

**National Interest Analysis [2017] ATNIA 11
with attachment on consultation**

Exchange of notes amending the:

*Agreement on Consular Relations between Australia
and the People's Republic of China*
[2000] ATS 26

and

*Agreement between the Government of Australia and the Government of the People's
Republic of China concerning the Continuation of the Consular Functions by
Australia in the Macau Special Administrative Region of the People's Republic of
China [1999] ATS 33*

(Canberra, 9 May 2016)

[2017] ATNIF 10

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed action is to amend two treaties: (1) the *Agreement on Consular Relations between Australia and the People's Republic of China* (the China Agreement), and (2) the *Agreement Between the Government of Australia and the Government of the People's Republic of China Concerning the Continuation of the Consular Functions by Australia in the Macau Special Administrative Region of the People's Republic of China* (the Macau Agreement).
2. The parties agreed to the proposed amendments through an exchange of diplomatic notes dated 12 November 2015 and 9 May 2016. The parties shall inform each other when the necessary domestic procedures for the amendments to enter into force have been completed. The amendments will enter into force on the thirty-first day from the date of the last notification.
3. On 16 June 2016, China confirmed its domestic processes have been completed and is awaiting similar advice from Australia.

Overview and national interest summary

4. The purpose of the proposed treaty action is to amend two bilateral consular agreements – the China Agreement and the Macau Agreement – to bring the Macau Special Administrative Region (SAR) within the geographic scope of application of the China Agreement.
5. The parties signed the China Agreement in September 1999 to establish a consular framework that confirms their commitments under the *Vienna Convention on Consular Relations* (Vienna Convention). While Hong Kong was included in the geographic scope of application of the China Agreement, the Macau SAR was excluded as it was not under the governance of China at the time of signature.

6. To provide for Australia's consular functions in the Macau SAR after China resumed governance on 20 December 1999, the parties signed a short, separate treaty – the Macau Agreement – also in September 1999.

7. The proposed amendments would strengthen Australia's ability to provide consular support to Australians in the Macau SAR. Australia has a strong commercial presence in the Macau SAR, including, but not limited to, the design, construction, project management and fit-out of casinos as well as commercial interests in marinas and other entertainment projects.

8. Australia's bilateral merchandise trade with the Macau SAR has also grown steadily in recent years and was valued at \$88.2 million over the 2015-16 period. Australian exports account for more than 82 per cent of total two-way merchandise trade. Australia and the Macau SAR signed a Tax Information Exchange Agreement on 12 July 2011, and a Memorandum of Understanding on immigration cooperation on 19 November 2013. Approximately 2,000 people of Macanese descent live in Australia and around 1,000 Australians live in the Macau SAR.

Reasons for Australia to take the proposed treaty action

9. The ability to provide greater consular access to Australians in the Macau SAR would be the key advantage in proceeding with the proposed treaty action. The amendments would provide procedural certainty for the management of consular cases in the Macau SAR.

Obligations

10. Three amendments are proposed to the China Agreement and Macau Agreement to bring the Macau SAR within the geographical scope of the China Agreement. The proposed amendments are as follows.

11. The first proposed amendment is to Article 18 of the China Agreement ('Aircraft of the sending State'). Pursuant to this proposed amendment, the provisions of the China Agreement concerning vessels of the sending state would apply to aircraft of the sending state only to the extent that their application does not contravene air service agreements Australia has signed with the Macau SAR. This requirement is in addition to the existing obligations under the China Agreement for the parties not to contravene the bilateral and multilateral agreements to which they are signatories, including air service agreements signed between Australia and the Hong Kong SAR.

12. The second proposed amendment is to Article 21 of the China Agreement ('Application of the Agreement to the Hong Kong Special Administrative Region'). It brings the Macau SAR within the geographic scope of the Agreement's geographic application. Pursuant to this proposed amendment, the following commitments under the China Agreement would also apply in the Macau SAR:

- a. Article 2, which requires the parties to notify appointments, arrivals, and departures of consular staff.
- b. Article 3, which obliges the parties to take appropriate measures to ensure the smooth performance of a consular post's functions.
- c. Article 4, which commits the parties to facilitate the purchase or lease of a building or land as consular premises and the residences of consular staff.

- d. Articles 5-9, which notes the functions which can be undertaken by consular officers:
 - i. protection of the rights and interests of the parties and their nationals;
 - ii. applications for citizenship;
 - iii. registering nationals for consular access purposes;
 - iv. registering births and deaths;
 - v. handling procedures relating to marriages;
 - vi. issuing of passports;
 - vii. document notarisation and authentication; and
 - viii. transmission of judicial and extrajudicial documents.
- e. Article 10, which requires the parties to facilitate travel between the two states for persons who may have a claim simultaneously to the nationality of Australia and the People's Republic of China.
- f. Article 11, which obliges the parties to ensure consular officers can communicate with their nationals. Specifically:
 - i. Consular officers can request the receiving state to help determine the whereabouts of a national of the sending state;
 - ii. Formal guidelines are to be applied when the receiving state arrests or detains nationals of the sending state; and
 - iii. Receiving state authorities shall inform the consular post of the sending state within three days if a national of the sending state is arrested or committed to prison or custody pending trial, unless the individual concerned expressly requests that the consular post of the sending state not be informed. A consular visit to the detainee must be permitted within two days thereafter.
- g. Articles 12-13, which commit the receiving state to notify the sending state of the death of a national (of the sending state) and provide guidelines for the handling of the estate of a deceased person who has left an estate in the receiving state and there is no heir or testamentary executor.
- h. Article 14, which entitles the parties to protect nationals who are minors and other vulnerable persons.
- i. Articles 15-18, which, *inter alia*, entitle consular officers to provide assistance to vessels and aircraft of the sending state which are in the territorial waters or airspace of the receiving state, and oblige the receiving state to notify the consular post when they intend to take compulsory action or begin an investigation against a vessel or aircraft.

j. Article 19, which allows consular posts to levy fees and charges.

13. The third proposed amendment is to Article 2 of the Macau Agreement. Under the Macau Agreement, China is obliged to accord necessary assistance and facilities to the Consulate General of Australia in Hong Kong in the exercise of its consular functions in the Macau SAR, in accordance with the Vienna Convention and relevant laws and regulations of China. Under the proposed amendment to the Macau Agreement, China shall now also provide such assistance and facilities in accordance with the China Agreement.

Implementation

14. No changes to any Australian legislation are required for implementation of the proposed amendments.

Costs

15. No cost implications are anticipated for Australia.

16. The Office of Best Practice Regulation has been consulted and confirms a Regulation Impact Statement is not required.

Future treaty action

17. The China and Macau Agreements do not contain any specific procedural provisions for amending their respective agreements. However, a treaty may be amended at any time by agreement between the parties (Article 39, *Vienna Convention on the Law of Treaties* (VCLT)).

Withdrawal or denunciation

18. The proposed amendments do not of themselves provide procedures for withdrawal or denunciation. The China Agreement provides that either party may terminate that Agreement on six months' notice in writing to the other party. The Macau Agreement does not contain express provisions for withdrawal or denunciation. However, in accordance with Article 54 of the VCLT, termination of that Agreement is possible at any time by consent of both parties.

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

1. The State and Territory Governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No action will be required from States or Territories to implement the Agreement.