

**AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND
THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON
SOCIAL SECURITY, DONE AT CANBERRA ON 27 SEPTEMBER 2001**

Documents tabled on 12 March 2002

- **National Interest Analysis**
- **Text of the proposed treaty action**
- **Regulation Impact Statement**

Agreement between the Government of Australia and the Government of the United States of America on Social Security, done at Canberra on 27 September 2001

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. It is proposed that Australia enter into a Social Security Agreement (“the Agreement”) with the United States (“the US”).

Date of proposed binding treaty action

2. The Agreement was signed on 27 September 2001.
3. In accordance with Article 24, the Agreement shall enter into force on the first day of the third month following an exchange of notes between Australia and the US notifying that all legislative matters necessary to give effect to the Agreement have been finalised. It is proposed that this exchange of notes will take place in July 2002 with the Agreement entering into force on 1 October 2002.

Date of tabling of the proposed treaty action

4. 12 March 2002.

Purpose of the proposed treaty action and why it is in the national interest

5. The Agreement will bring economic and political benefits to Australia. It will assist in maximising the foreign income of Australian residents and there will be a flow-on effect of these funds into the Australian economy. The Agreement will also serve to reinforce Australia’s political, business and strategic interests. The Agreement will further strengthen bilateral relations between Australia and the US and provide choices in retirement for individuals who have migrated (or who will migrate) to Australia or the US during their working lives.
6. The Agreement provides for enhanced access to certain Australian and US social security benefits and greater portability of these benefits between the countries. Portability of benefits allows for the payment of a benefit from one country into another country. This is an underlying principle of Australia’s bilateral agreements on social security where the responsibility for providing benefits is shared. Under the Agreement, residents of Australia and the US will be able to move between Australia and the US with the knowledge that their right to benefits is recognised in both countries.

Reasons for Australia to take the proposed treaty action

7. Australia's network of bilateral social security agreements improves access to income support for people whose adult lives are split between Australia and the other country that is a party to the Agreement. Most people benefiting from these agreements are age pensioners. Such agreements also improve income support coverage for people with disabilities, widowed persons and some carers.

8. The Agreement with the US incorporates the same general principles as a number of other agreements that Australia has on social security - including those with Austria, Canada, Cyprus, Denmark, Ireland, Italy, Malta, the Netherlands, Portugal and Spain. A key element of this Agreement, and the other social security agreements, is the sharing of responsibility between the parties in providing adequate social security coverage for former residents of their countries.

9. The Australian Government currently pays pensions under the *Social Security Act 1991* ("the Act") to around 3,800 US-born pensioners, the vast majority of whom are resident in Australia. Under domestic portability provisions in the Act, Australia pays pensions to approximately 450 people (not necessarily US-born people) residing in the US.

10. US domestic legislation requires a person to have at least 40 quarters of coverage (about 10 years) to qualify for a retirement pension. It also restricts the payment of certain benefits to recipients who live outside the US. The Agreement will help overcome these restrictions.

11. The Department of Family and Community Services estimates that, through the Agreement, approximately 4,000 people residing in Australia and the US will benefit by being able to claim payments to which they currently do not have access.

12. For Australia, the Agreement will cover access to age pensions, disability support pensions (DSP) for people who are severely disabled, carer payments in respect of the partners of persons who receive DSP or age pensions, and pensions payable to widowed persons. For the US, the Agreement will cover old-age benefits, disability benefits and survivor benefits.

13. The Agreement provides that both countries will share the financial responsibility for providing these benefits. This means that individuals may be eligible for benefits from both countries if they meet certain eligibility criteria and they have lived and/or worked in both countries during their working lives. Residents of Australia and the US will be able to move between Australia and the US knowing that their right to benefits is recognised in both countries and that each country will contribute fairly to support those who have spent part of their working lives in both countries.

14. Double coverage provisions have also been included to ensure that Australian and US employers do not have to make two superannuation contributions for an employee seconded to work in the other country. Under current arrangements the employer would be required to make contributions under both Australian and US legislation. The new provisions will ensure the employer, and the employee where compulsory employee contributions are required, have to contribute only to the relevant superannuation scheme in their home country.

Obligations

15. The Agreement places equivalent obligations on both Australia and the US. Article 1 defines terms used in the Agreement and in some cases limits Australia's obligations under it. For example, carer payment is limited to individuals who care for a partner in receipt of an Australian (age or DSP) pension - in contrast, in Australia carer payment can be paid to individuals not related to the caree (the person being cared for) and the caree does not have to be in receipt of an Australian pension.

16. Article 2 sets out for both countries the scope of social security benefits covered by the Agreement as described in paragraph 13 of this National Interest Analysis.

17. Article 3 describes the group of people to whom the Agreement applies. It provides that the Agreement shall apply to any person who is or has been an Australian resident, or is or has been subject to the laws of Australia or the US, and, where applicable, to any partner, dependant or survivor of such a person.

18. Article 4 of the Agreement requires that all persons to whom the Agreement applies must be treated equally in relation to the application of laws regarding social security benefits.

19. Article 5 of the Agreement deals with portability of benefits and provides for the payment of benefits by Australia and the US into the other country. Neither Australia, nor the US, is entitled to charge administrative fees or charges for processing benefits payable under the Agreement.

20. Article 6 of the Agreement deals with the situation of employees who are sent from one country to the other to work. This Article is generally aimed at avoiding double coverage of employees or liability of employers in, for example, the case of superannuation. It specifies that in certain circumstances, only one country's legislation relating to coverage will apply. The general rule is that only the legislation of the country in which the employee is working will apply. The main exception to this rule is where the employee has been seconded to work temporarily in that country (a five-year limit applies to non-Government employees). In such situations, only the legislation of the employee's home country will apply. If the employee is working on a ship or aircraft in international traffic then only the legislation of the country where the employee is resident will apply.

21. Article 8 concerns a person in the USA who would have the right to lodge a claim for a benefit - but for the fact that he or she is not an Australian resident and not in Australia. Article 8 allows such a person to lodge such a claim - provided that that person once resided in Australia.

22. Article 9 establishes the circumstances in which US periods of coverage can be used to satisfy the minimum residence requirements for an Australian benefit stipulated in the Act. Under this Article, claimants are able to add these 'deemed' US periods to actual periods of residence in Australia in order to qualify for an Australian benefit. This means that people who do not meet the minimum period of Australian residence to qualify for payment can add periods of coverage in the US to their actual periods of Australian residence in order to qualify for payment. However, the rate of Australian pension will still be based on their actual periods of working life residence in Australia. Article 7 imposes a similar obligation on the US to treat relevant periods of residence in Australia as US periods of coverage. This

means that individuals who do not satisfy the minimum 40 credits (equivalent to about 10 years of work) required to qualify for US benefits can add to those US credits their periods of Australian working life residence. However, the rate of US benefit will still be based on the person's average earnings in the US and the duration of their working life in the US.

23. Article 11 provides that, for the purposes of Articles 9 and 10, a period of Australian working life residence has the normal meaning it has in the Act, rather than the modified definition in Article 1 (and used by the USA in Article 7).

24. The method of calculating the rate of Australian benefits is set out in Article 10 of the Agreement. When calculating a person's entitlement Australia is obliged to modify the method of calculation under Australian social security law, both inside and outside Australia. Where an Australian pension is payable to a person outside Australia that pension is determined according to Australian law. However, only a portion of any US benefit paid to that person is regarded as income when calculating the Australian benefit. Further, the rate of pension paid to Australian pensioners outside Australia will attract concessional treatment under the Australian income test. This is consistent with concessions given in other agreements and with the principle of shared responsibility. Benefits paid by the US under the Supplemental Security Income program are to be disregarded when calculating the rate of Australian pension. This is consistent with other agreements where welfare type payments are disregarded for the purposes of calculating the rate of Australian pension. Where an Australian benefit is payable to a person who is in Australia the rate of that benefit is determined by calculating that person's income according to Australian law but disregarding any US benefit received by that person or their partner. However, the amount of the US benefit received is then deducted from the maximum rate of Australian benefit payable for people in Australia. It should be noted that people in Australia will be paid the outside Australia rate if that rate would be higher than the inside Australia rate.

25. Under Article 12 of the Agreement Australia and the US must make the necessary administrative arrangements for the implementation of the Agreement and designate liaison agencies. They must also notify each other of measures taken for the application of this Agreement and of changes in domestic laws which may affect the application of the Agreement.

26. Article 13 requires Australian and US authorities to assist each other, subject to relevant domestic laws, regulations and policies, in the implementation of the Agreement, including the exchange of information to assist in processing claims. The domestic laws on privacy in each country continue to apply to personal data.

27. Article 14 sets out certain requirements with respect to the authentication of documents and the waiver of fees for processing documents.

28. Article 16 obliges Australia and the US to deem claims for benefits as claims for corresponding benefits from the other Party if the person requests it or if the person indicates they have completed social security periods in the other country.

29. Article 17 provides a mechanism by which Australia may recover overpayment of a benefit resulting from the subsequent grant (with arrears) of an equivalent benefit from the other Party. This Article is particularly necessary for Australia's income tested social security system and is a standard provision in Australia's bilateral agreements on social security.

30. Article 17 also provides that the Agreement shall not establish any entitlement to benefits for any period prior to its entry into force, and will consider all events and periods that have a bearing on a person's entitlement when determining eligibility to a benefit,

31. Article 18 provides that any claim, notice or written appeal lodged with one Party within a prescribed period is to be accepted as having been lodged with the other Party within the prescribed period.

32. Article 19 requires Australia and the US to immediately transfer sums owed under the Agreement in case of currency controls being introduced by either country.

33. Article 20 obliges Australian and US authorities to resolve by consultation any disagreement with regard to the interpretation or application of the Agreement.

Implementation

34. A new Schedule containing the full text of the Agreement will be added to the *Social Security (International Agreements) Act 1999*. The regulation making powers contained in Sections 8 and 25 of that Act will be used to implement the Agreement. Article 12 of the Agreement specifies that it will be implemented in accordance with a separate Administrative Arrangement. The Administrative Arrangement was also signed on 27 September 2001 and is tabled with the text of the Agreement.

35. An amendment has been to be made to the Superannuation Guarantee (Administration) Act 1992 dealing with bilateral social security agreements to eliminate double superannuation coverage. The Regulations were gazetted on 17 August 2001. The Regulations provide 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 an appropriate international agreement is in place).

36. No action is required by the States or Territories, and no change to the existing roles of the Commonwealth, the States and Territories in social security matters will arise as a consequence of implementing this Agreement.

Costs

37. The Agreement is expected to result in an increase in administered outlays of A\$3.207m over the forward estimates period to 30 June 2005. Departmental costs of A\$2.939m over the same period represent the cost of implementing the Agreement including the costs of developing new computer systems, administrative processes, forms and staff training.

38. There will also be costs (\$3.738m) involved with system enhancements over the period to 30 June 2005 for the new Agreement with the US and the five revised social security agreements (Austria, Canada, Portugal, Spain, the Netherlands) tabled before the Committee in 2001.

Consultation

39. State and Territory Governments were advised of the proposed Agreement through the Commonwealth-States-Territories Standing Committee on Treaties, and through separate explanatory information sent out on 3 December 2001. Replies were received from the ACT and NSW Governments.

40. The ACT Government was concerned about the possible cost involved with the provision of additional concessions as a result of granting pensions under the Agreement to people who would not otherwise qualify. This concern was addressed, as it was explained to the ACT Government that it is expected there will be minimal grants to Australian residents under the Agreement because of the application of the income and assets test.

41. The NSW Government raised concerns about the coverage of de facto partners under the Agreement. As this related mostly to the definition of common law marriages under US legislation input was sought from the US Social Security Administration. The NSW Government was satisfied with the reply to their query. They also requested a definition of 'severely disabled' which was supplied.

42. The views of 13 US community groups in Australia were sought in December 2001, but no responses were received from these organisations. A list of the US community groups whose views were sought is at Attachment A.

43. Unsolicited comments were received from two members of the public as a result of the text of the new Agreement being placed on the Department of Family and Community Services website. Their comments supported the Agreement.

44. The views of major welfare organisations in Australia were also sought in December 2001, but no comments were received. A list of these organisations is at Attachment B

45. The views of the Southern Cross Group (representing expatriate Australians) were also sought in December 2001 and a submission supporting the Agreement was received on 31 January 2002.

46. Positive comments on the Agreement were also received from the Association of Superannuation Funds of Australia.

47. Finally, the accounting firm PricewaterhouseCoopers raised concerns regarding the treatment of employment in the US prior to the commencement of the Agreement. This concern was addressed as the Agreement does count periods of employment and working life residence prior to the commencement date of the Agreement.

Regulation Impact Statement

48. A Regulation Impact Statement is attached.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

49. Article 21 of the Agreement states that it may be amended in the future by supplementary agreements. Article 22 requires both the US and Australia to meet to review the Agreement when so requested by the other country.

Withdrawal or denunciation

50. Article 24 (2) provides that the Agreement shall remain in force until the expiration of 12 months from the date either country notifies the other country in writing of their intention to terminate the Agreement.

51. In the event of termination, Article 24 (3) preserves the rights of those people who are receiving benefits or who have lodged claims and would have been entitled to receive benefits under the Agreement.

52. The Agreement does not expressly provide for withdrawal or denunciation. However, either party may withdraw or denounce the treaty in accordance with Article 56 of the *Vienna Convention on the Law of Treaties 1969*.

Contact details

International Agreements
International Branch
Department of Family and Community Services

ATTACHMENT A

The US Community Organisations consulted: -

American Citizens Abroad
Homebush NSW 2140

Australian American Association
North Sydney NSW

American Chamber of Commerce
Sydney NSW

American Club
Sydney NSW

American Legion
Sydney NSW

American Society
Sydney NSW

American Women of Sydney
Sydney NSW

Australian American Association
Newcastle NSW

American Legion
Toormina NSW

American Legion
Brisbane QLD

Australian American Association
Robina QLD

Australian American Association
Townsville QLD

American Legion
Malanda QLD

ATTACHMENT B

Major welfare organisations consulted: -

NSW Council on the Ageing (Sydney, NSW)	National Welfare Rights Network (Surry Hills, NSW)
Welfare Rights Centre Inc (Stone's Corner, QLD)	Welfare Rights Centre (Adelaide, SA)
Welfare Rights Centre (Turner, ACT)	Welfare Rights Unit Inc (Collingwood, VIC)
Australian Council of Social Service (Strawberry Hills, NSW)	Ethnic Communities' Council of Tasmania (Hobart, TAS)
Federation of Ethnic Communities' Councils of Australia (Curtin, ACT)	Multicultural Council of the Northern Territory (Darwin, NT)
Brotherhood of St Laurence (Fitzroy, VIC)	Carers Association of Australia (Deakin, ACT)
Disability Council of NSW (Sydney, NSW)	Australian Pensioners and Superannuants Federation (Canberra, ACT)
Association of Superannuation Funds of Australia (Sydney, NSW)	Australian Bankers' Association (Melbourne, VIC)
Combined Pensioners & Superannuants Association (Surry Hills, NSW)	Tasmanian Council of Social Service (Battery Point, TAS)
Northern Territory Council of Social Service (Darwin, NT)	Western Australian Council of Social Service (Perth, WA)
Queensland Council of Social Service (Red Hill, QLD)	South Australian Council of Social Service (Adelaide, SA)
Victorian Council of Social Service (Melbourne, VIC)	ACT Council of Social Service (Canberra, ACT)
NSW Council of Social Service (Surry Hills, NSW)	National Disability Advisory Council (Canberra, ACT)

Deafness Forum Ltd
(Braddon, ACT)

National Council on Intellectual
Disability
(Mawson, ACT)

Blind Citizens Australia
(Prahran, VIC)

Women With Disabilities Australia
(Dickson, ACT)

ACROD
(Curtin, ACT)

Australian Association of the Deaf
(Sydney, NSW)

Helen Cudlipp
PricewaterhouseCoopers

Head Injury Council of Australia
(Mawson, ACT)

National Ethnic Disability Alliance
(Harris Park, NSW)

Physical Disability Council of Australia
(Northgate, QLD)

National Association of People Living
with HIV/AIDS
(Darlinghurst, NSW)

Association for Competitive Employment
(Seven Hills, NSW)

Ms Anne MacGregor
Southern Cross Group
Washington DC 20009
USA