RECIPROCAL SOCIAL SECURITY AGREEMENTS ENTERED INTO BY AUSTRALIA: EXTENDING INCOME SUPPORT OR WINDING BACK THE WELFARE STATE?*

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Access to social security is clearly regarded by the international community as a basic human right.[1] But the development of social security on a domestic level has tended to focus on citizenship, a qualifying period of residence or contribution to a social security scheme as a prerequisite to the payment of a pension or other benefit. This approach has often persisted despite nations having policies which promote the free market and with it a dependence on the free movement of labour. It is, of course, persons who move from one country to another who are most affected when access to social security is determined by the above criteria which may restrict their access to this human right.

The recognition that social security provision is an international issue based on principles of human rights and the acceptance that there exists an international labour movement must thus be reconciled with the traditional view that a nation is primarily responsible for its own nationals within its own territory. It is the growing body of international social security law which attempts to reconcile these principles. But it is also clear that this body of law is shaped as much by fiscal considerations as it is by the human rights of migrants.

BACKGROUND

The development of international social security law rests primarily on bilateral agreements made between countries. In addition there are multilateral conventions that also contribute to the evolution of this area of the law. Such agreements are crucial in providing the necessary legal structure to facilitate the free movement of individuals between countries by treating in a non-discriminatory manner persons who have worked in more than one country. The equal treatment of migrants and native residents in gaining access to

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[1] See *Universal Declaration of Human Rights*, articles 22, 25; *International Covenant on Economic, Social and Cultural Rights*, article 11; *International Convention on the Elimination of All Forms of Racial Discrimination*, article 5(e)(iv); *Convention on the Elimination of all Forms of Discrimination Against Women*, article 11(1)(e).

social security removes possible inhibitors to migration and may ensure that they have the same protection against poverty and other social hardships.[2] Such agreements thus become an important means of ensuring the development of economies that depend upon migrant labour. In the case of Australia the agreements may perform this function to a more limited extent than in, for example, Europe where there is today a greater dependence on the movement of labour between States than may currently be the case with respect to Australia. To that extent the reasons for Australia entering into reciprocal agreements may be thought to have more to do with meeting the needs of migrants who came to Australia during the post-war period. But while this is no doubt one motivation, it should be considered that in certain areas Australia still depends on migrant labour[3] and that as a consequence the development of reciprocal social security rights also looks to the future.

The first bilateral agreement to be considered the forerunner of modern reciprocal social security agreements was the Franco-Italian Treaty of 1904. This agreement was a response to the importation of cheap goods from Italy into France which caused resentment in France amongst French workers. The agreement of 1904 sought to ensure the equal treatment of the workers of both countries in the areas of accident compensation and the movement of worker's savings between the two countries. Although pensions and unemployment benefits were mentioned, neither country had developed the latter and France had no pensions.[4] Even at this early stage the agreements were as much about the encouragement of labour migration and the legitimation of the economic system as they were about providing for the income support needs of migrant workers.

Contemporary practice mirrors these early tensions regarding the purpose of reciprocal social security agreements. The role of the International Labour Organisation (ILO) has been crucial in seeking to advance the rights of migrating workers by advocating their need for protection from discrimination in the social security laws of the host country. The most basic form of discrimination against such workers occurs when eligibility for a social security benefit requires a minimum period of residence or amount of contributions

[2] R Moles, 'Social Security for Migrant Workers' (1964) 2 *International Migration* 47.

[3] For example, some parts of regional Australia depend on the attraction of overseas medical practitioners to service their regions. In recent times nurses, teachers and other skilled workers have also been recruited to Australia. While it may be true to say that Australia does not have the same degree of dependence on migrant labour for its economic development as in the past, it may still be argued that as with many developed countries Australia may tailor its immigration programme around its economic needs and that this process will continue in the future.

[4] M S Gordon, *Social security policies in industrialised countries: A comparative analysis* (Cambridge, Cambridge University Press, 1988), p 329 citing P Watson, *Social Security Law of the European Communities* (London, Mansell, 1980), p 8. There were earlier agreements that also provided a model for later reciprocal social security agreements. Germany entered into agreements concerning sailors with Britain in 1879 and France in 1880, and also agreements concerning the medical aid of migrants with Italy in 1873, Denmark in 1873 and Belgium in 1877. My thanks to Karl Bieback for bringing these agreements to my attention.

where the scheme is a contributory one.[5] It is this form of discrimination that the ILO has particularly addressed as many migrant workers may not have satisfied such minimum requirements due to their migration and consequent short period of residence or low number of contributions.

While an ILO treaty in the area of accident compensation[6] has gained significant support, a 1935 Convention[7] which aimed to have the pension rights of migrants transferred from country to country has not been so received.[8] This Convention has, however, provided a model for later bilateral and regional agreements as it was based on the notion of 'aggregation' of contributions to different social security schemes and what has been termed 'proraterisation' or the distribution of the cost of paying benefits between countries based on the amount of contributions paid to each scheme.[9] The dominance of contributory schemes around the world has led to widespread adoption of this particular model and its terminology.

The model has been utilised and adapted for agreements entered into by Australia where non-contributory social security payments exist. The Australia system of social security is based on a residential qualification leading to a 'flat-rate' payment. In contrast the social security systems of many other countries are essentially based on an insurance model where the payment of contributions leads to earnings related benefits. For Australia this means that the negotiation of reciprocal agreements involves the blending together of social security rights and benefits based on quite distinct models. Such coordination can raise significant issues of policy and ideology.[10] The agreements that Australia enters into thus provide for 'totalisation' of periods of residence (rather than aggregation of contributions) and the 'proportional' payment of Australian benefits (rather than proraterisation) based on the length of residence in Australia.

The export of benefits and the enabling of access to benefits for persons residing in other countries results in cost-sharing between countries and the recognition by nations of their responsibility for the whole labourforce and not just their citizens. But it is also the case that this 'cost sharing' principle contained in the ILO model has been adopted and arguably manipulated by parties to bilateral agreements. The sharing of payments of social security benefits to migrants who do not otherwise qualify for payments under the laws of one country has provided a window through which countries have been able to maintain their particualr philosophy of social security. Thus Australia can impose its selective and highly means-tested system of social security upon a person who is also receiving a part payment from a country that grants such payments as a right of citizenship. Persons who were born into the latter system and who have made some contributions to the scheme

[5] For a discussion of the effective discriminatory effects of social security law in this context see F Netter, 'Social Security for Migrant Workers' (1963) 87 *International Labour Review* 31.
[6] See note 14 below.
[7] *Migrants' Pensions Rights Convention* 1935.
[8] Only eight countries ratified, two later withdrawing: Gordon op cit, p 330.
[9] Ibid.
[10] See discussion below.

but who then leave to work in Australia may find upon their return to the country of their birth that their social security rights are far inferior to those of their contemporaries who remained. Migrants can in this way find that they are the locus for the convergence of two different sets of social and economic priorities. Bilateral agreements thus do not challenge the lack of uniformity in social security legislation of various countries to a significant degree. In this sense they risk producing a 'harmonisation' of social security systems that is based on the lowest common denominator principle rather than the enshrinement of minimum standards in social security.[11]

The general view that emerges of reciprocal social security agreements is that they arise out of a concern for the rights of migrants to be protected from economic hardship in the same way that native residents are protected, a need to facilitate migration for the economic benefits that may flow from such migration, and the importance of social security as an ameliorating or legitimating mechanism for the harsher effects of the economic system. Thus the negotiation of reciprocal social security agreements by Australia in recent years has taken place in the context of specific policies in relation to social justice[12] which have given much support to the concept of reciprocal agreements as primarily concerned with the rights of migrants.[13] Clearly, these concerns do influence the shape of the agreements.

But the other relevant context in which recent negotiations for reciprocal social security agreements have been taking place is what has been described as 'the fiscal crisis of the State'[14] and policies of economic rationalism. As a consequence the resources of the State have been pruned to the point where support for such matters as social security is severely curtailed. In this climate one would not expect to see a significant increase in programmes designed to expand individuals' access to social security, and this expectation should be borne in mind when examining reciprocal social security agreements.

[11] The ILO has called for the harmonisation of social security systems over and above the need for reciprocal agreements. The problem remains of determining what degree of harmonisation is possible, which the ILO would also seem to recognise given the vagueness of its pleas, for example:

> 'Since one of the main thrusts for international harmonisation has been the desirability of eliminating from international economic competition the advantages or disadvantages of different levels of social protection provided in individual States, it is desirable that the search for harmonisation should include, in particular, the question of the method of financing social security benefits.' *Into the twenty-first century: the development of social security*, Geneva, International Labour Office 1984), p 34.

See also the comment expressed in a conference convened by the European Commission that the goal of harmonisation was a very vague one: cited in A I Ogus and E M Berendt: *The Law of Social Security* (London, Butterworths, 1982), p 627.

[12] See eg *Towards A Fairer Australia: Social Justice Budget Statement* 1988–89 (Canberra, Australian Government Publishing Service, 1988).

[13] For example the comments on the debate on the *Social Security (Proportional Portability of Pensions) Amendment Bill* 1985 by Mr Hand: 'We should ask ourselves who will benefit from these agreements. The object of having reciprocal agreements is to protect and enhance the rights of migrants. . .I am happy to take part in a debate in which there is agreement that we are basically concerned about improving the lot of people, whether they be long term residents or new arrivals.' *Parliamentary Debates*, House of Representatives, 14 February 1986, 571.

[14] J O'Connor, *The Fiscal Crisis of the State* (New York, St Martin's Press, 1973).

The need for reciprocal social security agreements in the Australian context

Australia has a long history of migration yet it is only in more recent years that it has seen the need to enter into reciprocal social security agreements with other countries. Apart from the agreements entered into with New Zealand in 1943 and the United Kingdom in 1954, it is really only since 1986 that Australia has been active in this area.[15] The original agreements with the United Kingdom and New Zealand were (and remain) 'host' agreements, that is the country in which the person is resident pays the pension or benefit even though the person may qualify by way of residence or contribution in their country of origin. The other reciprocal agreements to which Australia is a party with Italy, Canada, Spain, Malta, the Netherlands, Ireland and Portugal require each country to make some proportional payment based on the proportion of the person's working life spent in the respective countries. These latter agreements conform to the ILO model mentioned above and represent a distinct new phase in the type of reciprocal agreement entered into by Australia. It is in the context of these new cost-sharing agreements that one must analyse the factors which explain Australia's tardiness compared to other countries in entering into reciprocal social security agreements.[16]

MIGRATION

Obviously without migration there would be no need for reciprocal social security agreements, but it is only since the end of the second world war that migration has apparently reached proportions which have given a real impetus for proponents of reciprocal social security rights. This is probably

[15] A reciprocal agreement with Italy was signed on 23 April, 1986; a revised agreement with New Zealand was signed on 5 October, 1986; an agreement with Canada was signed on 4 July 1988 and an amendment signed on 11 October 1990; an agreement with Spain was signed on 10 February 1990; with Malta on 15 August 1990; with the Netherlands on 4 January 1991; with Ireland on 8 April 1991; and with Portugal on 30 April 1991.

[16] At the multilateral level, International Labour Organisation treaties in the area of social security rights of migrant workers date back to 1925. See *Equality of Treatment (Accident Compensation) Convention* 1925 (which Australia ratified on 12 June 1959; *Maintenance of Migrants' Pension Rights Convention* 1935; *Migration for Employment Convention (Revised)* 1949; *Equality of Treatment (Social Security) Convention* 1962 (Australia has not ratified these latter conventions). The European Community has also been active in ensuring the preservation of social security rights for workers moving amongst member States since at least 1971, see EEC Regulations No 1408/71 and No 574/72. Other European agreements initiated by the Council of Europe are the *European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors and Protocol thereto* 1953 and the *European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors and Protocol thereto* 1953 and the *European Convention on Social Security and Supplementary Agreement for the Application of the European Convention on Social Security* 1972. At the bilateral level the United Kingdom, for example, has entered into eighteen reciprocal social security agreements, excluding agreements with EEC countries. Countries with which the United Kingdom has entered into such an agreement are the USA, Switzerland, New Zealand, Sweden, Cyprus, Finland, Canada, Iceland, Jamaica, Malta, Australia, Israel, Mauritius, Austria, Bermuda, Turkey, Norway and Yugoslavia.

even more so in the case of Australia which has experienced a boom in migration since 1947 when an intensive immigration programme was implemented.[17]

Various explanations for migration are often given. Common amonst these are the search for work or better paid work, family reunion, a desire to live in a better climate and political refuge.[18] These reasons are, however, more to do with the personal motivations of the individual migrant than the broad structural forces that facilitate migration. Clearly, governments help to shape migration patterns in order to develop their country, both economically and socially.[19] Thus in the Australian context migrants were sought to supply the necessary labour for industrial expansion[20], and the manner in which Australia initially drew on Western European countries as a source of migrants in order to reinforce Australia as a predominantly white society has been well documented.[21]

These latter explanations for migration are important to a discussion of

[17] See eg W J Hudson in F Crowley (ed): *A New History of Australia* (Melbourne, Heinemann, 1974) remarking that migration statistics are difficult to gather but estimating that between 1950 and 1970 there were two and a half million migrants to Australia, p 521. Reinforcing the view that the statistics are extremely difficult to ascertain Zubrzycki gives the estimated net gain from immigration between July 1947 and June 1978 as 2,571,000. Taking into account the Australian-born children of many of these migrants, he states that immigration was responsible for 57 per cent of the population growth since 1947: J Zubrzycki, 'International Migration in Australasia and the South Pacific' in M Kritz et al (eds) *Global Trends in Migration: Theory and Research on International Population Movements* (New York, The Center for Migration Studies, 1981), p 159. A study of migrant workers in 1982 begins by stating that 'in the decades after World War II. . .immigration and refugee programs have brought more than 3 million people to [Australia]': A Burbidge, J Caputo & L Rosenblatt, *"They Said We'd Get Jobs" — Employment, Unemployment & Training of Migrant Workers* (Melbourne, Centre for Urban Research and Action, 1982), p i.

[18] ILO, op cit, p 31.

[19] See eg P Peek and G Standing (eds): *State Policies and Migration: Studies in Latin America and the Caribbean* (London, Croom Helm, 1982) Although this work concentrates on internal migration within various South American countries it illustrates how economic forces influence demographic change. In particular Peek and Standing argue that most analyses of migration concentrate on individual motivations and choices and 'divorce the analysis from consideration of the social relations of production and the mechanisms of exploitation used by the powerful to control and manipulate the labouring poor.' p 5: See also A Marshall, *The import of labour* (Rotterdam University Press, 1973). Marshall considers the implications for the receiving and sending countries of the immigration of workers, in particular he analyses the way in which advanced countries depend upon underdevelopment continuing in other countries as a means of ensuring a motive for workers to emigrate and so guarantee a source of labour. Another work which examines this question is C W Stahl, *International Labour Migration and International Development* (Research Report or Occasional Paper No 61, Department of Economics, University Of Newcastle, 1981).

[20] J I Martin, *The Migrant Presence: Australian Responses* 1947–1977: *research report for the National Population Inquiry.* (Sydney, Allen and Unwin, 1978), p 27.

[21] Hudson, for example, remarks that there was a policy of favouring British and northern European migrants 'on the grounds of sentiment and alleged capacity to assimilate easily'. He cites the example of the rate of assisted passages: 84 per cent of British migrants were granted assisted passages, while less than 25 per cent of Mediterranean migrants were assisted. See Hudson in Crowley op cit, p 521. See also Zubrzycki, in Kritz et al op cit, p 166. Of course this policy had to change when immigration from Western Europe declined and migrants were sought from other countries and regions: see J I Martin op cit, pp 24–30.

social security rights for migrants. If migration is actively encouraged by a State to serve its own interests, then it seems that the responsibility for the social welfare of the migrants that are so attracted to that country cannot be placed solely at the feet of those migrants on the basis that they chose to enter the country. Equally, a State that perceives its interests in the attraction of migrants must consider to what extent the preservation of the social security rights of migrants will itself facilitate migration. If the promise of a more secure economic life is a personal motivation for migration, then the possible loss of social security rights acquired in the home country may influence whether migration occurs at all.

Economic rationales

A factor which has contemporary relevance considering the fiscal problems currently being experienced globally is what occurs when migrants acquire social security rights in two (or more) countries. Where duplication of payments occurs in this way, it is arguable that social security funds are being wasted.[22] In these circumstances a State has a clear interest in entering into agreements with other States to co-ordinate matters in order to minimise the payments that it must make.

There are other factors in the Australian context which must also be considered when examining economic reasons underlying the need for reciprocal social security agreements. As Australia is a country which has more people migrating to it than people leaving it,[23] the burden for Australia in providing for the social security needs of its migrant population can be substantially reduced if it seeks to ensure that any rights to social security in those migrants' countries of origin are preserved and some contribution sought from those countries.

Although reciprocal agreements will also benefit Australian nationals who move overseas, the net benefit will obviously flow to Australia in gaining financial assistance for the social security needs of its large migrant population. The reciprocal agreement with Italy has been estimated as delivering to Australia a 'saving' of $200,000 from 1987 to 1990.[24] But this figure is misleading as an indication of the benefit for Australia as it is derived by subtracting the amount that the agreement is expected to cost in administration from the taxation revenue gained from Italian pensions paid in Australia. The real benefit is in the amount of $120.7 million that is expected to come into the country as a result of the payment of Italian pensions, as it will not only produce tax revenue but also other fiscal benefits.[25] It is esti-

[22] ILO, op cit, p 32.

[23] Australia is often described as 'a country of immigration': See also Zubrzycki in Kritz et al op cit, p 169. The statistics also bear this out. Between 1975 and 1988, for example, there were 1,162,425 arriving settlers. In the same period 167,019 former settlers departed: Australian Bureau of Statistics, Monthly Summary of Statistics, Australia for those years.

[24] Explanatory memorandum to Social Security (Reciprocity with Italy) Bill 1986, p 3.

[25] Id, p 3. See also Ministerial Statement, *Parliamentary Debates* House of Representatives, 8 May 1985, p 1844: (Social Security Minister Howe)

'Agreements are also important for the community as a whole. Payments of foreign

mated that Australia, on the other hand, will have to pay out only $11.1 million in pensions to persons under the Agreement, meaning that the net benefit to Australia will be in the order of $109.6 million. The initial statistics confirm this flow in Australia's favour. Of the 22,000 people in Australia and Italy who utilised the Agreement to gain access to benefits between its commencement in September 1988 and the end of June 1989, 16,000 claimed Italian pensions.[26] The other reciprocal social security agreements entered into by Australia, such as those with Canada, Spain, Malta, the Netherlands, Ireland and Portugal will also be likely to provide similar benefits for Australia.

The ageing of the population must also be considered when explaining the existence of reciprocal social security agreements, particularly as most agreements cover at the very least old age pensions. The population as a whole is ageing and as a consequence it is thought that the social security burden that this will place on the rest of the population will lead to a financial crisis unless something is done to provide alternative support for the aged.[27] The ageing of the population has also been exacerbated by the influx of young migrants in the post war period who are now beginning to retire. At a general policy level the encouragement of alternative means of income support for the aged and invalid that do not rely on direct government funding such as superannuation is one way of dealing with this phenomenon. But where the aged are also migrants then the opportunity may also exist to utilise reciprocal agreements to ensure that their countries of origin incur some of the cost of their income support at a saving to Australia. In this way the 'new' cost sharing reciprocal agreements currently being negotiated form part of a wider programme of minimising the role of the (Australian) State in providing for the social security needs of the population.

This path is fraught with danger for the social security rights of the migrants concerned. It assumes that the social security system of the other country from whom contribution is sought will, together with any Australian component, fund the individual at an adequate level. The current situation is that Australia may be able to rely on the contributory social security schemes maintained by many of the countries from which migrants to Australia have come, as these schemes tend to recognise social security as a right and, due to their insurance features, income support may be relatively generous. But the fiscal crisis that lies behind Australia's push in this direction is a global crisis. Commentators are beginning to argue that contributory schemes, par-

pensions represent an inflow of foreign currency which assists the balance of payments. Agreements also have direct budgetary implications, to the extent that such payments are taxable and are taken into account under the income test arrangements of Australia's social security legislation. . .'

[26] Department of Social Security, *Annual Report* 1988–89, pp 109–10.

[27] For a statement of this stance and a critical analysis of it, see J Myles, *Old Age in the Welfare State: The Political Economy of Public Pensions*, (Little Brown, Boston, 1984), pp 105 ff. See also C Foster, *Towards a National Retirement Incomes Policy*, Issues Paper No 6, Social Security Review (Australia, 1988), esp ch 4; Senate Standing Committee on Community Affairs, *Income Support for the Retired and Aged: An Agenda For Reform* (Canberra, AGPS, 1988), pp 18–22; H L Kendig & J McCallum, *Greying Australia: Future Impacts of Population Ageing* (Canberra, AGPS, 1986), pp 54–6.

ticularly for old-age pensions should be changed to less generous flat-rate pensions based on greater selectivity,[28] such as Australia already operates. In this way reciprocal social security agreements may form part of a global push to force individuals to find alternative forms of income support to the public pension.

It has also been argued that the 'ageing problem' is exaggerated as far as the likely burden that this will place on the social security budget is concerned. Myles claims that it costs more to raise a child to the age of 20 than it does to support a person from age 60 to death. Thus as the population ages one would expect the cost of maintaining that population to decline.[29] The real issue, he argues, is the question of to what extent the State should control the money supply. Public pensions represent State control of significant amounts of money that could be placed in private hands if the funding of pensions was left to the individual rather than the State. The encouragement of private superannuation rather than social security payments is thus welcomed by those who seek capital for the funding of enterprises as the funds are more accessible.[30]

Myle sees the 'ageing crisis' as obscuring the real motivations of those driving current social security policy. If this is the case, then the official commitment to the view that the benefits of reciprocal agreements are primarily for migrants seems to be extremely thin. The long term benefits of such agreements for migrants would have to be questioned if they in fact contributed to the demise of State pensions, while, as stated above, a benefit for the State in the short term is also the inflow of foreign capital directly into private hands and subsequently taxed. In this schema reciprocal agreements may become part of a wider program to further the interests of private capital and the State more than the migrant.

The role of migrants

Perhaps one reason for the slow pace of the taking up of the concern with reciprocal social security rights is the lack of organisation of the various migrant communities around this issue.[31] Since these various communities have begun to establish themselves and form groups that can lobby on their be-

[28] See eg C Euzeby: 'Non-contributory old-age pensions: A possible solution in the OECD countries' (1989) 128 *International Labour Review* 11; Gordon, op cit, p 338.

[29] Myles, op cit, p 109.

[30] Id, pp 110–14.

[31] Of course, this is not to suggest that since the issue has entered the political arena there has not been action on the part of migrant groups. For example, the Turkish community protested in 1990, including the use of hunger strikes, to express concern over changes in the pension portability rules. In 1991 members of the Greek community also spoke out against the possible loss of payments of overseas pensions as part of the move towards reciprocal agreements. What is of note here is that such protests have been reactions to changes in social security policy rather than attempts to set the agenda of that policy. It seems that prior to reciprocal agreements in their current form being placed on the political stage by the government in the 1980s there was little done to develop the international social security rights of migrants by migrant communities. While this no doubt has something to do with the complexity of this body of law, it also has profound implications for the nature of the reform process and the shape of the agreements.

half[32] they have been able to exert some influence on government policy which they were previously unable to do.[33]

The recognition of the benefits that flow to individual migrants from reciprocal social security agreements is also a part of the official rhetoric. A Ministerial Statement by Social Security Minister Howe announcing the reciprocal social security agreement with Italy emphasised the access to entitlements that such agreements would bring to migrants. In particular he stressed that for those persons who had lived in other countries, where in most cases contributory schemes operated, and who had made contributions to a social security fund but had not lived long enough in that country to make sufficient contributions to qualify for a pension from that fund upon retirement, invalidity or widowhood, there would now be some entitlement to a payment. The statement estimated that about one million people could benefit over the next twenty years.[34] This concern with the social security needs of migrants reflects a dramatic change in the apparent power that migrant communities now exert on the political process compared to the 1970s when the Department of Social Security and related agencies were criticised as being inept in providing for the needs of migrants.[35]

The extent of the change must, however, be weighed against the coverage of the reciprocal agreements. The concentration tends to be on the payment of pensions. The degree to which rights to unemployment and sickness benefits may be preserved are important areas which also need to be examined. It is notable that the Social Security Minister linked 'portability of pensions' with reciprocal agreements. This narrowing of the focus of the agreements is con-

[32] As Burbidge, et al write: 'the early 1960's and early 1970's saw Italians beginning to question their position within the community. This process was characterised by initiatives that at times were extremely controversial within the Italian community and was marked by the creation of three organisations which have changed the face of the Italian community. There were the Comitaro Italiano di Coordinamento (CIC), the Comitato-Italiano-Assistenza (Co-As-It), and the Federazione Italiana Lavoratori Emigrati e Famiglie (FILEF),' op. cit., p 49. The growing influence of such groups is evident in this area. Ethnic communities' concerns with reciprocal social security agreements were acknowledged by the Government and caused changes to the legislation which was a necessary part of the implementation of reciprocal agreements: see Minister's Second Reading Speech, *Social Security (Proportional Portability of Pensions) Amendment Bill* 1985, *Parliamentary Debates* House of Representatives, 20 November, 1985, pp 3242–3.

[33] See eg Zubrzycki who comments in the change in the status of migrants since 1947 from one where 'the migrant presence was only seen as a matter affecting groups of people with the transient marginal status to the official recognition of ethnic groups as legitimate structures within Australian society' in Kritz et al op cit, p 176 citing J I Martin: *The Migrant Presence: Australian Responses, 1947–1977: research report for the National Population Inquiry* (Sydney, Allen and Unwin, 1978), p 78. The role of migrant workers in trade unions must also be considered. Trade unions in Australia have not appeared to be particularly vocal on the need to protect the social security rights of migrant workers. This might be in part explained by the low participation of non-English speaking migrants in trade union activities which arose from their alienation from the unions of which they were members: see M Quinlan: *Convergence and Divergence In Migrant Worker Organization: The Post-War Australian Experience* (Occasional Paper No 21, School of Social and Industrial Administration, Griffith University, Queensland, 1982), p 1 and the literature cited at note 4 therein.

[34] *Parliamentary Debates* House of Representatives, 8 May 1985, p 1844.

[35] Martin, op cit, p 62.

sistent with a government that is motivated as much by fiscal concerns as it is by the welfare of migrants.[36]

RECIPROCAL SOCIAL SECURITY AGREEMENTS ENTERED INTO BY AUSTRALIA

At the present time Australia is a party to nine reciprocal social security agreements. Two of the agreements, those with New Zealand and the United Kingdom, are 'host' agreements. That is, the agreements require the country in which the person claiming the relevant payment is residing to make the full payment. The other seven agreements, with Italy, Canada, Spain, Malta, the Netherlands, Ireland and Portugal follow the new model for such agreements based on the notion of 'shared responsibility', which requires each party to make a contribution to the payment claimed by the recipient. While the 'host' agreements do raise their own problems, because the 'cost-sharing' agreements are the only type that will be negotiated in the future, this article concentrates on those agreements.

Portability of pensions

Reciprocal agreements based on 'cost-sharing' became an option for Australia with the introduction of portability of pensions on 7 May 1973. Until that time a pension could not be paid if a recipient left Australia permanently. Until then, the desire on the part of many migrants to return to their country of origin meant that unless they qualified for a pension in that country they would receive no income support.[37] This change to the payment of pensions meant that for many persons who left Australia there was no need to attempt to qualify for a payment in the country to which they were returning.[38]

Portability of pensions did not, however, assist certain groups of people. The requirement that the person be in receipt of the pension before leaving Australia meant that a person who may have accumulated sufficient residence to qualify for a pension in Australia but who left before being otherwise eligible was not able to have a pension paid overseas as the Act required that the person had to lodge a claim while in Australia.[39] The portability provisions were also of no assistance to persons who did not qualify for a pension because

[36] See also *Social Security Act* 1991, s 1211 which provides that social security benefits and family allowance supplement are not payable to persons outside Australia. A person is regarded as being in Australia for the purposes of payment of sickness benefit if temporarily absent from Australia for three months or less: s 667. Family allowance ceases to be payable to a person who continues to be absent from Australia for more than three years (s 840) or in respect of a child who leaves Australia for more than three years (s 836).

[37] Except for those who returned to the United Kingdom or New Zealand because of the host agreements which Australia has with those countries.

[38] It has been suggested that this was due to the Australian pension being paid at a rate that was often generous compared to overseas standards. For a critique of this view see J Kirkwood, *Social Security Law and Policy* (Sydney, Law Book Co, 1986) p 130.

[39] See *Social Security Act* 1947, ss 25(1)(b), 28(b), 37, 39(1)(c), 45(a); *Social Security Act* 1991, s 1212.

they did not have sufficient residence in Australia. A person who could not establish ten years residence in Australia could not establish an entitlement even though his or her status, for example as a retired person or an invalid, may not have changed. Thus a person who had reached retirement age but who left Australia after working here for nine years could not claim an age pension and 'carry' it to his or her home country. On returning to the home country the person may also find that he or she had insufficient residence or contributions to qualify for a payment from the social security system of that country and so was without income support.

A new model for reciprocal agreements

The new model for reciprocal social security agreements which resulted in an attempt to address these problems has a narrow range of objectives based on a number of broad principles. The narrow objectives are to extend the payment of pensions overseas to persons who do not qualify under the basic portability provisions, and for persons in the country who come from other countries without an entitlement to a foreign payment. Thus there are four groups of people who are assisted under the model:

(1) Persons in Australia who have migrated to Australia and have insufficient residence to qualify for an Australian pension;
(2) Persons in Australia who have made contributions to a foreign social security scheme and have insufficient contributions to claim a payment from that scheme, or who lose an entitlement or an expectancy, or have it reduced when leaving their former country;[40]
(3) Former Australian residents living in other countries who have sufficient residence to claim an Australian pension but who must be in Australia to lodge their claim; and
(4) Former Australian residents who are living in other countries but have less than the required number of years' residence to qualify for an Australian pension.[41]

The four principles upon which such agreements are negotiated are stated as shared responsibility, equality of treatment, totalisation and pro-rata benefits.[42] One of the principles, equality of treatment, appeared in the host agreements with New Zealand and the United Kingdom and is a concept borrowed from International Labour Organisation conventions in this area.[43] Although it is based on the notion that the residents and citizens of one country are treated as if they were residents and citizens of the other country, this does not preclude the possibility of some discrimination occurring as

[40] In German law the German pension of a foreigner living in a foreign country is reduced, but not the German pension of a foreigner living in Germany. I thank Karl Bieback for providing this information.

[41] My thanks to David Murdoch, Director, International Branch, Department of Social Security, for outlining these categories.

[42] See Department of Social Security: *Annual Report* 1987–88, p 84; Mr Howe, Second Reading speech on *Social Security Amendment (Reciprocity with Italy) Bill* 1986, *Parliamentary Debates*, House of Representatives, 20 August 1986, p 348.

[43] See for example *Social security for migrant workers* (International Labour Office, Geneva, 1977) pp 3, 42–7.

there will always be some difficulty in adjusting for the effect of migration.[44] The problem is that the real impact of the agreements may give rise to a considerable amount of effective discrimination against migrants.

Totalisation of qualifying periods in each country is an extension of the principle contained in host agreements that residence in one country should be deemed to be residence in the other. Under the new model of reciprocal agreements, in order to extend the availability of payments to persons who have insufficient periods of residence in a country to qualify for payment, totalisation allows periods of residence in either country to be totalled in order that the minimum qualifying periods are satisfied.[45]

The other two principles which underlie the new agreements are interrelated and represent the quid pro quo for the extension of payments to persons formerly excluded. Essentially, the agreements are based on cost sharing arrangements, hence 'shared responsibility' requires both countries to contribute to the person's payment, and 'pro-rata benefits' connect the qualifying period in each country with the proportion of the payment that each country will be required to make to the individual recipient.

Proportional portability of pensions

The pro-rata payment of Australian pensions overseas is, as a consequence of the shared responsibility principle, an important part of the new reciprocal agreements. Until this concept appeared pensions that were paid overseas were paid at the full rate. Its novelty in the Australian context was admitted by the Minister when he made a ministerial statement on reciprocal agreements in 1985:

> 'I believe that proportional portability, when linked with agreements, is a very reasonable concept. I can appreciate, because it is a new concept within the Australian system, that it may be difficult to understand readily. It is, however, a concept on which most international agreements on social security are based. It recognises that both Australia and any other country where a person has worked, share responsibility for income support. It also recognises that this responsibility is limited to the amount of time spent in each country. Reciprocal agreements will assist Australia and its agreement partners to meet social security responsibilities more comprehensively.'[46]

The amendment of the *Social Security Act* to allow for the proportional portability of pensions was done ostensibly to allow for the negotiation of new reciprocal agreements based on the above principles. While the changes are clearly part of the new model upon which reciprocal agreements are to be based, the introduction of porportional portability can also be criticised as a

[44] The ILO also appears to accept some limitations in the concept of equality of treatment when it is put into practice; id, pp 46–7.

[45] Department of Social Security: *Annual Report* 1987–88, p 84.

[46] Mr Howe, Ministerial Statement on Reciprocal Social Security Agreements, *Parliamentary Debates*, House of Representatives, 8 May 1985, p 1844.

'cost-saving' and not necessarily a 'cost-sharing' exercise.[47] This criticism rests on the point that proportional portability, although brought in to allow the operation of reciprocal agreements, will not only apply in situations where reciprocal agreements exist.

Section 1221 of the *Social Security Act* 1991 applies proportional portability to a person who commences to receive a pension after 1 July 1986, and who leaves Australia after commencing to receive the pension and is absent for more than twelve months. The period of residence that would be required for a person to be eligible for full portability is twenty-five years of their 'working-life residence', that is they would have had to have been resident in Australia for twenty-five years between the ages of 16 and 60 (for a woman) or 65 (for a man).[48] This compares with the required ten years' residence for the payment of pensions to persons paid within Australia, where this residence is 'historical residence', that is a ten year period over any time between birth and death.

The somewhat arbitrary nature of the required period of residence for full portability compared to the 'normal' ten year period is illlustrated by the fact that the original intention of the Australian Government was to require thirty-five years for full portability of a pension overseas.[49] When the legislsation establishing proportional portability was brought in, the period had been changed to twenty-five years. This followed consultation with immigrant communities. The Minister gave as the principal reason for the change the recognition that most countries paid a minimum pension after about 15 years and a full pension after about 40 years. These variations occurred due to the contributory nature of most other countries' pension schemes. The 25 year peiod set by the legislation was apparently chosen as being the mid-point of these periods.[50] In reality, this was an attempt to inject into the Australian system a characteristic of the contribution based schemes.[51] But nothing was

[47] See for example 'New Portability Rules' (1986) 29 *Social Security Reporter* 367; T Carney and P Hanks, *Australian Social Security Law, Policy and Administration* (Melbourne, Oxford University Press, 1986), p 144. Carney and Hanks note that *Social Security Act* 1947, s 83AD (now *Social Security Act* 1991, s 1220) was retained with the proportional portability changes. This section requires a former Australian resident to remain in Australia for twelve months to qualify for a pension to be paid overseas. This acts as a disincentive for a person to return to lodge a claim in order to qualify (where there is no reciprocal agreement that allows them to lodge overseas) and also is an indication that the Government was not apparently motivated by the needs of migrants which are hardly served by the retention of this section of the Act.

[48] See *Social Security Act* 1991, ss 1221-B1, 1221-C1.

[49] Mr Howe, Ministerial Statement, *Hansard*, House of Representatives, 8 May 1985, p 1845: 'The government believes that where a person has spent less than 35 years in Australia it is over generous to pay a full Australian pension overseas. The equitable *and affordable* solution is for Australia to follow the pattern set by most income security systems throughout the world and to pay its pensions abroad on a proportional basis.' [my emphasis]

[50] Mr Howe, *Parliamentary Debates* House of Representatives, 20 November 1985, p 3243.

[51] See for example the comment in Department of Social Security: *Annual Report* 1987–88 at p 86: 'Proportional portability is based on the principle that the amount of Australian pension to be paid outside the country should reflect the length of time a person has spent in Australia. It has introduced an element into the Australian system which brings

said about the appropriateness of such an injection into a system that is not, after all, a contributory scheme, nor the implications of such a development for the ten year residential requirement for pensions paid within Australia.

The net effect of the proportional portability provisions in the absence of a reciprocal agreement is to reduce the amount that the Australian Government would be otherwise liable to pay to overseas pensioners. This impact on pensioners is implicitly accepted by the Government, as the transitional provisions of the legislation phase in the provisions over a period of time. The new rules will not come into full effect until 1996 in order 'to protect the expectations of people who were living in Australia when it was introduced.'[52] In the meantime, the imminent decline in the level of payment that Australia will be making to overseas pensioners becomes a lever to encourage other countries to enter into reciprocal agreements in order to maintain those persons' income levels. The fact that the preservation of an individual's level of income support should depend upon government to government negotiations is a criticism of this system that no one seems to have made as yet, although it must of necessity be a part of the development of a body of international social security law.

Coverage of the 'shared responsibility' agreements

The reciprocal agreement with Italy was signed on 23 April 1986 and began operation on 1 September 1988. At its commencement it was expected to extend the coverage of each country's social security system to about 30,000 people in Australia and Italy.[53] The agreement covers the Australian age, invalid,[54] widow's, wife's, double orphan's, and spouse carer's pensions, and additional pensions for mothers and guardian's allowances for children. It also applies to the Italian old age, seniority, anticipated, invalidity, survivor's and privileged inability pensions, and to the privileged invalidity allowance,

it closer to contributory systems and facilitates the negotiation of cost-sharing agreements with countries which have such systems.'

[52] Ibid. The four groups of pensioners who are exempted from the proportional portability provisions and who will continue to receive full pensions overseas are: persons resident in Australia on 8 May 1985 who commenced to receive a pension or allowance before 1 January 1996 and whose absence from Australia commenced before 1 January 1996, invalid pensioners who became permanently incapacitated for work in Australia, persons in receipt of widows' pension (now sole parent's pension) who qualified by the death of their husband where both were residing permanently in Australia when he died, and people in Australia on 8 May 1985 who become pensioners and take their pension overseas before 1 January 1996 or, *at any time*, if they take their pension to a country that does not have a reciprocal agreement with Australia: *Payments to Individuals by the Department of Social Security — An Outline of Rates and Conditions*, Social Policy Division, Department of Social Security, November 1988, p 64; see also *Social Security Act* 1991, ss 1221 (3), (4), (5), (6). It should be emphasised that for a person to maintain their full pension while overseas by going to a country that does not have a reciprocal agreement, they must still have been resident in Australia on 8 May 1985: s 1221(4).

[53] Department of Social Security: *Annual Report 1987–88*, p 85.

[54] All of the reciprocal agreements which cover invalid pensions have yet to replace this term with disability support pension.

invalidity attendance allowance, family allowances for dependants of pensioners and unemployment allowances.[55]

The agreement clearly concentrates on pension payments. Although the Italian coverage includes unemployment allowance this follows from the contributory nature of that system, where such a payment resembles a payment from a contributory pension fund. The focus on pensions from the Australian perspective is probably in part due to the connection between portability of pensions and reciprocal agreements. Australia has never extended portability to unemployment and sickness benefits, only pensions have been portable. On the other hand, the host agreements with New Zealand and the United Kingdom do extend to unemployment and sickness benefits, suggesting that in principle such payments may be the appropriate subject of a reciprocal agreement, although there is no suggestion in those agreements that the 'non-host' country should pay part of such payments. Concern with reciprocal unemployment and sickness benefit entitlement is clearly more important when workers are moving from country to country constantly. Hence the EEC's concern with the preservation of migrant workers' social security rights in such areas.[56]

Australia's entry into the field of reciprocal social security rights has been motivated to a large extent by the perceived need to deal with the growing number of pensioners who return to their country of origin at the end of their working life. Of course, extending reciprocity to unemployment and sickness benefits may have the potential to increase budget outlays for those payments. Nevertheless, the fact that Australia confines itself generally to pensions in the negotiation of reciprocal agreements and not to the full array of payments does suggest that the advancement of the rights of migrants to the fullest possible social security coverage is not a high priority.

It is of some significance that the agreement with Italy does cover the Italian unemployment allowance. Even if this is a consequence of that allowance being contributory, the result is difficult to reconcile with the principle of shared responsibility. The outcome in a case where a person is able to utilise the agreement to obtain the Italian unemployment allowance would be that the person would receive a part allowance from Italy[57] and no payment from Australia, as the agreement does not cover any similar payment on the Australian side. For a person who is unemployed upon their arrival in Australia, this means that no equivalent Australian payment in respect of unemployment could be made until the person had been resident in Australia for at least one week.[58] While this is not a severe residential requirement that would be greatly assisted by allowing the person to include their time in Italy while unemployed prior to leaving, there are other payments that are connected

[55] Australia-Italy reciprocal agreement, article 2.

[56] See *Regulation (EEC) No 1408/71 Of the Council*, Chapters 1 and 6.

[57] By the operation of article 9 of the Australia-Italy reciprocal agreement.

[58] This is the effect of *Social Security Act* 1991, ss 534, 540 which set out an ordinary waiting period of seven days from the 'provisional commencement date' of the claimant for job search allowance. The provisional commencement date is the date that the claim for job search allowance is lodged. (s 534(1)) The person must be in Australia on the day the claim is lodged. (s 554)

with this benefit that do have stricter qualifying periods. For example, in some cases rent assistance is only payable to persons who are qualified to receive payments for unemployment or sickness and have been so qualified for a continuous period of 26 weeks.[59]

The reciprocal agreement with Canada commenced operation on 1 September 1989. As with Italy the agreement with Canada has involved the co-ordination of the Australian system with a system that is primarily based on contributions. The Canadian payments covered by the agreement are payments under the contributory Canada Pension Plan: disability pension, surviving spouse's pension, orphan's benefit and death benefit; and the old age security pension and related payments[60] which are based on residence requirements and not contributions. The old age security pension is effectively a 'fall back' for persons who do not qualify for the much more generous benefits under the earnings related Canada Pension Plan.[61] The Australian payments covered by the Agreement are age pensions, invalid pensions, wives' pensions, carers' pensions and 'pensions payable to widowed persons'.[62]

Similar criticisms can be made of this agreement as can be made of the agreement with Italy. It concentrates on the payment of pensions and excludes coverage for unemployment and sickness. Of course, it could be considered that such lack of coverage is not necessarily a weakness when income support for 'unemployment' or 'sickness' may be granted where the person also fulfills the criteria of another payment such as that for the age pension or invalid pension. However, there is little doubt that persons who do not fulfill the eligibility for some other payment would have a strong case for the transnational application of such payments. The host agreements between Australia and the United Kingdom and between Australia and New Zealand include unemployment and sickness benefits,[63] and in the realm of contributory based systems the agreements entered into by the United Kingdom with other countries, for example, often cover unemployment and sickness benefits.[64] The European Community also includes unemployment and sickness benefits in its legislation in relation to social security for migrant workers.[65]

The general absence of concern in the reciprocal agreements entered into by

[59] *Social Security Act* 1991, ss 1067–F4, 1067–56.

[60] Guaranteed income supplement and spouse's allowance.

[61] In 1983 the full old age security pension was the equivalent of 14 per cent of the average Canadian industrial wage: *Overview: The Income Security Programs of Health and Welfare Canada*, Health and Welfare Canada, Income Security Programs Branch, Policy, Liaison and Development (September, 1983) p 5. A retirement pension paid under the Canada Pension Plan in 1983 was equal to 25 per cent of a contributor's average monthly pensionable earnings during the person's contributory period: Id, p 13.

[62] Australia-Canada reciprocal agreement, article 2.

[63] See Australia-United Kingdom reciprocal agreement, articles 15, 17, 18; Australia-New Zealand reciprocal agreement, articles 9, 12.

[64] The United Kingdom has reciprocal social security agreements with the following countries that include access to unemployment and sickness benefits: Austria, Australia, Iceland, Norway, Yugoslavia, New Zealand, Sweden, Cyprus, Finland and Malta. In addition sickness benefits are covered in the agreements with the following countries: Israel, Switzerland and Turkey.

[65] *Regulation (EEC) No 1408/71 Of The Council*, articles 18–36, 67–71.

Australia with the inclusion of benefits for unemployment and sickness may also impact harshly on persons moving from Australia to another country where they may not satisfy minimum contribution requirements for that country's unemployment insurance programmes.[66] As such schemes are based on the same model as pension insurance schemes, there seems no reason in principle to exclude them from reciprocal social security agreements entered into by Australia. This would at least allow the benefits of totalisation of periods of residence in Australia and contribution to the other country's scheme to flow to such individuals.

In the more recent agreements between Australia and Ireland and between Australia and Portugal there is inclusion of employment contributions in the case of the agreement with Ireland[67], and Australian unemployment and sickness benefits[68] and the Portuguese payments for unemployment and sickness are included in the agreement with Portugal.[69] Although the reasons behind the apparent shift in policy to include such payments in the latest agreements is not known, it would seem that certain countries are prepared to seek wider social security coverage for persons moving between countries than has been the case in past negotiations. Such agreements also support the view that such payments are the proper subject of reciprocal agreements.

The agreement with Canada also does not cover the retirement pension which is available under the Canada Pension Plan. The retirement pension is available to anyone who has made one valid contribution and it is thus not necessary to include it in reciprocal agreements to which Canada is a party, as eligibility is virtually automatic where a person has at some time worked in Canada and made a contribution.[70] The rate of payment will depend upon actual contributions made, thus the effect of this provision is to pay a proportional pension based on the number of contributions, in the same way that rates are struck under the reciprocal agreement.

The disparity between the types of payments covered by the agreements can also be seen in the more recent agreements completed by Australia. The agreement with Spain covers the Australian age, invalid, wives' and carer's pensions, as well as 'pensions payable to widows'. The Spanish payments covered are 'benefits for temporary incapacity for work in cases of common illness, maternity or non-industrial accident', invalidity, old age and survivors, and unemployment benefits.[71] The agreement with Malta provides

[66] Eligibility for Canadian unemployment insurance payments requires at least 10 to 14 weeks in insurable employment in the last year or since the person's last claim for unemployment insurance: Health and Welfare Canada, *Basic Facts on Social Security Programs* (Canada, Minister of Supply and Services, 1987), p 39.

[67] Australia-Ireland agreement, art 2.

[68] The agreement does not as yet refer to 'sickness allowance' which replaced sickness benefit on 12 November 1991: see *Social Security Act* 1991, s 666 as amended by *Social Security (Disability and Sickness Support) Amendment Act* 1991, s 10.

[69] Australia-Portugal agreement, art 2. It is also clear that the objective of this coverage is to allow individuals to meet the qualifying criteria for payment within the country of residence as neither Australian nor Portuguese payments for unemployment or sickness can be paid outside the respective country: art 6(4).

[70] *Overview: The Income Security Programs of Health and Welfare Canada* p 25.

[71] Australia-Spain agreement, art 2.

access to the same Australian payments as the Spanish agreement, as well as payments made under the Maltese Social Security Act in respect of retirement, invalidity, widowhood and 'non-contributory assistance and pensions'.[72] On the other hand the agreement with the Netherlands only includes the Australian age and wives' pension and the Netherlands' general old age insurance, but where a person is sent by his or her employer in the Netherlands to work in Australia for a period of up to five years, the agreement extends to the payment of sickness and unemployment insurance, children's allowances, invalidity insurance and general survivor's insurance by the Netherlands.[73] This provision is quite novel in agreements entered into by Australia, although a similar provision exists in the reciprocal agreement between Germany and Canada.[74] Its effect is to come very close to applying the social security law of only one country to the individual for a five year period in certain circumstances. This seems to be a move towards the EEC solution of applying only one body of law to the migrant to avoid the problem of co-ordinating two systems.[75]

The most recent agreements with Ireland and Portugal continue the differential coverage of the agreements.[76] The agreement with Ireland covers the Australian age, invalid, widow's and wife's pensions and widowed person's allowances, and the Irish old age and widow's (contributory) pensions, orphan's (contributory) allowances, retirement and invalidity pensions, death grants and employment and self-employment contributions. The agreement with Portugal covers Australian age, invalid, wife's and carer's pensions, benefits payable to widows, unemployment and sickness benefits. It applies to the Portuguese old age and invalid pensions, survivors' pensions and death grant, sickness and maternity benefits, unemployment benefits, funeral grant, family allowance for pensioners, work injury and occupational diseases pensions, and non-contributory old age, invalid and survivor's pensions.

ADMINISTRATION OF THE RECIPROCAL AGREEMENTS

Although the obligations imposed on parties to the reciprocal agreements are similar, these obligations only deal with the question of access to a country's social security system for those persons who fail certain residential or contribution requirements. The agreements also set out principles upon which the proportional share of the parties' contribution to a person's payment will be calculated. Once the agreements have assisted in qualifying the person for some entitlement in that regard, any other eligibility criteria that must be

[72] Australia-Malta agreement, art 2.
[73] Australia-Netherlands agreement, arts 2 and 6.
[74] Agreement on Social Security between Canada and the Federal Republic of Germany, art 7.
[75] See discussion below.
[76] Both agreements were incorporated into the Social Security Act on 13 December 1991: see *Social Security Legislation Amendment Act* (No 4) 1991, s 2, Sch 6.

established will fall to be considered under the domestic law of the country concerned.

Thus the manner in which a country provides a review mechanism or incorporates the principles in the agreement into its own law may vary from country to country. For example, the method of calculating the proportional rate of pension which is set out in the 'shared responsibility' agreements has also been incorporated into the body of the *Social Security Act*.[77] This has possible implications for such things as appeals.

APPEALS AGAINST DETERMINATIONS

As all the agreements are schedules to the *Social Security Act* and the schedules are part of the Act[78], where a decision is made under an agreement by the Australian Department of Social Security the decision is thereby also made under the Act and the person affected must have the same rights of appeal as a person who claims a payment otherwise than by way of a reciprocal agreement. A person affected by a decision under the Act may apply to the Secretary for review of the decision,[79] to the Social Security Appeals Tribunal,[80] and, where the matter has been reviewed by the Social Security Appeals Tribunal, to the Administrative Appeals Tribunal.[81] Although the reciprocal agreements may override the Act,[82] it does not seem to be considered that appeal rights arise otherwise than by virtue of the *Social Security Act* in respect of Australian decisions.

THE PROBLEM OF MUTUAL DECISIONS

A more immediate problem is to whom a claimant should appeal. The agreements refer to the bureaucracies that administer social security in the countries that are parties as the 'competent authorities'. In the context of the appeals system, it is to the relevant competent authority that the appeal against a decision must be made, although the actual documents may be lodged with the competent authority of either party to an agreement.[83] Although the agreements are modelled on the assumption that eligiblity for a payment from a particular country will be determined under the social security laws of that country, in fact it is possible for there to be considerable overlap in the decision-making process.

[77] Section 1210.
[78] *Acts Interpretation Act* 1901 (Cth), s 13(2).
[79] *Social Security Act* 1991, s 1240.
[80] *Social Security Act* 1991, s 1247.
[81] *Social Security Act* 1991, s 1283.
[82] Section 1208.
[83] Australia-Italy agreement, art 21; Draft Administrative Arrangement Implementing the Reciprocal Agreement on Social Security between Australia and Canada, art 12; Australia-Spain agreement, art 18; Australia-Malta agreement, art 11; Australia-Netherlands agreement art 13.

The joint determination or 'mutual decisions' that may take place will probably not affect the availability of an appeal as such. The claimant under the agreement will target the competent authority who is paying (or not paying) the payment to which the person feels entitled and utilise the appeal process provided by that State. Nevertheless, the inter-Government exchange that necessarily takes place in certain situations casts doubts on the effectiveness of the appeal process in terms of reviewing the decisions taken by another State. It is extremely problematic, and no doubt beyond its jurisdication, for an appeal tribunal in one jurisdiction to go behind the decision of another sovereign State.

Decisions of appeal tribunals under the new agreements are as yet rare, but an example of this problem occurred in the case of *Wilson and Director-General of Social Security* in the context of the 'host' agreement with New Zealand.[84] The Administrative Appeals Tribunal was asked to review a decision by the Department of Social Security to cancel the invalid pension of the applicant, which had been granted under the reciprocal agreement between Australia and New Zealand as implemented at the time by the *Social Security (Reciprocity with New Zealand) Regulations*. Wilson had returned to New Zealand and when the Department of Social Security learned of this it first suspended his pension and then four months later cancelled it. Regulation 11 of the above regulations provided that a person who was 'ordinarily resident in Australia [but] temporarily resident in New Zealand' is to continue to receive any pension granted provided 'in the opinion of the New Zealand Social Security Commission, [he was] not residing permanently in New Zealand.'[85]

The Tribunal received evidence of a 'formal decision' by the New Zealand Social Security Commission that Wilson was not permanently resident up until at least the time that the Australian Department of Social Security suspended his pension. The Tribunal combined this formal decision with evidence of Wilson's intention, to conclude that Wilson was not permanently resident in New Zealand and was still qualified to receive the pension.[86] The manner in which the Tribunal both used the New Zealand Social Security Commission's decision and referred to it suggests that it was effectively beyond review. Although his state of mind and the formal decision of the New Zealand authority were apparently consistent, the wording of the regulation at the time would suggest that the formal decision would prevail if there was a conflict.

In *Re Furnari and Secretary to the Department of Social Security*[87] the Administrative Appeals Tribunal again showed its reluctance to explore the vagaries of another country's social security system. The applicant sought to have a Departmental decision overturned as to the extent to which his Italian pension should affect the payment of his Australian pension. The mechanics

[84] (1985) 23 *Social Security Reporter* 271.
[85] Ibid.
[86] Ibid. The decision to cancel the pension was, however, affirmed on other grounds.
[87] 23 December 1988, Decision no 4938, noted at (1989) *Australian Administrative Law Bulletin* para 1510.

of the reciprocal agreements are that a person who relies on the agreement to qualify for a pension and who is subsequently paid a pension in Australia by another country will have his or her Australian pension calculated in the usual way and then reduced by the amount of the overseas pension.[88] However, under article 17 of the reciprocal agreement with Italy, any supplement to an Italian pension will not be included as income for the purposes of calculating the Australian benefit.[89]

Furnari was affected by the determination of the Australian authorities to reduce his Australian pension by the full amount of his Italian pension. The problem for the Administrative Appeals Tribunal was that there was no information as to the level of supplement in this case. Although the Department of Social Security informed the Tribunal that there was almost certainly a supplement being paid, 'there were delays in obtaining precise information from Italian authorities, who would only disclose such information to pensioners and not to the Australian Department of Social Security.'[90] Although the Italian authorities were perhaps motivated by laudable concerns about the privacy of the applicant, such concern may well have rebounded as the Tribunal took the view that in the absence of information it had no option but to affirm the Departmental decision as to the degree to which the Australian pension should be affected by the Italian payment. If nothing else, *Furnari* underlines the need for an appeal body that is able to compel the disclosure of information from either party to the agreement in such a case. It also indicates the manner in which the decision by one authority can be affected by the decision, or inaction, of another, leaving the applicant without an effective remedy.

The agreement with Italy raises other similar issues. Article 16 of the agreement provides that where a person claims a benefit payable by one of the parties to the agreement and that party has 'reasonable grounds for believing' that the person may also be entitled to a payment from the other party (under the agreement or otherwise) that would affect the amount that the first party would be required to pay, then the amount that the party thinks the person is entitled to from the other party can be taken into account in determining the claim. It is possible that the parties could communicate information about individuals' entitlements under their social security laws.[91] In fact, given the language and other barriers that would prevent Australian authorities con-

[88] See eg the Australia-Italy reciprocal agreement art 8(1)(b).

[89] The supplement is an amount paid by Italy to bring the pension amount up to a guaranteed minimum in that country's system.

[90] (1989) *Australian Administrative Law Bulletin* para 1510.

[91] The Australia-Italy agreement, art 19 provides for mutual assistance in the implementation of the agreements. Article 20 provides for the exchange of information 'as is necessary for the operation of [the] Agreement or of the social security laws of the Contracting Parties concerning all matters arising under [the] Agreement or under those laws.' This may not be affected by the practice of Italy as disclosed by the decision in *Furnari*. It is stated in that decision that the Italian authorities were reluctant to disclose 'precise' information as to the level of supplement. Presumably the Italian authorities would not baulk at disclosing that a person was entitled to an Italian benefit in general terms. The agreements with Canada, Malta, Spain, the Netherlands, Ireland and Portugal also provide for this mutual assistance.

ducting their own research of Italian social security law in the case of the Italian agreement, it is likely that the parties will rely on the exchange of information to give effect to this provision. The cost-saving implications of doing so would also suggest that this provision is likely to be given real effect.

In such a case, if the approach adopted by the Administrative Appeals Tribunal in *Wilson* is followed, a certificate as to the entitlement of the claimant under the social security laws of the other party may be effectively beyond review. While there are practical problems for the review of such a decision, there is also the legal problem as to whether any Australian tribunal has jurisdiction to review a decision by the Italian Government as to the eligibility of a person for a payment under the social security laws of that country, in order to assess the reasonable belief of the Australian authorities that a person is entitled to a benefit from Italy that will affect the Australian payment. The answer must be surely no, for although the matter arises as an issue by way of the agreement which is a part of the *Social Security Act*, the Italian decision cannot be truly characterised as a decision under an Act (of the Commonwealth) to give jurisdiction to any of the appeal bodies in the social security sphere.

A person in such a situation may have to challenge the decision of the other country in the Courts or tribunals available in that jurisdiction. However, this raises the problem of the availability of such appeal systems in that country, added expense, and the danger of falling between two systems as the other country's decision may in turn depend upon an acceptance of the first country's statement as to the person's entitlement under its social security laws. The person may find themselves in the classical 'catch-22' situation.

The decision under the Act in such a case is the decision of the Australian Department of Social Security to have regard to the Italian payment based on the decision by the Italian authority to issue a certificate that such a payment is forthcoming. Given the difficulties of conducting an examination into Italian law in an Australian tribunal, the Italian certificate is unlikely to be questioned in practice, nor is it probably able to be questioned by an Australian tribunal unless there is some evidence as to the social security law of Italy.[92]

This view seems to be supported further by the words of article 20(5) of the Agreement with Italy which states that:

> 'Unless there are reasonable grounds for believing the contrary, any information received by a competent authority or relevant institution from the competent authority or an institution of the other Contracting Party shall be accepted as valid or true, as the case requires.'

Although the article suggests that the information supplied by the other country is not conclusive, it would probably be difficult to establish the required reasonable grounds to raise a contrary belief in the Tribunal. The likely effect

[92] For proof of foreign law see eg P E Nygh, *Conflict of Laws in Australia* (4th ed, Sydney, Butterworths, 1984) pp 198ff.

is that the validity of the information supplied by one party to another under the agreement will go unquestioned. It is also clear that the agreement anticipates that such information may be relevant for use in an appeal tribunal,[93] so it is no answer that the above article may not be applicable in the case of appeals against determinations.

FORUM FOR APPEALS

It follows from the nature of the agreements into which Australia has entered that the forum for the hearing of appeals will be the courts and tribunals of the country that is perceived by the claimant as the country denying payment, reducing the claimant's rate of payment or in some other way affecting the claimant's entitlement. This would mean in the case of a person claiming an entitlement under a shared responsibility agreement that it may be necessary to appeal to two different appeal tribunals in respect of each part of his or her apportioned income support.

There is some justification in requiring separate appeals, given the model upon which the agreements are presently based. By sharing responsibility between two countries and so allowing a person's income support to be derived from two separate systems of social security, different questions of entitlement may arise in respect of those different systems. For example, an Australian invalid pension was, at the time all of the current reciprocal agreements were entered into, paid to a person who was permanently incapacitated for work to a degree of eighty-five per cent, where at least fifty per cent of the incapacity was directly caused by a permanent physical or mental impairment.[94] The Italian invalidity allowance is paid on the basis of sixty-six per cent incapacity.[95] A person may thus have been described as an 'invalid' by one social security system and received a pension but may not have been so qualified in the other system. Recent changes to payments for invalidity in Australia have not made such issues any less problematic. Qualification for a disability support pension now requires a physical, intellectual or psychiatric impairment of at least 20% or more under impairment tables appended to the *Social Security Act*.[96] The potential for a person to qualify under one system

[93] The Australia-Italy agreement, art 20(3) states:
'any information received by the competent authority or an institution of a Contracting Party pursuant to paragraphs 1 or 2 shall be protected in the same manner as information obtained under the social security laws of that Contracting Party and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with matters, including the determination of appeals, arising under the provisions of this Agreement or the social security laws of the Contracting Parties and shall be used only for those purposes.' So it is no answer that the above article may not be applicable in the case of appeals against determinations. Interestingly, the later agreements with Spain, Malta, the Netherlands and Portugal do not have a similar article to art 20(5) of the Italian agreement. But see Australia-Ireland agreement, art 15(3).

[94] *Social Security Act* 1991, s 94.

[95] Information provided by David Murdoch, Director, International Branch, Department of Social Security.

[96] *Social Security Act* 1991, s 94 as amended by *Social Security (Disability and Sickness Support) Amendment Act* 1991, s 10.

but fail to do so under another remains. Similar problems exist in the area of old age pensions, where different countries have set different ages for qualification for such a pension. As the present aim of the reciprocal agreements is not to create new areas of eligibility but to extend *part* of a country's social security system to persons otherwise excluded, the need for two appeals in a particular case may be made out.

But there are also drawbacks in such a fragmented system of appeals. The fact that the agreements do not attempt to co-ordinate social security systems so as to prevent the possibility of a person being an invalid for one country's purposes and not for the other's, and thus receiving part income support as a consequence, is a serious shortcoming. Although this problem springs from the difficulty in co-ordinating systems of social security which are based on different models of welfare, any reform in this area should look seriously at the need for a forum for the hearing of appeals which is transnational in character and which seeks to avoid anomalies in the delivering of income support to persons who rely on reciprocal agreements.

While this proposal would no doubt be anathema to individual States, it would further the development of the concept of an international social security law that may provide greater protection to persons moving from one country to another.[97] Such a proposition is not entirely novel in the context of international treaties in the area of social security, as the European Court of Justice hears appeals from the social security tribunals and Courts exercising jurisdiction in such cases in matters related to the interpretation of EEC regulations concerning the application of social security laws to persons moving from country to country within the EEC.[98]

Of course, the EEC does not have the problem of attempting to meld two different sets of rules in respect of one person's social security entitlement. The solution in the EEC is to ensure that a migrant worker is generally subject to the legislation of only one State, thus avoiding the problems outlined above.[99] There are also minimum EEC standards contained in EEC legislation that can override the domestic law of a country, for example, in the area of discrimination against migrant workers, that a transnational tribunal (the Court of Justice) can ensure are observed.[100]

An international tribunal is in a much better position than a domestic tribunal to give considerable weight to the objectives of reciprocal agreements. For example, the agreement between Australia and Italy states that its objective is to co-ordinate the operation of each country's social security system and to enhance equitable access to those systems for people who move

[97] See for example Moles, 'Social Security For Migrant Workers', op cit pp 112–13.

[98] The Court of Justice derives its jurisdiction in such matters from the Treaty establishing the European Economic Community, art 177.

[99] *Regulation (EEC) No 1408/71 Of The Council*, art 13. For a discussion of the application of this article see M A Morgan, 'A Review of the Case Law of the Court of Justice on Migrant Workers and Social Security July 1986 to June 1987' (1988) 25 *Common Market Law Review* 391.

[100] See eg E P Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals* (The Hague, Martinus Nijhoff, 1966), pp 176–7.

between each country.[101] The domestic forum is also constrained in that it is restricted to assessing eligiblity for the Australian payment alone, while an international tribunal may be charged with coming to an 'equitable' decision with respect to both apportionment and overall income support for the individual. This type of tribunal may not be far away. A provision in the Australia-Malta agreement provides for an international tribunal in the event that the Parties to the agreement disagree over its interpretation.[102]

Of course, this provision deals with disputes between States which means that considerations of accessibility and cost are of minor concern. An international appeals tribunal would have to be structured in such a way that individual applicants would not be put to unrealistic expense. The most obvious solution would be to empower the present appeals tribunals to act as transnational forums in appropriate cases. This must simplify matters for applicants. At the moment while Australia's appeals system appears to be accessible and inexpensive, the reality is that for a recipient of a payment under a reciprocal agreement who resides overseas such a system is almost out of reach and at the least presents various practical problems in accessing it. It would seem to be far simpler to allow the relevant local tribunal to decide all matters arising from the agreements.[103]

THE CO-ORDINATION OF DIFFERENT SYSTEMS OF SOCIAL SECURITY

Comment has already been made on the manner in which the shared responsibility agreements require Australia to co-ordinate its residential based and 'flat-rate' payment system of social security with the contribution based systems of other countries. In order to achieve this co-ordination the agreements usually provide that periods of residence during working life in Australia will be counted as periods of contribution for the purposes of the social security law of other countries, while periods of making contributions in other countries may be counted as periods of residence in Australia.[104] In this way the

[101] For a discussion of the effect of the preamble to a treaty on its interpretation see S Schepers, 'The Legal Force of the Preamble to the EEC Treaty', (1981) 6 *European Law Review* 356.

[102] Australia-Malta agreement, art 16.

[103] This may mean that members of such tribunals have to be advised on the content of other countries' social security law or alternatively have some familiarity with such law. There may be some inconvenience in this, but it is not an insurmountable problem. This, after all, is only requiring the tribunal to do what the applicant must already do, viz, learn the rules of two distinct systems.

[104] See Australia-Italy agreement, art 7; Australia-Canada agreement, arts 6, 10; Australia-Spain agreement, arts 8, 10; Australia-Malta agreement, art 7, 9; Australia-Netherlands agreement, art 9. Apart from the Italian agreement which specifies working life residence, the agreements themselves only refer to 'periods of residence in Australia' as the basis of totalisation. But *Social Security Act* s 1210(3) defines this phrase to mean a reference to 'Australian working life residence'. The exception to this scheme is in relation to the Canadian Old Age Security Pension. This pension depends upon residence rather than contributions. Thus residence in Australia may be counted as residence in Canada for the purposes of qualifying for this pension: Australia-Canada

person may fulfil the basic residence requirements or minimum period of contribution in order to qualify for a payment under either country's social security system. This is the process of totalisation, and only provides entry into the systems of the respective countries.

The actual determination of the rate of benefit payable is dependent upon the length of time that the person has resided in Australia or the period of time that they have made contributions under the systems of other countries. As discussed above, the very notion of paying a proportional pension based on the 'working life' of a person is an attempt to introduce features of a contribution scheme into the Australian system. Arguably, to the extent that it is founded upon the notion that in some way paying taxes contributes to a person's pension entitlement, this introduction into the Australian system of such a feature supports the general ideology of individual responsibility that is pervading modern welfare policy.[105]

The 'working-life residence' notion also presents other problems for potential claimants. It does not require that a person be a participant in the workforce during their 'working-life' but it does assume a perhaps outdated view of what constitutes a person's working-life by fixing the span of years at 16 to 60 for a woman and 16 to 65 for a man. Clearly, this offers men a considerable advantage in having 5 more years than women to accumulate the twenty-five years necessary to qualify for a full pension paid overseas. It also means that for both sexes any actual work engaged in outside these year spans will not count towards pension entitlement.

THE CALCULATION OF A PENSION UNDER A CONTRIBUTORY SCHEME BASED ON RESIDENCE IN ANOTHER COUNTRY

The difficulty in co-ordinating a system based on contributions and one based on residence, as the shared responsibility agreements attempt to achieve, has been recognised by the International Labour Organisation as presenting the greatest problems in the case of reciprocal social security agreements.[106] One of these problems which impacts particularly harshly on individual claimants

reciprocal agreement, art 10(2)(a). See also the discussion of the Netherlands benefits covered below.

[105] See eg for developments prior to the election of the Hawke Government, G Elliot, 'The Social Policy of the New Right' in M Sawer (ed) *Australia and the New Right* (Sydney, Allen and Unwin, 1982) pp 121–34; for a view of policy since 1983 see B Dickey, *No Charity There: A Short History of Social Welfare In Australia* (Sydney, Allen and Unwin, 1987) p 180 which stresses the still prevailing notion of individualism that underlies the Australian welfare state rather than an 'integrative' universalism. For overseas analysis of the ideology of individualism in welare policy see J Higgins, *States of Welfare: Comparative Analysis in Social Policy* (Oxford, Basil Blackwell, 1981) pp 62–3. An earlier and somewhat prophetic discussion of the trend towards individual responsibility for welfare is by I Gough, *The Political Economy of the Welfare State* (London, Macmillan, 1979) especially p 140.

[106] International Labour Office, *Into the twenty-first century: The development of social security* (Geneva, International Labour Organisation, 1984) p 33.

is the effect of allowing the person to become eligible for a pro-rata pension under a contributory scheme based on the deeming of periods of residence in another country as periods during which they made contributions to the contributory scheme. This deeming provision only allows entry into the system, the rate of payment is determined only be reference to actual contributions made.[107]

The effect of the relevant articles in the agreements that govern this determination is first to require the competent authority of either of those States to fix an amount that the person would have received had they continued to make credited contributions in the particular State. The second stage is to multiply that amount by the ratio of the actual period of contributions to that period, together with the period of residence in Australia or the maximum period required to qualify for the full rate of the benefit.[108]

The negative aspect of this calculation is the fixing of a theoretical amount that the person would have been paid had he or she continued to live in the other country, when in an earnings related system the actual amount may have eventually ended up as being higher than that fixed by the competent authority. For example, under the Canadian agreement the earnings related portion of the benefit payable is determined only be reference to the earnings that actually had contributions deducted.[109] Thus the level of earnings of a person while in Australia will be ignored in this calculation.

The fiscal rationale for this provision is defensible on the basis that, to the extent that the Canada Pension Plan is an insurance fund, it would be unfair to other 'insured' persons if a person could take out more than he or she has put in. But as a method of providing income support it is questionable. The impact on the individual directly affected may be that his or her level of income has been reduced, for the simple reason that he or she has moved to another country.

The problem of co-ordination is also exemplified in the reciprocal agreement between Australia and Italy with respect to the treatment of the Italian supplement. The fact that this supplement is disregarded for the purposes of calculating the level of Australian pension paid[110] has more to do with compromise over the conflict of two systems of social security based on quite different models of welfare than it has to do with any attempt to logically co-ordinate the two systems. The Italian system regards social security as a right, hence the need to supplement a person's pension where it falls below a certain level. It would have been unpalatable to the Italian authorities for Australia to maintain the view that this payment should be treated as income and thus reduce the level of payment for a person in receipt of an Italian benefit below that which would be regarded in that system as an adequate level. The Australian system on the other hand is based more on a conception

[107] See Australia-Canada agreement, art 12; Australia-Italy agreement, art 9.
[108] See eg Australia-Italy agreement, art 9; Australia-Spain agreement, art 12. Cf Australia-Malta agreement, art 10.
[109] Australia-Canada agreement, art 12. Payments under the Canada Pension Plan have a flat rate component and an earnings related component.
[110] See Australia-Italy agreement art 17.

of social security as a privilege for those in need — at least to the extent that income support policies have derived largely from a residualist model[111] — and so without a special provision would find no difficulty in treating the Italian supplement as income.[112] Article 17 in the reciprocal agreement with Italy is one of the prices for having such an agreement at all.[113]

The agreements with Ireland and Portugal also provide examples of the compromise necessary when two systems of social security built on a different philosophical basis are combined. In calculating the rate of any Australian benefit payable under the agreement with Ireland it is provided that the receipt of a large number of Irish payments are to be disregarded.[114] The payments covered by this provision appear to be payments which are non-contributory in nature and which seek to ensure a certain standard of living in a similar manner to the Italian supplement. In the agreement with Portugal there is also a provision which requires Australia, when assessing the income of a person who is in receipt of an Australian pension while resident in Portugal, to disregard any payment made under Portuguese legislation to that person, and to also disregard 'any non-contributory supplement paid to that person by Portugal to bring the amount of that person's Portuguese benefit to the minimum level guaranteed under the legislation of Portugal.'[115]

The Netherlands agreement also stands apart from the other agreements. It provides that benefits under the Netherlands *Old Age Pensions Act* shall be calculated only on the basis of periods of insurance as defined in that legislation.[116] Of course, the other Netherlands benefits included in the agreement only apply to employees seconded to work in Australia.[117] This seems to be a very limited degree of reciprocity.

Another problem in co-ordination is evidenced by the Administrative Appeals Tribunal decision in *Lenoardi and Secretary to Department of Social Security*.[118] Lenoardi had lived in Australia for nine years and seven months and so failed by five months to meet the residential qualification for an

[111] See eg T Carney and P Hanks, op cit p 7. There may well be some debate about whether social security policy in Australia is only a safety net aimed at the truly needy, or whether it seeks to redistribute wealth based on notions that individuals have a right to a certain standard of living. While it is no doubt the case that there are examples of both views in the present social security system, the highly means tested and categorical nature of most social security payments does suggest a learning towards the residualist approach, within which income support is not usually conceived of as a right of citizenship.

[112] See for example *Zanon and Secretary to Department of Social Security* (No V89/49) 20 July 1989, Administrative Appeals Tribunal; (1989) 18 ALD 82.

[113] I am grateful to David Murdoch, Director, International Branch, Department of Social Security for this insight into the Italian agreement.

[114] Australia-Ireland agreement, art 9(3). The payments which are to be disregarded are: unemployment assistance, old age pension, blind pension, widow's (non-contributory) pension, orphan's (non-contributory) pension, deserted wife's allowance, prisoners' wife's allowance, lone parent's allowance, single woman's allowance, supplementary welfare allowance, child benefit, rent allowance, maintenance allowances under s 69 *Health Act* 1979 (Ireland), and any allowance, dependant's allowance, disability pension or wound pension under the *Army Pension Act* 1923–1980 (Ireland).

[115] Australia-Portugal agreement, art 12(3).

[116] Australia-Netherlands agreement, art 11.

[117] Art 6.

[118] No T90/103, 23 September 1991.

invalid pension. On her return to Italy she found she was also ineligible for Italian benefits because she had never made a contribution to the Italian scheme. As she has not made any such contributions, she could not combine a period of contributions with her Australian residence to claim an invalid pension. She received no payment.

Different concepts of eligibility

An area of potential difficulty in the implementation of reciprocal agreements is in the area of benefits which depend upon the medical assessment of the claimant's incapacity. For example, the Administrative Arrangements made under the agreements with Italy and Canada provide a process for the medical examination of a person in either of those countries with the report on such examination being then sent to Australia.[119]

The medical assessment will be done by medical practitioners who are not familiar with Australian social security law and, for example, the peculiarities of the disability support pension including the complexities of the Impairment Tables appended to the *Social Security Act*. The test for invalidity in Australia primarily depends on a notion of 20% impairment according to the Impairment Tables. Under Canadian law a person is eligible for a disability pension under the Canada Pension Plan where the person has a 'physical or mental disability which is both severe and prolonged.'[120] A disability is severe if it means that the person is unable to regularly pursue any substantial gainful occupation.[121] It is a prolonged disability where it 'is likely to be long continued and of indefinite duration.'[122]

Although there are similarities in the tests of invalidity under the different systems, there are problems in expecting medical practitiners who are used to working with one legal test to appreciate the subtleties of another system. The result may be that the medical assessment of invalidity of a pereson claiming from two systems will depend upon the degree to which the examining medical practitioner understands the different tests to apply, and whether the practitioner regards the tests as requiring the fulfilling of different criteria. This may result in a person being classed as an invalid for the purposes of one system but not the other, or a person being required to fulfil only one set of criteria because the practitioner does not see any difference in the two countries' rules. In other words, the medical assessment depends more upon the knowledge of the doctor than it does on the strict application of the law. Even if the decision is not left solely to the medical practitioner the officers of the Department of Social Security will have to decide upon eligibility on the basis

[119] Administrative Arrangements under the Canadian agreement, para 8, 9, 10 and 11; Administrative Arrangements under the Italian agreement, art 8.
[120] *Overview: The Income Security Programs of Health and Welfare Canada*, Health and Welfare Canada, p 14.
[121] Ibid.
[122] Ibid.

of a report that may use the terminology of a different social security system and not that to which they are accustomed.[123]

Although one solution may be thought to be the sending of medical teams to the other country, this may still present difficulties. In *Panagopoulos and DSS*,[124] an invalid pensioner living in Greece had his pension discontinued on the basis of medical reports by Australian doctors sent to examine him. The Administrative Appeals Tribunal overturned the Department's decision, and in doing so seemed to prefer the opinions of Greek doctors who had examined the applicant as to his degree of incapacity. The Tribunal also noted the limited amount of time the team had to consult the treating doctors in Greece. These doctors took quite a different view of the applicant's incapacity for work to that of the Australian team.

RECOVERY OF OVERPAYMENTS

The provisions that govern overpayments under the agreements are primarily concerned with situations where the person in receipt of a payment from one country receives a duplicate payment from the other country that would affect the rate of payment from the first-mentioned country. Thus the agreements provide a mechanism whereby such overpayments can be recovered, either by the payment of any arrears to the country instead of directly to the individual,[125] or by deduction from future payments.[126] Most agreement also provide that any overpayment is a debt due to the country concerned.[127]

Clearly, overpayments raise once again the problems associated with mutual decisions, as the 'overpayment' by one party will depend on the decision of the other party to the agreement to make a duplicate payment or to supply information to the other party as to the eligibility of the claimant for a payment under their legislation. The reviewability of the decision in these circumstances depends upon the decision being characterised as a decision under the Act and therefore reviewable by the various tribunals. The characterisation of the decision to raise the debt as arising under the Act may also be crucial to a person who may seek to have the debt written off or waived under sections 1236 and 1237 of the *Social Security Act* 1991, as those sections only empower the Secretary to the Department of Social Security to write off debts arising under or as a result of the Act.[128] It would have to be argued that if the overpayment is properly described as arising under the agreement by virtue of

[123] The meaning of invalidity under Australian social security law is problematic even for Australian authorities used to its concepts: see eg *Zanos and Secretary to Department of Social Security* (1989) 50 *Social Security Reporter* 658.

[124] No V89/626. 17 June 1991.

[125] Australia-Italy agreement, art 16(4); Australia-Spain agreement, art 19(3); Australia-Netherlands agreement art 14(3); Australia-Malta agreement, art 12(5).

[126] Australia-Canada agreement, art 14(4); Australia-Netherlands agreement, art 14(4), (6).

[127] Australia-Canada agreement, art 14(4)(d); Australia-Spain agreement, art 19(3)(c); Australia-Netherlands agreement, article 14(5); Australia-Malta agreement, art 12(4)(d).

[128] Or under a limited range of related legislation: see ss 1222, 1228.

the actions of another country in paying their benefit, the raising of the debt may still be described as arising as a result of the Act as the reciprocal agreement derives its legal status in Australia as a consequence of the Act.[129] Thus the debt may be written off or waived.

But this does not deal with the problem of one party recovering through its structure an overpayment on behalf of another country. While the agreements provide for one party to request the other to pay arrears to it instead of the person, it is unclear whether there is any discretion to do so. For the individual concerned it does seem to exclude or make difficult the possibility of challenge while the Government to Government exchanges are taking place. The problematic aspect of this process is the status of the money when it is paid from one country to the other. In the event of the arrears being incorrectly paid to the other country on the basis of the 'overpayment' in the initial payment received by the person concerned being miscalculated, does the person challenge the decision to hand over the arrears or the decision to retain them?

Also, as the overpayment is a 'debt', it may be recovered in the courts. But, the obvious practical difficulties in pursuing an overpayment by legal proceedings where the recipient is resident overseas means that the minimisation of such overpayments is likely to be more productive than the recovery of debts. Some agreements attempt to limit overpayments occurring by providing that where a person makes a claim for a payment under an agreement, then if it is thought that the person would also be eligible for a payment by the other party to an agreement and that payment would affect the amount of the payment first claimed, no payment shall be paid until a claim is lodged with the other country.[130] Such a provision is not, however, included in the agreements with Canada, Spain or Italy.

The agreement with Italy sets out quite different provisions designed to minimise overpayments. This agreement allows one party to assume the amount of the benefit a claimant may receive from the other Party in calculating the rate of their payment.[131] Where it is established that the person has not in fact received the amount from the other Party that the first Party assumed, then the deficiency that would have occurred is to be adjusted by the payment of arrears.[132]

The Department of Social Security has a policy that outside the specific instances listed in the agreements above where overpayments arise by way of arrears of payments paid under an agreement, recovery would not be sought except in the normal way. Thus a person residing overseas who falsely stated their income or assets and who as a consequence was overpaid age pension,

[129] See *Social Security Act*, s 1208. This would not appear to present any real difficulties: see discussion above. Of course, problems with respect to the participation of the other country in the decision-making process may arise as discussed thereat.

[130] Australia-Malta agreement, art 12(3); Australia-Netherlands agreement, art 14(1), Australia-Ireland agreement, art 13(4); Australia-Portugal agreement, art 20(3).

[131] Australia-Italy reciprocal agreement, art 16(3), para 1.

[132] Australia-Italy reciprocal agreement, art 16(3), para 2.

would not be pursued for the debt until they came within the jurisdiction of the Australian legal system.[133]

THE APPLICATION OF ELIGIBILITY RULES TO AUSTRALIAN PENSIONS PAID OVERSEAS

In the debates on the *Social Security (Proportional Portability of Pensions) Act* 1985 the problem of the application of various rules within the Australian social security system to overseas pensioners was raised. A member of the Opposition asked:

> 'The fact is there are certain administrative problems in ensuring that the provisions of the Australian social security system are adhered to with benefits paid to people who reside outside Australia. This Government has spent a lot of time enforcing what is known as the assets test. It has gone to fairly extreme lengths in the domestic situation to enforce its proposals for the assets test on Australian pensioners. The Minister has told me in answer to a question that beneficiaries residing outside Australia are required to comply with the same provisions of the Social Security Act as beneficiaries residing in Australia. . .
>
> The question arises as to how those provisions are actually implemented. I am told that the Department sent assets test forms to the London office and as a result of that a number of pensions were either reduced or cancelled. The real question arises as to how the Department can be confident that its provisions, not only in terms of the assets test and the age pension but also in terms of other social security benefits, are adhered to. . .throughout the word. . .'[134]

The Australian Department of Social Security must simply rely on the honesty of claimants and any assistance provided by the authorities of other countries in the administration of such rules. Such assistance will vary from country to country. The agreements provide the mechanism for the exchange of information between Parties that may include details about the eligibility of individuals for payment under Australian social security law.[135] However, the culture of the relevant country may determine to what extent the assistance required is forthcoming.

For example, the documentation required to claim an Australian payment from Italy requires the completion of two forms. The first form, which is accepted and processed for transmission by the Italian authorities to Australia, concerns information relevant to residence in Australia and family information. The second form relates to the income and assets test and must be sent direct to the Australian Department of Social Security. The reason for this separate documentation is that the Italian authorities do not want to be

[133] Information provided by David Murdoch, Director, International Branch, Department of Social Security.

[134] Mr Blunt, *Parliamentary Debates* (House of Representatives), 12 February 1986, p 369.

[135] See Australia-Italy reciprocal agreement, art 20; Australia-Canada reciprocal agreement, art 16.

associated with what they regard as the intrusion on privacy that the questioning relevant to the income and assets test requires.[136]

Also raised in the Parliament was the appropriateness of applying overseas eligibility rules that have been evolved for Australian conditions. In particular, the extent to which the cost of living in Australia which underpins the income and assets test may be an unfair measure in another country where the cost of living is dramatically different, particularly if the test is assessed in Australian dollars where its value may fluctuate.[137] This point can be taken further if one considers the applicability of other rules such as cohabitation. How does one apply such a rule overseas and in a culture where polygamous marriages may be the norm? Even more difficult to resolve would be the question of widow's pension in a case where the one person had many spouses, or where extra benefits were claimed for a number of spouses.[138]

The resolution of these difficulties may be in the effective non-application of such rules in many instances as a means of minimising the costs of their administration. If this did occur, one could foresee many claims of discrimination and haphazard imposition of the rules forthcoming.

CONCLUSIONS

The reciprocal social security agreements that Australia has entered into with other countries do deliver real benefits to the migrants who are able to utilise them. It cannot be denied that many persons who would not otherwise be eligible for a social security payment from a party to one of the agreements are able to qualify in particular cases.

Where the agreements do not enhance the social security rights of migrants is in what they fail to achieve. The agreements do not, for example, attempt to 'internationalise' social security. Unlike the ILO, individual governments, including Australia's, do not seem to have a strong commitment to improving the standard of social security coverage globally through the use of reciprocal agreements.

The consequence is that individuals receiving payments under the agreements are caught up in the usual problems that beset domestic social security programmes. This may not in itself appear to be any different to individuals receiving payments under the domestic legislation, but it must be considered that individuals who qualify under the agreements and who receive payments from two States may find themselves caught in the middle of two systems. For the individual the combined payments represent one income, but for the States making the payments, such payments may become the battleground for ideological battles over the purpose of social security.

[136] Information supplied by David Murdoch, Director, International Branch, Department of Social Security.

[137] Mr Blunt, *Parliamentary Debates* House of Representatives, 12 February 1986, pp 369–70.

[138] For a discussion of the conflict between different cultural norms in social security, see D Pearl, 'Social security and the immigrant' (1974) *3 New Community* 272.

The concern with such matters, and the economic considerations that often motivate them, also means that the rights of migrants become secondary considerations in the formulation of the agreements. The problems of joint determinations and review could lead to a serious undermining of the social security rights that the agreements purport to provide. Another area of concern is the application of the various rules of eligibility in the Australian social security system to pensioners overseas. At a practical level such rules appear to have little chance of uniform enforcement. The inequities to which this could give rise, as pensioners in Australia are subjected to the tests while those overseas have the tests applied in an almost random manner, suggest that the concept of 'equality of treatment', upon which the agreements are based, is fluid indeed.

While the cost of reciprocal agreements has apparently always been of importance, the fiscal problems of recent years would seem to have been the major influence in the drafting and negotiating of the latest agreements. The attraction of 'cost sharing' as the reason for entering the new phase of reciprocal agreements seems to have caught the imagination of the Australian Government. The passing of the legislation giving effect to proportional payments of pensions, which will eventually reduce the amount of pensions paid overseas to persons regardless of whether they are able to claim under a reciprocal agreement, further indicates that social justice tends to lose out to fiscal savings.

Underlying the reciprocal agreements is the issue of who should bear the responsibility for the social security needs of migrants. Where a country attracts migrants for the purpose of developing its economy, then perhaps the responsibility for income support properly falls on the host country. The interests of that country are also served by accepting such responsibility as it may encourage immigration. However, an approach based on the question of who should accept responsibility appears to lead inevitably to the question of who should bear the cost. At that point the interests of States begins to cut across the welfare rights of migrants.

A more desirable approach from the point of view of migrants would be to base the reciprocal agreements on a model that maximises their social security rights. This would necessitate placing the interests of the individual over those of the State. One justification for doing so is that it would be consistent with the philosophy underpinning the various international human rights documents mentioned at the beginning of this article.

This leads to the principle upon which the European Community meets the social security needs of migrant workers. In particular, the model adopted in Europe of applying only one piece of legislation to determine a person's eligibility for social security and providing an ultimate appeal body that has a transnational status would seem to generate far more rights for migrants than the current model of bilateral agreements based on shared responsibility pursued by Australia. However, even in the European context there has been a

questioning of the fairness in requiring the host State to meet the cost of the social security needs of migrant workers.[139]

Given the large number of migrants in Australia with high expectations as to provision of income support, it seems inevitable in the current economic climate that the Australian Government will exploit any opportunity to have those expectations satisfied by the countries from which those migrants emigrated. But it would be folly not to recognise that, while it may save costs for the Australian Government by having another country meet that need, the agreements also legitimate the declining role of the Australian State in providing income support through the introduction of such concepts as proportional portability of pensions.

The new model of reciprocal agreements also opens up a vast array of problems for the migrants who must utilise them for their income support. Sharing responsibility implies shared administration, processing and determinations which will introduce a number of legal problems for users of the agreements. Not least of the problems is what is likely to happen if other countries with which Australia enters into such agreements also begin to move to a more selective provision of social security. In those circumstances migrants may find that they are gaining access to a questionable social security right.

[139] J. Steiner, 'The Right to Welfare: Equality and Equity under Community Law', (1985) 10 *European Law Review* 21, 41.