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The Parliament of the Commonwealth of Australia

# **Report 32**

**Six Treaties Tabled on 7 March 2000**

**Joint Standing Committee on Treaties**

May 2000

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ISBN



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## Membership of the Committee

|                     |                           |                               |
|---------------------|---------------------------|-------------------------------|
| <b>Chair</b>        | The Hon Andrew Thomson MP |                               |
| <b>Deputy Chair</b> | Senator Barney Cooney     |                               |
| <b>Members</b>      | The Hon Dick Adams MP     | Senator Andrew Bartlett       |
|                     | The Hon Bruce Baird MP    | Senator Helen Coonan          |
|                     | Kerry Bartlett MP         | Senator Joe Ludwig            |
|                     | Anthony Byrne MP          | Senator Brett Mason           |
|                     | Kay Elson MP              | Senator the Hon Chris Schacht |
|                     | Gary Hardgrave MP         | Senator Tsebin Tchen          |
|                     | De-Anne Kelly MP          |                               |
|                     | Kim Wilkie MP             |                               |

## Committee Secretariat

|                               |                |
|-------------------------------|----------------|
| <b>Secretary</b>              | Grant Harrison |
| <b>Inquiry Secretaries</b>    | Robert Morris  |
|                               | Susan Redman   |
| <b>Administrative Officer</b> | Lisa Kaida     |



## **Recommendations**

### **Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations**

The Committee supports the proposed *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, and recommends that binding treaty action be taken (paragraph 2.52).

### **Agreement between Australia and New Zealand on Child and Spousal Maintenance**

The Committee supports the proposed *Agreement between the Australia and New Zealand on Child and Spousal Maintenance*, and recommends that binding treaty action be taken (paragraph 2.53).

The Committee recommends that the Attorney-General and the Minister for Family and Community Services monitor the operation of the two child and spousal maintenance treaties to ensure that they operate in a fair and reasonable manner, without limiting the rights of custodial parents, non-custodial parents or children; or impeding the contact between non-custodial parents and their children.

This monitoring should culminate in a comprehensive review of the operation of the treaties and their impact upon all parties three years after binding action is taken. A copy of the review report should be provided to the Joint Standing Committee on Treaties (paragraph 2.55).

**Agreement for Cooperation with the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation**

The Committee supports the proposed *Agreement for Cooperation with the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation*, and recommends that binding treaty action be taken (paragraph 3.17).

**Agreement with the Slovak Republic on Trade and Economic Relations**

The Committee supports the proposed *Agreement with the Slovak Republic on Trade and Economic Relations*, and recommends binding treaty action be taken (paragraph 4.13).

**Agreement with Denmark on Social Security**

The Committee supports the *Agreement with Denmark on Social Security* and recommends that binding treaty action be taken (paragraph 5.15).

**Double Taxation Agreement with Romania**

The Committee supports the proposed *Double Taxation Agreement with Romania*, and recommends that binding treaty action be taken.

## Introduction

### Purpose of the report

1.1 This Report contains advice to Parliament on the review by the Joint Standing Committee on Treaties (the Committee) of the following, proposed treaty actions, which were tabled on 7 March 2000<sup>1</sup>:

- *Agreement with New Zealand on Child and Spousal Maintenance*, in Chapter 2;
- *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, also in Chapter 2;
- *Agreement for Cooperation with the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation*, in Chapter 3;
- *Agreement with the Slovak Republic on Trade and Economic Relations*, in Chapter 4;
- *Agreement with Denmark on Social Security*, in Chapter 5; and
- *Double Taxation Agreement with Romania*, in Chapter 6.

1.2 This is our second and final report on the proposed treaty actions tabled on 7 March 2000, the first having been *Report 31, Three Treaties Tabled on 7 March 2000*. In *Report 31* we commented on ratification of the *Convention on the Safety of United Nations and Associated Personnel*; on the partial withdrawal of Australia's reservation regarding women's employment in

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1 Senate Journal No. 95, 15 February 2000, p. P2275; House of Representatives, *Votes and Proceedings*, No 89, 15 February 2000, p. P1106

combat and combat related duties to the *United Nations Convention on the Elimination of all Forms of Discrimination Against Women*; and on a amendments to the *International Convention on the Simplification and Harmonization of Customs Procedures*.

- 1.3 At the time we presented *Report 31* we had not completed our review of the proposed treaty actions considered in this report.

## Availability of documents

- 1.4 The advice in this Report refers to, and should be read in conjunction with, the National Interest Analyses (NIAs) prepared for these proposed treaty actions. Copies of the NIAs are at Appendix B. These analyses were prepared for each proposed treaty action by the Government agency responsible for the administration of Australia's responsibilities under each treaty. The NIAs were tabled in Parliament as aids to Parliamentarians when considering these proposed treaty actions.
- 1.5 Copies of each of the treaty actions and NIAs can also be obtained from the Treaties Library maintained on the Internet by the Department of Foreign Affairs and Trade (DFAT). The Treaties library is accessible through the Committee's website at [www.aph.gov.au/house/committee/jsct](http://www.aph.gov.au/house/committee/jsct).

## Conduct of the Committee's review

- 1.6 Our review of each of treaties tabled on 7 March 2000 was advertised in the national press and on our web site. A total of 22 submissions were received in response to the invitation to comment in the advertisement. A list of those submissions is at Appendix C.<sup>2</sup>
- 1.7 For the proposed treaty actions reviewed in this report, we gathered evidence at public hearings held on 13 March 2000 and on 3 April 2000. A list of witnesses who gave evidence at these hearings is at Appendix D.
- 1.8 A transcript of the evidence taken at both hearings can be obtained from the database maintained on the Internet by the Department of the

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2 Our review of these proposed treaty actions was advertised in *The Weekend Australian* on 11/12 December 1999, p. 13

Parliamentary Reporting Staff ([www.aph.gov.au/hansard/joint/committee/comjoint.htm](http://www.aph.gov.au/hansard/joint/committee/comjoint.htm)), or from the Committee Secretariat.

- 1.9 We always seek to consider and report on each proposed treaty action within 15 sitting days of it being tabled in Parliament. In this instance it was not possible to complete our review of all of the treaties tabled on 7 March 2000 within the 15 sitting day period, which expired on 13 April 2000. At the time we presented *Report 31* the Chairman advised the Minister of Foreign Affairs that our report on the remaining proposed treaty actions would be presented as soon as possible.

## Two Child and Spousal Maintenance Treaties

### Proposed treaty actions

- 2.1 This chapter focuses on the following two proposed international treaties which aim to secure the payment of adequate child and spousal maintenance:
- a *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations* (the Convention); and
  - an *Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance* (the Agreement).
- 2.2 The main objective of both proposed treaties is to establish international arrangements for the recognition and enforcement of child and spousal maintenance.<sup>1</sup>
- 2.3 Australia's existing international maintenance enforcement arrangements, which are designed to deal solely with court ordered maintenance, need to be replaced by new arrangements which also apply to administrative assessments of the Child Support Agency (CSA).
- 2.4 Currently, an administrative assessment of the CSA can be sought only if the payer is an Australian resident. This means that a parent with an

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1 National Interest Analysis for the *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, (NIA for Convention), p. 1; National Interest Analysis for the *Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance*, (NIA for Agreement), p. 1

assessment against a non-resident parent must go through the process of obtaining a court order which the Attorney-General's Department can then send overseas for enforcement.

- 2.5 The Convention and the Agreement will be implemented in Australia by the CSA. The CSA will administratively enforce overseas maintenance decisions and send applications for recognition and enforcement of Australian liabilities to authorities in other Convention countries.
- 2.6 The proposed treaties also aim to alleviate the deficiencies in existing arrangements, such as delays in enforcement, poor outcomes and complex procedures. An *Issues Paper* published by the Attorney-General's Department in 1999 made the following comments about existing reciprocal arrangements:

The effectiveness of existing reciprocal arrangements in obtaining maintenance for Australian payees is variable. Delays and poor outcomes are common where an Australian payee has to go through the process of obtaining a provisional order from an Australian court and seeking confirmation of it by an overseas court ... Overseas payees [and] child support agencies have also been critical of the operation of existing procedures for obtaining maintenance for children overseas.<sup>2</sup>

## The Convention

- 2.7 The Convention will complement existing bilateral and multilateral arrangements for the enforcement of child and spousal maintenance. Currently, the major multilateral agreement is the *Untied Nations Convention on the Recovery Abroad of Maintenance* (UNCRAM) which has 55 countries as signatories.
- 2.8 Australia's experience with UNCRAM has been disappointing as procedures are cumbersome and slow. Also, the Attorney-General's Department incurs significant costs in payments to legal aid authorities.<sup>3</sup>
- 2.9 The Commonwealth Parliamentary Joint Select Committee on Family Law Issues, in 1994, was concerned that there was no reciprocal arrangements with migrant source countries. The Joint Select Committee concluded that:

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2 Attorney-General's Department, *International Child Support Enforcement - Proposed New Treaty Arrangements: Issues Paper*, November 1999, p. 5

3 Attorney-General's Department, *International Child Support Enforcement - Proposed New Treaty Arrangements: Issues Paper*, November 1999, p. 10

... the simplest and most effective method of enforcement of overseas maintenance orders should be utilised. ... the preferred approach is the expansion of the existing reciprocal arrangements as the approach adopted by UNCRAM is too cumbersome and costly.<sup>4</sup>

- 2.10 The proposed Convention has been ratified by nineteen countries, mostly European and many of them high migrant source countries.<sup>5</sup> The proposed Convention obliges authorities in a Convention country to recognise and enforce maintenance decisions made by judicial or administrative authorities in another Convention country.
- 2.11 Authorities in Australia will be bound by findings of fact made by the overseas authorities and will not be able to review the decisions unless there has been a change in the circumstances of a payer or payee since the decision was made. Australian authorities could also suspend enforcement if it is impossible for the payer to pay as a result of his or her financial situation.

### Agreement with New Zealand

- 2.12 Australia has more child support enforcement cases with New Zealand than any other country. Each country has similar systems of administrative assessment of child support. Currently, UNCRAM and non treaty reciprocal arrangements exist between Australia and New Zealand on the recognition and enforcement of maintenance obligations.
- 2.13 In the past there have been difficulties encountered with the jurisdiction provisions of Australian and New Zealand legislation. There have been cases where individuals have been issued with both Australian and New Zealand child support assessments. In other cases New Zealand has issued child support assessments which have had the effect of overriding pre-existing Australian court orders for maintenance and thereby extinguished arrears that were owed to Australian payees.<sup>6</sup> The Agreement is designed to put an end to such conflicts. Under the Agreement, jurisdiction to make a maintenance decision will be based on the habitual residence of the payee at the date of the decision.

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4 Joint Select Committee on Certain Family Law Issues, *Child Support Scheme: An examination of the operation and effectiveness of the scheme*, November 1994, p. 274

5 Belgium, Czech Republic, Denmark, Finland, Estonia, France, Germany, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom

6 John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR8

- 2.14 The proposed Agreement provides for each country to recognise and enforce maintenance decisions, including court orders and administrative assessments, made in the other country. The Agreement also provides for each country to establish central authorities to facilitate the operation of the Agreement: the Child Support Agency in Australia and the Commissioner of Inland Revenue in New Zealand.

## Evidence presented

### Number of cases

- 2.15 The Attorney-General's Department currently has about 4000 to 5000 cases where overseas orders have been registered in Australian courts for enforcement. During 1998-99 financial year, 206 new cases were sent to Australia by overseas authorities or by overseas payees. No reliable statistics are available, however, on the number of cases in which payments are made to overseas payees.<sup>7</sup>
- 2.16 Figures on the total number of payees in Australia who receive child support payments from overseas authorities are not available because usually the payee deals with the overseas agency directly.<sup>8</sup> However, the number of new cases that went through the Attorney-General's Department to get their orders registered overseas was 225 in the 1998-99 financial year. The Attorney-General's Department does not monitor the outcome of cases referred to overseas authorities for enforcement, however, a study by the CSA indicated that the number of Australian payees receiving payments from overseas payers each month varied between 20% to 50%.<sup>9</sup>
- 2.17 The CSA advised that it has approximately 4227 cases in which the payer is known to be overseas. Of these cases, 1331 involve Australian court orders which have been sent to the Attorney-General's Department for enforcement overseas, and 2896 involve administrative assessments which can not be sent to overseas authorities because the existing international child support enforcement arrangements only provide for enforcement of court orders.

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<sup>7</sup> Attorney-General's Department, *Submission No. 7, Attachment A*, p. 2

<sup>8</sup> John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR12

<sup>9</sup> Attorney-General's Department, *Submission No. 7, Attachment A*, p. 1

- 2.18 A further 5200 cases need to be examined to determine if they can be referred to overseas authorities for enforcement. The CSA estimates, based on past experience, that 1000 to 2000 of these cases could be sent overseas for enforcement when the new treaty arrangements are in force.<sup>10</sup>

### Benefits of the treaties

- 2.19 One of the main benefits of the Convention and the Agreement is that they provide for the enforcement of both administrative assessments of child support and court orders. In the past, Australia has only had arrangements that provided for the recognition of court orders for maintenance.<sup>11</sup> This is unsuited to the current situation in Australia in which court ordered maintenance is being replaced by administrative assessments by the CSA.
- 2.20 We also received evidence that effectiveness of existing reciprocal arrangements in obtaining maintenance for Australian payees has been poor. Delays and poor outcomes are common and the process is slow and complex. Overseas payees and child support agencies have also been critical of the operation of existing Australian procedures for obtaining maintenance for children overseas.<sup>12</sup>
- 2.21 The National Council of Women of Australia also supported Australia taking binding action on the treaties.<sup>13</sup> Legal Aid Queensland, Legal Aid New South Wales and The Law Society of New South Wales agreed that Australia should become party to the treaties due to the recognition of administrative assessments as well as court orders and the savings in time and resources in maintenance enforcement.<sup>14</sup> The Australian Council of Social Service supported the two treaties because they recognise administrative assessments and this would reduce procedural complication and expense.<sup>15</sup> Legal Aid Western Australia agreed that the current system in relation to overseas maintenance is cumbersome, slow and not always successful.<sup>16</sup>

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10 Attorney-General's Department, *Submission No. 7, Attachment A*, p. 1

11 John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR8

12 Attorney-General's Department, *International Child Support Enforcement - Proposed New Treaty Arrangements: Issues Paper*, November 1999, p. 8

13 National Council of Women of Australia, *Submission No. 9*, p. 1

14 Legal Aid Queensland, *Submission No. 1*, p. 1; The Law Society of New South Wales, *Submission No. 2*, p. 1; Legal Aid New South Wales, *Submission No. 3*, p. 1

15 Australian Council of Social Service, *Submission No. 8*, p. 1

16 Attorney-General's Department, *Submission No. 7, Attachment C*, p. 1

- 2.22 The Lone Fathers Association (LFA) did not support the treaties and stated that Australian Government should not be giving high priority to hounding non-custodial parents who may have left the country in order to attempt to regain control of their own lives. Further, the LFA, did not support the international enforcement of CSA assessments unless they had been verified by a court.<sup>17</sup>

### **Maintenance enforcement arrangements with other countries**

- 2.23 The Tasmanian Government had concerns that some South East Asia countries, such as the Philippines, Thailand, Vietnam and Malaysia Indonesia, are not contracting States to the Convention, while many payer parents live and work in these countries. The Tasmanian Government recommended that Australia facilitate the establishment of an inter-country working party to improve child support arrangements between South-East Asia countries and Australia.<sup>18</sup> Legal Aid Queensland also referred to the Philippines as a country where a number of payer parents choose to work, however, there have been no cases of successful recovery of maintenance.<sup>19</sup>
- 2.24 The Attorney-General's Department's experience has been that the maintenance enforcement authorities in these countries are not effective in recovering maintenance on behalf of Australian payees.<sup>20</sup>
- 2.25 Once the proposed treaty arrangements are concluded, the Attorney-General's Department will, in cooperation, with the Department of Foreign Affairs and Trade, be actively seeking to establish further arrangements with other countries, including those from South East Asia. The Attorney-General's Department's view is that, in considering whether it is in the public interest for Australia to establish an arrangement with a particular country, the Department will need to give careful consideration to whether the public authorities of that country are adequately resourced to pursue maintenance claims on behalf of Australian payees.<sup>21</sup>

### **Ability to challenge maintenance assessments internationally**

- 2.26 Some concern was expressed about the ability of payers to challenge an order that is made overseas under the proposed treaties. For example,

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17 Lone Fathers Association, *Submission No. 5*, p. 3

18 Tasmanian Government, *Submission No. 2*, p. 2

19 Legal Aid Queensland, *Submission No. 1*, p. 1

20 Attorney-General's Department, *Submission No. 7B*, p. 1

21 Attorney-General's Department, *Submission No. 7*, Attachment D, p. 5

Legal Aid New South Wales claimed that it is essential that the payer has a right of response regarding his or her assessment<sup>22</sup>

- 2.27 The Attorney-General's Department told us that a payer has a right to go to an Australian court to argue that circumstances have changed since the overseas authority made an assessment and to apply for another more appropriate order. At all times the payer has the option of applying to the overseas authority to overturn the order. This is the preferred approach as the overseas authority holds all the information about the circumstances of the payer and payee.<sup>23</sup> In relation to Agreement with New Zealand, payers will have full access to the administrative arrangements of the country issuing the assessment.<sup>24</sup>
- 2.28 The assistance provided in legal proceedings overseas varies from country to country. Often, as occurs in Australia, an official of an overseas court will represent a payer residing in Australia. Some countries attempt to negotiate a settlement between the parties.<sup>25</sup>
- 2.29 On a similar issue, Legal Aid New South Wales argued that where an application is made for enforcement against a payer in another Convention country, 'no order or assessment (should) be made without evidence that the payer has been served with notice of the application and has had sufficient time to enable him or her to defend the proceedings or oppose the application'.<sup>26</sup> In response, the Attorney-General's Department stated that Article 6 of the Convention includes requirements for notice to a payer before a decision is issued. This ensures that the overseas payer has the opportunity to provide evidence and made submissions to the Australian court or the CSA. Also, the Agreement permits the Australian CSA to issue assessments in cases where a payer cannot be located, but the payer will then have the opportunity to seek a recalculation later.<sup>27</sup>
- 2.30 Also, there was concern as to whether such challenges would create extra costs to payers who want to seek redress for administrative assessments or problems. The CSA claimed that this would not occur. In the case of the Agreement, the payers will have access to telephones and all of the

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22 Legal Aid New South Wales, *Submission No. 3*, p. 2

23 John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR10

24 Sheila Bird (CSA), *Transcript of Evidence*, 13 March 2000, p. TR10

25 John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR11; Attorney-General's Department, *Submission No. 7*, Attachment D, p. 3

26 Legal Aid New South Wales, *Submission No. 3*, p. 2

27 Attorney-General's Department, *Submission No. 7*, Attachment D, p. 4

administrative mechanisms that are available in the country issuing the assessment.<sup>28</sup>

- 2.31 In terms of exchange rate variations, an assessment in Australian dollars for an Australian payer who is in New Zealand will be converted to New Zealand dollars according to the exchange rate at the time. An assessment is updated about once a year which would take into account changes in exchange rates.<sup>29</sup>
- 2.32 Legal Aid New South Wales and Legal Aid Western Australia expressed concern in relation to whether a payer would be required to reimburse an overseas authority if the payer successfully overturns the payee's entitlement to child support at a later stage.<sup>30</sup> In response, the Attorney-General's Department claimed that reimbursement applies only if there is a maintenance obligation between the payer and payee which is recognised by Australian law and only if the overseas authority is entitled to claim enforcement in place of the payee. Therefore, if the payee has no entitlement to child support, the public body cannot seek enforcement by Australian authorities.<sup>31</sup>

### Access provisions

- 2.33 We heard from the LFA that the denial of access of children to the non-custodial parent is common. The LFA also claimed that current deductions in child support assessments do not adequately compensate for the costs incurred when the non-custodial parent has access to the children.<sup>32</sup>
- 2.34 Child support legislation provides for assessments to be reduced if the payer's access or contact with children requires high costs. The reduction is calculated on a case by case basis and is determined by the costs incurred by the payer to have contact with his or her children. The *Draft Child Support Guideline PG D8/99* outlines the CSA's current views concerning the change of child support assessments due to high contact costs. The guidelines provide that:

An application for departure, based on the high cost of contact ground, requires a parent to establish that the costs of maintaining

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28 Sheila Bird (CSA), *Transcript of Evidence*, 13 March 2000, p. TR9

29 Sheila Bird (CSA), *Transcript of Evidence*, 13 March 2000, pp. TR9, TR13

30 Legal Aid New South Wales, *Submission No. 3*, p. 1; Attorney-General's Department, *Submission No. 7*, Attachment C, pp. 1-2

31 Attorney-General's Department, *Submission No. 7*, Attachment D, p.1

32 Barry Williams (Lone Fathers Association), *Transcript of Evidence*, 3 April 2000, pp. TR54, TR56

a child are significantly affected because of high costs involved in enabling a parent to have contact with the child.<sup>33</sup>

A parent's costs can only be high for the purpose of the application if, during a child support period, they total more than 5% of the payer's notional child support income. The costs included can relate to the provision of accommodation and transport, such as parking, bus fares, airfares and motor vehicle expenses.<sup>34</sup>

- 2.35 During the nine months of July 1998 to March 1999, 82 applications for a change in assessment for child support on the grounds of high costs of contact were received by the CSA. Thirty-one of these cases were successful. Another thirty-one of the cases were unsuccessful because the costs of contact were below or slightly higher than 5% of the child support income or there was a lack of evidence to support the claim. In 12 of the unsuccessful cases the payer's income was higher than the income used for child support or the payer had the capacity to pay for contact costs.<sup>35</sup>

### Relocation of children overseas

- 2.36 There are provisions in the *Family Law Act 1975* that custodial parents cannot take children out of the country permanently without the permission of the non-custodial parent. If the parents cannot agree on whether a child should be taken out of Australia then a case is brought before the Family Court.<sup>36</sup> The central issues that the Family Court considers in all relocation cases are what is in the best interests of the child or children concerned and how the individual facts of the case impact upon that determination.<sup>37</sup>
- 2.37 There is no evidence to suggest that payers or payees move to a particular country in order to achieve a 'better' child support assessment. Applicants for overseas enforcement of child support are not required to state their reasons for their movements. However, the evidence in international child abduction and custody cases indicates that, in nearly all such cases, parents give as their reason for moving a desire to return to live near family and friends in their country of origin following the breakdown of their marriage.<sup>38</sup>

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33 CSA *Submission No. 4*, Attachment B, p. 2

34 CSA *Submission No. 4*, Attachment B, p. 23

35 CSA, *Submission No. 4*, p. 2

36 John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR14

37 Attorney-General's Department, *Submission No. 7*, Attachment B

38 Attorney-General's Department, *Submission No. 7*, p. 1

## Costs and resources

- 2.38 The Attorney-General's Department claim that the two treaties would bring significant cost savings to Australia including:
- saving in expenditure of legal aid funds, which are presently spent in obtaining Australian court orders for payees when payers move overseas;
  - current delays would be avoided, therefore Australian payees would receive maintenance sooner, with a possible consequent reduction in social security benefits payable;
  - a greater number of countries would be obliged to recognise and enforce maintenance liabilities which would result in an increase in the payment of child support to Australian payees, with a possible consequent reduction in social security payable;
  - Attorney-General's Department funds currently spent on obtaining maintenance orders in UNCRAM applications for overseas payees would be replaced by relatively inexpensive administrative enforcement of overseas orders by the CSA.
- 2.39 The Law Society of New South Wales and the Legal Aid New South Wales claimed that, with an increase in the number of countries involved, legal aid resources will be affected. The Attorney-General's Department disagreed and claimed that the reduction in the demand for legal aid required to establish court orders will outweigh any increase in demand for legal aid for variation proceedings.<sup>39</sup>
- 2.40 Legal Aid Western Australia was concerned that resource implications on the CSA may have a detrimental effect on the quality of service provided to all clients. In respect of the Agreement, Australian and New Zealand agencies are required to enter into a service arrangement which deal with the reimbursement by one government of costs incurred by the other country's CSA if there is an imbalance in the number of cases one country takes action on. Therefore, the Agreement will not cost anymore than the normal costs in Australia.<sup>40</sup>
- 2.41 In respect of the Convention, the Attorney-General's Department expects that the usual number of cases to be received every year will be between

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<sup>39</sup> Attorney-General's Department, *Submission No. 7*, Attachment 5, p. 5

<sup>40</sup> Sheila Bird (CSA), *Transcript of Evidence*, 13 March 2000, p. TR9; Attorney-General's Department, *Submission No. 7*, Attachment D, p. 1

50 and 70. It is expected that this number of cases can be handled with existing resources.<sup>41</sup>

## Legislation

- 2.42 The Convention and the Agreement oblige each Contracting State to provide in its domestic legislation for the recognition and enforcement of child and spousal decisions of other contracting countries.
- 2.43 The Child Support Legislation Amendment Bill 2000 was passed by Parliament on 10 April 2000. The amendments in this legislation provide for regulations to be made which prescribe, in respect of countries with which Australia has entered into arrangements, all matters relevant to the recognition and enforcement of child support and spousal maintenance.

## Re Wakim

- 2.44 At a public hearing on 3 April 2000, we raised a concern as to the impact on Australia's international maintenance obligations of the decision in *Re Wakim: Ex parte McNally* (1999) 163 ALR 270. In *Re Wakim* the High Court invalidated the conferral of State jurisdiction on federal courts under various 'cross-vesting' arrangements between the Commonwealth and the States. The affect of the decision in relation to family law proceedings is to prevent applications for property settlement and actions for damages between defacto couples.
- 2.45 A submission from the Attorney-General's Department assured us that spousal and child maintenance cases are within Commonwealth legislative power and are not affected by the decision in *Re Wakim*.<sup>42</sup>

## Consultation

- 2.46 In November 1999 the Attorney-General's Department published an issues paper *International Child Support Enforcement - Proposed New Treaty Arrangements* which outlined the purpose and effect of the Convention, proposed arrangements for its implementation in Australia and sought comments. The issues paper was circulated to over 70 agencies operating in the field of child support and spousal maintenance.<sup>43</sup> There was general

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41 John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR9

42 Attorney-General's Department, *Submission No. 7C*, p. 1

43 NIA of Convention, p. 4

agreement with the proposals and very little in the way of comment on the implementation of the treaties.<sup>44</sup>

- 2.47 We were told by the President of the LFA that his organisation did not receive a copy of the issues paper and had not had the opportunity to comment on the proposed treaties.<sup>45</sup> The Attorney-General's Department records show that a copy of the issues paper was sent to the LFA as well as other organisations on 26 November 1999. The Attorney-General's Department undertook to contact the LFA to clarify address details and stated that it is anxious to ensure that the LFA has the opportunity to comment on matters of interest. Unfortunately, this did not happen on this occasion.<sup>46</sup>

## Conclusions and recommendations

- 2.48 It is clear from the evidence we received that Australia's existing international child support enforcement arrangements are in need of updating and extension. The current international enforcement processes are slow and arduous and the success rate of enforcing maintenance obligations is variable. Accession to the Convention will expand the range of countries with which Australia has maintenance enforcement arrangements.
- 2.49 One major benefit of the Convention and the Agreement is that they provide for liabilities to be processed by an administrative authority: in Australia's case, the CSA. The statistics on the numbers of cases held by the Attorney-General's Department and the CSA indicate that between 3000 and 4000 Australian resident custodial parents may be able to benefit when the new treaty arrangements are in force. In addition, approximately 225 new cases per year will be sent to overseas authorities by Australian authorities. On the other hand, about 206 new cases enforcing payment against Australian resident payers can be expected per year.
- 2.50 Payers who want to challenge international assessments can do so through the overseas authority. If communication channels between countries under the Convention and the Assessment are open and effective, payers should have sufficient avenue to challenge their assessments.

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44 John McGinness (Attorney-General's Department), *Transcript of Evidence*, 13 March 2000, p. TR9

45 Barry Williams (Lone Fathers Association), *Transcript of Evidence*, 3 April 2000, pp. TR53, TR55; Lone Fathers Association, *Submission No. 5A*, p. 1

46 Attorney-General's Department, *Submission No. 7A*, pp. 1-2

- 2.51 We believe that the projected savings in costs and the simple and speedy enforcement procedures will benefit Australia and the many individuals who have international enforcement cases before the courts or the CSA.

### **Recommendation 1**

- 2.52 **The Committee supports the proposed *Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, and recommends that binding treaty action be taken.**

### **Recommendation 2**

- 2.53 **The Committee supports the proposed *Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance*, and recommends that binding treaty action be taken.**

- 2.54 We acknowledge the practical and financial difficulties that can be faced by non-custodial parents attempting to maintain contact with their children while living in different countries. We would be concerned should any evidence emerge that these treaties are being used to impede the contact between non-custodial parents and their children. This is a matter that the Attorney-General and the Minister for Family and Community Services should keep under review.

### **Recommendation 3**

- 2.55 **The Committee recommends that the Attorney-General and the Minister for Family and Community Services monitor the operation of the two child and spousal maintenance treaties to ensure that they operate in a fair and reasonable manner, without limiting the rights of custodial parents, non-custodial parents or children; or impeding the contact between non-custodial parents and their children.**

**This monitoring should culminate in a comprehensive review of the operation of the treaties and their impact upon all parties three years after binding action is taken. A copy of the review report should be provided to the Joint Standing Committee on Treaties.**



## **Agreement for Cooperation with the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation**

### **Proposed treaty action**

- 3.1 The proposed *Agreement for Cooperation with the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation* is designed to facilitate the export of an innovative technology developed by Silex Systems Limited, an Australian company. This technology enables the separation of isotopes of uranium by laser excitation. The proposed Agreement has been negotiated because the existing Australia-US agreement concerning peaceful uses of nuclear energy does not cover the transfers of sensitive nuclear technology.
- 3.2 The Silex technology, if successfully developed on a commercial scale, will allow the efficient production of low enriched uranium for use by the electricity generation industry.
- 3.3 The Agreement is the first of its kind and establishes the procedures through which Silex, with financial and technical support from the United States Enrichment Corporation (a US company which provides uranium fuel enrichment services to electricity generation companies), will develop and commercialise its technology. The work will be undertaken at the Silex Laboratories at Lucas Heights in Sydney. The Agreement provides that Silex technology may be transferred to the US for peaceful purposes but that Silex and derived technologies cannot be retransferred to any other country without Australia's consent. The US Enrichment

Corporation has already invested some \$US7.5 million in the evaluation phase of the project and plans to invest up to \$US18 million as milestones in the project are completed.

- 3.4 Strict safeguards, verification and physical protection measures are stipulated and are designed to ensure the technology is used exclusively for peaceful purposes. The Australian Safeguards and Non-Proliferation Office (ASNO) is the Government Agency monitoring the project to ensure that Australia's non-proliferation commitments are satisfied and the requirements of the *Nuclear Non-Proliferation (Safeguards) Act 1987* are met.
- 3.5 The US Department of Energy and the Nuclear Regulatory Commission perform a similar role in the US, monitoring the work of the US Enrichment Corporation.
- 3.6 The Agreement will remain in force for 30 years and can be extended if both parties agree, or it can be terminated with one year's written notice. If either Party fails to comply with the Agreement, or breaches its safeguards agreement with the International Atomic Energy Commission (IAEA), cooperation under the Agreement may be terminated and the return of Silex technology required.<sup>1</sup>

## Evidence presented

- 3.7 We were advised at our hearing that the proposed Agreement is fully consistent with Australia's obligations under the Nuclear Non-Proliferation Treaty and with Australia's uranium export policies as described in the existing network of bilateral safeguards agreements. These agreements, of which there are now 15, provide for the application of IAEA safeguards and prior Australian consent for re-export, high enrichment or reprocessing of Australian uranium.<sup>2</sup>
- 3.8 This network of agreements will ensure that the material produced using the Silex technology will be properly monitored, will be handled and

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1 Unless otherwise specified material in this section was drawn from the National Interest Analysis (NIA) for the *Agreement for Cooperation between Australia and United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation* (NIA for Agreement on Laser Technology), pp. 1-2

2 Australia has bilateral safeguards agreements with 'the United States, the UK, Russia, France, Finland, Sweden, Switzerland, Japan, Korea, Euratom [that is the European nations that are party to the European Union], the Philippines, New Zealand and three other nations'. See Susan Deitz (DFAT), *Transcript of Evidence*, 3 April 2000, p. TR23

transported appropriately, will remain in peaceful use and will not be misused by any subsequent customer.<sup>3</sup>

3.9 The Silex technology was explained to us in the following terms:

Natural uranium consists of a variety of isotopes. One, in very small proportion naturally, is uranium 235, which is the one sort after by those who want to use it for fuelling power reactors or research reactors. This process [the Silex technology] will basically take natural uranium in a gaseous form and pass it through a laser. The concept is that the laser will selectively excite different isotopes of uranium so that one can be separate from the other and, in fact, the one we want can be collected ... further enriched and turned into an appropriate product to fuel a power reactor.<sup>4</sup>

3.10 An unusual aspect of the proposed Agreement is that it seeks to regulate the behaviour of two private companies. ASNO witnesses confirmed that the Agreement would require the Australian and United States Governments to establish regimes to monitor the exchange of information between the two companies, the manner in which the information is handled and the security clearances required of certain staff in the companies.<sup>5</sup>

3.11 Both Governments are currently developing a 'classification guide' which will describe exactly what aspects of the project are classified and to what level these aspects are classified. ASNO witnesses advised us that this guide, along with the commercial interests that both parties have to protect in this project, give the Australian Government a high degree of confidence that the sensitive aspects of this technology will be well protected.<sup>6</sup>

3.12 We also took evidence on:

- who is responsible for spent product at the end of the process (any by-product is the responsibility of the nation in which the by-product is produced);<sup>7</sup> and
- the consequences of not taking the proposed treaty action (which would involve substantial financial losses for Silex and the termination of its research).<sup>8</sup>

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3 Susan Deitz (DFAT) and Andrew Leask (ASNO), *Transcript of Evidence*, 3 April 2000, pp. TR23-24

4 Andrew Leask (ASNO), *Transcript of Evidence*, 3 April 2000, p. TR24

5 Andrew Leask (ASNO), *Transcript of Evidence*, 3 April 2000, p. TR25

6 Andrew Leask (ASNO), *Transcript of Evidence*, 3 April 2000, p. TR26

7 Andrew Leask (ASNO), *Transcript of Evidence*, 3 April 2000, p. TR24

- 3.13 After our hearing we received a submission objecting to the proposed treaty action. Tina Lesses, from Woodville Gardens in South Australia, opposes the Agreement on the basis that it prolongs Australia's involvement in the uranium industry and does nothing to promote alternative energy technologies, or technologies for the safe storage or elimination of radioactive waste.<sup>9</sup>

## Conclusion and recommendation

- 3.14 We recognise that there is a body of community opinion opposed to uranium mining and the use of uranium as a fuel for electricity generation. However, we note that prevailing government policy and legislation, is to allow the mining and export of uranium for such purposes.
- 3.15 The technology that would be developed under the auspices of this agreement is fully consistent with Australia's existing nuclear non-proliferation obligations. Moreover, the use of the fuel products that may ultimately be developed as a result of this technology would be regulated by Australia's existing network of nuclear safeguards agreements.
- 3.16 We support the development of this cutting edge technology and accept the assurances given to us that the monitoring and oversight arrangements described in the proposed Agreement and in Australia's existing bilateral safeguards agreements are adequate to ensure that the product produced by the technology will only be used for peaceful purposes.

### Recommendation 4

- 3.17 **The Committee supports the proposed *Agreement for Cooperation with the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation*, and recommends that binding treaty action be taken.**

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8 Susan Deitz (DFAT) and Andrew Leask (ASNO), *Transcript of Evidence*, 3 April 2000, pp. TR26-27

9 Tina Lesses, *Submission No. 1*, Agreement on Laser Technology, 21 March 2000, pps. 1-2

## **Agreement with the Slovak Republic on Trade and Economic Relations**

### **Proposed treaty action**

- 4.1 The proposed *Agreement with the Slovak Republic on Trade and Economic Relations* will replace the currently operating 1972 Agreement with the Czechoslovak Socialist Republic. The 1972 Agreement is considered by both parties to be outdated and inconsistent with the Slovak Republic's newly independent status and its transition from a planned to a market economy.
- 4.2 The proposed Agreement is intended to provide a more comprehensive framework for the facilitation and development of trade and commercial relations between the two countries. It is also designed to provide a more reliable basis and a greater level of protection for the Australian business community in the pursuit of closer trade and economic relations with the Slovak Republic.
- 4.3 The proposed Agreement will complement the Double Tax Agreement between the two countries, which entered into force in December 1999.<sup>1</sup>
- 4.4 The proposed Agreement also contains a significant political element signalling strong support from Australia for the economic and social changes being made in the Slovak Republic.

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<sup>1</sup> We reviewed and supported the Double Tax Agreement with the Slovak Republic in our *Report 28, Fourteen Treaties Tabled on 12 October 1999* (December 1999).

- 4.5 The proposed Agreement closely follows the form and content of the *Agreement with the Czech Republic on Trade and Economic Cooperation*, which was signed in March 1997.<sup>2</sup>

## Evidence presented

- 4.6 In evidence at our hearing, witnesses from the Department of Foreign Affairs and Trade (DFAT) acknowledged that two-way trade between Australia and the Slovak Republic is, at present, relatively small. Australian exports to the Slovak Republic totalled A\$5 million in 1999, while imports were valued at A\$8 million. While it is unlikely that the proposed treaty will give rise quantifiable economic benefits in the short term, it was argued that it would help provide a foundation for increased trade and investment in the future.<sup>3</sup>
- 4.7 We were also told of the mutual interests involved in the negotiation of the proposed treaty. From the perspective of the Slovak Republic, such agreements help strengthen their case for membership of groups such as the OECD and European Union. From the Australian perspective, any market access that can be negotiated at this stage can be preserved should the Slovak Republic succeed in its bid to join the European Union.<sup>4</sup>
- 4.8 The term 'most favoured nation status' was discussed at some length at the hearing. In the context of the proposed Agreement 'most favoured nation status' means that should one party to the Agreement give a trade benefit (for example, lower tariffs) to another trading partner, that same benefit would have to be made available to the other party to the Agreement. DFAT witnesses agreed that the term is open to misunderstanding as it does not in fact result in one country being favoured over another, but ensures that any benefits granted are made available equally to all trading partners.<sup>5</sup>

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2 The former Committee reviewed and supported the *Agreement with the Czech Republic on Trade and Economic Cooperation* in its *Eighth Report* (June 1997). Unless otherwise specified material in this section was drawn from the National Interest Analysis (NIA) for the *Agreement with the Slovak Republic on Trade and Economic Relations* (NIA for Slovak Trade), pp. 1-2

3 Sue Tanner (DFAT), *Transcript of Evidence*, 3 April 2000, p. TR31

4 Peter Scott (DFAT) and Sue Tanner (DFAT), *Transcript of Evidence*, 3 April 2000, pp. TR31 & TR33

5 Peter Scott (DFAT), *Transcript of Evidence*, 3 April 2000, p. TR32

4.9 We also took evidence on:

- the similarities between this proposed Agreement and other trade and economic cooperation agreements considered by the Committee in the past;<sup>6</sup> and
- the important benefits that can be derived from community consultation in developing treaty proposals such as this.<sup>7</sup>

## Conclusion and recommendation

4.10 The Treaties Committee has reviewed many similar agreements in the past: including agreements with Romania, Mexico, the Czech Republic, Lebanon, Malaysia, the Ukraine and Fiji. In each case we have expressed support for the agreements, arguing that they represent a sound basis for building stronger economic relationships into the future.

4.11 The proposed Agreement with the Slovak Republic represents the second plank in a more modern trade and economic relationship between the two countries – the first being established late last year with the entry into force of the Double Tax Agreement.

4.12 In supporting the Double Tax Agreement with the Slovak Republic we noted that the agreement would provide a framework to support growth in the trading relationship between the two countries, as well as establishing a more secure environment for businesses currently involved in such trade. These points are equally valid for this proposed agreement.

### Recommendation 5

4.13 **The Committee supports the proposed *Agreement with the Slovak Republic on Trade and Economic Relations*, and recommends binding treaty action be taken.**

6 Sue Tanner (DFAT), *Transcript of Evidence*, 3 April 2000, p. 31

7 Sue Tanner (DFAT), *Transcript of Evidence*, 3 April 2000, p. 34

## **Agreement with Denmark on Social Security**

### **Proposed treaty action**

- 5.1 The proposed *Agreement with Denmark on Social Security* is intended to co-ordinate the social security schemes of Australia and Denmark to provide better welfare protection for people that move between Australia and Denmark.
- 5.2 For Australia, the proposed Agreement will cover age pension, disability support pension for the severely disabled, and parenting payment for widowed persons paid under the *Social Security Act 1991*. For Denmark, corresponding benefits under its contributory and non-contributory social assistance schemes are covered.
- 5.3 If the Agreement is implemented, people will be able to move between Australia and Denmark knowing that their pension rights are recognised in both countries and that each country will contribute fairly to support those people who have spent part of their working lives in both countries. Both countries will share responsibility for the total social security coverage for people who are within the scope of the Agreement.
- 5.4 For example, a Danish-born Australian resident will be able to add together their periods of residence in Denmark and Australia to meet the 10 year residential qualification requirement for access to an Australian age pension. The Agreement would operate to ensure that the Australian Government would pay the pension accrued as a result of the period

residence in Australia, while the Government of Denmark would pay the pension accrued as a result of the period of residence in Denmark.<sup>1</sup>

- 5.5 The Agreement will benefit Australia's population of about 9,000 Danish-born residents and Denmark's population of about 230 Australian-born residents.
- 5.6 It is estimated that the Agreement will result in:
- a net flow of foreign income into Australia of \$A2.864m in 2000-01; of \$A3.781 in 2001-02; and of \$A4.159m in 2002-03 (that is, payments by Denmark into Australia less payments by Australia into Denmark); and
  - an ongoing net saving to the Australian Government of over A\$200 000 per year in pension payments (that is, savings generated by a reduction in Australian pension payments to Danish-born residents in Australia taking account of pension income received by those people from the Government of Denmark).<sup>2</sup>

## Evidence Presented

- 5.7 Witnesses from the Department of Family and Community Services (FACS) further explained the proposed Agreement in the following terms:

[it] will help people overcome residence requirements in the domestic law of both countries in relation to the lodgment of claims; it will help people meet their minimum residence requirements; it will overcome time limitations on portability payments if people live in either country; it will apply a specific income testing regime for Australia; and it will provide avenues for mutual assistance to help in the correct determination of entitlements.<sup>3</sup>

- 5.8 We were advised that the proposed Agreement complements Australia's nine other shared responsibility agreements with Italy, Canada, Spain, Malta, the Netherlands, Ireland, Portugal, Austria and Cyprus. This style of agreement differs from the older style host country agreements, where the country of permanent residence assumes responsibility for all social security cover. Australia has a host country agreement with New Zealand

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1 See Jeff Whalan (Department of Family and Community Services [FACS]), *Transcript of Evidence*, 3 April 2000, p. TR36

2 Unless otherwise indicated, the material in this section is drawn from the NIA for the Social Security Agreement with Denmark.

3 Jeff Whalan (FACS), *Transcript of Evidence*, 3 April 2000, p. TR36

and, until it was terminated earlier this year, had a host country agreement with the United Kingdom.<sup>4</sup>

5.9 We were also advised that:

- no pensioner, irrespective of whether they live in Australia or Denmark, would be worse off under the proposed Agreement;<sup>5</sup>
- each country would be responsible for determining and paying their component of any entitlements, meaning that beneficiaries would receive two separate payments – one from each government;<sup>6</sup>
- the proposed Agreement excludes entitlement areas where the two countries do not have a common approach – for example, in the area of disability entitlements, only payments for manifest disability are covered. Payments which require participation in a rehabilitation program and regular reviews are not covered by the Agreement;<sup>7</sup>
- FACS had engaged in extensive consultation with Danish community organisations in Australia during the development of the proposed Agreement;<sup>8</sup> and
- while FACS has a long-term strategic ambition to negotiate similar agreements with major migrant source countries in South East Asia, priorities currently lie in establishing agreements with countries with older migrant age profiles.<sup>9</sup>

5.10 At the hearing we sought information about the exchange rates used to value the overseas income of pensioners receiving an Australian benefit. In a written submission dated 11 April 2000 FACS advised that:

Customers receiving an Australian benefit and living in Australia have their exchange rates automatically updated every month ... These rates are then used to determine the value of a pensioner's overseas income and assets for each pay day in that month.

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4 Jeff Whalan (FACS), *Transcript of Evidence*, 3 April 2000, pp. TR35-36  
We reviewed and supported the proposed termination of the Social Security Agreement with the United Kingdom in our *Report 27, Termination of Social Security Agreement with the United Kingdom and International Plant Protection Convention* (December 1999).

5 Jeff Whalan (FACS), *Transcript of Evidence*, 3 April 2000, p. TR37

6 Bob Holbert (FACS), *Transcript of Evidence*, 3 April 2000, p. TR39

7 Jeff Whalan (FACS) and Bob Holbert (FACS), *Transcript of Evidence*, 3 April 2000, pp. TR41-42

8 Jeff Whalan (FACS), *Transcript of Evidence*, 3 April 2000, p. TR37

9 See Bob Holbert (FACS), *Transcript of Evidence*, 3 April 2000, p. TR38 and Jeff Whalan (FACS), *Transcript of Evidence*, 3 April 2000, p. TR39. The witnesses also made the point that before such agreements can be negotiated it is important that well-developed and stable social security systems exist in potential partner countries.

... People receiving an Australian benefit who live overseas have the exchanged rates used to assess their income and assets updated twice a year. More frequent assessments are not possible because of the time requirements for computer processing.<sup>10</sup>

- 5.11 Customers who believe they are being disadvantaged by the exchange rates used by Centrelink may request a review, although current law allows such reviews only if there is a difference of more than 5% between the exchange rate used by Centrelink and the actual exchange rate received by the customer.<sup>11</sup>

## Conclusions and Recommendation

- 5.12 The principle of establishing a network of international bilateral agreements to give better welfare protection to people who move between countries is sound. Australia's involvement in such a network is equally sound. Australia is home to many overseas-born people and agreements which integrate the key elements of our social security system with those of other countries are fair and reasonable, both to the individuals and the governments concerned.
- 5.13 Such agreements can also maximise the level of foreign income coming into Australia and, more generally, help reinforce our international political, business and strategic interests.
- 5.14 The negotiation of 'shared responsibility' rather than 'host country' agreements is clearly preferable and it is pleasing to note that the proposed Agreement with Denmark is of this type.

### Recommendation 6

- 5.15 **The Committee supports the *Agreement with Denmark on Social Security* and recommends that binding treaty action be taken.**
- 5.16 The Department of Family and Community Services is to be commended for the steps it has taken to improve its approach to community consultation in the development of these agreements. The consultative

<sup>10</sup> FACS, *Submission No. 1*, p. 1

<sup>11</sup> FACS, *Submission No. 1*, p. 2

program implemented on this occasion was comprehensive – in contrast to the approach taken last year on the proposed termination of the *Social Security Agreement with the United Kingdom*.



## Double Taxation Agreement with Romania

### Proposed treaty action

- 6.1 The proposed *Agreement with Romania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion* is intended to:
- promote closer economic cooperation between Australia and Romania by eliminating possible barriers to trade and investment caused by overlapping taxing jurisdictions and providing a reasonable element of legal and fiscal certainty within which trade and investment can take place; and
  - create a legal framework through which the tax administrations of both countries can prevent international fiscal evasion.
- 6.2 The proposed Agreement will reduce or eliminate double taxation by limiting taxing rights over various types of income flowing between the two countries. For example, the Agreement contains the standard tax treaty provision that neither country will tax business profits derived by residents of the other country unless the business activities in the other country are substantial enough to constitute a ‘permanent establishment’ and the income is attributable to that permanent establishment.
- 6.3 Generally, the allocation of taxing rights under the proposed Agreement is similar to the international practice set out in the *OECD Model Tax Convention on Income and on Capital*. In some instances, however, consistent with Australian practice, the proposed Agreement is influenced more by the United Nations’ *Model Double Taxation Convention between Developed and Developing Countries*.

- 6.4 The proposed Agreement are is likely to:
- reduce Romanian taxation on interest, dividends and royalties;
  - restrict the circumstances in which Australians trading in Romania will be taxed by requiring the existence of a permanent establishment in Romania before Romanian taxation will be imposed; and
  - assist Australian investors by increasing the certainty of the taxation rules applying to cross-border investment.
- 6.5 The NIA for this proposed treaty action contains a detailed description of the key elements of the proposed Agreement, including an analysis of those aspects of the proposal that differ from the two model texts and from Australia's preferred tax treaty practice. A copy of the NIA is at Appendix B.
- 6.6 Romania is Australia's largest export market in Central Europe, ranking 19<sup>th</sup> overall as an export destination. In 1998-99, Australian exports to Romania totalled A\$75 million. In the same period imports amounted to A\$8.5 million.<sup>1</sup> The proposed Agreement is the third and final element in the framework of bilateral agreements typically negotiated with major trading partners: an investment promotion and protection agreement was established in 1993 and a trade and economic relations agreement established in 1995.<sup>2</sup>

## Evidence presented

- 6.7 At our hearing we were advised, by witnesses from the Australian Taxation Office (ATO), that Australia currently has a network of 38 double taxation agreements with major trading partners. The proposed Agreement with Romania is substantially similar to Australia's recent tax treaties.<sup>3</sup>
- 6.8 We also received evidence at the hearing and afterwards about the purpose and operation of Article 13 of the proposed Agreement, which

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1 A number of Australian companies including BHP, Esmeralda, Minproc, Lycopodium and Asance have interests in Romania from shipping of iron and steel to gold exploration. Department of Foreign Affairs and Trade, *Submission No. 4*, Double Tax Agreement with Romania, p. 1

2 The information in this section is drawn from the *NIA for the Double Taxation Agreement with Romania* (NIA for Double Taxation).

3 Ken Allen (ATO), *Transcript of Evidence*, 3 April 2000, p. TR48

seeks to address issues raised by the Federal Court in the *Commissioner of Taxation v. Lamesa Holdings BV* (1997).

- 6.9 In that case the Federal Court decided that real property held by a non-resident through a chain of companies did not fall within the terms of the alienation of real property provisions in the *Double Taxation Agreement with the Netherlands*. The consequence of this decision is that non-residents may be able to structure their real property holdings through a chain of companies so as to avoid Australian taxation on the ultimate sale of one of the interposing companies.
- 6.10 In April 1998 the Treasurer announced that the Government had decided to legislate to ensure that non-residents did not take advantage of the Lamesa Holdings decision to escape Australian taxation on profits from the sale of real property in Australia.<sup>4</sup> The Tax Law Amendment Bill (No. 11) 1999, which seeks to legislate to this end, is currently before Parliament.
- 6.11 The wording of Article 13 in the proposed Agreement reflects the intent of this Bill and is designed to ensure that Australia's taxing rights over income from the alienation of real property remains effective when property that has been held through one or more entities is alienated by the sale of one of the interposing entities. Similar provisions have been included in recent double tax agreements with South Africa, Argentina and the Slovak Republic.<sup>5</sup>
- 6.12 A submission from the ATO on this matter is reproduced at Appendix \*\* for the information of Members of Parliament.
- 6.13 At the hearing we also discussed a matter of continuing interest: the estimation of the costs and benefits associated with double taxation agreements. ATO witnesses noted that while the proposed Agreement is likely to benefit Australian firms operating in Romania (because it will operate, generally, to limit Romanian tax), it is difficult to assess the costs or benefits to revenue of double tax agreements.<sup>6</sup>

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4 Hon Peter Costello MP, Treasurer, *Press Release No. 039, Alienation of Property and Australia's Double Taxation Agreements*, 27 April 1998.

5 The Treaties Committee reviewed and supported the Double Tax Agreement with South Africa in *Report 25, Eight Treaties Tabled on 11 August 1999*, (September 1999) and the Double Tax Agreements with Argentina and the Slovak Republic in *Report 28, Fourteen Treaties Tabled on 12 October 1999* (December 1999).

6 Ken Allen (ATO), *Transcript of Evidence*, 3 April 2000, p. TR51

- 6.14 Nevertheless, we were advised that the ATO had recently asked the Treasury 'if there is any more economic analysis that could be done in terms of working out the costs and benefits.'<sup>7</sup>

## Conclusions and recommendation

- 6.15 In recent years the Treaties Committee has reviewed and supported proposed double tax agreements with Vietnam, Finland, South Africa, Malaysia, Argentina and the Slovak Republic. In each case we have concluded that the agreements are mutually advantageous.<sup>8</sup>
- 6.16 Double tax agreements are an integral component of our network of bilateral trade arrangements. They help support international commercial opportunities for Australian companies and facilitate overseas investment in Australia. They also help tax administrations in each of the partner countries to combat international tax evasion.

### Recommendation 7

- 6.17 **The Committee supports the proposed *Double Taxation Agreement with Romania*, and recommends that binding treaty action be taken.**
- 6.18 We are pleased that the ATO is continuing to investigate ways of identifying better cost-benefit information for such treaties. We acknowledge that this is a difficult task and that, in many respects, the cost and benefits of double tax agreements depend on the extent to which they influence future trade and investment flows. Nevertheless, we remain of the view that the Government should sponsor initiatives, in Australia and internationally, to test the costs and benefits of these agreements.
- 6.19 Finally, while we recognise the imperatives which have driven the Government to seek to legislate to clarify the scope of the alienation of real property provisions in double tax agreements, we believe it important that this matter also be raised and resolved in direct negotiations with our tax

<sup>7</sup> Michael Lennard (ATO), *Transcript of Evidence*, 3 April 2000, p. TR52

<sup>8</sup> See the 7<sup>th</sup> Report (March 1997) for comment on the Agreement with Vietnam; the *Thirteenth Report* (March 1998) for comment on the Agreement with Finland; *Report 25, Eight Treaties Tabled on 11 August 1999* (September 1999) for comment on the Agreements with South Africa and Malaysia; and *Report 28, Fourteen Treaties Tabled on 12 October 1999* (December 1999) for comment on the Agreements with Argentina and the Slovak Republic.

treaty partners. In terms of Australian law the legislative action proposed by the Government is reasonable, but it is important that our treaty partners be assured that we are not seeking to override our treaty obligations by domestic legislation. The consequences of the Federal Court's decision in *Commissioner of Taxation v. Lamesa Holdings BV* should be addressed in discussions with each of our tax treaty partners and, if necessary, amendments to our existing double tax agreements should be negotiated.

**ANDREW THOMSON MP**

Committee Chairman

8 May 2000





## **Appendix A - Extract from Resolution of Appointment**

The Resolution of Appointment for the Joint Standing Committee on Treaties allows it to inquire into and report on:

- (a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
- (b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and
- (c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.





## **Appendix B - National Interest Analyses**

### **Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, done at the Hague on 2 October 1973**

#### **NATIONAL INTEREST ANALYSIS**

##### **Date of Proposed Binding Treaty Action**

On, or as soon as possible after, 14 April 2000. Binding treaty action will be by lodgment of an instrument of accession with the depositary of the Convention, the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention entered into force generally on 1 August 1976. Under article 35, the Convention will come into force for Australia on the first day of the third calendar month after the expiry of a period of 12 months after Australia lodges its instrument of accession. During the twelve month period after lodgement of the instrument of accession, other contracting States may object to the accession. The treaty then enters into force as between Australia and those contracting States which have not raised an objection (article 31).

At the time of accession Australia will make a reservation under article 26(3) of the Convention to state that within Australia and its territories recognition or enforcement will not be given to decisions in respect of maintenance obligations between persons related collaterally or by affinity. The effect of this reservation would be to restrict Australia's obligations to recognise and enforce overseas liabilities to those which are currently enforced by domestic law in Australia. These are liabilities for the maintenance of children and spouses.

At the time of accession Australia will make a declaration under article 32 that the Convention will extend to all territories for the international relations of which Australia is responsible.

**Date of Tabling of the Proposed Treaty Action**

7 March 2000.

**Reasons for Australia to take the Proposed Treaty Action**

The main objective of the Convention is to establish international arrangements for the recognition and enforcement of child support and spousal maintenance liabilities. The Convention obliges each Contracting State to provide in its domestic legislation for the recognition and enforcement of such liabilities.

The Convention will complement Australia's existing bilateral and multilateral international arrangements for enforcement of child support and spousal maintenance liabilities. Australia is a party to the United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956 which obliges Contracting States to take action to recover maintenance for claimants in other Contracting States. Australia also has non treaty bilateral arrangements with twenty seven countries under which authorities take action to recover child support and spousal maintenance.

A major benefit of the Convention to the Australian recipients of child support and spousal maintenance is that the Convention provides for the recognition and enforcement of existing liabilities. Australia's existing international arrangements are of limited value to the recipients of child support and spousal maintenance as they are largely dependent on slow and cumbersome procedures for the initiation and pursuit of proceedings in foreign courts to obtain orders for maintenance. The Convention provides for the relatively simple and speedy enforcement of existing Australian liabilities by overseas courts and child support agencies. The time currently taken to obtain child support payments for Australian payees would be significantly reduced.

Another major benefit of the Convention to Australian recipients of child support is that the Convention provides for the enforcement of administrative assessments of child support. Australia's existing international child support arrangements were devised on the basis that all liabilities were in the form of orders made, or agreements registered by, a court. They are unsuited to the current situation in Australia in which court ordered maintenance is gradually being replaced by administrative assessments of child support issued by the Child Support Agency. The Convention is an improvement as it provides for the enforcement of administrative assessments of child support as well as enforcement of court orders and registered agreements.

Accession to the Convention will expand the range of countries with which Australia has child support enforcement arrangements. In 1994 the

Commonwealth Parliament's Joint Select Committee on Certain Family Law Issues recommended that Australia increase the number of arrangements in the international arena for the reciprocal recognition and enforcement of child support obligations. The Committee was particularly concerned that there are no reciprocal arrangements with some migrant source countries. It regarded this as a significant loophole in Australia's international child support enforcement arrangements. Many of the countries which are parties to the Convention (Belgium, Czech Republic, Denmark, Finland, Estonia, France, Germany, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom) are migrant source countries for Australia.

### **Obligations**

Article 4 requires that Australian domestic legislation provide for the recognition and enforcement of child support and spousal maintenance decisions of judicial and administrative authorities of other Convention countries. In addition article 4 requires the recognition and enforcement of settlements, such as registered maintenance agreements. Article 1 specifies that maintenance decisions include decisions rendered against a maintenance debtor on the application of a public body seeking reimbursement of benefits paid by the body to a maintenance creditor. In some countries the child support system provides for a public body to pay a set amount of child support to payees and then for the body to recover the child support from the payer. Although the debt is owed to the public body, it is still a debt in the nature of child support debt.

As part of the obligation to recognise and enforce decisions from other Convention countries, the Convention limits the scope for Australian authorities to vary or discharge those decisions. Article 9 provides that authorities in Australia will be bound by findings of fact made by the overseas authorities and will not be able to review the decisions on the merits. However Australian authorities would still have the power to vary or discharge foreign decisions on the ground of a change in the circumstances of a payer or payee since the decision was made or where suspension of enforcement is necessary because it is impossible for the payer to pay because of his or her financial situation.

Article 15 of the Convention provides that a payee who has received 'legal aid' in the country where the maintenance decision is issued shall be entitled to 'the most favourable legal aid' in the country where the decision is enforced. In practice article 15 will be met by the Child Support Agency registering all decisions received from other Convention countries and using the Agency's administrative procedures to enforce the decisions. In accordance with the Convention, no security, bond or deposit will be required from overseas applicants in relation to the enforcement of foreign decisions in Australia.

### **Costs**

The Commonwealth Attorney-General's Department and the Child Support Agency are already meeting the cost of enforcing overseas maintenance decisions in Australia and of obtaining support for Australian payees from other countries. Accession to the Convention would have a number of savings implications for agencies in Australia currently involved in overseas maintenance enforcement.

As article 1 of the Convention provides for the recognition and enforcement of administrative liabilities, it will allow Australian authorities to send child support assessments to other countries for registration and enforcement. This may result in a significant saving in expenditure of Australian legal aid funds (which are at present spent in obtaining Australian court orders for payees when payers move to other countries from Australia. It may also mean a reduction in payments by the Commonwealth Attorney-General's Department to the States for the use of State courts in family law matters.

A greater number of countries would be obliged to recognise and enforce Australian maintenance liabilities as a result of Australia's accession to the Convention. The increase in liabilities sent overseas for enforcement would result in an increase in the payment of child support to Australian payees, with a possible consequent reduction in social security benefits payable.

In relation to the cost of action by Australian authorities to obtain maintenance for overseas payees, the effect of Australia's ratification of the Convention may be a significant saving in expenditure of Commonwealth Attorney-General's Department funds, which are at present spent in obtaining Australian maintenance orders in expensive and lengthy applications to Australian courts on behalf of overseas payees. These proceedings will be replaced by speedy and relatively inexpensive administrative enforcement of overseas orders by the Child Support Agency under the Convention.

It is not proposed to establish any new agencies to deal with matters arising under the Convention. The Child Support Agency will undertake the role of co-ordinating communications between Australian payees / payers and government authorities in other countries.

### **Future Protocols, Annexes, other legally binding Instruments**

Article 23 provides that the Convention will not restrict the application of an international instrument in force between Convention countries for the purpose of obtaining recognition or enforcement of a maintenance decision or settlement.

Article 34 provides that a Contracting State may at any time withdraw a reservation it has made by notification to the depositary of the Convention. This action would constitute a separate treaty action and be subject to the usual domestic treaty making procedures.

**Implementation**

The Convention will be implemented in Australia by the Child Support Agency administratively enforcing overseas maintenance decisions and by sending applications for recognition and enforcement of Australian liabilities to authorities in other Convention countries.

It is expected that provisions to implement the Convention will be introduced into and passed by the Commonwealth Parliament in early 2000 by way of amendments to the *Child Support (Assessment) Act 1989*, the *Child Support (Registration and Collection) Act 1988* and the *Family Law Act 1975*.

**Consultation**

In November 1999 Commonwealth Attorney-General's Department published an Issues paper "International Child Support Enforcement - Proposed New Treaty Arrangements". The paper outlined the purpose and effect of the Convention, proposed arrangements for its implementation in Australia and sought comments on whether Australia should accede to the Convention. The paper was circulated to State and Territory law Departments, legal aid bodies, the Family Court of Australia, the Family Court of Western Australia, the Family Law Council, the Law Council of Australia, State and Territory law societies and bar councils, family law practitioners associations and groups interested in child support policy issues.

Legal Aid Western Australia raised an issue in relation to Australia's accession to the Convention. It asked whether, under the Convention, a payer in Australia will be required to reimburse an overseas public authority for benefits paid by the body to an overseas maintenance creditor if the payer overturns the payee's entitlement to child support. Article 18 of the Convention requires that Australian law provide for the recognition and enforcement of decisions rendered against a maintenance debtor on the application of a public body seeking reimbursement of benefits paid by the body to a maintenance creditor. However article 19 makes clear that an overseas public body can only request enforcement by Australian authorities if the public body is entitled to claim enforcement in place of the payee. Thus, if the payee has no entitlement to child support, the public body cannot seek enforcement under the Convention.

**Withdrawal or Denunciation**

Article 36 of the Convention provides that the Convention shall remain in force for five years and shall be renewed tacitly every five years. This means that if it is not denounced at the end of each five year period, the Convention is taken to have been renewed for a further five years. This process of tacit renewal can continue indefinitely. The denunciation takes effect only as regards the State which has

notified it. To date no Contracting State has denounced the Convention and the Convention continues in force indefinitely.

**Contact Details**

Civil Justice Division  
Legislation and Policy Section  
Attorney General's Department  
Child Support Agency

## **Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance**

### **NATIONAL INTEREST ANALYSIS**

#### **Date of Proposed Binding Treaty Action**

As provided by article 30, the Agreement between the Government of Australia and the Government of New Zealand on Child and Spousal Maintenance will enter into force 30 days after the Australian and New Zealand Governments notify each other that their respective domestic requirements for the Agreement's entry into force have been met. It is proposed that Australia will give such a notification as soon as practicable after 14 April 2000.

#### **Date of Tabling of the Proposed Treaty Action**

7 March 2000.

Tabling of the text of the Agreement prior to signature has been agreed with New Zealand.

#### **Reasons for Australia to take the Proposed Treaty Action**

The main objective of the Agreement is to provide new arrangements between Australia and New Zealand for the collection and payment of monies in relation to child and spousal maintenance. The Agreement operates where the payer is resident in the jurisdiction of one country and the payee is resident in the jurisdiction of the other country.

The Agreement obliges each country to take action to register and enforce child support assessments, court maintenance orders and registered maintenance agreements. Other principal provisions of the Agreement provide principles for the resolution of conflicts of jurisdiction between Australian and New Zealand Child Support Agencies and courts, principles for determining the law applicable in cases where child support is payable in respect of children in both countries, obligations of administrative and judicial authorities to collect monies under liabilities registered in their jurisdiction, requirements for reciprocity in legislative presumptions of parentage and requirements for the establishment of Central

Authorities in both countries to be responsible for the implementation of the Agreement.

The Agreement will replace existing arrangements between Australia and New Zealand for enforcement of child support and spousal maintenance liabilities. These existing arrangements are the United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956 (which provides for Contracting States to take action to recover maintenance for claimants in other Contracting States) and non treaty arrangements between Australia and New Zealand which provide for the recognition and enforcement of child support and spousal maintenance liabilities.

A major benefit of the Agreement to Australian recipients of child support is that the Agreement provides for the enforcement of administrative assessments of child support. Australia's existing arrangements with New Zealand were devised on the basis that all liabilities were in the form of orders made, or agreements registered, by a court. Throughout Australia and New Zealand, however, court ordered maintenance is gradually being replaced by administrative assessments of child support issued by Child Support Agencies. The Agreement is more flexible than previous arrangements because it provides not only for the enforcement of court orders and registered agreements but also for the enforcement of administrative assessments of child support.

Another major benefit of the Agreement to Australian recipients of child support and spousal maintenance is that the Agreement provides for simple and speedy enforcement of Australian liabilities by the New Zealand Child Support Agency. Australia's existing arrangements with New Zealand are of limited value to the recipients of child support and spousal maintenance as they are largely dependent on slow and cumbersome procedures for the initiation and pursuit of proceedings in courts. By providing for enforcement by child support agencies, the Agreement will significantly reduce the time currently taken to obtain child support payments for Australian payees.

In the past Australian courts and a number of payers / payees in Australia have encountered difficulties with inconsistent jurisdiction provisions in Australian and New Zealand child support legislation. There have been cases where individuals have been issued with both Australian and New Zealand child support assessments. In other cases, payers in New Zealand have obtained New Zealand child support assessments for the purpose of extinguishing arrears owing under Australian maintenance orders. The jurisdiction provisions in the Agreement are designed to put an end to conflicts in jurisdiction between Australian and New Zealand courts and child support agencies.

### **Obligations**

Articles 4 and 5 of the Agreement will oblige judicial and administrative

authorities in Australia and New Zealand to observe new jurisdictional rules. Jurisdiction to make a maintenance decision will be based on the habitual residence of the payee at the date of the decision. These provisions are designed to avoid future conflicts in jurisdiction between Australian and New Zealand courts and child support agencies.

Article 7 of the Agreement requires that Australian law provide for the recognition and enforcement of child support and spousal maintenance decisions of judicial and administrative authorities of New Zealand. In addition article 7 requires the recognition and enforcement of maintenance agreements registered with a judicial or administrative authority. Article 15 provides for each country to recognise and enforce penalties owed by payers in relation to late payment or under estimation of child support.

Under article 12 authorities in both countries will be obliged to take action to recover monies payable under registered liabilities. Under article 14 any monies collected are to be paid to the Central Authority of the other country for payment to the payee or for other disbursement in accordance with the laws of that country.

Under articles 17, 18 and 19, Australia and New Zealand agree to provide reciprocity in presumptions of parentage based on birth registers, findings of courts and statutory acknowledgments. Sections 69R, 69S and 69T of the *Family Law Act 1975* and section 29 of the *Child Support (Assessment) Act 1989* enable regulations to be made prescribing New Zealand as a prescribed overseas jurisdiction for the purpose of parentage presumptions.

Article 20 provides that both countries will not discriminate on the basis of nationality in the provision of legal aid. This provision is consistent with existing non discrimination policies of legal aid bodies in Australia.

Article 21 provides for the appointment of a Central Authority in each country which will take responsibility for co-ordinating all agencies and will take follow up action on all maintenance cases referred for enforcement. For New Zealand the Central Authority is the Commissioner of Inland Revenue and for Australia it is the Child Support Registrar.

Article 23 provides for the exchange of information between authorities in Australia and New Zealand to give effect to the Agreement.

Article 24 provides for the Australian and New Zealand Child Support Agencies to enter into a service arrangement covering matters related to the practical implementation of the Agreement.

### **Costs**

The Commonwealth Attorney-General's Department and the Child Support Agency are already meeting the cost of enforcing some New Zealand maintenance

decisions in Australia and of obtaining from payers in New Zealand payments for Australian payees. Conclusion of the Agreement would have a number of savings implications for agencies in Australia currently involved in overseas maintenance enforcement.

As the Agreement provides for the recognition and enforcement of administrative liabilities, it will allow Australian authorities to send child support assessments to New Zealand for registration and enforcement. This may result in a saving in expenditure of Australian legal aid funds which are at present spent in obtaining Australian court orders for payees when payers move to New Zealand from Australia. It may also mean a reduction in payments by the Commonwealth Attorney-General's Department to the States and Territories for the use of State courts in family law matters.

In relation to the cost of action by Australian authorities to obtain maintenance for New Zealand payees, the effect of the conclusion of the Agreement may be a saving in expenditure of Attorney-General's Department funds, which are at present spent in obtaining Australian maintenance orders in expensive and lengthy applications to Australian courts on behalf of overseas payees. These proceedings will be replaced by speedy and relatively inexpensive administrative enforcement of New Zealand liabilities by the Australian Child Support Agency under the Agreement. If a large number of child support assessments are referred to the Australian Child Support Agency for enforcement, the Agency may incur significant costs. The Agreement provides for the Australian and New Zealand Child Support Agencies to enter into a service arrangement. This arrangement will provide for the New Zealand Government to reimburse the costs incurred by the Australian Child Support Agency.

It is not proposed to establish any new agencies to deal with matters arising under the Agreement. The Child Support Agency will undertake the role of co-ordinating communications between Australian payees / payers and government authorities in New Zealand.

#### **Future Protocols, Annexes, other legally binding Instruments**

Both Australia and New Zealand are parties to the United Nations Convention on the Recovery Abroad of Maintenance of 20 June 1956. Article 27 of the Agreement provides that as between Australia and New Zealand the Agreement replaces the United Nations Convention. The reason for the replacement is that it would be impractical for judicial and administrative authorities to comply with conflicting procedures for applications for the recovery of maintenance under both treaties. The Agreement gives greater benefits to payers and payees than the United Nations Convention in relation to collection of child support and spousal maintenance.

The Agreement does not provide for any future protocols or legally binding instruments. However under article 29 the Agreement and the Service Arrangement may be reviewed at any time.

### **Implementation**

The Agreement will be implemented in Australia by the Child Support Agency administratively enforcing New Zealand child support assessments, court maintenance orders, registered agreements and penalties. The Agency will also send applications for recognition and enforcement of Australian liabilities to the New Zealand Child Support Agency for enforcement.

It is expected that provisions to implement the Agreement will be introduced into and passed by the Commonwealth Parliament in early 2000 by way of amendments to the *Child Support (Assessment) Act 1989*, the *Child Support (Registration and Collection) Act 1988* and the *Family Law Act 1975*.

### **Consultation**

The Agreement was advised to State and Territory governments through the Standing Committee on Treaties schedule of treaty action. To date there has been no request from State or Territory governments for further information.

In November 1999 Commonwealth Attorney-General's Department published an issues paper "International Child Support Enforcement - Proposed New Treaty Arrangements". The paper outlined the purpose and effect of the Agreement, proposed arrangements for its implementation in Australia and sought comments on whether Australia should enter into the Agreement. The paper was circulated to State and Territory law Departments, legal aid bodies, the Family Court of Australia, the Family Court of Western Australia, the Family Law Council, the Law Council of Australia, State and Territory law societies and bar councils, family law practitioners associations and groups interested in child support policy issues.

Legal Aid Western Australia raised one issue in relation to Australia entering into the Agreement with New Zealand. The concern was that the Agreement would have significant workload implications for the Australian Child Support Agency and this may have a detrimental effect on the quality of service provided to all clients of the Agency. The Agreement provides for the Australian and New Zealand Child Support Agencies to enter into a service arrangement dealing with, among other things, reimbursement by the New Zealand Government of costs incurred by the Australian Child Support Agency under the Agreement. This will ensure the continued provision of quality service by the Child Support Agency.

**Withdrawal or Denunciation**

Article 31 of the Agreement provides that the Agreement may be terminated by either country giving notice in writing through the diplomatic channel. The Agreement terminates six months after the date of the notice.

**Contact Details**

Civil Justice Division  
Legislation and Policy Section  
Attorney General's Department  
Child Support Agency

**Agreement for Cooperation between Australia and the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation, Agreed Minute, and Exchange of Notes, done at Washington on 28 October 1999**

**NATIONAL INTEREST ANALYSIS**

**Date of Proposed Binding Treaty Action**

The proposed Agreement for Cooperation between Australia and the United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation, Agreed Minute, and Exchange of Notes (the Agreement) will enter into force on the date on which the Parties exchange diplomatic notes informing each other that they have completed all applicable requirements for its entry into force (Article 16). It is anticipated that Australia will be able to provide such advice after 13 April 2000.

**Date of Tabling of the Proposed Treaty Action**

7 March 2000.

**Reasons for Australia to take the Proposed Treaty Action.**

The existing Australia-US Agreement Concerning Peaceful Uses of Nuclear Energy does not apply to transfers of "sensitive nuclear technology", unless specifically provided for by amendment of that Agreement or by a separate agreement. The Agreement now proposed establishes the procedures through which an Australian company, Silex Systems, and a US company, the United States Enrichment Corporation (USEC), will conduct research, development and commercial utilisation of the Silex technology. It establishes reciprocal obligations on the Parties and meets Australia's key non-proliferation requirements. The proposed Agreement, allowing for the transfer of sensitive nuclear-related technology, is required as part of Australia's stringent non-proliferation policy.

Silex Systems limited is developing a laser enrichment technology, which may have nuclear and non-nuclear applications. If the technology proves to be practical, it is intended that any nuclear application will only be for the production of low enriched uranium for use by the electricity generation industry. Research

and development into this technology is being carried out at Silex's laboratories, leased from the Australian Nuclear Science and Technology Organisation at Lucas Heights, Sydney, with financial and technical backing from USEC, a company which provides uranium fuel enrichment services for commercial power plants.

USEC is investing in the development of the Silex technology on the basis that the commercial application of the technology would take place in the United States. USEC has invested an initial US \$7.5 million in the evaluation phase of the project. If the technology is transferred to the US further payments totalling US \$18 million will be made as certain milestones are reached in the development of the technology. Royalty payments to Silex Systems would ensue if the project proceeded to commercialisation.

Transfer of Silex technology to the US for peaceful purposes is fully consistent with our obligations under the Nuclear Non-Proliferation Treaty (NPT). While the Agreement concerns transfers of Australian enrichment technology (and nuclear material produced through its use), the text has been structured to be consistent with Australia's uranium export policies, as reflected in Australia's series of bilateral safeguards agreements. The safeguards agreements generally provide for the application of IAEA safeguards and prior Australian consent for re-export, high enrichment or reprocessing of Australian uranium. This is to ensure that Australian uranium is properly monitored through the nuclear fuel cycle and is neither used for, nor contributes to, any military or explosive purpose, or is used in any other way contrary to Australia's obligations under the NPT. Australia currently has fifteen such agreements in place.

The Agreement specifies that Silex technology shall be used for peaceful purposes only. The use of Silex technology, and material produced using the technology, for any nuclear explosive purpose, or for any military purpose, is specifically excluded. Strict safeguards, verification and physical protection (i.e. security) measures are stipulated to ensure the observance of this requirement. The Agreement also ensures that Silex and derived technology are controlled against unauthorised use and cannot be retransferred to any other country without Australia's consent. The Australian Safeguards and Non-Proliferation Office (ASNO) is monitoring the project to ensure that Australia's non-proliferation commitments are satisfied and the requirements of the *Nuclear Non-Proliferation (Safeguards) Act 1987* are being met.

### **Obligations**

The Agreement places a number of obligations on the United States and Australia to cooperate in relation to the development and use of Silex technology. The Agreement accords with Australia's primary non-proliferation concerns by requiring that: the technology remain in exclusively peaceful use and subject to International Atomic Energy Agency (IAEA) safeguards; that Australia's prior

consent is required for use of the technology by the United States to produce high enriched uranium; that Australia's prior consent is required for retransfer of the technology to third parties; and that the obligations imposed by the Agreement apply not only to the Silex technology itself but to any other technology derived from it.

The principal obligations of the Agreement are outlined as follows:

- the Parties shall cooperate in research on and development and utilisation of Silex technology for peaceful purposes. No transfers shall take place except as authorised by the Agreement. Cooperation in Australia shall not be for the purpose of constructing a uranium enrichment plant in Australia (Article 2);
- Silex technology and related information may be transferred for peaceful purposes, except for that information which the Parties are unable to transfer due to treaties, national laws and regulations (Article 3);
- transfers may include facilities and components related to Silex technology (Article 4);
- material produced through the use of sensitive nuclear facilities and major critical components shall only be stored in a mutually acceptable facility. Silex technology, and nuclear material produced through its use, will not be transferred to unauthorised persons, and Australia's prior consent is required for any transfer of such technology or nuclear material to third parties, or beyond territorial jurisdiction (Article 5);
- nuclear material used in or produced through the use of the technology covered by this agreement shall not be reprocessed or enriched to 20 percent or more in the isotope uranium-235 (i.e. high enriched uranium) without Australia's prior consent (Article 6);
- physical protection (i.e. security) is to be maintained on Silex technology and related components and nuclear material, consistent with IAEA standards and shall be subject to review and consultation and the exchange of information between the parties (Article 7);
- Silex technology, and any material produced through its use, shall not be used for any explosive device or for research or development of any device for any military purposes (Article 8);
- nuclear material used in or produced through the use of Silex technology in the US will be subject to IAEA safeguards. Both parties are responsible for taking measures to maintain and facilitate the application of safeguards and for controlling material related to the agreement, in accordance with the existing Australia-US Agreement Concerning Peaceful Uses of Nuclear Energy, while enabling the economic and safe conduct of the respective nuclear programs (Article 9);

- cooperation under the Agreement may be terminated, and the return of Silex technology required, if either Party fails to comply with Articles 5-9 or breaches its safeguards agreement with the IAEA (Article 10);
- Silex technology is to be protected in accordance with national legislation and security arrangements between the Parties (Article 11);
- the Parties shall consult on cooperation in protecting the international environment from any effects stemming from the Agreement (Article 12);
- the Parties shall consult at the request of either regarding the implementation of the Agreement. The appropriate government authorities (ASNO and the US Department of Energy) shall establish administrative arrangements to ensure the effective implementation of the Agreement (Article 13);
- any dispute relating to the interpretation or implementation of the Agreement shall be addressed by consultation or negotiation with (Article 14);
- the Agreement may be amended by written agreement and will enter into force on the exchange of diplomatic notes (Article 15);
- the agreement will remain in force for 30 years. It can be extended if both parties agree or terminated with one year's written notice (Article 16);
- the Parties shall establish arrangements necessary to ensure proper protection of Silex technology and classified information from unauthorised access (elaborated in Annex A);
- Australia agrees to the transfer of low enriched uranium produced through the use of Silex technology from the US to third countries with which Australia has a bilateral safeguards agreement in force, as specified in Annex B.

The Agreed Minute attached to the Agreement has several additional obligations

- facilities, components, technology and data shall be transferred only after confirmation that they will be subject to the Agreement.
- Safeguards that conform with IAEA principles and procedures will be applied as part of the agreement. There is provision for a review of facilities, the maintenance and production of records and reports to assist with accountability for any nuclear material produced, and a mutual inspection regime.
- While transfers to countries specified at Annex B can occur, transfers shall not be permitted for purposes of enrichment to twenty per cent or greater in the uranium isotope 235. Also, countries to which transfers can occur can be added or deleted following consultation. Transfers shall, unless otherwise

agreed by Australia, be subject to Australia having cooperation agreements in force and shall be subject to those agreements.

The Exchange of Notes, with reference to the Agreement and in particular the Agreed Minute's "Coverage of Agreement" section, clarifies the Parties' understanding that information transferred by one Party or its authorised persons to the other prior to entry into force of the Agreement will be subject to the Agreement if it is subsequently determined by the Parties to be restricted data or sensitive nuclear technology.

### **Costs**

There will be some implementation costs to ASNO as a result of the Agreement entering into force. These will be absorbed into ASNO's operating budget.

### **Future Protocols**

No future legally-binding instruments connected with the Agreement are envisaged. However the Agreement may be amended by agreement between the Parties (Article 15).

### **Implementation**

No new legislation is required to give effect to the terms of the Agreement. It will be necessary to amend the Regulations under the *Nuclear Non-Proliferation (Safeguards) Act 1987* to add the Agreement to the list of "prescribed agreements" under the Act, and to make a similar amendment to the Regulations under the *Australian Radiation Protection and Nuclear Safety Act 1998*. No changes to the existing roles of the Commonwealth or the States and Territories will arise as a consequence of implementing the Agreement.

### **Consultation**

The Agreement was notified to the States and Territories through the Standing Committee on Treaties' Schedule of Treaty Action. To date there has been no request for further information.

A press release was issued by the Department of Foreign Affairs and Trade on 1 November 1999 providing details of the Agreement and the schedule for tabling it in Parliament. There has been a request for further information on the details of the agreement from the media in response to the media release.

### **Withdrawal or Denunciation**

The Agreement may be terminated by either Party on one year's written notice to the other Party (Article 16). Notwithstanding termination or expiration of this Agreement or any cessation of cooperation hereunder for any reason, several articles will continue to apply to relevant material, facilities, components, data or technology. The articles relate to storage and transfers (Article 5), reprocessing, alteration and enrichment (Article 6), physical protection (Article 7), no explosive or military application (Article 8), safeguards (Article 9), cessation of cooperation (Article 10) and confidentiality (Article 11) shall continue in effect so long as relevant to the agreement.

**Contact Details**

Nuclear Trade and Security Section  
Nuclear Policy Branch  
International Security Division  
Department of Foreign Affairs and Trade

## **Agreement between the Government of Australia and the Government of the Slovak Republic on Trade and Economic Cooperation, done at Canberra on 23 April 1999**

### **NATIONAL INTEREST ANALYSIS**

#### **Date of Proposed Binding Treaty Action**

The proposed Agreement between the Government of Australia and the Government of the Slovak Republic on Trade and Economic Cooperation ("the Agreement") was signed on 23 April 1999. Article 10.1 of the Agreement provides that it will enter into force once both parties have notified each other that their respective legal and other procedures necessary for bringing the Agreement into force have been completed. It is proposed that Australia provides such notification as soon as practicable after 13 April 2000.

Once the Agreement is in force, the currently operating 1972 Agreement on Trade Relations between Australia and the Czechoslovak Socialist Republic (the 1972 Agreement) shall cease to be in force as between Australia and the Slovak Republic.

#### **Date of Tabling of the Proposed Treaty Action**

7 March 2000.

#### **Reasons for Australia to take the Proposed Treaty Action**

Although two states have emerged from the former Czechoslovak Socialist Republic, trade and economic relations with the Slovak Republic continue to be governed by the 1972 Agreement mentioned above. The negotiation of a new trade and economic cooperation agreement was first raised by the Slovak Republic in May 1996. It was considered that the 1972 Agreement was outdated and inconsistent with the Slovak Republic's newly independent status and transformation to a market economy.

The Agreement differs from the 1972 Agreement in that it is a more contemporary document. In particular, the reference to the General Agreement on Tariffs and Trade (GATT) has been replaced with the World Trade Organization (WTO)

reflecting the GATT's supersession by the WTO and both countries' obligations as members of the WTO; it extends the coverage of the Agreement to trade in services; includes a reference to the principle of "Most Favoured Nation" arising from obligations under the WTO; includes a provision for dispute settlement; and replaces the "Joint Trade Committee" (established under the 1972 Agreement but which no longer operates) with a more flexible means of consultation between the Parties.

The Agreement will provide a more comprehensive institutional framework for the facilitation and development of trade and commercial relations between Australia and the Slovak Republic. It will do this by updating the language in the 1972 Agreement to make it more relevant to the contemporary environment, as well as more accurately reflecting the international rights and obligations of both parties. It will also complement the Australia-Slovak Republic Double Taxation Agreement (which entered into force on 22 December 1999).

The main objectives of the Agreement are to:

- . provide an enhanced Government-to-Government framework supportive of the development of bilateral commercial relations; and
- . provide a more reliable basis and a greater level of protection for the Australian business community in the pursuit of closer trade and commercial relations with the Slovak Republic.

Political considerations, namely a wish to assist the Slovak Republic's economic and political transition, were also an important factor underlying the decision to enter negotiations for a new Agreement. Bringing the Agreement into force will demonstrate that the Australian Government attaches importance to promoting trade and investment with the Slovak Republic. The Agreement will help to ensure that Australian companies are well placed to take advantage of the growing commercial opportunities within the Slovak Republic as the transition to a market economy takes hold.

In 1999, Australian exports to the Slovak Republic totalled A\$5 million, while imports were valued at A\$8 million. (It should be noted, however, that according to Slovak statistics imports from Australia are running at three times this level. Trans-shipments from elsewhere in Europe may be a reason for this discrepancy.) Wool is Australia's major export item (\$A3.7 million), followed by civil engineering equipment, telecommunications equipment and computers. Prospects for iron ore exports are promising, as the Slovak Republic seeks to diversify its source of iron ore supplies. Imports included computer parts, nitrogen-function compounds, plastics, glassware and rubber tyres.

Australian business community interest in expanding commercial operations in the Slovak Republic has been evident since negotiation of the Agreement was first proposed. However, while potential for joint ventures exists, specifically in the

construction and mining, telecommunications, textiles and transport sectors, Australian businesses canvassing such options have to date found the going slow. Encouragingly, QBE made a sizeable investment in November 1999 through the purchase of 99.7 per cent of shares in the Slovak Investment Insurance Company (SIP). This investment remains effectively Australia's one and only investment in the Slovak Republic.

Notwithstanding the rather limited current bilateral economic relationship, the Slovak Republic has had an impressive domestic economic performance, with a good growth rate and low rate of inflation. The Slovak Government is actively seeking closer integration with western Europe and is seeking membership of the European Union (EU) and the Organisation for Economic Cooperation and Development (OECD). At the Helsinki Summit in December 1999, EU leaders agreed to open accession negotiations with the Slovak Republic. The conclusion of the Agreement will therefore help position Australia to take advantage of the longer term trade and commercial opportunities arising from the Slovak Republic's political and economic integration with Europe.

### **Obligations**

Article 1 of the Agreement requires the Parties to take all appropriate measures, subject to their laws and regulations, to facilitate, strengthen and diversify bilateral trade and economic cooperation, including trade in goods and services.

Obligations outlined in Article 2 include the encouragement and facilitation of: the negotiation and conclusion of commercial contracts - 2(a); the development of economic, industrial and technical cooperation - 2(b); the interchange of commercial and technical representatives and delegations - 2(c); the holding of, and participation in, trade fairs, trade exhibitions and promotional activities in the field of trade and technology in each country - 2(d); participation of small and medium sized enterprises in trade and industrial cooperation - 2(e); and the encouragement of cooperation in third markets, especially through information exchanges - 2(f).

Article 3 of the Agreement requires that trade between both countries be carried out in accordance with the principle of Most Favoured Nation treatment and other rights and obligations arising from their membership of the WTO.

Under Article 4, the provisions of Article 3 do not apply to preferences or advantages accorded by either Party by means of free trade areas; customs unions; frontier traffic facilitation; or any other preference system permitted by the agreements and associated legal instruments of the WTO.

Article 5 of the Agreement requires that, in encouraging and facilitating activities under the Agreement, both countries shall encourage commercial entities to have due regard to the protection of intellectual property in their contracts, including

full account of commitments arising under the WTO Agreement on Trade Related Aspects of Intellectual Property Rights.

Article 7 requires that payments for transactions be effected in mutually acceptable freely convertible currency or otherwise as mutually agreed.

Article 8 requires both countries to encourage and develop a close and constructive dialogue to facilitate the development of bilateral trade and economic cooperation including through trade missions and, as agreed, periodic meetings of government and business representatives to promote trade, address any problems that may arise and review the implementation of the Agreement.

Article 9 obliges contracting parties to seek to resolve any dispute relating to the interpretation or implementation of the Agreement by friendly consultations and negotiations.

### **Costs**

On entry into force, the Agreement will not impose any direct compliance or implementation costs on either Party. However, there may be costs associated with those activities provided for by the Agreement, such as trade fairs, exhibitions and other promotional activities. It is expected that these costs would be met by the private sector primarily and from existing Commonwealth departmental resources (Department of Foreign Affairs and Trade/Austrade and other Departments as appropriate) to the extent that Government might be involved in such activities.

### **Future Protocols**

The Agreement does not provide for the negotiation of future related legally binding instruments.

### **Implementation**

No new legislation is required to give effect to the obligations contained in this Agreement as they are to be implemented in accordance with the laws and regulations of the Parties.

No changes to the existing roles of the Commonwealth or the States and Territories will arise as a consequence of implementing the Agreement.

Provision is made in Article 8(iv) for the review of implementation of the Agreement where both Parties agree.

**Consultation**

Austrade was consulted in an effort to identify Australian businesses with trading interests in the Slovak Republic.

The State and Territory Governments were advised of the proposed Agreement through the Standing Committee on Treaties process. The text of the Agreement was sent to all State and Territory Governments, along with a letter seeking comments and feedback. Comments from only two Governments - Western Australia (supportive) and the ACT Government ("nil return") - were received.

Letters seeking comment were also sent to the Australia Slovak Chamber of Commerce (no comment received); Asia Motors (Australia) (exports mini-buses and automotive products manufactured in Korea to the Slovak Republic) (no comment received); the Australian Chamber of Commerce and Industry (no comment received); QBE Insurance Group (very positive) and The Woolmark Company (also positive).

**Withdrawal or Denunciation**

Article 10(2) provides that the Agreement shall remain in force for an initial period of five years, after which it shall remain in force until the expiration of six months from the date on which either Party receives written notice of the other's intention to terminate. Any amendments to the Agreement, or its termination, shall not affect previously concluded contracts or their unfulfilled obligations. (Article 11).

**Contact Details:**

Central and Southern Europe and Nordics Section  
Americas and Europe Division  
Department of Foreign Affairs and Trade.

## **Agreement between Australia and the Kingdom of Denmark on Social Security, done at Canberra on 1 July 1999**

### **NATIONAL INTEREST ANALYSIS**

#### **Date of Proposed Binding Treaty Action**

Australia signed the Agreement on Social Security with the Kingdom of Denmark on 1 July 1999 (the Agreement).

In accordance with Article 17(2) the Agreement shall enter into force two months after an exchange of Notes between the Parties through the diplomatic channel. The exchange of Notes will occur after all legislative or constitutional matters required to give effect to the Agreement have been completed. It is proposed that Australia's Note be lodged as soon as practicable after 13 April 2000.

#### **Date of Tabling of the Proposed Treaty Action**

7 March 2000.

#### **Reasons for Australia to take the Proposed Treaty Action**

Once in force the Agreement will co-ordinate the social security schemes of Australia and Denmark to provide better welfare protection to people who move between Australia and Denmark. It will benefit Australia's population of about 9,000 Danish-born residents, as well as those former Australian residents now living in Denmark.

People will be able to move between Australia and Denmark knowing that their pension rights are recognised in both countries and that each country will contribute fairly to support those people who have spent part of their working lives in both countries. In this way, both countries will share responsibility for the total social security coverage for people who are within the scope of the Agreement.

A network of bilateral social security agreements has been set up within the international community to give better welfare protection to people who move between countries. Australia is a country with a large overseas-born population and it is appropriate for it to participate in this network of agreements.

Australia's participation also brings economic and political benefits to Australia by maximising both the foreign income of Australian pensioner residents and the

flow on effect of these funds into the Australian economy, and by reinforcing Australia's political, business or strategic interests.

The social security Agreement with Denmark complements Australia's nine other shared responsibility agreements with Italy, Canada, Spain, Malta, the Netherlands, Ireland, Portugal, Austria and Cyprus. This style of Agreement differs from old style host country agreements where the country where the person permanently resides takes responsibility for social security cover for that person.

### **Obligations**

Article 2 specifies the social security benefits covered by the Agreement. For Australia, age pension, disability support pension (DSP) for severely disabled persons and parenting payment (single) for widowed persons paid under the *Social Security Act 1991* are covered. Denmark has included corresponding benefits under its contributory scheme, the *Labour Market Supplementary Pensions (ATP) Act*, and its non-contributory social assistance scheme, the *Social Pensions Act*.

Article 3 describes the broad group of people to whom the Agreement applies. In the case of Australia, these are the people who are or who have been Australian or Danish residents. Article 3 does not confer any entitlement to benefits. Entitlement is still worked out under the specific terms of the Agreement and legislation of the country that pays the benefit.

Article 4 is a statement of principle, common in all bilateral social security agreements, that people covered by the Agreement shall not be treated in a discriminatory way.

Article 5 allows the payment of benefits made under the Agreement by Australia and Denmark to be paid into the other country. The payment of a benefit into the other country is known as portability. Portability of benefits is an important principle underlying agreements where the responsibility for social security support is shared.

Article 5(1) allows benefits payable by one country under the Agreement to be paid in the territory of the other country.

Article 5(2) provides that if there is a time limit on portability of a benefit paid by either country, that limit will not apply in the other country.

For example, although the portability of Australian parenting payment for a widowed person is generally limited to 26 weeks (ie, only if the overseas absence is temporary), the Agreement will allow a person to take her or his payment to Denmark with no time restriction. However, if the person leaves Denmark and does not return to Australia, payment will stop after 26 weeks (or earlier if the absence is not temporary).

Article 5(3) serves to overcome any currency controls preventing portability of benefits between the countries.

Article 5(4) ensures neither country will deduct administrative costs for transfer of benefits.

Article 5(5) ensures that any domestic exemptions from fees or charges for certificates and documents which are produced to claim Agreement benefits are extended to Agreement documents. It also provides exemption from diplomatic / consular authentication requirements.

Articles 5(6), (7), (8), (9), (10) and (11) apply to Danish benefits. Article 5(6) specifies a minimum 12 month period of employment in Denmark in order for a benefit under the *Social Pensions Act* to be payable to an Australian national in Australia.

Article 5(7) and (8) qualify Article 5(6) by providing alternative means to meet the 12 month rule.

Article 5(9) specifies that certain supplements, allowances and benefits under the *Social Pensions Act* are payable to a Danish national residing outside Denmark only if that Act provides for such a situation.

Article 5(10) specifies that, notwithstanding any other provision of the Agreement, periods of residence in Denmark prior to 1 April 1957 are not to be taken into account in calculating a benefit payable under the *Social Pensions Act* to an Australian national resident outside Denmark.

Article 5(11) specifies that the rights under this Article do not apply to rent assistance or pharmaceutical allowance. For Australia, this means that these supplementary payments are not payable to people outside Australia.

Under Article 6 former residents of Australia residing in Denmark will be able to lodge claims for Australian age and disability support pensions without returning to reside in Australia.

Under Article 7, people living in either country may be able to add periods of residence in each country in order to qualify for Australian pensions more quickly.

Without the help of the Agreement people would only be able to count periods of Australian residence to satisfy residence qualifications. The process of adding periods of residence in both countries is called totalisation. In order to totalise under the Agreement, a person who is not an Australian resident must have a minimum period of Australian Working Life Residence (WLR) of one year (six months of which must be continuous) since 1 April 1957. If a person is an Australian resident, no minimum WLR is required to totalise. WLR is a period of Australian residence accrued between the age of 16 years and age pension age.

Article 8 defines the methods for calculating Australian benefits under the Agreement.

Article 8 paragraphs (1) and (2) specify that Danish benefits 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.

Article 8 paragraph (3) specifies that Australia will disregard any personal allowance (or similar payment) under the *Social Pensions Act* of Denmark paid to a person residing in Denmark. Article 8(4) specifies that payments that come within paragraph (3) are to be published in the *Commonwealth of Australia Gazette*.

Article 8(5) provides that residents of Australia in receipt of Australian benefit by virtue of the Agreement will have the amount of their Danish benefit directly deducted from the rate of Australian benefit until they meet the residence requirements for Australian benefits. This approach is a feature of Australia's other agreements where responsibility for social security support is shared. Once the residence requirements for Australian benefits are met without the help of the Agreement, Danish benefits will be treated as ordinary income under the income test.

Article 9 and Article 10 of the Agreement establish special residence requirements for people to qualify for specified social security payments from Denmark under the Danish *Social Pensions Act*. The method of calculating Danish social security benefits is in the domestic social security laws of Denmark specified in Article 2(1)(b)(i) and (ii).

Article 11 specifies the method and place of lodgement of claims. Article 11(1) enables the lodgement of social security claims, notices or appeals in either country in accordance with the Administrative Arrangement that is provided for in Article 14.

Article 11(2) ensures that the original date of lodgement of claims, notices or appeals will be retained regardless of the place of lodgement. Without this provision, the start date of any payment could be adversely affected by the time it takes to send the documents to the other country.

Article 11(3) serves to clarify the scope of the appeals referred to in paragraph 2. It restricts the operation of paragraph 2 to appeals to authorities set up under social security legislation. In Australia's case, Authorised Review Officers and the Social Security Appeals Tribunal are such authorities. It excludes appeals to the Administrative Appeals Tribunal (AAT) which has its own legislation and cannot have its activities modified by this Agreement.

Article 12(1) provides that, when determining eligibility to a benefit under the Agreement, all the events and periods which have a bearing on the entitlement are taken into account. This applies whether the events occurred before or after the

date the Agreement came into force. This is subject to restrictions stated elsewhere in the Agreement such as paragraph 10 of Article 5 and paragraph 3 of Article 7.

Article 12(2) makes sure benefits granted under the Agreement will not be paid in respect of any period prior to the Agreement's start date.

Article 12(3) enables the country which initially grants a benefit to recover any overpayment caused by the subsequent grant of the other country's benefit with arrears. Withholdings may be made from the person's regular payments to assist in the recovery of the debt.

Article 12(4) provides that, for Australia, the benefits referred to in paragraph 3 need not be limited to the specific payment types covered by the Agreement, whereas for Denmark, the benefits overpaid must be covered by the Agreement.

Article 12(5) provides that a claim for a benefit from one country will also be regarded as a claim for a benefit from the other country. This will ensure timely access to all possible entitlements under the Agreement and confirm the principle of shared responsibility embodied in the Agreement.

Under Article 13 the two countries agree to help each other in claim processing, information exchange, administrative arrangements and dealing with inquiries from the public so that the Agreement can be administered properly.

Article 13(1) sets out the form of mutual assistance to implement the Agreement and ensure its effective operation. Australia and Denmark will exchange customer and other information so that the Agreement can be applied. Each country will let the other know of changes or amendments to legislation, the steps taken to implement the Agreement and of any technical and administrative problems that may occur in applying the Agreement. The countries also agree to help one another with the operation of their other agreements. For example, Australia will accept claims for Danish benefits from Australian residents who wish to claim through an agreement Denmark may have with another country.

Article 13(2) provides for the help which Denmark and Australia give each other under the Agreement to be given free of charge, unless the authorities of both countries decide otherwise in the Administrative Arrangement.

Under Article 13(3) and (4) Australian and Danish laws protect the privacy of information collected for social security purposes. Customer information exchanged between Denmark and Australia under the terms of this Agreement is confidential. It also makes sure that neither country will use the Agreement to ask the other for administrative assistance or information which is contrary to its law or practices.

Article 14 provides for the Parties to the Agreement to make arrangements to implement and administer the Agreement. It is usual for countries to make operational arrangements for the Agreement in a separate document, usually called an Administrative Arrangement.

The document is not of treaty status. The working rules for agreements usually need periodic amendment when either or both parties change their administrative practices. The necessary changes can occur more easily if these rules are kept apart from the main treaty.

Article 15(1) and (2) provide for the resolution of any difficulties in interpretation or application of the Agreement. The Parties are to act in good faith in accordance with the ordinary meaning given to the terms of the Agreement except where the meaning may have been specifically modified. The parties are also to consult promptly at the request of either party.

Article 16 provides for the review of the Agreement. Where a Party makes such a request a meeting is to take place within six months. Unless otherwise agreed, the meeting is to be held in the territory of the party to which the request is made.

Article 17 makes provision for the entry into force and termination of the Agreement. Article 17(1) prevents the Agreement from reducing the amount of a benefit where the entitlement to that benefit was established prior to the Agreement's entry into force. However, this paragraph will not prevent any rate reductions under each country's domestic law.

#### **Costs**

Under the proposed Agreement, there will be an estimated net inflow of foreign income into Australia of \$A 2.864m in 2000-01, \$A 3.781m in 2001-02 and \$A 4.159m in 2002-03 (payments by Denmark into Australia less payments by Australia into Denmark).

Australia is expected to outlay \$A 0.807m in 2000-2001 (based on implementation in September 2000), \$A 1.070m in 2001-02 and \$A 1.177m in 2002-03 on Australian pension payments to people in Denmark.

Against this, Denmark is expected to make Agreement payments into Australia of \$A 3.671m in 2000-2001, \$A 4.851m in 2001-02 and \$A 5.336m in 2002-03.

There will also be a net reduction in administered expenses of \$A 0.283m in 2000-01, \$A 0.374m in 2001-02 and \$A 0.412m in 2002-03 for the Commonwealth Department of Family and Community Services (FaCS) after allowance for reductions in Australian pensions from the assessment of Danish pensions under the pension income test.

Once the Agreement has been implemented in 2000-01, there will be ongoing net savings (after allowance for departmental expenses) of over \$A 200,000 a year. Details are shown below.

**Costs: Table outlining Financial Implications for the Department of Family and Community Services (FaCS)**

|                                                                                                                           | 1999-00<br>\$A m | 2000-01<br>\$A m | 2001-02<br>\$A m | 2002-03<br>\$A m |
|---------------------------------------------------------------------------------------------------------------------------|------------------|------------------|------------------|------------------|
| <b>Administered Expenses</b>                                                                                              |                  |                  |                  |                  |
| □ <b>New pensions</b>                                                                                                     | 0                | 0.807            | 1.070            | 1.177            |
| □ <b>Less: Reduction in existing Australian pensions from assessment of Danish pensions under the pension income test</b> | 0                | -1.090           | -1.444           | -1.589           |
| <b>Net FaCS Administered Expenses</b>                                                                                     | 0                | -0.283           | -0.374           | -0.412           |
|                                                                                                                           |                  |                  |                  |                  |
| <b>Departmental Expenses</b>                                                                                              | 0.364            | 0.329            | 0.160            | 0.169            |
|                                                                                                                           |                  |                  |                  |                  |
| <b>Net FaCS Expenses for the Agreement</b>                                                                                | 0.364            | 0.046            | -0.214           | -0.243           |
|                                                                                                                           |                  |                  |                  |                  |
| <b>Payments by Denmark into Australia</b>                                                                                 | 0                | 3.671            | 4.851            | 5.336            |

**Proposed Protocols etc**

The Agreement does not provide for the negotiation of any future legally binding instruments.

**Implementation**

A new Schedule will be added to the *Social Security (International Agreements) Act 1999* which will contain the full text of the Agreement. The regulation making powers contained in Sections 8 and 25 of that Act will be used to implement the Agreement.

**Consultations**

State and Territory Governments received advice of the proposed Agreement through the Standing Committee on Treaties 'Schedule of Treaties Action'.

The views of eight Danish Community Organisations, 20 Welfare Organisations and the relevant Departments of the State and Territory Governments were sought on 2 December 1999.

The Danish Community Organisations contacted were:

|                                                                       |                                                                         |
|-----------------------------------------------------------------------|-------------------------------------------------------------------------|
| The Danish Club<br>(Frenchs Forest, NSW)                              | Danish Church in Australia Inc.<br>(Denistone, NSW)                     |
| Danish Association Heimdal<br>(Newstead, QLD)<br>(Stones Corner, QLD) | Scandinavian Association of SA<br>(Hindmarsh, SA)<br>(Mount Barker, SA) |
| Scandinavian Association of<br>Tasmania<br>(North Hobart, TAS)        | Danish Australian Cultural Society<br>(Canterbury, VIC)                 |
| Danish Club<br>(Middle Park, VIC)                                     | Scandinavian Association of WA<br>(Langford, WA)                        |

The Welfare Organisations contacted were:

|                                                                                   |                                                                             |
|-----------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| Federation of Ethnic Community<br>Councils of Australia<br>(Deakin, ACT)          | Australian Council of Social Service<br>(Strawberry Hills, NSW)             |
| St Vincent De Paul<br>(Manuka, ACT)                                               | Association of Superannuation Funds<br>of Australia<br>(Sydney, NSW)        |
| ACROD (National Industry<br>Association for Disability Services)<br>(Curtin, ACT) | Australian Pensioners and<br>Superannuants Federation<br>(Surry Hills, NSW) |
| Salvation Army National<br>Secretariat<br>(Manuka, ACT)                           | Australian Retirement Incomes<br>Streams Association<br>(Sydney, NSW)       |
| Australian Catholic Social Welfare<br>Commission<br>(Curtin, ACT)                 | Combined Pensioners &<br>Superannuants Association<br>(Surry Hills, NSW)    |
| Australian Council of Retiree<br>Organisations<br>(Canberra, ACT)                 | National Seniors Association<br>(Brisbane, QLD)                             |

|                                                      |                                                                             |
|------------------------------------------------------|-----------------------------------------------------------------------------|
| National Ethnic Disability Alliance<br>(Mawson, ACT) | National Welfare Rights Network<br>(Surry Hills, NSW)                       |
| Brotherhood of St Laurence<br>(Fitzroy, VIC)         | St Vincent de Paul Society<br>National Council<br>(Summer Hill, NSW)        |
| Council on the Ageing Australia<br>(Melbourne, VIC)  | Association of Independent Retirees<br>(Buderim, QLD)                       |
| Australian Red Cross Society<br>(Carlton, VIC)       | Federation of Ethnic Community<br>Councils of Australia<br>(St Georges, SA) |

Replies have been received from:

Association of Independent Retirees Inc.;

Council on the Ageing;

National Seniors Association Limited;

Association of Superannuation Funds of Australia Limited;

Chief Minister's Department, ACT;

NSW Cabinet Office for the Principle Project Officer, Intergovernmental and Regulation Reform Branch, New South Wales;

Director, Social Policy and Intergovernmental Relations, South Australian Government; and

Director, Department of Premier and Cabinet, State Government of Tasmania.

No objections were raised about any aspect of the proposed Agreement by these organisations or departments.

The Department of Premier and Cabinet, Tasmania, noted that the Agreement may result in some flow on effects to concessions provided to pensioners in Tasmania as most concessions provided by that State government are dependent on eligibility for an Australian pension. However, the Department of Premier and Cabinet, Tasmania, did not envisage any major difficulties with the Agreement.

No requests for further information have been sought from other organisations.

**Withdrawal or Denunciation**

Article 17(3) specifies that the Agreement can be terminated by either Party.

Article 17(3) states:

Subject to paragraph 4, this Agreement shall remain in force until the expiration of 12 months from the date on which either Party receives from the other a note through the diplomatic channel indicating the intention of the other Party to terminate this Agreement.

Article 17(4) preserves the rights of all those people who have claimed or are receiving benefits under the Agreement should the Agreement be terminated.

Article 17(4) reads:

In the event that this Agreement is terminated in accordance with paragraph 3, the Agreement shall continue to have effect in relation to all persons who:

- (a) at the date of termination, are in receipt of benefits; or
- (b) prior to the expiry of the period referred to in that paragraph, have lodged claims for, and would be entitled to receive, benefits,

by virtue of this Agreement.

**Contact Details**

Agreements 1

International Branch

Department of Family and Community Services

## **Agreement between Australia and Romania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Protocol, done at Canberra on 2 February 2000**

### **NATIONAL INTEREST ANALYSIS**

#### **Date of Proposed Binding Treaty Action**

The proposed Agreement between Australia and Romania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Protocol ("the Agreement") was signed on 2 February 2000. It will enter into force once both Parties have notified each other in writing that their respective legal and constitutional requirements for entry into force are complete. It is proposed that Australia provides such advice to Romania by the end of 2000.

#### **Date of Tabling of the Proposed Treaty Action**

7 March 2000.

#### **Reasons for Australia to Take the Proposed Treaty Action**

##### *General*

The Agreement will add to Australia's existing income tax treaty network. Australia currently has 38 comprehensive income tax treaties (Argentina, Austria, Belgium, Canada, China, Czech Republic, Denmark, Fiji, Finland, France, Germany, Hungary, India, Indonesia, Ireland, Italy, Japan, Kiribati, Malaysia, Malta, the Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Poland, Singapore, Slovak Republic, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Thailand, United Kingdom, United States of America and Vietnam) and four Airline Profits Agreements (China, France, Greece and Italy - Airline Profits Agreements are more limited, dealing only with cross-border taxation of airline profits).

## Background

Negotiations with Romania commenced in 1992. The second and last round of talks was held in 1995. Finalisation of the text was delayed largely due to translation difficulties. More recently there was also a need to renegotiate part of the *Income, profits or gains from the alienation of property* Article following the adverse Federal Court decision in the *Lamesa Holdings BV*<sup>1</sup> case (see *Overview of the Agreement* below).

## Investment and Trade Relationship

Once it is in force, the main impact of the Agreement will be on Australian enterprises investing in and trading with Romania. Romania is Australia's largest export market in Central Europe. It is ranked 19th among our export destinations. In 1998-99, Australian exports to Romania totalled A\$75 million, the main items being raw materials such as coal, iron ore and other ores. Romania is ranked 77th among our import sources. In 1998-99 imports amounted to A\$8.5 million, the main items being footwear and clothing. Although Australia's current investment and trade relationship with Romania is not substantial, this Agreement will assist in developing a bilateral framework for investment and trade with Romania.

The 1993 Investment Promotion and Protection Agreement entered into force in April 1994 and the 1995 Trade and Economic Cooperation Agreement in March 1997.

## Reasons for the Agreement

The two key objectives of the Agreement are to:

- promote closer economic cooperation between Australia and Romania by eliminating possible barriers to trade and investment caused by the overlapping taxing jurisdictions of the two countries, and providing a reasonable element of legal and fiscal certainty within which cross-border trade and investment can be carried on;
- create a legal framework through which the tax administrations of Australia and Romania can prevent international fiscal evasion.

The Agreement once in force will reduce or eliminate double taxation caused by the overlapping taxing jurisdictions by limiting taxing rights over various types of income flowing between the two countries. For example, the Agreement contains the standard tax treaty provision that neither country will tax business profits

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<sup>1</sup> *Commissioner of Taxation v Lamesa Holdings BV* 97ATC 4752.

derived by residents of the other country unless the business activities in the other country are substantial enough to constitute a "permanent establishment" (as defined in Article 5) and the income is attributable to a "permanent establishment" (Article 7). The countries also agree on methods of reducing double taxation where both countries have a right to tax.

In negotiating the sharing of taxing rights under bilateral agreements, Australia seeks an appropriate balance between source and residence country taxing rights. Generally the allocation of taxing rights under the Agreement is similar to international practice as set out in the *OECD Model Tax Convention on Income and on Capital* ("the OECD Model"), but consistent with Australian practice, there are a number of instances where the Agreement is biased more towards source country taxing rights: the definition of "permanent establishment" is wider in some respects than the OECD Model, and the *Business profits, Ships and aircraft, Royalties, Income, profits or gains from the alienation of property and Income not expressly mentioned* Articles also give greater recognition to source country taxing rights.

In common with Australia's other tax treaties, the Agreement provides an agreed basis for determining whether the income returned or expenses claimed on related party dealings by members of a multinational group operating in both countries can be regarded as acceptable (Articles 7 and 9), and in so doing addresses fiscal evasion in the form of international profit shifting. Another feature of the Agreement which assists in the prevention of fiscal evasion is the exchange of information facility (Article 25). The two tax administrations can also use the mutual agreement procedures (Article 24) to develop a common interpretation and resolve differences of application of the Agreement.

### **Impact of the Agreement**

The Agreement is likely to have an impact on:

- Australians and Romanians investing in and trading with the other country;
- Australians and Romanians working in or supplying services to the other country;
- the Governments of Australia and Romania;
- people receiving pensions from the other country.

**Australians investing in and trading with Romania.** The Agreement will reduce Romanian taxation on interest, dividends and royalties. It will also restrict the circumstances in which Australians trading with Romania will be taxed by requiring the existence of a permanent establishment in Romania before Romanian taxation will take place. The Agreement will assist Australian investors by increasing the certainty of the taxation rules applying to the cross-border investment.

**Cross-border movement of personnel.** The Agreement will also assist in clarifying the taxation of individual Australians working in Romania. In particular, Article 14 (Independent Personal Services) and Article 15 (Dependent Personal Services) set out circumstances in which Romania can tax individual consultants or employees.

There are important impacts on the **Governments** which are party to the Agreement.

- As mentioned the Agreement will promote greater cooperation between the relevant taxation authorities to prevent fiscal evasion and tax avoidance.
- The Agreement will also assist the bilateral relationship by adding to the existing network of commercial treaties between the two countries.

### **Overview of the Agreement**

In general the Agreement follows the structure of the OECD Model. However, there are some influences from the more source country biased United Nations' *Model Double Taxation Convention between Developed and Developing Countries* ('the UN Model'). In addition both countries have proposed some variations to reflect their domestic tax rules, economic interests and legal circumstances (see *Key Departures in Obligations* below). Subject to these variations, the Agreement is substantially similar to Australia's recent tax treaties.

The Agreement applies to residents of either Australia or Romania. It applies to the following **taxes** (Article 2):

- the Australian federal income tax, and the resource rent tax.
- the Romanian tax on income derived by individuals, profit, salaries and other similar remuneration, dividends and agricultural income;

It does not apply to Australian State or Territory taxes.

### **Obligations**

The Agreement requires the two Governments to relieve double taxation of cross-border income in accordance with its terms (Article 23).

It also establishes procedures for mutual agreement of issues that may arise under the Agreement (Article 24), for the exchange of information (Article 25) and the notification of substantial changes in the respective laws of each country that affect the taxes covered by the Agreement (Article 2).

In general the Agreement does not impose any greater obligations on residents of Australia than Australia's domestic tax laws would otherwise require. However, subject to secrecy and privacy safeguards, the Agreement may require information concerning the tax affairs of Australian residents to be supplied to the Romanian

revenue authorities. Similarly, the Australian Taxation Office (ATO) may obtain tax information from those authorities.

Under the terms of the Agreement:

- **Dual resident individuals** (i.e., persons who are residents of both Australia and Romania according to the domestic law of each State) are, in accordance with specified criteria, to be treated for the purposes of the Agreement as being residents of only one State (Article 4).
- **Income from real property** (Article 6) may be taxed in full by the State in which the property is situated. Income from real property includes natural resource royalties.
- **Business profits** (Article 7) are to be generally taxed only in the State of residence of the recipient unless they are derived by a resident of one State through a branch or other prescribed **permanent establishment** (Article 5) in the other State, in which case that other State may tax the profits. **Profits of associated enterprises** (Article 9) may be taxed on the basis of dealings at arm's length, thus assisting the revenue authorities of both countries in combating tax avoidance arising from the artificial shifting of profits between multinational enterprises.
- Profits from **international operations of ships and aircraft** (Article 8) may be taxed only in the State in which the place of effective management of the enterprise is situated.
- **Dividends, interest and royalties** as defined (Articles 10, 11 and 12) may generally be taxed in both States, but there are limits on the tax that the State in which the dividend, interest or royalty is sourced may charge on such income flowing to residents of the other State who are beneficially entitled to that income. These limits are 10 per cent for royalties and interest. The limit is five per cent for dividends which have been fully taxed at the corporate level, and where the dividend recipient is a company that holds directly at least 10 per cent of the capital of the company paying the dividend. A 15 per cent limitation applies to all other dividends.
- **Income, profits or gains from the alienation of real property** (Article 13) may be taxed in full by the State in which the property is situated. Subject to that rule and other specific rules in relation to business assets and some shares, capital gains are to be taxed in accordance with the domestic law of each State. The Agreement also includes revised provisions designed to address the issues raised by the Federal Court in the *Lamesa Holdings BV* case.

The Full Federal Court in *Lamesa Holdings BV* decided that real property held by a non-resident through a chain of companies did not fall within the terms of the alienation of real property provision in the Australia / Netherlands double tax agreement.

The decision of the Court means that, in double tax agreements that contain alienation of property articles similar to that in the Australia / Netherlands double tax agreement, that article applies where real property is held through a company, but not where the real property is held through a company at the bottom of a chain of companies and one of the higher tier companies is alienated. This decision has implications for all of Australia's double tax agreements and highlights opportunities for non-residents to escape Australian taxation on profits from the sale of real property and mining rights in Australia by the use of a chain of holding companies or trusts.

- **Income from professional services** (Article 14) and other similar activities provided by an individual will generally be taxed only in the State in which the recipient is resident for tax purposes. However, remuneration derived by a resident of one State in respect of professional services rendered in the other State may be taxed in the latter State, where attributable to a fixed base of the person concerned in that State.
- **Employee's remuneration** (Article 15) will generally be taxable in the State where the services are performed. However, where the services are performed during certain short visits to one State (maximum 183 days in any 12 month period) by a resident of the other State, the income will generally be exempt in the State visited. However, employment aboard a ship or aircraft operated in international traffic may be taxed in the State in which the place of effective management of the enterprise is situated.
- **Directors' fees and other similar payments** (Article 16) may be taxed in the State of residence of the paying company.
- Income of **entertainers and sportspersons** (Article 17) may generally be taxed by the State in which the activities are performed.
- **Pensions and annuities (including government pensions)** (Article 18) may be taxed only in the State of residence of the recipient.
- **Government service remuneration** (Article 19) will generally be taxed only in the State that pays the remuneration. However, the remuneration may be taxed in the other State in certain circumstances where the services are rendered in that other State.
- Income of **visiting students** (Article 20) will be exempt from tax in the State visited for a period not exceeding 7 years, so far as it concerns payments made from abroad for the purposes of their maintenance or education.
- **Income not expressly mentioned** (i.e., income not dealt with by other articles) (Article 21) may be taxed by both States.
- **Source rules** (Article 22) are prescribed in the Agreement to the effect that income, profits or gains derived by a resident of Australia which, under the

provisions of the Agreement may be taxed in Romania, shall be treated as being sourced in Romania.

- **Double taxation relief** (Article 23) for income which under the Agreement may be taxed by both States is required to be provided by the State in which the taxpayer is resident under the terms of the Agreement as follows:-
  - in **Australia**, by allowing a credit for the Romanian tax against Australian tax payable on income derived by a resident of Australia from sources in Romania. In the case of certain dividend payments from a company resident in Romania to a related Australian resident company, the Romanian tax to be credited by Australia includes the 'underlying' tax paid in respect of the profits out of which the dividend is paid.
  - in **Romania**, by allowing an exemption or a deduction against Romanian tax for the Australian tax paid on income, profits or gains derived by residents of Romania from sources in Australia.

In the case of Australia, effect will be given to the double tax relief obligations arising under the Agreement by application of the general foreign tax credit system provisions of Australia's domestic income tax law, or relevant exemption provisions of that law where applicable.

- **Consultation and exchange of information** between the two taxation authorities is authorised by the Agreement (Articles 24 and 25). The exchanged information is restricted to that permitted under the existing domestic laws of the two countries but is not restricted to residents of either State (Article 1). The information is to be treated as secret but may be disclosed to duly authorised persons and authorities involved in tax administration (including courts).
- The **Entry into force** Article (Article 27) provides that the Agreement will have effect in the case of Australia for withholding tax on income derived by a non-resident on or after 1 January in the calendar year next following that in which the Agreement enters into force and for other income taxes for the years of income commencing on or after 1 July in the calendar year next following that in which the Agreement enters into force. In the case of Romania, it has effect for all taxes on income, profits and gains for the taxable period starting from 1 January of the next calendar year following that in which the Agreement enters into force.

*Key departures from preferred Australian tax treaty practice (for many of which there are precedents in other Australian tax treaties)*

- **Dual resident individuals - mutual agreement** (Article 4.3(c)). Unlike the OECD and UN Models in relation to tie-breaker tests for dual resident

individuals, the Australian Model Double Tax Agreement ("the Australian Model") does not confer on the competent authorities the duty or power to resolve by mutual agreement any difficulty that may remain after the tie-breaker tests for individuals have been exhausted. It is Australia's policy that the questions of residence in Australia are questions of fact which can only be determined by the courts referring to the law rather than being negotiated by the Commissioner of Taxation. However in this Agreement, Australia agreed to add the phrase 'the competent authorities shall consult each other' to the tie-breaker rules. In essence this repeats the requirements of the *Mutual Agreement Procedure* Article (Article 24), but complies with the form of the OECD Model.

- **Permanent establishment - temporary fair or exhibition** (Article 5.3(f)). This is a Romanian specialty. It provides that an enterprise shall not be deemed to have a permanent establishment merely by reason of the sale of displayed goods after the closing of a temporary trade fair or exhibition. Most of Romania's recent double tax treaties contain a similar provision.
- **Income from real property** (paragraphs 5 and 7 of Article 6). Romania wishes to retain its right to tax the income of an enterprise or an individual from any form of use of a right to enjoyment of real property situated in Romania when such a right is derived from the holding of shares or other corporate rights in the company owning the property, or from such a right that is used in the performance of independent personal services.
- **Ships and aircraft** (Article 8.1). There are three internationally recognised bases under which taxing rights over profits from international operations of ships and aircraft may be allocated □ residence, place of effective management and place of registration. In the past Australia always agreed to the residence basis. However, a review of the Australian Model revealed that there was insufficient reason for Australia to depart from the OECD Model (which uses the place of effective management test) and that the Australian Model should adopt the place of effective management criterion.  
The Romanian Agreement is the first new Australian tax treaty to include the new basis for taxing profits from international operations of ships and aircraft. In adopting the OECD Model place of effective management criterion for allocating taxing rights over profits from the international operations of ships or aircraft, this Agreement also includes the OECD Model provision that states that if the place of effective management of a shipping enterprise is aboard a ship, it shall be deemed to be situated in the country in which the home harbour of the ship is situated, or, if there is no such home harbour, in the country of which the operator of the ship is resident (Article 8.3).
- **Interest** (Article 11.3). In accordance with the internationally recognised rules concerning sovereign immunity it was agreed to exempt from source country taxation investment of official funds by the governments, government monetary institutions or banks performing central banking functions.

- **Income, profits or gains from the alienation of property** (Article 13.3). Having adopted the OECD Model place of effective management criterion for allocating taxing rights over profits from the international operations of ships and aircraft, income, profits or gains from the disposal of ships or aircraft operated in international traffic, or of associated property, are to be taxable only in the country in which the place of effective management of the enterprise alienating those ships, aircraft or other property is situated.
- **Dependent personal services** (Article 15.3). As with Article 13.3, as a consequence of adopting the OECD Model place of effective management criterion for allocating taxing rights over profits from the international operations of ships and aircraft, remuneration in respect of an employment exercised aboard a ship or aircraft operated in international traffic may be taxed in the country in which the place of effective management of the enterprise is situated.
- **Entertainers - cultural exchanges** (Article 17.3). Although this provision is not part of the Australian Model, a number of Australia's double tax treaties provide various exemptions for publicly funded entertainers to facilitate cultural exchanges between the respective countries.
- **Visiting students** (Article 20). Income of visiting students will be exempt from tax in the State visited for a period not exceeding 7 years, so far as it concerns payments made from abroad for the purposes of their maintenance or education. All of Australia's tax treaties that contain such an article do not specify a time period. The specification of a time period in this Agreement was requested by the Romanians to avoid an indefinite obligation on the visited State to exempt a foreign student's overseas payments.
- **Non-Discrimination Article (NDA)** (the Protocol). The Protocol to the Agreement provides that if Australia subsequently agrees to include a NDA in any of its double tax treaties it will enter into negotiations with Romania to provide the same treatment to Romania. The Protocol arose from Australia's previous tax treaty policy of not including a NDA in any new tax treaty. This refusal proved to be a major difficulty for the Romanian delegation and the Protocol was agreed as a compromise measure in order to achieve final agreement on an otherwise satisfactory Agreement.

## Costs

Once it is in force the Agreement is not expected to result in increased administration or compliance costs. Nor is there expected to be significant revenue effects.

There may be some reduction in Australian Government revenue from taxation of Romanian investments and other business activities in Australia (because the Agreement restricts source country taxation of certain items of income) but this has to be balanced against the likely increases in trade and investment arising from the Agreement. In addition, limitation of Romanian taxation rights in circumstances where Australia may have given credit for Romanian taxation may lead to increased Australian tax revenue.

### **Future Protocols etc**

The Agreement does not provide for the negotiation of future legally binding instruments (although this does not preclude the two Governments from agreeing in the future to amendments of the Agreement: e.g. Article 7.7 dealing with non-resident insurance businesses and Article 10.2 concerning the domestic laws relating to the taxation of dividends).

### **Implementation**

As the Agreement affects Commonwealth income tax legislation, enabling legislation must be enacted by the Commonwealth to give the Agreement the force of law in Australia. This will be achieved by incorporating the text of the Agreement as a schedule to the *International Tax Agreements Act 1953*, prior to its coming into force for Australia. Consequential amendments to the Act itself will also be necessary. No action is required by the States or Territories and no change to the existing roles of the Commonwealth, or the States or Territories will arise as a consequence of implementing the Agreement.

### **Consultation**

The Australian Taxation Office (ATO) has established a Tax Treaties Advisory Panel to review proposed tax treaty actions. As advice on double tax agreement matters is largely provided to industry through specialist tax professional firms, membership of the Panel is composed of tax professional specialists, industry representatives and officials from the ATO, Commonwealth Treasury and Attorney-General's Departments. The Panel includes representatives from the Australian Bankers' Association, Australian Society of Certified Practising Accountants, Business Council of Australia, Corporate Tax Association, Institute of Chartered Accountants, International Fiscal Association, Law Council of Australia, Metal Trades Industry Association (now the Australian Industry

Group), Minerals Council of Australia and Taxation Institute of Australia. No Australia-Romania business council yet exists to be included in consultations.

On 13 February 1998 the Tax Treaties Advisory Panel met to consider various proposed tax treaties including the Romania Agreement. All Panel members including those unable to attend the meeting, were provided with copies of the full draft treaty texts along with draft national interest analyses for each of the respective countries in advance of that meeting. Panel members were also invited to provide comments on the agenda items prior to the meeting.

The four Panel members unable to attend the meeting (those representing Corporate Tax Association and Business Council of Australia; the Law Council of Australia; the Metal Trades Industry Association; and the Australian Bankers' Association) received all related papers prior to the meeting and minutes from the meeting.

At the meeting, all the articles of the Agreement were discussed in depth by the Panel. The Panel supported the signature of the Agreement subject to further work on the "land rich entities" provision (Article 13.4) which had been revised following the decision in *Lamesa Holdings BV* case. Prior to conclusion of the Agreement the ATO reached agreement with the Romanian Ministry of Finance on a revised provision to address the issues raised by this case and the Panel's discussion.

The Department of Foreign Affairs and Trade has been involved in the finalisation of the Agreement. The Department has sought to further Australian business and investment links with Romania as the opportunity arises and has also been consulted to that end.

Information in relation to the proposed Agreement has been provided to the States and Territories through the Commonwealth-State Standing Committee on Treaties' Schedule of Treaty Action. To date there have been no requests for further information.

### **Withdrawal or Denunciation**

The Agreement provides for termination (Article 28) by either of the Contracting States by written advice through the diplomatic channel on or before 30 June in any calendar year beginning after the expiration of five years from the date of entry into force. Otherwise the Agreement shall continue indefinitely.

If such written notice of terminations is given, the Agreement would cease to have effect in Australia for withholding tax purposes in relation to income derived on or after 1 January in the calendar year next following that in which the notice is given and, in relation to income, profits or gains of any year of income beginning on or after 1 July of that year for other income taxes. In the case of Romania, the Agreement would cease to have effect in respect of all Romanian taxes on income,

profits and gains covered by the Agreement for the taxable period starting from 1 January of the next calendar year following that in which the notice of termination is given.

**Contact Details:**

Treaties Unit  
International Tax Division  
Australian Taxation Office



## **Appendix C - Submissions**

### **Proposed Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations**

### **Proposed Agreement between Australia and New Zealand on Child and Spousal Maintenance**

| Submission No. | Organisation / Individual                                                                                                |
|----------------|--------------------------------------------------------------------------------------------------------------------------|
| 1              | Legal Aid, Queensland                                                                                                    |
| 2              | The Law Society of New South Wales                                                                                       |
| 3              | Legal Aid, New South Wales                                                                                               |
| 4              | Child Support Agency                                                                                                     |
| 5              | Lone Fathers Association (Australia) Incorporated                                                                        |
| 5A             | Lone Fathers Association (Australia) Incorporated                                                                        |
| 6              | Standing Committee on Uniform Legislation and<br>Intergovernmental Agreements, Western Australia<br>Legislative Assembly |
| 7              | Attorney-General's Department                                                                                            |
| 7A             | Attorney-General's Department                                                                                            |
| 7B             | Attorney-General's Department                                                                                            |
| 7C             | Attorney-General's Department                                                                                            |
| 8              | Australian Council of Social Service                                                                                     |
| 9              | National Council of Women of Australia                                                                                   |
| 10             | Tasmanian Government                                                                                                     |

**Proposed Agreement for Cooperation between Australia and United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation**

| Submission No. | Organisation / Individual                                                                                          |
|----------------|--------------------------------------------------------------------------------------------------------------------|
| 1              | Tina Lesses                                                                                                        |
| 2              | Standing Committee on Uniform Legislation and Intergovernmental Agreements, Western Australia Legislative Assembly |

**Proposed Agreement between the Government of Australia and the Government of the Slovak Republic on Trade and Economic Relations**

| Submission No. | Organisation / Individual                                                                                          |
|----------------|--------------------------------------------------------------------------------------------------------------------|
| 1              | Standing Committee on Uniform Legislation and Intergovernmental Agreements, Western Australia Legislative Assembly |

**Proposed Agreement between Australia and the Kingdom of Denmark on Social Security**

| Submission No. | Organisation / Individual                                                                                          |
|----------------|--------------------------------------------------------------------------------------------------------------------|
| 1              | Standing Committee on Uniform Legislation and Intergovernmental Agreements, Western Australia Legislative Assembly |
| 2              | Commonwealth Department of Family and Community Services                                                           |
| 3              | Tasmanian Government                                                                                               |

**Proposed Agreement between Australia and Romania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income**

| Submission No. | Organisation / Individual                                                                                          |
|----------------|--------------------------------------------------------------------------------------------------------------------|
| 1              | Standing Committee on Uniform Legislation and Intergovernmental Agreements, Western Australia Legislative Assembly |
| 2              | Australian Tax Office                                                                                              |
| 3              | ACT Legislative Assembly                                                                                           |
| 4              | Department of Foreign Affairs and Trade                                                                            |



## **Appendix D - Witnesses at Public Hearings**

**Monday, 13 March 2000, Canberra**

**Department of Foreign Affairs and Trade**

David Mason, Executive Director, Treaties Secretariat, Legal Branch

**Attorney-General's Department**

Robyn Frost, Principal Legal Officer, Office of International Law

**Proposed Convention on the Recognition and Enforcement of Decisions  
Relating to Maintenance Obligations**

**Proposed Agreement between Australia and New Zealand on Child and  
Spousal Maintenance**

**Attorney-General's Department**

John McGinness, Principal Legal Officer

**Department of Family and Community Affairs**

Sheila Bird, Assistant General Manager, Child Support Agency

**Monday 3 April 2000, Canberra**

**Department of Foreign Affairs and Trade**

David Mason, Director, Treaties Secretariat

**Attorney General's Department**

John Atwood

**Agreement for Cooperation between Australia and United States of America concerning Technology for the Separation of Isotopes of Uranium by Laser Excitation**

**Department of Foreign Affairs and Trade**

Susan Dietz, Director, Nuclear Trade and Security Section

Andrew Leask, Assistant Secretary, Australian Safeguards and Non-Proliferation Office

Catherine Simmons, Nuclear Policy Branch

**Agreement between Australia and the Slovak Republic on Trade and Economic Relations**

**Department of Foreign Affairs and Trade**

Sandy Collett, Executive Officer, Central and Southern Europe Section and Nordics Section, Europe Branch

Peter Scott, Executive Officer, International Law Section, Legal Branch

Sue Tanner, Assistant Secretary, Europe Branch, Americas and Europe Division

**Agreement between Australia and Denmark on Social Security**

**Department of Family and Community Services**

Bob Holbert, Assistant Secretary, International Branch

Benny Sammut, A / g Director, International Agreements 1

Jeff Whalan, Deputy Secretary, Community and Business Strategy Branch

Kath Winter, International Agreements 1

**Double Taxation Agreement between Australia and Romania**

**Australian Tax Office**

Ken Allen, Treaties Counsel, International Tax Division

Micheal Lennard, International Treaties Counsel, International Tax Division

Ariane Pickering, Acting Assistant Commissioner, International Tax Division

Li Li Teh, Treaties Unit, International Tax Division

**Lone Fathers Association Australia Inc**

Barry Williams, President





## **Appendix E – Submission from Australian Tax Office**

### **ATO SUBMISSION TO JOINT STANDING COMMITTEE ON TREATIES**

At the Joint Standing Committee on Treaties hearing of 3 April 2000, the Australian Taxation Office representatives agreed to provide a written submission with further comments on the operation of paragraph 4 of Article 13 of the proposed double tax agreement (DTA) with Romania. An explanation for the wording of that provision is given in the Explanatory Memorandum to the implementing legislation, the *International Tax Agreements Bill (No 1) 2000*, which is currently before Parliament.

It provides as follows:

#### **ARTICLE 13 - INCOME, PROFITS OR GAINS FROM THE ALIENATION OF PROPERTY**

##### **SHARES AND OTHER INTERESTS IN LAND-RICH ENTITIES**

1.114 Paragraph 4 applies to situations involving the alienation of shares or other interests in companies, and other entities, whose assets consist principally of real property (as defined in Article 6) which is situated in the other country (again, in the terms of Article 6). Such income or gains may be taxed by the country in which the real property is situated. This paragraph complements paragraph I of this article and is designed to cover arrangements involving the effective alienation of *incorporated* real property, or like arrangements,

1.115 This is to be the case whether the real property is held directly or indirectly through a chain of interposed entities, While not limited to chains of companies, or even chains of entities only some of which are companies, the example of chains of companies is used to make clear that the *corporate veil* should be lifted in examining direct or indirect ownership.

1.116 This provision responds to the tax planning opportunities exposed by the decision of the Full Federal Court in the *Commissioner of Taxation v. Lamesa Holdings B V* (1 997) 77 FCR 597. It is designed to protect Australian taxing rights over income, profits or gains on the alienation or effective alienation of Australian real property (as defined) despite the presence of interposed bodies corporate or other entities. **[Paragraph 41]**

The form of words used in paragraph 4 of Article 13 of the proposed DTA with Romania, is similar to the wording in recent agreements with South Africa, Slovakia and Argentina, as implemented by the *International Tax Agreements Act 1999*. It is designed to ensure that Australia's DTA taxing rights over income, profits or gains from the alienation of real property remain effective when property that has been held through one or more entities is alienated by the sale of one of the interposed holding entities.

The form of words used is based on paragraph 4 of Article 13 of the UN Model DTA. That Model provision is designed (according to its official commentary) 'to prevent the avoidance of taxes on the gains from the sale of immovable property. Since it is often relatively easy to avoid taxes on such gains through the incorporation of such property, it is necessary to tax the sale of shares in such a company.'

The UN form of wording has been amended in the proposed DTA to more clearly meet this purpose. The amended wording is designed to ensure, first of all, that it operates where there is more than one corporate or other entity in ownership, following the *Lamesa* decision.

The proposed wording ensures, secondly, that taxable alienations are not limited to those of 'shares of the capital stock of a company' because it is difficult to see why the provision (and the taxing right) should, in principle, be so limited, thus allowing the easy avoidance of taxes on gains which the Article is meant to cover.

Source: This is an electronically scanned copy of a submission received from the Australian Tax Office on 11 April 2000