[36]

4.33 The Department assured the Committee that, at this stage, current resources are sufficient to implement the new system. However, the Department did not rule out the need for further resources in the future:

> If we need more resources, the department and indeed our ministers have said, 'We're happy to have that conversation.' It has not been blocked. But for this purpose we absolutely do not need them. We may need them 'tomorrow'; it might be that at some point in time we are getting lots of matches.[37]

4.34 According to the NIA the regulatory impact of the proposed treaty action has been assessed and no additional regulatory costs have been identified.[38]

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33 Mr Paul Anthony Cross, Assistant Secretary, Identity Branch, Risk, Fraud and Integrity Division, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 15.

34 NIA, para 30.

35 NIA, para 31.

36 NIA, para 32.

37 Mr McCairns, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 13.

38 NIA, para 33.

Conclusion

4.35 The Committee is satisfied that the automation of the fingerprint matching process with the United States will provide substantial benefits in the way of increased speed, efficiency and volume for immigration information sharing.

4.36 The Committee notes that further expansion of the program is being pursued in the immediate region.

4.37 The Committee suggests that the Department's resource levels be closely monitored to ensure that adequate resources remain available to support the program.

4.38 The Committee supports Australia's ratification of the Agreement and recommends that binding treaty action be taken.

Recommendation 3

4.39 **The Committee supports the *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information* and recommends that binding treaty action be taken.**

Mr Wyatt Roy MP
Chair