

National Interest Analysis [2015] ATNIA 21

with attachment on consultation

Agreement Between Australia and the Republic of Austria on Social Security

(Canberra, 12 August 2015)

[2015] ATNIF 16

NATIONAL INTEREST ANALYSIS – CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between Australia and the Republic of Austria on Social Security

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Nature and Timing of Proposed Treaty Action

1. The proposed treaty action is to bring into force the *Agreement between Australia and the Republic of Austria on Social Security* done at Canberra on 12 August 2015 ('Agreement'), which replaces and consolidates the:

- (a) *Agreement between Australia and the Republic of Austria on Social Security* [1992] ATS 35 (Canberra, 1 April 1992);
- (b) *Protocol to the Agreement between Australia and the Republic of Austria on Social Security* [2002] ATS 20 (Vienna, 26 June 2001); and
- (c) *Second Protocol to the Agreement between Australia and the Republic of Austria on Social Security* [2012] ATS 1 (Vienna, 17 February 2010) (collectively 'the existing Agreement').

2. Pursuant to **Article 24** (Entry into Force and Termination), the proposed Agreement shall enter into force on the first day of the third month after the month in which notes have been exchanged by Australia and Austria through the diplomatic channel notifying each other that all matters as are necessary to give effect to the Agreement have been finalised. Pursuant to **Article 24** (4) (a), on entry into force of the proposed Agreement the existing Agreement will terminate.

Overview and national interest summary

3. Australia's social security agreements are bilateral treaties which close gaps in social security coverage for people who migrate between countries. The agreements do this by overcoming barriers to pension payment in the domestic legislation of each country, such as requirements on citizenship, minimum contributions or residence.

4. The proposed Agreement continues to cover the same benefits for both countries as currently provided for in the existing Agreement, but provisions are updated to make them more consistent with changes in each country's legislation and the consolidation makes it more accessible. The proposed Agreement reflects extant provisions in the existing Agreement, under which both countries share responsibility for providing social security coverage for people who move between these countries.

5. The proposed Agreement will continue to ensure that employers and employees do not have a 'double liability' in respect of compulsory pension or superannuation contributions, which means that they will only be subject to the system of the 'sending' country where an employee is temporarily seconded to work in the other country.

6. The proposed Agreement will be simpler to read, and will continue to provide economic and social benefits to Australia, including facilitating business links between the two countries through the removal of unnecessary costs. The proposed Agreement will continue to play a part in reinforcing Australia's political, business and strategic interests.

7. The proposed Agreement maintains the same principles as the existing Agreement and Australia's other social security agreements, namely the Social Security Agreements with Belgium, Canada, Chile, Croatia, Cyprus, the Czech Republic, Denmark, Finland, the Former Yugoslav Republic of Macedonia, Germany, Greece, Hungary, Ireland, Italy, Japan, Republic of Korea, Latvia, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Switzerland and the United States of America.

Reasons for Australia to take the proposed treaty action

8. For Australia, the proposed Agreement includes an amendment to the portability period for Disability Support Pension paid under the existing Agreement for non-severely disabled people, to bring it in line with domestic legislation. There is also an amendment to the conditions under which a claim for a benefit of one Party can be backdated to the date of lodgement of a claim for a benefit of the other Party.

9. For Austria, the proposed Agreement is consistent with European Union ('EU') regulations on the free movement of EU citizens and calculation of pensions. Austrian periods of insurance covered by the scope of the Agreement have been defined as those made 'due to gainful activity' to reflect changes in Austrian legislation. The proposed Agreement also includes, if necessary, periods of insurance in another country with which Austria has an agreement to meet the minimum contributory period required for an Austrian pension.

10. As at the end of 2014, Austria paid a total of 7,736 pensions into Australia worth about \$30.5 million per year. This includes 3,868 pensions paid under the Agreement, worth about \$14.4 million per year. Currently, Australia pays 967 pensions into Austria, worth approximately \$6.1 million per year (877 of these, worth \$4.9 million, are paid under the Agreement).

Obligations

11. **Part I**, (Articles 1 to 5) of the proposed Agreement sets out general provisions. **Article 1** defines the terms used in the Agreement. **Articles 2 and 3** respectively set out the legislative and personal scope of the Agreement. **Article 4** (Equality of treatment) obliges the Parties to ensure equal treatment of persons covered by the proposed Agreement with their nationals, with respect to eligibility for and payment of benefits. **Article 5** (Equivalence of Territories) provides that benefits are payable to, and may be claimed by, persons who are residents of or in the territory of either Party, subject to the restrictions specified. **Article 5 (7)** of the proposed Agreement reduces the portability period of an Australian Disability Support Pension for persons who are not severely disabled from 13 weeks to the period provided in the Australian social security legislation (currently four weeks in any 12 month period).

12. **Part II**, (Articles 6 to 10) of the Agreement contains the provisions regulating which country's legislation shall apply when employees are seconded to work in the other country temporarily. **Article 7** (Special Provisions) provides that an employed person 'posted' for a period not exceeding five years, to the Territory of the other Party is subject to the legislation of the sending Party. **Article 8** (Members of Diplomatic Missions and Consular Posts) refers to members of diplomatic missions or consular posts and states that the Agreement does not affect the provisions of the relevant Vienna Conventions on Diplomatic or Consular Relations (1961 and 1963). **Article 9** (Government Officials) provides that officials sent by the Government of a Party to the territory of the other Party are subject only to the legislation of the first mentioned Party. **Article 10** (Exceptions) allows the relevant government authority of each Party, specified in **Article 1 (1) (c)**, to agree in writing to exceptions to **Part II**.

13. **Part III**, (Articles 11 and 12), applies to benefits payable by Australia and:

- (a) provides that with certain limitations, periods of insurance in Austria (being periods of contributions used to acquire the right to a benefit under Austrian 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 11**); and
 - (b) specifies how the rate of Australian benefits will be calculated under the proposed Agreement to a person who is living inside or outside Australia (**Article 12**).
14. **Part IV**, (Articles 13 and 14), applies to benefits payable by Austria and:
- (a) provides that with certain limitations, periods of Australian working life residence (being periods of permanent residence in Australia between the age of 16 and pension age) will be regarded as periods of insurance in Austria for the purpose of meeting any minimum qualifying periods for an Austrian benefit (**Article 13**); and
 - (b) specifies how the rate of Austrian benefits will be calculated (**Article 14**).
15. **Part V**, (Articles 15 to 21), sets out obligations relating to administration of the proposed Agreement, including:
- (a) for the Parties to consider the date a claim is lodged in one country as the date of lodgement in the other country (**Article 15 (1)**);
 - (b) for the date of lodgement of a claim for a benefit from one Party to be regarded as the date of lodgement for a claim for a benefit from the other Party, providing the second claim is received within 12 months of the first claim (**Article 15(2)**);
 - (c) for the mutual recovery of any advance payments or overpayments made by either Party to the Agreement (**Article 16**);
 - (d) for the Parties to the Agreement to pay benefits without deductions for government administrative fees and charges (**Article 17 (2)**);
 - (e) for the Competent Authorities to conclude an administrative Arrangement to implement the Agreement and to assist each other by, inter alia, communicating information needed to apply the Agreement and establishing liaison agencies (**Article 18**);
 - (f) **Article 19** (Exemption from Taxes and from Authentication) provides for reciprocity of any exemption from or reduction of taxes, stamp duty or fees provided in national legislation for any documentation required to be submitted for the application of the Agreement for both Parties and exemption from the need for authentication of such documents;
 - (g) **Article 20** (Data Protection) contains data protection requirements in line with EU and Australia's *Privacy Act 1988* (Cth) standards and consistent with the provisions in Australia's other social security agreements. The main principles are:
 - (i) personal data may be communicated between the competent authorities or institutions for the purposes of the proposed Agreement and any implementing arrangement;
 - (ii) data communicated is confidential;
 - (iii) receiving bodies shall provide information concerning the use of data, and the results achieved at the request of the communicating body;

- (iv) communicating bodies shall ensure data communicated is up-to-date and accurate and whether the communication is necessary and proportionate with regard to the purpose;
- (v) people shall be able to request information about the data relating to them, in principle, free of charge and have any inaccurate data corrected;
- (vi) any person whose rights to information, correction and deletion have been violated have the right to have the matter decided by an independent authority. Any data subject who has suffered damage as a result of unlawful processing of data is entitled to receive compensation according to domestic law;
- (vii) personal data communicated shall be deleted if found to be inaccurate, unlawfully obtained or communicated or no longer needed;
- (viii) authorities shall record the reason, contents and date of any communication or receipt of personal data and store electronic data for at least three years; and
- (ix) both communicating and receiving bodies are obliged to provide effective personal data protection.
- (h) for the Competent Authorities to resolve, to the extent possible, any disagreements in connection with the application of this Agreement by mutual agreement. If a disagreement cannot be resolved within six months, the matter (other than matters concerning Part II of the Agreement) can be referred to binding arbitration by an arbitral body agreed by the Parties (**Article 21**).

16. **Part VI**, (Articles 22 to 24), contains transitional and final provisions for the proposed Agreement including:

- (a) precluding payment for any period prior to the date on which the Agreement enters into force (**Article 22** (1)), but ensuring that Austrian periods of insurance and periods of Australian residence completed before the Agreement enters into force will be taken into account when determining entitlements to benefits under the proposed Agreement (**Article 22** (2)).
- (b) specifying that persons receiving benefits by virtue of the existing Agreement will, when this proposed Agreement comes into force, receive benefits by virtue of this Agreement (**Article 22** (4)).

17. **Article 24** sets out the arrangements for the entry into force of the proposed Agreement and its termination.

Implementation

- 18. The *Social Security (International Agreements) Act 1999* (Cth) ('Act') gives effect in domestic law to relevant provisions of Australia's bilateral social security agreements which are set out in **Schedules 1 – 31** of the Act. A new Schedule containing the full text of the Agreement with Austria will be added to the Act as a legislative instrument pursuant to **Sections 8** (Addition of new scheduled international social security agreements) and **25** (Regulations) of that Act following consideration of the Agreement by JSCOT.
- 19. Pursuant to **Section 27** (1) (e) of the *Superannuation Guarantee (Administration) Act 1992* and **Regulation 7AC** the *Superannuation Guarantee (Administration) Regulations 1993*, the provisions of Australia's 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 Act. This is 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 scheduled social security agreement is in place.

20. Following the passing of the new legislative instrument to the Act, the Agreement will enter into force under **Article 24 (1)** on the first day of the third month following exchange of Notes by the Parties.

Costs

21. The financial implications of the proposed Agreement are estimated to be nil or negligible over the forward estimates period.
22. Under the existing Agreement, Austria pays about \$14.4 million into Australia. Australia pays a total of \$5.7 million under the existing Agreement (\$4.9 million into Austria and \$0.8 million to Australian residents).

Future Treaty Action

23. The proposed Agreement does not contain any provisions for amendment or future review of its provisions. Accordingly, the 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* ('VCLT').
24. Any future amendments to the proposed Agreement, whether arising out of review of the Agreement by the Parties or arising out of an ad hoc mutual agreement to amend the Agreement under **Article 39** of the VCLT will be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by JSCOT.

Withdrawal or denunciation

25. The proposed Agreement contains no specific provisions for withdrawal from or denunciation of the Agreement by either Party, but contains instead a termination provision (**Article 24**).
26. **Article 24 (2)** of the proposed Agreement provides that it will remain in force until terminated by either Party giving 12 months written notice to the other through the diplomatic channel.
27. Any future termination of the proposed Agreement by Australia would be subject to Australia's domestic treaty-making process.
28. In the event of termination, **Article 24 (3)** of the Agreement preserves the rights of those who are receiving benefits under the proposed Agreement and of those who have lodged claims and would have been entitled to receive benefits under the Agreement. **Article 24 (5)** preserves the rights of certain employees and/or employers to whom the double superannuation liability provisions of **Articles 6 (1)** and **7 (1)** of the Agreement apply.
29. **Article 24 (4)** provides that on entry into force of this proposed Agreement, the existing Agreement will terminate.

Contact Details

International Agreements
Eligibility and Participation Policy Branch

ATTACHMENT ON CONSULTATION

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(Canberra, 12 August 2015)

[2015] ATNIF 16

CONSULTATION

1. The Department of Social Services ('DSS') and The Treasury did not consult regarding Australia's proposed entry into the proposed Agreement between Australia and the Republic of Austria on Social Security ('Agreement') as there are no major changes to the existing Agreement, nor are significant numbers of people affected.
2. The only change potentially adversely affecting existing pensioners is the amendment to reduce the period a disability support pension under the Agreement is payable outside Australia, for a person who is not severely disabled. This amendment is, however, consistent with changes to Australia's social security law which came into effect from 1 January 2015 and applies to all other disability support pension recipients paid under the social security law. Currently (as at August 2015) there are no disability support pension recipients paid in Australia under the Agreement with Austria.
3. Relevant community groups, welfare organisations and State and Territory Governments were consulted prior to entry into force of the existing Agreement (including employer groups and the superannuation industry prior to the entry into force of the Second Protocol).