

National Interest Analysis [2015] ATNIA 2

with attachment on consultation

**Agreement between Australia and the Republic of India
on Social Security**

done at Canberra on 18 November 2014

[2014] ATNIF 31

NATIONAL INTEREST ANALYSIS – CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between Australia and the Republic of India on Social Security done at Canberra on 18 November 2014 [2014] ATNIF 31

Nature and timing of proposed treaty action

1. The proposed treaty action will bring into force the *Agreement between Australia and the Republic of India on Social Security* done at Canberra on 18 November 2014 ('Agreement').
2. Under **Article 25**, the Agreement will enter into force on the 'first day of the third month following the month' in which diplomatic notes are exchanged by Australia and India notifying each other that all matters necessary to give effect to the proposed Agreement have been finalised. This is expected to occur later in 2015 following Tabling and JSCOT consideration.
3. Given the timing of the signature of the Agreement at the end of the 2014 Parliamentary year, the 2015 Parliamentary sittings provide the earliest opportunity to Table this National Interest Analysis ('NIA')

Overview and national interest summary

4. Australia's social security agreements are bilateral treaties which close gaps in social security coverage for people who migrate between countries. The social security agreements do this by overcoming barriers to pension payment in the domestic legislation of each country, such as requirements on citizenship, minimum contributions, past residence history, and current country of residence.
5. The proposed Agreement provides for enhanced access to Australian and Indian retirement benefits for people in Australia and India and greater portability of these benefits between the two countries. Portability of benefits allows for the payment of a benefit from one country to a person in another country. Enhanced access to benefits is an underlying principle of bilateral social security agreements where the responsibility for providing benefits is shared.
6. Under the proposed Agreement, residence in one Contracting Party's territory will not affect a person's entitlement to benefits under the legislation of the other Contracting Party. People who move between Australia and India will be able to do so in the knowledge that their rights to benefits are recognised in both countries. For Australia, the proposed Agreement generally covers the age pension and superannuation guarantee (subject to the exclusions outlined in Paragraph 16 of this document). For India, the proposed Agreement covers old age and survivors' pension for employed persons and Permanent Total Disability pension for employed persons.
7. The Agreement will facilitate business between Australia and India by ensuring employers and employees do not have 'double liability' in respect of the same work of an employee. This means, for example, that when an employee from one Contracting Party is temporarily seconded to work in the territory of the other, the employee and/or their employer will not need to make compulsory pension or superannuation contributions in both countries. In the Australian context, the Agreement will exempt employers and/or employees already making superannuation guarantee contributions in Australia, from the requirement to make compulsory social security contributions in India. Similarly, Indian employers will be exempt from the requirement to make superannuation guarantee contributions for employees sent to work temporarily in Australia, provided they continue to make contributions in India.

8. The proposed Agreement will serve to reinforce Australia's political, business and strategic interests. It will bring economic and social benefits to Australia and facilitate business links between the two countries by reducing costs. It will help to maximise the foreign income of Australian residents, which will have positive flow-on effects within the Australian economy. It will also further strengthen bilateral relations between Australia and India and provide choices in retirement for individuals who migrate to Australia or India during or after their working lives.

Reasons for Australia to take the proposed treaty action

9. Australia's bilateral social security agreements improve access to income support for people whose adult lives are, or have been, divided between Australia and the other country which is a Party to the relevant agreement. The main beneficiaries of these bilateral agreements are age pensioners, although they apply to any type of benefit, pension or allowance as listed in the provisions regarding legislative scope.

10. The proposed Agreement incorporates the same principles as Australia's other bilateral social security agreements. A key element of the Agreement is the sharing of responsibility between the Parties in providing adequate social security coverage for current and former residents of both countries.

11. Under the proposed Agreement, individuals may be eligible for benefits from both countries if they meet certain criteria and have resided and/or worked in both countries during their working lives. Residents of Australia and India will be able to move between these countries knowing that their rights to benefits are protected. Australia has around 295,000 Indian-born residents representing 1.4 per cent of Australia's total population.

12. The proposed Agreement will provide substantial benefits to Australian businesses operating in India. Based on a survey of major Australian businesses operating in India, it is estimated the provisions in the Agreement to remove double liability for superannuation contributions will reduce costs to businesses by around \$10 million a year. The removal of superannuation guarantee 'double liability' will also result in a reduction in Australian taxation revenue over the first three years of operation of the Agreement of an estimated \$4.8 million.

13. The Department of Social Services ('DSS') estimates that, in the first three years of the proposed Agreement, approximately 150 people living in India will claim Australian pensions with a value of around \$1.8 million. Indian pensions will be payable in Australia under the Agreement, but it is difficult to estimate the number of pensions payable.

Obligations

14. **Part I** (Articles 1 to 5) of the proposed Agreement sets out general provisions. **Article 1** of the Agreement contains definitions and **Articles 2** and **3** respectively set out the legislative and personal scope of the Agreement. **Article 4** obliges the Parties to ensure equal treatment of people covered by the proposed Agreement, with respect to eligibility for and payment of benefits. **Article 5** provides that benefits are payable to persons who are residents of, and in, the territory of either Contracting Party.

15. **Part II** (Articles 6 to 11) of the Agreement concerns coverage and contains provisions to avoid double liability for superannuation contributions in respect of the same work of an employee. **Article 8** provides that where a person whose employment is subject to the laws of one Contracting Party is temporarily seconded to work in the territory of the other Contracting Party, the person and/or their employer will be subject only to the legislation of the first Contracting Party. **Article 10** allows the relevant government authority of each Contracting Party, specified in **Article 1(b)** of the proposed Agreement (the Competent Authorities), or institutions they have designated, specified in **Article 1(c)** (the Competent Institutions), to agree in writing to modify the application of **Part II** in respect to a particular person or category of persons.

16. **Part III** (Articles 12 to 14) of the Agreement applies to benefits payable by Australia. Under **Article 1** of the Agreement, a benefit is defined as 'a benefit, pension or allowance' provided for in the legislation of a Party, excluding (in the case of Australia) 'any benefit, payment or entitlement under the law concerning the superannuation guarantee'. **Article 2** makes it clear that the Agreement only applies to Australian social security law related to the age pension and the law concerning the superannuation guarantee.

17. **Part III:**

- (a) obliges Australia to regard residents of India, and Australian residents who are temporarily in India, as Australian residents and as being present in Australia, for the purpose of claiming the benefit, provided the person has been a resident of Australia for at least 12 months at some time in his or her working life. (**Article 12**);
- (b) provides that with certain limitations periods of insurance in India (being periods of contributions used to acquire the right to a benefit under Indian legislation, or periods deemed equivalent) will be regarded as periods of residence in Australia for the purpose of meeting any minimum qualifying period of residence for the benefit (**Article 13**); and
- (c) specifies how the rate of the Australian benefit (ie. age pension) will be calculated under the Agreement and how this applies to a person who is living inside or outside Australia (**Article 14**).

18. **Part IV** (Articles 15 and 16) of the Agreement applies to benefits payable by India. Certain periods of Australian working-life residence will be taken into account by India for the purpose of meeting minimum insurance periods under Indian legislation, provided the periods do not overlap with the person's periods of insurance accumulated in India (**Article 15**). The rate of pension from India will generally be based on a person's period of insurance accumulated in India (**Article 16**).

19. **Part V** of the Agreement (Articles 17 to 23) sets out various obligations relating to the administration of the Agreement, including:

- (a) for the Contracting Parties to consider the date a claim is lodged in one country as the date of lodgement in the other country (**Article 17 (2)**) and, in certain circumstances, to consider a claim for a benefit from one country as a claim for the corresponding benefit from the other country (**Article 17 (3)**);
- (b) for the Contracting Parties to guarantee payment of benefits in the event that currency transfer controls are imposed by either country (**Article 18 (1)**) and without deductions for government administrative fees or charges (**Article 18 (2)**);
- (c) for the Competent Authorities and Competent Institutions of each Contracting Party to assist each other to exchange information and to protect the confidentiality of personal data, and to communicate and accept documents in any of the official languages of either Contracting Party (**Article 19**);
- (d) for the Competent Authorities to conclude an Administrative Arrangement to implement the proposed Agreement (**Article 20**);
- (e) for the Competent Authorities to exchange annual statistics on the payments granted under the Agreement (**Article 21**); and
- (f) for the Competent Authorities to resolve, to the extent possible, any differences which arise in interpreting or applying the proposed Agreement according to its spirit and fundamental principles (**Article 22 (1)**) and for the Contracting Parties to meet to review the proposed

Agreement upon request by either Contracting Party
(Article 23).

20. Part VI (Articles 24 to 26) of the Agreement contains transitional and final provisions. Article 24 precludes payment for any period prior to the date on which the proposed Agreement enters into force (Article 24 (1)), but ensures that Indian periods of insurance and periods of Australian residence completed before the proposed Agreement enters into force will be taken into account when determining entitlements to benefits under the proposed Agreement (Article 24 (2)).

21. Article 24 also provides that the Agreement will not apply in respect to periods of insurance which were liquidated by the granting of a lump sum payment or the reimbursement of contributions (Article 24 (3)) and that the double superannuation liability provisions of Articles 7 (2) and 8 (2) of the Agreement apply from the date of entry into force of the Agreement, even if an employee from one Contracting Party was seconded to work in the territory of the other before the proposed Agreement entered into force (Article 24 (4)).

22. Articles 25 and 26 respectively set out the arrangements for the entry into force of the proposed Agreement and its termination.

Implementation

23. The *Social Security (International Agreements) Act 1999* (Cth) ('the Act') gives effect in domestic law to relevant provisions of Australia's bilateral social security agreements which are set out in Schedules 1 -30 of the Act. A new Schedule containing the full text of the Agreement with India will be added to the Act as a legislative instrument pursuant to regulations made under Sections 8 and 25 of the Act following tabling of the Agreement and consideration of the Agreement by JSCOT.

24. Pursuant to Section 27 (1)(e) of the *Superannuation Guarantee (Administration) Act 1992* (Cth) and Regulation 7AC of the *Superannuation Guarantee (Administration) Regulations 1993* (Cth), the provisions of Australia's bilateral social security agreements relating to double superannuation coverage are automatically given effect in Australian domestic law once the relevant agreement is added as a separate Schedule to the *Social Security (International Agreements) Act 1999*. The combined effect of Section 27 (1)(e) and Regulation 7AC is that payment of salary or wages to an employee who has been sent temporarily to work in Australia will not give rise to a superannuation guarantee obligation for the overseas employer, provided that a relevant scheduled social security agreement is in place.

Cost

25. The proposed Agreement was funded in the 2014-15 Federal Budget at a net cost of **\$11.7 million** over the forward estimates period.

26. Departmental costs incurred by DSS, the Department of Human Services (Centrelink) and the Australian Taxation Office total **\$5.04 million** over the forward estimates period, and are primarily one-off set-up costs related to implementation of the Agreement.

27. In addition to departmental expenses, there is a revenue cost of **\$4.8 million** over the forward estimates period associated with the superannuation double coverage provisions. Administered costs for DSS are estimated to be \$1.8 million over the forward estimates period.

Future treaty action

28. The proposed Agreement does not contain a specific provision in relation to amendment of the Agreement or for the negotiation of future legally binding instruments. In the absence of specific

procedures, the Contracting Parties may amend the proposed Agreement by mutual agreement at any time in accordance with **Article 39** of the *Vienna Convention on the Law of Treaties*.

29. Nevertheless, **Article 23** of the proposed Agreement obliges the Contracting Parties to meet to review the proposed Agreement within six months of the request of either Contracting Party.

30. Any future amendment to the Agreement, whether arising out of review of the Agreement by the Parties under **Article 23** or arising out of ad hoc mutual agreement to change the Agreement under **Article 39** of the *Vienna Convention on the Law of Treaties* would be subject to Australia's domestic treaty-making process.

Withdrawal or denunciation

31. The Agreement contains no specific provisions for withdrawal from or denunciation of the Agreement by either Party, but contains instead a termination provision (**Article 26**).

32. **Article 26** (1) of the Agreement provides that it will remain in force until terminated by either Contracting Party giving 12 months' written notice to the other through the diplomatic channel

33. Any termination of the Agreement by Australia would be subject to Australia's domestic treaty-making process.

34. In the event of termination, **Article 26** (2) preserves the rights of those who are receiving benefits under the proposed Agreement, those who have lodged claims and would have been entitled to receive benefits under the proposed Agreement, and certain employees and/or employers to whom the double superannuation liability provisions of **Articles 7** (2) and **8** (2) of the proposed Agreement apply.

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ATTACHMENT ON CONSULTATION

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CONSULTATION

1. The Department of Social Services ('DSS') and the Treasury consulted with relevant community groups, welfare organisations, State and Territory Governments, employer groups and the superannuation industry in relation to Australia's proposed entry into the Agreement between Australia and the Republic of India on Social Security ('Agreement').
2. On 27 November 2014, the DSS wrote to 27 Indian community groups in Australia and 16 welfare groups across Australia, in addition to all State and Territory Governments, to provide information and seek their views and comments on the proposed Agreement. The Agreement text and information about the proposed Agreement are available on DSS's website.
3. Welfare and other organisations consulted by DSS and Treasury in relation to the Agreement were:

Ethnic Communities Council of QLD	ACT Multicultural Community Council
Ethnic Communities Council of WA	Australian Council of Social Service
Multicultural Council of NT Inc	Southern Cross Group
Welfare Rights Centre	Ethnic Communities Council of NSW
Multicultural Communities Council of SA	Ethnic Communities Council of Victoria
Multicultural Council of Tasmania	Council on the Ageing Australia
Federation of Ethnic Communities' Councils of Australia (FECCA)	Association of Independent Retirees
Superannuants Association	National Seniors Association

4. State/Territory Governments consulted by DSS and Treasury in relation to the Agreement were:

ACT Chief Minister's Department
QLD Department of Premier and Cabinet
VIC Department of Premier and Cabinet
NT Department of Chief Minister
SA Department of Premier and Cabinet
TAS Department of Premier and Cabinet
WA Department of Premier and Cabinet
NSW The Cabinet Office, Inter-Governmental & Regulatory Reform Branch

5. No responses were received as a result of this consultation.
6. Treasury wrote to the organisations listed below on 27 November 2014 seeking their views on the Agreement:

Institute of Chartered Accountants in Australia
Australian Chamber of Commerce and Industry
Industry Funds Forum Inc
A.C.T.U.
Council of Small Business Organisations of Australia
Association of Superannuation Funds of Australia
Financial Services Council

7. Two responses supporting the double liability aspects of the proposed Agreement and one response noting that the double liability aspects of the Agreement did not raise any concerns were received.
8. Treasury also consulted with the Office of Best Practice Regulation ('OBPR') in relation to the requirement for a Regulation Impact Statement. OBPR advised DSS that the regulatory impacts of the Agreement with India are minor given that it:
 - (a) reduces the compliance burden and costs for both Australian and Indian employers by removing the obligation to pay compulsory contributions into both countries' systems; and;
 - (b) lowers the regulatory burden on Australian superannuation funds as they will not need to process as many superannuation payments, including 'departing Australia super payments' for Indian employees temporarily working in Australia and unclaimed superannuation.