

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

Social Security (International Agreements) Act 1999

*Social Security (International Agreements) Amendment (Republic of Austria)
Regulation 2016*

The *Social Security (International Agreements) Act 1999* (the Act) gives effect to any social security agreement between Australia and another country relating to reciprocity in social security or superannuation matters if the text of the agreement is set out in a Schedule to the Act. Section 6 of the Act provides that the provisions of a scheduled international social security agreement have effect despite anything in the social security law. An agreement is a scheduled international agreement if the text of the agreement is set out in a Schedule to the Act.

Section 25 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient for carrying out or giving effect to the Act.

In particular, subsection 8(1) of the Act provides that a Schedule setting out the terms of an agreement between Australia and another country, if the agreement relates to reciprocity in social security or superannuation matters, may be added to the Act by the regulations.

Section 9 of the Act provides that the regulations may repeal a Schedule to this Act.

The purpose of the Regulation is to repeal and substitute Schedule 10 to the Act setting out the terms of the *Agreement between Australia and the Republic of Austria on Social Security* (the Agreement).

The Agreement, done at Canberra on 12 August 2015 replaces and consolidates the Agreement signed on 1 April 1992, the Protocol signed on 26 June 2001 and the Second Protocol signed on 17 February 2010.

This Agreement will continue to cover the same benefits for both countries as currently provided for in the existing Agreement and Protocols but updates provisions in line with each country's domestic legislation and makes the document easier to read and therefore more accessible.

For Austria, the amendments included are consistent with European Union (EU) regulations on the free movement of EU citizens and calculation of pensions. It also allows for periods of coverage in another country with which Austria has an agreement to be included, if necessary, to meet the minimum contributory period required for an Austrian pension.

For Australia, the Agreement will: align the portability period of Australian Disability Support Pension for non-severely disabled persons to domestic legislation, align the conditions surrounding the backdating of the date of lodgement of a claim and clarify the provisions for double superannuation coverage for self-employed workers.

The Agreement includes transitional provisions to ensure that persons paid under the provisions of the previous agreement would continue to receive the same benefits at the same rate.

The Agreement continues to enable people with contribution records in the Republic of Austria, now living in Australia, to claim pensions from the Republic of Austria and helps them to qualify for those pensions. Similarly, former Australian residents living in the Republic of Austria will be able to claim Australian pensions and can use the Agreement to help them qualify. The Agreement also continues to include provisions modifying Australia's Superannuation Guarantee arrangements to avoid double coverage of Austrian employees seconded to work temporarily in Australia and Australian workers seconded to work temporarily in the Republic of Austria.

The Agreement complements similar agreements Australia has with Belgium, Canada, Chile, Croatia, Cyprus, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, India, Ireland, Italy, Japan, Korea, Latvia, the former Yugoslav Republic of Macedonia, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Switzerland and the United States of America.

All international agreements specify 'entry into force' requirements, which stipulate that each party notify the other party in writing of the completion of their respective statutory and constitutional procedures required for the entry into force. An agreement would then come into operation on a date specified by reference to the exchange of the notification of completion of all statutory and constitutional procedures.

The Agreement provides for entry into force on the first day of the third month following the month in which written notifications are exchanged by the Parties through the diplomatic channel notifying each other that all matters necessary to give effect to the Agreement have been satisfied.

The making of the Regulation provides sufficient time for all necessary steps to be completed prior to the Agreement entering into force. Regulations adding agreements must be tabled in both Houses of the Parliament, and the period for disallowance of those regulations must have elapsed, before the parties can finalise the exchange of diplomatic notes to each other as required.

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Sections 1 to 5 of the Regulation commence on the day after they are registered. Schedule 1 to the Regulation which contains the text of the Agreement will commence on a day to be fixed by the Minister for Social Services (the Minister) by notice in the Gazette. The required Gazette notice will be made by the Minister shortly after the completion of an entry into force exchange of diplomatic notes between Australia and the Republic of Austria as required under Article 24 of the Agreement.

The commencement provision in section 2 of the Regulation also satisfies the requirements of subsection 8(2) of the Act that regulations not come into operation on a day earlier than the day the relevant agreement comes into effect for Australia.

The commencement provision in section 2 of the Regulation does not include a mechanism by which the Regulation will commence or be repealed if the Minister has not made a notice in the Gazette by a certain date. The required Gazette notice would

be made by the Minister after the regulations have completed the disallowance period and shortly after the completion of an entry into force exchange of diplomatic notes between Australia and the Republic of Austria as required under Article 24 of the Agreement.

Section 4 of the Regulation provides that the Regulation will be repealed the day after Schedule 1 to the Regulation commences. Part 3 of Chapter 3 of the Legislation Act provides for the automatic repeal of spent legislative instruments, but only those whose only legal effect is to amend or repeal one or more other legislative instruments. Part 3 of Chapter 3 of the Legislation Act does not operate to automatically repeal spent legislative instruments which amend or repeal Acts. For this reason, to ensure the Regulation does not remain in force once spent, section 4 of the Regulation has been included to ensure that the Regulation will be repealed once Schedule 1 to the Regulation commences.

Consultation

The Department of Social Services (DSS) and the Department of the Treasury did not undertake consultation regarding this Agreement as part of the treaty process as the changes to the Agreement are minor and the number of people affected are not significant.

Relevant community groups, welfare organisations and State and territory governments were consulted prior to entry into force of the initial Agreement in 1992. Employer groups and the superannuation industry were consulted prior to the entry into force of the Second Protocol.

Regulatory Impact Analysis

Treasury also consulted with the Office of Best Practice Regulation ('OBPR') in relation to the requirement for a Regulation Impact Statement. OBPR advised DSS that a Regulation Impact Statement was not required as this Agreement makes no substantive changes to the operation of the provisions of the existing Agreement affecting businesses and individuals.

Statement of Compatibility with Human Rights

Social Security (International Agreements) Amendment (Republic of Austria) Regulation 2016

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Legislative Instrument repeals and substitutes a new Schedule 10 containing the terms of the Agreement on Social Security made on 12 August 2015 between Australia and the Republic of Austria (the Agreement) to the *Social Security (International Agreements) Act 1999*.

The Agreement replaces and consolidates the Agreement signed on 1 April 1992, the Protocol signed on 26 June 2001 and the Second Protocol signed on 17 February 2010.

This Agreement will continue to cover the same benefits for both countries as currently provided for in the existing Agreement and Protocols but updates provisions in line with each country's domestic legislation and makes the document easier to read and therefore more accessible.

The Agreement coordinates the social security systems of Australia and the Republic of Austria to give better retirement income protection for people who move between the two countries.

The Agreement will continue to enable people who have contributed to the Austrian retirement system, now living in Australia, to claim pensions from the Republic of Austria and from Australia and help them to qualify for those pensions. Similarly, former Australian residents living in the Republic of Austria will be able to claim Australian and Austrian pensions and can use the Agreement to help them qualify. The Agreement also maintains the provisions which modify Australia's Superannuation Guarantee arrangements to avoid double coverage of Austrian employees seconded to work temporarily in Australia and includes reciprocal exemptions for Australian workers seconded to work temporarily in the Republic of Austria.

The major additional inclusions in this Agreement are, in the case of the Republic of Austria, ensuring it is consistent with European Union (EU) regulations on the free movement of EU citizens and calculation of pensions and allowing for periods of coverage in another country with which Austria has an agreement to be included, if necessary, to meet the minimum contributory period required for an Austrian pension.

For Australia the Agreement will align the period for which payment of Disability Support Pension (DSP) for non-severely disabled persons is payable outside Australia (the 'portability period') to the period specified in the social security law which applies to all other DSP recipients. The current Agreement specifies that DSP for non-severely disabled persons may not be paid outside Australia for more than 13 weeks, which was the

portability period for payment of DSP outside Australia under the social security law when the current Agreement was last amended. Since then the portability period under the social security law has been reduced to six weeks from 1 January 2013, and further to four weeks in any 12 month period from 1 January 2015. The Agreement will specify that DSP for non-severely disabled persons is not payable outside Australia for more than the period stated in the social security law, as was always intended.

This change does not relevantly limit the right to social security as it only affects payment while a person is outside Australia. There is no internationally accepted extraterritorial right to social security, particularly in relation to non-contributory social security schemes, like Australia's, as recognised in Article 32 of International Labour Organisation (ILO) Convention 128, and also in Article 69 of ILO Convention 102.

The Agreement will also align the conditions surrounding the backdating of the date of lodgement of a claim and will clarify the provisions for double superannuation coverage for self-employed workers.

The Agreement includes transitional provisions to ensure that persons paid under the previous agreement would continue to receive the same benefits at the same rate.

Human rights implications

The Legislative Instrument engages the right to social security.

The right to social security

This Legislative Instrument supports the right to social security as it allows people in both Australia and the Republic of Austria to access social security assistance that would not have otherwise been available to them.

Conclusion

The Legislative Instrument supports the right to social security and is compatible with human rights.

Minister for Social Services, the Hon Christian Porter MP