

**NEW ZEALAND'S SOCIAL SECURITY
CONVENTIONS: MERELY DOUBLE TAXATION
AGREEMENTS IN REVERSE?**

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SUMMARY

In common with many countries, New Zealand provides a comprehensive range of social security benefits for its residents. As New Zealand has traditionally been a country that attracts migrants and, more recently, a source of migrants for other countries, cross-border issues relating to social security benefits are an important issue both for the individuals concerned and also the New Zealand Government. It is for this reason that many countries, including New Zealand, have entered into bilateral treaties (known as “social security conventions” or SSCs) to coordinate the provision and funding of social security benefits across borders. Because SSCs are international treaties, they have implications not only for those individuals who fall within their scope, but also for the governments who are signatories to them.

The most important SSCs New Zealand has negotiated are the ones with Australia and the UK because of the substantial migration flows between New Zealand and these two countries. Both these SSCs are very different to the other six negotiated in the 1990s which is probably because New Zealand entered into these SSCs long before it decided to provide general portability of New Zealand Superannuation to other countries. As a consequence, the benefits payable under these two SSCs to New Zealanders who retire in Australia or the UK may be less than what is payable now under the general portability provisions for New Zealand Superannuation. In this respect SSCs differ from double tax agreements (DTAs) which are usually invoked to provide relief for a taxpayer and do not make a taxpayer worse off.

The coordination of social security benefits with Australia has its own issues due to the free movement of labour between the two countries under the trans-Tasman Travel Arrangement and also because Australia has adopted retirement income policies that are substantially different to New Zealand's. The SSC with Australia is unusual in that it may leave New Zealand retirees resident in Australia much worse off than if they had claimed New Zealand Superannuation under the general portability provisions and retired elsewhere. The SSC also has significant fiscal risks to New Zealand if large numbers of Australians decide to retire in New Zealand.

The general portability provisions have a Pacific Islands option which is generous to Pacific Islanders who can retire back to their countries of origin with New Zealand Superannuation at full rates free of New Zealand tax after 20 years of New Zealand residency. When the Social

Assistance (Payment of New Zealand Superannuation and Veteran's Pension Overseas) Amendment Bill 2009 is passed, the general portability provisions for other countries will be closer to the provisions for Pacific Island portability, however, a much longer period of New Zealand residency will be required for overseas payment of New Zealand Superannuation at full rates.

The general and Pacific Island portability provisions can also be criticised on grounds that the payment of New Zealand Superannuation overseas without any deduction of New Zealand tax is unfair when the benefit is fully taxable when to paid to retirees living in New Zealand. Both portability provisions can also be criticised on equity grounds that they may place retirees to Pacific Island and other countries in a much better position than those who retire to Australia and have payment of New Zealand Superannuation denied to them under the Australian SSC.

1.0. INTRODUCTION¹

In common with many countries, New Zealand provides a comprehensive range of social security benefits for its residents, the first of which can be traced to the 1890s. As New Zealand has traditionally been a country that attracts migrants and, more recently, a source of migrants for other countries, cross-border issues relating to social security benefits are an important issue both for the individuals concerned and also the New Zealand Government. It is for this reason that many countries, including New Zealand, have entered into bilateral treaties (known as “social security conventions” or “SSCs”) to coordinate the provision and funding of social security benefits across borders.

The objective of this paper is to review New Zealand’s network of SSCs in the context of New Zealand’s social security regime using double tax agreements (DTAs) as a point of comparison where appropriate. As agreements such as SSCs and DTAs have fiscal effects, consideration will also be made of the risks arising to New Zealand from SSCs.

2.0. DESIGN OF SOCIAL SECURITY REGIMES

Social security regimes are designed with the objective of providing assistance for individuals affected by conditions such as old age, poverty, disability and unemployment. While most social security regimes provide assistance primarily in the form of income assistance (i.e. pensions or benefits), assistance may also be provided in other forms such as subsidised housing, medical care and other social services. Because of the wide range of social problems being addressed, there can be substantial differences between countries social security regimes such as the nature of the coverage, benefits provided and the manner in which they are funded and administered.

There are two main approaches underpinning the design of social security regimes.² One is termed the “Bismark” approach and the other the “Beveridge” approach reflecting early social security programmes developed in Germany and the United Kingdom respectively.

¹ This paper is based on the New Zealand National Report presented by the author at the High Level Scientific Conference on Tax Treaties and Social Security Conventions held in Rust, Austria, 7-10 July 2005 organised by the Tax Law Department of the University of Vienna. The National Reports from this conference were subsequently printed in Michael Lang (editor), *Double Taxation Conventions and Social Security Conventions*, Linde Verlag, Vienna, 2006. An earlier version of this paper was presented at the annual conference of the Australasian Tax Teachers’ Association Conference, Hobart, Tasmania, January 2008. The paper has been updated to reflect the law as at 1 June 2009.

² Yariv Brauner; “The International Tax Regime and Social Security”, chapter in *Double Taxation Conventions and Social Security Conventions*, Michael Lang (editor), Linde Verlag, Vienna, 2006, pp 17-26 at pages 18-19.

Under the Bismark approach,³ social security benefits are provided for specific risks with the quantum of benefits provided based upon the individual's contributions. This type of social security it is more akin to a form of insurance –hence the term, often used in Europe, “social insurance”. More commonly, such schemes are financed by separate taxes or levies (usually imposed on both the “insured” person and employers) and administered through a stand-alone fund. On the other hand, the Beveridge approach,⁴ is characterised primarily by a flat-rate of benefit which is intended to provide a minimum income level based upon need, not prior contributions hence benefits are unlikely to be related to what an individual may have contributed. Such schemes are less commonly financed by separate taxes or levies and are often funded out of ordinary government expenditure financed by general tax revenues. Most social security schemes today contain elements of both approaches,⁵ however, New Zealand's social security regime since its inception closely follows the Beveridge approach.⁶

The Bismark/Beveridge dichotomy on its own still does not encompass all possible means of addressing social risks. The mandatory provident or superannuation policies adopted in Singapore and Australia for the provision of retirement income fall outside the scope of the Bismark-Beveridge dichotomy, however, both are responses to the same underlying issue of provision of income in old age which other jurisdictions address through social security.

Because of significant differences between various countries' social security regimes, creating an interface between particular regimes can be complex. Individuals who spread part of their working lives between two or more jurisdictions are likely to be exposed to different and potentially conflicting social security regimes, which may lead to problems of overlapping or inadequate coverage. This may affect not only the individual concerned, but also their employers and the governments of the countries where they have been resident. It is for this reason that an increasing number of countries are entering into bilateral SSCs to deal with cross-border social security issues.

³ Called the “Bismark” approach after the German Chancellor Bismark who devised the first scheme of social insurance for German workers in the 1880s.

⁴ Called the “Beveridge” approach after Lord Beveridge who produced a report delivered in 1942 setting out proposals for a scheme of social insurance for the UK titled *Social Insurance and Allied Services*, Report by Sir William Beveridge, presented to Parliament November 1942, HMSO, CMND 6404.

⁵ Refer Yariv Brauner, “The International Tax Regime and Social Security” from Michael Lang (editor), *Double Taxation Conventions and Social Security Conventions*, Linde Verlag, Vienna, 2006, pp17-26 at page 19.

⁶ *Social Insurance and Allied Services*, Report by Sir William Beveridge, Presented to Parliament November 1942, HMSO, CMND 6404 paragraph 304.

This interaction is also made more complex because there are typically two dimensions to most social security regimes one being the payment of benefits to eligible persons and the other the funding of those benefits. This is in contrast to income tax which usually has only one dimension, which is the levying and collection of tax. This means there may be two areas of interface that the SSC has to bridge, unlike a DTA which typically has only one.

3.0. WHAT ARE SOCIAL SECURITY CONVENTIONS?

Social security conventions are international treaties between two states for coordination and harmonisation of social security benefits when a resident or citizen of one state has lived or worked in both or the other state or makes a claim for social security benefits in the other state. In some respects SSCs have similarities to DTAs while in other respects they do not. While DTAs are entered into to relieve international double taxation, SSCs are entered into to address two problems that can arise with social security programmes when they overlap between two countries the first is dual coverage and the second the coordination of benefits.

3.1. Dual Coverage

Liability to contribute or pay for social security programmes in two countries can arise at the same time in respect of the same individual which is termed “dual coverage”. This liability may fall on either employer or employee or both. Dual coverage is analogous to that of double taxation that can arise with cross-border income flows. On the other hand, even when dual coverage arises it does not necessarily mean that an individual subject to such coverage may be entitled to receive two pensions when they retire, although it may be possible to claim under two countries’ social security programmes at the same time for pensions on an apportioned basis.

In negotiating SSCs the US appears to have been particularly concerned with the problem of “dual coverage” and the additional costs arising to US employers caught with an employee who suffers such dual coverage.⁷ The US has sought to assist US employers reduce the cost of employing US staff transferred overseas by US multinationals (MNEs) through entering SSCs and with the aim of improving the competitiveness of US MNEs.

Where the “dual coverage” problem arises, the SSC usually requires one state to forgo their claim upon an individual. This concept is more analogous to that of the residence “tie-breaker” clause

⁷ These cost problems are made worse under the tax equalisation policies adopted by some multinationals for intra-company transfers where additional taxes and levies suffered by the employee in the country to which they are seconded to are compensated for by the employer.

commonly found in most DTAs. This can be seen in the following statement from the US Social Security Administration in respect of the SSCs the US is a party to:

“The aim of all U.S. totalization agreements [i.e. SSCs] is to eliminate the dual Social Security coverage and taxation while maintaining the coverage of as many workers as possible under the system of the country where they are likely to have the greatest attachment, both while working and after retirement. Each agreement seeks to achieve this goal through a set of objective rules.”⁸

There is probably a greater risk of dual coverage where a country funds its social security programmes through separate levies outside the scope of their income tax regimes. Social security levies and taxes do not normally come within the scope of DTAs, so DTAs cannot be invoked to relieve the “dual coverage” problem. Unlike income tax, the principle of crediting foreign social security levies paid against those payable in another country is not usually allowed as social security levies or taxes are more akin to an insurance premium rather than a tax.

Where social security programmes are funded out of general taxation (as is the case with New Zealand and Australia), SSCs can be used to allocate the cost of funding social security programmes between two governments, as occurs with a number of New Zealand’s SSCs. Reducing the costs of providing social security benefits where the eligible person has split their working life between New Zealand and another country is one of the stated objectives for New Zealand entering into SSCs.⁹ The “dual coverage” problem that US employers face is less likely to be an issue for New Zealand employers as New Zealand does not impose separate social security taxes or levies as is the fact that there are fewer New Zealand multinationals that would transfer staff overseas.

3.2. Co-Ordination of Social Security Benefits

Conflicts or problems of interface between two countries’ social security programmes can also arise when an individual claims benefits if they have entitlements or coverage in two countries. A person who has spent their working life split between two countries may also find that they are disadvantaged under both countries’ social security regime when they make a claim for benefits and may be entitled to a reduced pension or benefits. SSCs apply to such situations so that an individual’s entitlement to social security benefits is not disadvantaged where an individual has split their working lives between two contracting states.

⁸ From International Programs –U.S. International Social Security Agreements, Social Security Online at www.ssa.gov/international/agreements_overview.html.

⁹ *Briefing to the Incoming Minister –Improving Wellbeing for all New Zealanders*, Ministry of Social Development, Wellington, New Zealand 2002, Part 2, Chapter 3, pages 5-6.

As eligibility to most social security benefits hinges upon either the claimant making the necessary contributions to a social security scheme or establishing a period of residency in a state, a principle known as “totalisation” applies which provides that residency or a contributing period in one state is deemed to be residency or contribution in the other state for the purposes of entitlement to social security benefits. Therefore, an individual who has spent 15 years working in one state and 25 years in another could be deemed to be resident in either state for 40 years for social security purposes in under totalisation provisions. This results in the individual not suffering any disadvantage because they have split their working lives between two countries. It should be noted that totalisation usually only applies to the principle of eligibility for a benefit under one state’s social security laws. It does not determine which state will pay benefits to the claimant and, if both states are required to pay benefits, in what proportions. One of the stated objectives the US has sought from SSCs is to prevent loss of benefits for individuals who have divided their careers between two countries.¹⁰

SSCs may also provide benefits to individuals by allowing benefit portability allowing an individual who has entitlements under one country’s social security regime to receive benefits while residing in another contracting state. Some countries require claimants to be resident to receive benefits or at least resident when they first apply for a benefit. The SSC can apply to override that requirement in respect to the initial claim for benefits or continued payment of those benefits. Both the US and New Zealand have both cited benefit portability as one of the objectives sought from entering into SSCs.¹¹ Pension portability is also an issue that has driven New Zealand to enter into SSCs; this is framed in terms of giving New Zealanders freedom to retire where they want to. With respect to these issues the functions of a SSC are quite different to that of a DTA.

Some states have sought other objectives from entering into SSCs. New Zealand has sought to improve labour mobility in the context of attracting skilled labour to New Zealand by negotiating SSCs with the broader objective of improving international competitiveness of its economy.

¹⁰ Staff of the Social Security Administration, Social Security Handbook paragraph 107.3 as cited by Alison Christians, National Report USA, chapter in *Double Taxation Conventions and Social Security Conventions*, Michael Lang (editor), Linde Verlag, Vienna, 2006, pp 683-748 at pages 703-4. It should be noted that the US provides for portability of social security benefits under its domestic law and merely seeks to improve portability by obtaining undertakings that neither contracting state will impose restrictions on benefit payments based solely on criteria based on residency or personal presence in the other state. Christians, *ibid*, pp 689-690.

¹¹ Refer above footnote. Refer also to the Hon. Paula Bennett, Minister for Social Development and Employment, First Reading of the Social Assistance (Payment of New Zealand Superannuation and Veteran’s Pension Overseas) Amendment Bill, Hansard, 31 March 2009.

3.3. Comparisons Between DTAs and SSCs

While DTAs and SSCs are both treaties that under international law are superior to the domestic enactments of the contracting states, the manner in which they interface with domestic law differs. DTAs provide relief against double taxation where two states' domestic laws conflict. Therefore a contracting state's domestic law must first establish a tax claim upon a source of income before a DTA can potentially apply to provide relief. SSCs appear to go further in that they can create explicit rights by bridging two countries' social security regimes through totalisation provisions that may not exist in domestic law.

The principle that DTAs apply only to provide relief to the tax treatment prescribed under a contracting state's domestic law may also not be applicable in the case of SSCs. This is due to the nature of the wording of SSCs which is prescriptive rather than the more permissive style of wording found in DTAs. Therefore it is possible that a situation can arise where the application of a SSC can result in an individual being worse off than if the relevant domestic law treatment applied only.¹²

Unlike DTAs, where the OECD Model Agreement has provided a widely adopted template for the negotiation of such agreements, no such model agreement exists for SSCs. This is probably due to the much greater variations that exist between different countries' social security regimes than is found between income tax regimes. There also appears to be less consensus as to how benefits should be coordinated and costs of social security shared between two states. The OECD does not appear to have devoted itself to social security issues in the way it has to tax ones. It also appears for many countries the negotiation of SSCs is a more recent development than the negotiation of DTAs have been.

4.0. NEW ZEALAND'S SOCIAL SECURITY REGIME

4.1. Historical Background

Starting in the 1890s, New Zealand has developed a comprehensive social safety net for its citizens and residents for both health and income maintenance. The first social security benefits in New Zealand date back to 1891 when a modest old-age pension was introduced followed by a widow's benefit in 1911, a blind person's benefit in 1924, unemployment benefits in 1930 and a disability

¹² For example, where a New Zealand resident retires in Australia and claims payment of New Zealand Superannuation there.

pension in 1936. In 1938 these existing provisions were expanded into a comprehensive system of social security as well as comprehensive health coverage under the Social Security Act 1938.

When a more comprehensive system of social security was introduced in 1938, the costs of providing these benefits were partly funded through the introduction of a special tax, known as a “social security charge”, at a rate of 5% on taxable incomes which was a flat-rate tax additional to income tax. No levies were imposed upon employers nor have any been imposed since then. The social security charge was increased to 7.5% in 1942 where it remained until 1968 when it was incorporated into general income tax. Since 1968, all social security and health expenditure in New Zealand has been funded from general taxation, with one minor exception.¹³ New Zealand is unusual among OECD countries¹⁴ that no levies are imposed upon employers to fund social security programmes.¹⁵

New Zealand’s social security system operates pursuant to two statutes the Social Security Act 1964 (SSA) and the New Zealand Superannuation and Retirement Income Act 2001 (NZSRIA).¹⁶ Under the former a wide range of benefits¹⁷ are payable to address a number of situations, while the NZSRIA is concerned with the provision of a universal old age pension. The cost of providing this universal pension significantly exceeds the cost of all other social security benefits in New Zealand.¹⁸

New Zealand’s social security system is largely territorial in scope and operates on the “Beveridge” principles. Eligibility for social security benefits depends upon the type of benefit sought. For benefits under the SSA 1964 (all targeted benefits) a person must a citizen, permanent resident or

¹³ This is the Earner’s Levy for the Accident Compensation Scheme.

¹⁴ Australia and Denmark are also in a similar position. Due to the absence of any special social security levies or taxes being imposed in New Zealand, none of the SSCs New Zealand is a party to contain articles relating to the payment of social security levies or taxes in the other contracting state.

¹⁵ The only levy payable by employers in respect of their payroll is for worker’s accident insurance under the Accident Compensation Scheme. This covers workplace accidents only and does not fund any other social security programmes.

¹⁶ This Act when passed in 2001 was known as the New Zealand Superannuation Act, however the title of the Act was amended to its current form in 2005. The policy reason for this change is unknown.

¹⁷ They include: Domestic Purposes Benefit, Emergency Benefit, Independent Youth Allowance, Invalids Benefit, Orphans and Unsupported Child Benefit, Sickness Benefit, Student Allowance, Unemployment Benefit, Veteran’s Benefit and the Widow’s Benefit. All of these benefits are taxable except for the Orphans and Unsupported Child Benefit which is paid to the caregiver of the child.

¹⁸ For the 2007/2008, New Zealand Superannuation will be 13% of total government expenditure or around NZ\$7.3 billion (gross). Total social welfare expenditure will be 34% of total government expenditure or NZ\$19 billion. Source: New Zealand Treasury, Budget 2007, *Key Facts for Taxpayers*, Wellington.

refugee and have been “ordinarily resident” in New Zealand for a period of at least 2 years. In practice this 2-year residency rule is of little effect because of the existence of an Emergency Benefit, which can be paid to persons with no prior New Zealand residency. The amounts payable under this benefit are not significantly different to those payable under mainstream benefits. The term “ordinarily resident” is not defined in the SSA however has been the subject of a number of cases brought before the Social Security Appeal Authority.

Entitlement to New Zealand Superannuation is on a different basis. Unlike other benefits, it is a universal benefit payable to anyone over 65 years old meeting certain residence tests. These tests require a claimant to have lived in New Zealand for at least 10 years after the age of 20, and in that 10-year period, five of those years must be after reaching the age of 50.¹⁹ In addition, the applicant must be “ordinarily resident” in New Zealand at the time they applied for New Zealand Superannuation. These residency tests are subject to any totalisation provisions under an SSC and for this reason SSCs have their greatest impact on this type of benefit.

Under New Zealand law, a person’s status with respect to New Zealand income tax and social security is not directly linked. Residency for income tax purposes is defined in section OE 1 of the Income Tax Act (ITA) 2007 and is based upon a subjective “permanent place of abode” test supplemented by two subordinate personal presence tests.²⁰ The term “permanent place of abode” is not defined in statute. Thus the test for residency is a subjective one based upon an assessment of a variety of personal factors.²¹ They include location of the taxpayer’s family, centre of living, employment ties, financial and social security arrangements. Given these criteria it is unlikely that any person could be in receipt of any social security benefit from New Zealand and not be resident in New Zealand for tax purposes unless it was expressly intended by legislation.²²

¹⁹ Annette Lazonby notes that by international standards the residence requirement for New Zealand Superannuation is “very modest” although Australia also has similar eligibility criteria for its income and asset tested Age Pension. Refer Lazonby, A; “Passing the Buck –The impact of the direct deduction policy on recipients of overseas pension benefits in New Zealand”, RPRC Working Paper No. 2007-2, Retirement Policy and Research Centre, University of Auckland, New Zealand, 2007, at pp 7-8.

²⁰ A person becomes resident in New Zealand for tax purposes if they are personally present in New Zealand for more than 183 days in any consecutive period of 365 days. Once attaining residency, in order to become non-resident they must be personally absent for a period of more than 325 days in any consecutive period of 365 days, as well as not having a “permanent place of abode” in New Zealand. All of New Zealand’s DTAs contain residence “tie-breaker” provisions to resolve situations where an individual is deemed to be resident simultaneously in two contracting states.

²¹ The term “permanent place of abode” appears in the Australian income tax legislation but in a different context to the New Zealand legislation. The phrase has been considered by Australian courts in *FC of T v. Applegate* 79 ATC 4,037 and *FC of T v. Jenkins* 82 ATC 4,098.

²² The main example is where New Zealand Superannuation is paid to persons residing outside New Zealand.

However, effectively tax residency and eligibility for social security benefits are linked due to the similarity of the criteria for each test. A shorter period of residency in New Zealand will result in a person becoming resident in New Zealand for tax purposes than would be necessary to be held as “ordinarily resident” in New Zealand to qualify for social security benefits.

4.2. Cross-Border Issues

In terms of identifying the key cross border issues affecting New Zealand’s social security regime, it is relevant to examine the environment in which it operates. New Zealand is a country that is largely populated by migrants from Europe over the last 150 years.²³ New Zealand also experiences considerable turnover of its population with a significant number of new migrants arriving, but also the departure of existing residents. As a result its population has grown relatively slowly and now stands at 4.3 million. Of those 4.3 million, it is understood that approximately 25% are not New Zealand citizens and, a significant number of New Zealand citizens (possibly 15%-20%) also hold the citizenship of another country in addition to New Zealand citizenship, although neither statistic is collected by the Department of Statistics in their five-yearly census. New Zealand, as a small country, is not a major business centre and issues of expatriates and temporary transfers of MNE employees into New Zealand appears not to be a major issue as it is in the US and Europe.

New Zealand has special immigration arrangements with Australia dating back to 1920 (known as the “Trans-Tasman Travel Agreement”) which allows citizens of both countries to visit, work and reside in the other with little restriction or formality.²⁴ These arrangements preceded Closer Economic Relations (CER) by over 60 years and are currently supplemented by a SSC, a Reciprocal Health Agreement and a Child Support Agreement with Australia.²⁵ While the “Travel Arrangement” is not explicitly part of CER, it can be seen as supporting the wider objectives of CER in the context of an open labour market. This “Travel Arrangement” was not of much

²³ Approximately 74% of New Zealand’s population is European in origin (mainly from the UK, Ireland and a lesser extent the Netherlands) with 14% of its population indigenous (New Zealand Maori), while 6% are from the South Pacific and another 6% from Asia (predominately ethnic Indian or Chinese).

²⁴ Persons who have previously served a period of imprisonment do not have migration rights under the Arrangement, nor do persons with contagious diseases. New Zealand also grants permanent residents of Australia the same benefits as Australian citizens under the Trans-Tasman Travel Arrangement, however Australia does not do the same in respect of persons with New Zealand permanent residency.

²⁵ New Zealand Ministry of Foreign Affairs and Trade, The Australia New Zealand Closer Economic Relations (CER) Trade Agreement: 1983 – 2003 Backgrounder, <http://www.mfat.govt.nz/foreign/regions/australia/cer2003/cerbackgrounder.html>

significance until the late 1960s, when large numbers of New Zealand citizens started to take up residence in Australia. There are now over 450,000 New Zealand citizens residing in Australia.²⁶ For New Zealand citizens without dual citizenship, Australia is the only country they can relocate to without any significant restriction.

Cross-border issues arise with New Zealand's social security regime in three main areas:

- Eligibility for social security benefits where an individual has resided in two or more countries;
- Payment of benefits outside the country where the entitlement arose (portability);
- Recovery and/or sharing of the costs of providing social security benefits where an individual spent part of their working life outside New Zealand.

Because New Zealand does not impose separate social security taxes, the third issue does not directly affect individuals but arises at the Government level only. The absence of separate social security taxes or levies in New Zealand also removes some of the incentives to enter SSCs as the dual coverage problem cannot arise.

A key principle underpinning New Zealand's social security programmes for many years is that benefits are only payable if the beneficiary resides in New Zealand. In 1990 in response to pressures from some migrant communities, the New Zealand Government decided to provide for general portability of New Zealand Superannuation and Veteran's Benefits outside of any SSC.²⁷ Until this change, New Zealand pensioners could only receive these two benefits outside of New Zealand in either Australia or the UK pursuant to existing SSCs with these countries. As a consequence of the decision, it was also decided to expand New Zealand's existing SSC network and legislation was enacted which expressly provided for the negotiation of such agreements which are termed "reciprocity agreements".²⁸ As a result of this policy change, New Zealand Superannuation and Veteran's Benefits are now payable outside New Zealand²⁹ at 50% of the

²⁶ It is estimated there are around 50,000 Australian citizens living in New Zealand.

²⁷ Under the Social Welfare (Transitional Provisions) Act [SW(TP)A] 1990. With the passing of this Act the law relating to the provision of New Zealand Superannuation was removed from the SSA 1964 and set up under separate legislation. Certain matters applying to the administration of New Zealand Superannuation remained in the SSA.

²⁸ Section 19, [SW(TP)A] 1990. This Act was later amended in 2000 to provide for international recovery of social security debts (overpayments). At the same time the ITA 1994 was amended to provide for tax recovery agreements to be entered into.

²⁹ As noted earlier, applications to have either benefit paid outside New Zealand must be made when the applicant is "ordinary resident" in New Zealand. Applications cannot normally be accepted from outside New Zealand,

amount payable if they were living in New Zealand³⁰ subject to the provisions of any SSC.³¹ Payments of these benefits outside of New Zealand are exempt from New Zealand tax.

In 1993 the general portability was extended when special rules were introduced for superannuitants who wished to retire in the Cook Islands, Niue and the Tokelau Islands under an arrangement negotiated with these territories with effect from 1 April 1994. All three territories have a special relationship with New Zealand and their residents are New Zealand citizens. Under these rules, such superannuitants could be paid New Zealand Superannuation at the full rate provided they had previously resided in New Zealand for more than 20 years.³² These special rules were justified on grounds of recognising the contribution these three countries had made to the New Zealand labour market.³³ Foreign aid considerations may have also been an issue, as enabling Pacific Islanders to return home for their retirement with a relatively generous (by Pacific Island standards) pension to these three under populated territories would assist their economies and improve their viability as entities quasi-independent from New Zealand.

The list of Pacific Island countries eligible for this concession was subsequently extended to another 19 countries in 1999 with effect from 1 October of that year. Some of the countries or territories now eligible are surprising while most are Pacific Island territories with low GDP per capita incomes, wealthier dependent territories such as New Caledonia and French Polynesia (Tahiti) as well as a number of US associated ones including Guam, American Samoa, Palau, Northern Marinas and the Marshall Islands are now eligible.

While the introduction of the special provisions for Pacific Island portability have attracted virtually no adverse comment since they were introduced in 1993 and extended in 1999, the provisions are discriminatory. The grounds for this special treatment are questionable given that wealthier French

even where the applicant has met the 10-year/5-year residency test. However, under clause 6 of the Social Assistance (Payment of New Zealand Superannuation and Veteran's Pension Overseas) Amendment Bill 2009, it is intended to insert a new section (26A) which will allow applications from outside New Zealand from applicants in certain Pacific Island countries.

³⁰ Supplementary benefits (such as the living alone allowance) are not payable outside of New Zealand.

³¹ The two SSCs in force when general portability was introduced override the general portability provisions. As a consequence benefits cannot be paid in these two countries but instead persons eligible for New Zealand Superannuation and living in Australia or the UK are eligible to receive an equivalent Australian or British benefit under the domestic rules in force in these two countries.

³² If the applicant has been resident in New Zealand for between 10 and 20 years the amount paid is apportioned. Refer section 32 New Zealand Superannuation and Retirement Income Act 2001. Again application for payment outside New Zealand must be made when the applicant is "ordinarily resident" in New Zealand.

³³ Lazonby, *ibid*, page 5.

and US territories are also included. It is even more questionable on equity grounds when New Zealanders retiring in Australia may forgo any pension at all. Some of these issues could be addressed if general portability is extended to full rates as has been proposed in the 2008 Budget although the anomaly for Australian retirees would remain. (This is discussed in the next section.) Another even more questionable issue is that Pacific Island superannuitants could receive a larger net pension than if they had remained in New Zealand, because New Zealand Superannuation is payable to them exempt of New Zealand tax.

As part of the 2008 Budget, it was announced that the general portability provisions would be revised to permit superannuitants to receive up to 100% of New Zealand Superannuation outside of New Zealand (free of New Zealand tax) based on the number of years they had lived in New Zealand between the ages of 20 to 65 years. A bill titled the Social Assistance (Payment of New Zealand Superannuation and Veteran's Pension Overseas) Amendment Bill was introduced into Parliament on 31 March 2009 which will (when passed) bring these changes into effect from 2 November 2009.

When this bill is passed, some superannuitants will receive more than they currently do under the 50% portability rule, while others who have entitlement to New Zealand Superannuation through a bare 10 year presence in New Zealand will receive less if they apply for payment outside New Zealand under the general portability provisions.³⁴ It would also appear to disqualify any individual who had become eligible for New Zealand Superannuation through 10 years' of residency after the age of 65 from being eligible for general portability. In determining the length of time the superannuitant had lived in New Zealand, totalisation provisions arising under any applicable SSC will not apply, otherwise New Zealand could be used as a conduit for general public pension portability (particularly for Australians) without any period of New Zealand residency at all.

There are some advantages accruing to the Government from the proposed changes as they will reduce the amount payable outside of New Zealand where the superannuitant has had only the minimum 10 years residency (although there is a grandfathering clause for those already receiving payments in such circumstances). The changes also address the issue of migrants who bring their elderly dependent parents to New Zealand and receive New Zealand Superannuation after 10-years residency returning home and receiving New Zealand Superannuation under the general portability

³⁴ Persons who are already receiving payment overseas of New Zealand Superannuation and would receive less under the new formula will have their payment at the 50% grandfathered under Clause 10 of the Bill.

provisions. The superannuitant is unlikely to have made any contribution to the New Zealand workforce or tax base which policy grounds would establish a case for payment of New Zealand Superannuation outside New Zealand.

A key feature of New Zealand's social security regime for many years is a direct deduction policy for benefits payable under New Zealand social security.³⁵ Under this policy, claimants for any New Zealand social security benefit are required to simultaneously claim for any foreign, publicly provided benefit they may be entitled to elsewhere. Any foreign benefits they are eligible for are deducted from the amount of the New Zealand benefit paid. While this policy applies to all social security benefits, it primarily applies to New Zealand Superannuation and to a lesser extent the Veterans' Benefit. The objective of this policy is to reduce the cost to the New Zealand Government of funding social security benefits. This policy is longstanding and reflects that New Zealand traditionally has gained population through migration with inflows being greater than outflows. It is arguably appropriate in this context, given that full entitlement to New Zealand Superannuation can be obtained after only 10 years' residency; a very short time period by international standards.³⁶

The direct deduction policy can be criticised on both economic and equity grounds.³⁷ One particular limitation of the policy is that a deduction is only made for amounts payable from a foreign public pension scheme and not for pensions paid from foreign private schemes.³⁸ The SSA 1964 is somewhat unclear on this point but to date it has only been enforced in respect of pensions paid by publicly administered foreign pension schemes.

This delineation between public and private pensions can be somewhat problematic to apply with respect to retirement income arrangements found offshore. An increasing number of countries are substituting private pensions in place of public ones; however these private schemes are often underwritten with substantial tax preferences as is the case in Australia. Therefore it could be argued that they are to some extent public pensions although under the deduction policy they are treated as private ones. Other countries' pension schemes can have characteristics, from a New

³⁵ Under section 70 of the SSA 1964. This policy also applies to all benefits, not just New Zealand Superannuation.

³⁶ Refer footnote 19.

³⁷ Refer Lazonby, *ibid*.

³⁸ Presumably this is because private New Zealand pensions are not taken into account when New Zealand Superannuation is paid.

Zealand perspective, of being both a universal public pension and a private one (in that some the quantum of benefits is related to the amount the claimant earned prior to retirement) but are administered by a public agency as one pension scheme. Pensions paid from such schemes are treated as being wholly public even though in some respects they correspond to a private employment-based superannuation scheme in New Zealand. While no explicit criteria have been released for classifying foreign pensions for the purposes of the deduction test, it appears the crucial factor in classifying them is whether the pension is privately or publicly administered. Therefore, foreign hybrid-type pension schemes fare poorly under the deduction policy. This treatment will be revised when the Social Assistance (Payment of New Zealand Superannuation and Veterans Pension Overseas) Amendment Bill 2009 is passed. Under the Bill it is proposed to exclude from the deduction policy the proportion of state pensions built up by voluntary contributions (for example, the UK Second State Pension scheme).

The direct deduction policy has also stood in the way of New Zealand negotiating more SSCs.³⁹ In effect the policy undermines the principle of two governments sharing the costs of meeting a person's pension according to the time they have spent in each country.⁴⁰ This is because under the deduction policy, the total amount of a pension paid to a claimant will be determined by New Zealand only. An individual retiring in New Zealand with a generous public pension entitlement from another country could possibly receive no New Zealand Superannuation thus relieving New Zealand totally from the cost of paying pensions to such individuals despite them having spent part of their working lives in New Zealand. On the other hand there is a case for the deduction policy on grounds of preventing a "windfall" where a person receives two public pensions because they split their working life between two countries and qualified for a public pension in both of them without invoking the totalisation provisions of a SSC.⁴¹ New Zealand, however, is not the only country that has a deduction policy for social security.⁴² It can also be argued that Australia effectively has a form of deduction policy due the income and asset tests applying to their Age Pension. A claimant with a foreign pension will have that pension taken into account under the income test.

³⁹ *Briefing to the Incoming Minister –Improving Wellbeing for all New Zealanders*, Ministry of Social Development, Wellington, New Zealand 2002, Part 2, Chapter 3, page 6. Lazonby, *ibid*, lists in her paper Austria, Germany, Korea (South) and the US (at p. 5).

⁴⁰ The relative generosity of New Zealand Superannuation may also undermine the attractiveness for some countries of negotiating SSC with New Zealand. If the overseas pensions were based on a low level, the deduction policy makes a retiree better off than if they received an apportioned pension.

⁴¹ This could occur where one of the countries was prepared to pay their public pension to persons living outside the country. Refer Christians, *ibid*, pages 706-7 and 712. Lazonby, *ibid*, also makes this point (p. 9) although her paper is largely critical of the direct deduction policy due to other inequities it creates.

⁴² A. Christians, National Report USA, chapter in *Double Taxation Conventions and Social Security Conventions*, Michael Lang (editor), Linde Verlag, Vienna, 2006, pp 683-748 at pages 689, 706-7 and 712.

5.0. NEW ZEALAND'S SOCIAL SECURITY CONVENTIONS

The main stated purposes for which New Zealand has entered into SSCs are:

- To encourage the free movement of labour between New Zealand and other countries. (This is affecting more persons due to increased migration and the effects of globalisation.)
- To ensure that when a person has lived or worked in more than one country, each of those countries takes a fair share of the responsibility for meeting the costs of that person's social security coverage.
- To enable New Zealand residents the freedom to retire where they want.⁴³

5.1. New Zealand's SSC Networks

As of July 2008, New Zealand has negotiated nine SSCs⁴⁴ with the following countries:

--- INSERT TABLE 1 HERE ---

This figure can be compared to the 35 DTAs negotiated over a similar period. In addition New Zealand has entered into "Health Services Agreements" with Australia and the UK which will not be considered further in this paper.⁴⁵ It has been disclosed that New Zealand is in various stages of negotiating SSCs with five more countries.⁴⁶

In comparison to Australia and the United States, New Zealand's SSC networks are relatively limited. As at 1 August 2007, Australia has entered into 22 SSCs (including 4 that have been

⁴³ Quick Facts, Government Services, Income Support from www.stats.govt.nz.

⁴⁴ Termed "Agreements on Social Security". No significance should be placed upon the use of the term "agreement" instead of "convention". The terms are used interchangeably.

⁴⁵ These agreements have been entered into with the objective of providing emergency medical assistance for temporary visitors from one country who fall ill while visiting the other country. There is considerable travel by New Zealand and British citizens between New Zealand and the United Kingdom and by Australians and New Zealanders between their respective countries. The provisions in these agreements do not cover migrants and only cover basic emergency medical treatment, not continuing treatment for persons with chronic conditions. The agreements both apply on a "knock-for-knock" basis, in that there is no provision under the agreements for one contracting state to reimburse the other state for costs incurred in respect of the former state's citizens.

⁴⁶ Croatia, Cyprus, Hungary, Malta and Sweden. New Zealand has a DTA with Sweden, but not with the others. One of the objectives of the changes to be made with the enactment of the Social Assistance (Payment of New Zealand Superannuation and Veteran's Pension Overseas) Bill 2009 is to enable New Zealand to enter into a SSC with the United States. The author has been informed by public officials in the New Zealand Ministry of Social Development that New Zealand's existing social security laws have provisions that are incompatible with the US social security regime.

concluded but not yet come into force)⁴⁷, the US has entered into 23 SSCs (including 2 that have been negotiated and waiting ratification) and Canada has over 51, although this number is inflated by the large number negotiated with small Caribbean states.

These differences in the numbers of SSCs concluded are likely for several reasons. Firstly, the US, Canada and Australia have received migrants from a much wider range of countries than New Zealand, which instead encouraged migration from mainly Great Britain, Ireland and, to a lesser extent, the Netherlands in the period from the late 1940s to the 1970s. Therefore the number of individuals who potentially fall within the scope of SSCs outside those with Australia, the UK and the Netherlands would be very limited. New Zealand is also a newcomer to negotiating SSCs as it was only in the early 1990s that New Zealand changed its domestic law to provide for general portability of New Zealand Superannuation and to enter into further SSCs.

5.2. Analysis of New Zealand's SSCs

5.2.1 Scope of SSCs

The personal scope article found in New Zealand's eight SSCs limits the application of the SSCs to certain persons on one of two grounds. These grounds are:

- Entitlement to social security benefits under one of the contracting states' domestic law; *or*
- Having a specified period "ordinary residence" in one of the contracting states.

In some SSCs the personal scope article has two limbs that require both grounds to be met. However, it can be argued that the two-limb article is no more demanding than the ones with a single limb because under New Zealand law, entitlement to social security benefits is usually dependent upon a period of residency. In virtually all of New Zealand's SSCs, a temporary presence in another contracting state of up to 26 weeks is ignored. Because the eligibility criteria for pensions vary between each country, there are not necessarily symmetrical provisions applying to each signatory to the SSC. This lack of symmetry usually is appropriate, however, to effectively coordinate and harmonise social security benefits between two parties to the SSC.

The personal scope article of New Zealand's SSCs can be categorised under four headings:

⁴⁷ A SSC with the United Kingdom was denounced by Australia and subsequently terminated by the United Kingdom in 2000. Benefits under the old SSC are being continued for claims in existence when the treaty was terminated but not for new ones. Refer D Williams, "Double tax agreements and double social security agreements" in Michael Lang (editor), *Double Taxation Conventions and Social Security Conventions*, Linde Verlag, Vienna, 2006, pp 115-134 at 131.

- (1) Residency –Australia, United Kingdom.⁴⁸
- (2) Rights under Domestic Social Security Legislation –Jersey/Guernsey, the Netherlands.
- (3) Residence & Other Criteria –Canada, Ireland, Greece.
- (4) Rights under Domestic Social Security Legislation & Other Criteria –Denmark.

In the Australian SSC, special definitions of residency for each contracting state are contained in Article 5. These are necessary because of the special “Trans-Tasman Travel Arrangement” which allows citizens of both countries to settle in the other without any substantial restriction.⁴⁹ Because of the ease of movement between the two countries and an established pattern of persons moving back and forward between the countries to reside for various periods of time, the test of “ordinarily resident” is not so easily applied in some cases.

With the Canadian and Irish SSCs, different criteria apply depending upon which contracting state a claimant has established their entitlements from. Under the Canadian SSC, New Zealand entitlements are established through residency, while in Canada it is through a person establishing a “creditable period” under Canada’s social security laws through either a period of residency in Canada or contribution to Canadian social security schemes. With the Irish SSC, the personal scope contains one common criterion being “subject to the social security laws of one or both of the contracting states”. However that status is obtained differently in each contracting state which is recognised elsewhere in the Irish SSC. In New Zealand a person becomes subject to its social security laws due to a period of residency, while in Ireland a person becomes so subject by making “qualifying contributions” under Irish social security law.

The Greek SSC is very similar to the Irish one in that it initially applies to persons who derive rights from one or both contracting states social security laws. Those rights are established under different criteria under each respective state’s rules. For New Zealand it is residency by a New Zealand citizen or permanent resident while for Greece it is a Greek citizen who acquires rights to social security benefits due to an appropriate “period of insurance”.

⁴⁸ In the SSC with the United Kingdom, there is no specific Personal Scope Article. The convention is based upon the concept of “usually resident”. Given the historical ties between the UK and New Zealand (especially as a source of migrants) this criteria is more appropriate to apply given the large numbers of persons who have residency rights in both countries or who are citizens of both countries.

⁴⁹ Originally permanent residence was automatically granted for each country’s citizens upon arrival from the other country, but from February 2001, New Zealand citizens are no longer granted permanent residence in Australia upon arrival.

The Danish SSC has two criteria which apply to persons from both contracting states. They are being “subject to the social security laws of one or both of the contracting states” as well as being a citizen of one of the contracting states. New Zealand residents (rather than just citizens) are covered by the SSC under the personal scope article, but not equivalent Danish residents who are non-citizens. This difference probably reflects the fact that only 75% of the New Zealand population are New Zealand citizens –the remainder are persons present on permanent residence or work visas. However, it is very unlikely that a person seeking benefits under the Danish SSC would not be a citizen of either contracting state.

The Danish SSC also applies to persons resident in either contracting state who are refugees or stateless persons. These types of person are not explicitly mentioned in other SSCs but are likely to be covered under the residency test or subject to social security law criteria.

It is interesting to compare the personal scope provisions of DTAs and SSCs. Under New Zealand’s DTAs the concept of residency is paramount. Under New Zealand’s SSCs the personal scope articles specify either residency in a contracting state or entitlement under one of the contracting state’s social security laws. To be eligible for New Zealand social security benefits a person would have to be “ordinarily resident” in New Zealand, which in practice they would almost certainly be resident for income tax purposes under the 183 day or permanent place of abode test, despite the absence of any explicit link between New Zealand income tax and social security law on this issue.

Article 5 of the Australian SSC is interesting to examine in this context. Under the SSC, an “Australian resident” is defined in Australia’s social security laws *and* includes a New Zealand citizen who is not a holder of a permanent residence visa but is lawfully residing in Australia. In determining under this article whether a person is residing in Australia, “regard must be had to the following factors:

- (a) the nature of the accommodation used by the person in Australia;
- (b) the nature and extent of the family relationships the person has in Australia;
- (c) the nature and extent of the person’s employment, business or financial ties with Australia;
- (d) the nature and extent of the person’s assets located in Australia;
- (e) the frequency and duration of the person’s travel outside Australia; and
- (f) any other matter relevant to determining whether the person intends to remain permanently in Australia.”

Under Article 5(2) a “New Zealand resident” is defined as a “person who has or had New Zealand as their principal place of residence except where they were unlawfully resident or present in New Zealand or lawfully resident and present in New Zealand” on a temporary visa.⁵⁰ The six criteria above are also very similar to the ones that would be taken into account in determining whether a person had a “permanent place of abode” in New Zealand under the New Zealand tax residency rules.

5.2.2. *Material Scope*

The types of benefit covered by New Zealand’s SSCs vary between each convention. The following table summaries the benefits covered by each convention and are categorised with reference to the New Zealand equivalent benefit:

--- INSERT TABLE 2 HERE ---

There are differences between the coverage of the various SSCs. All of the SSCs cover income maintenance for three main categories of persons:

- Retired persons over 65 years of age. This includes Veterans’ Pensions.
- Invalids –persons who are permanently disabled.
- Widows (and Widowers under the Domestic Purposes Benefit).

Relatively few cover unemployment, sickness or orphans’ benefits. The first two categories are ones where coverage is likely to vary the most between contracting states and New Zealand. New Zealand domestic law does not permit claimants for the first two benefits to leave the country and retain their benefits unless special circumstances apply.⁵¹ Therefore, the exclusion of these types of benefits from SSCs may be of little practical significance.

Because New Zealand does not levy separate taxes or levies to fund social security benefits, none of New Zealand’s SSCs cover the issue of the liability for payment of social security levies or taxes. Similarly, none of New Zealand’s DTAs do either.

⁵⁰ Such as a visitor’s visa, temporary work or study visa.

⁵¹ The Chief Executive of the Work and Income New Zealand can authorise payments for up to 4 weeks (6 weeks for some benefits) for absences from New Zealand on specified grounds e.g. medical treatment, humanitarian reasons. Social Security Act 1964, section 77.

Where this issue can become problematic is where a person is resident in New Zealand for income taxes purposes and has earned income offshore usually from personal exertion (employment) during a short-term absence. They will be liable for New Zealand tax on their foreign income and will receive a foreign tax credit for any foreign taxes paid in the nature of income tax. However, they will not receive any credit for foreign social security contributions or levies deducted offshore.⁵² This can result in a person effectively funding two separate social security programmes at the same time – one through New Zealand income tax and the other through specific social security taxes/levies paid offshore. There is no provision in New Zealand law to remedy such outcomes. Therefore, it becomes essential for New Zealand residents working overseas to ensure that they are not resident in New Zealand for tax purposes while they are absent. This can sometimes be difficult to achieve due to the primacy of the “permanent place of abode” test in New Zealand’s tax residency rules.

5.2.3. Interpretative Provisions

All of New Zealand’s SSCs contain definition articles which are similar to those found in New Zealand’s DTAs. The definition article contains a limited range of definitions for the purposes of the convention, with undefined terms being given the meaning assigned to the term under the social security law of either contracting state. In some SSCs this is phrased as giving an undefined term “the meanings assigned to them in the legislation concerned”, the difference of which here is unlikely to be of any significance. Only the SSC with Ireland has a slightly different wording to the other seven SSCs with respect to definitions. If a conflict arises between the definitions contained in the social security laws of New Zealand and Ireland, the conflict is to be resolved by taking the definition of “whichever of those laws is the more applicable to the circumstances of the person”.

There are no New Zealand authorities regarding undefined terms in any New Zealand SSC or DTA. Given that three-quarters of New Zealand’s SSCs have been entered into since 1990, it is highly unlikely that a dispute would have arisen over such an issue. New Zealand is likely to follow the usual practice with DTAs where undefined terms have the meaning assigned to them under the domestic law of the “source” country. Therefore, the contracting state paying a social security benefit pursuant to a SSC is likely to have their domestic law definition prevail in the event of a conflict between the meanings assigned to an undefined SSC term.

Whether an undefined term is to have a static or ambulatory meaning assigned to it is even more unclear than the issue of which approach applies to undefined terms in New Zealand DTAs. If a

⁵² Refer *TRA Case F11*, (1983) 6 NZTC 59,613.

leading Canadian authority⁵³ is followed in New Zealand, the courts could well uphold a static definition for undefined terms in a DTA,⁵⁴ despite Commentaries to the OECD Model Convention that require an ambulatory meaning being given. The SSCs do not give any direction on this issue and a similar approach is likely to be adopted as that for undefined terms in a DTA.

5.2.4. Allocation Provisions

While the totalisation provisions address the issue of eligibility for benefits, the issues of the amount of benefits to be paid and which state is responsible for paying those benefits and in what proportions are dealt with under the allocative provisions. Two alternative approaches are adopted in New Zealand's SSCs -one which could be termed a "knock-for-knock" approach while the other an "allocative" approach. Under the "knock-for-knock" approach, the contracting state where the claimant retires assumes responsibility for the cost of providing benefits even though eligibility for those benefits has been established through residence between two contracting states. With the allocative approach, the two states pay a part pension based upon the proportions of time the claimant has lived in each state. Thus the cost of providing benefits is proportionately split between the two contracting states.

The UK SSC employs both approaches in parts. A person retiring in either state receives the pension according to the domestic law of the state where they retire. As New Zealand Superannuation cannot be paid outside of New Zealand, an individual who retires in the UK is entitled to the "basic retirement pension at the full standard rate" under UK law if they received New Zealand Superannuation prior to relocating to the UK. If they did not, the amount of the UK State pension they receive is determined according to the contributions they made while resident in the UK and residency in New Zealand under the totalisation provisions. This aspect of the SSC can be regarded as "knock-for-knock" as the UK assumes responsibility for paying a pension to someone who has spent part of their working life in New Zealand.

In the other direction an individual with UK pension rights who retires in New Zealand, may be eligible to receive a UK pension in New Zealand under UK law. If they are eligible for New Zealand Superannuation, any UK pension they receive is deducted from any payments of New

⁵³ *The Queen v Melford Developments, Inc.* (1982) CTC 330.

⁵⁴ The one exception is the Australia-New Zealand DTA which expressly requires an ambulatory approach to be adopted for undefined DTA terms.

Zealand Superannuation under the deduction policy. This is expressly authorised by the SSC.⁵⁵ Thus, in this direction the SSC is allocative. In each case, however, the amount of benefit an applicant receives is determined by the domestic law of the state in which they receive the benefit.⁵⁶

In respect of the Australian SSC, the same principle applies in both directions. The amount payable to a claimant is determined by the domestic law of the state where they retire not where they have spent their working life. A fundamental problem with this approach arises because the Australian Age Pension is income and asset tested while New Zealand Superannuation is a universal benefit. As a consequence, a person who qualifies for New Zealand Superannuation and then retires in Australia may suffer a reduction in their Superannuation (or lose it entirely) even though they would have been entitled to New Zealand Superannuation at the full rate if they had remained in New Zealand. On the other hand, an individual who retires in New Zealand may be entitled to New Zealand Superannuation at the full rate even when they had spent none of working lives there and would have received no Australian Age Pension due to the income and asset tests if they had remained in Australia.

While under the Australian SSC the amount of benefits are determined by the state where the claimant retires, the burden of funding that pension is not necessarily evenly shared between the two states. During the 1990s, the New Zealand Government agreed to make a direct “top-up” payment to the Australian Government to meet part of the cost of paying benefits to former New Zealand residents residing in Australia. This payment was directly negotiated between the two governments and was not directly linked to actual claims made by New Zealand residents residing in Australia.

With the negotiation of the 2002 SSC, this top-up payment has been replaced with a different arrangement similar in effect but directly linked to actual claims arising under the SSC provisions. From 2002, the New Zealand and Australian Governments will each pay their share of pension and disability benefits based on the years of working life spent in each country between 20 and 65 years of age, while the amount paid will remain determined according to rules of the state where the claimant retires. Therefore if a New Zealander retires in Australia and is entitled to only a part-pension under Australian law, the full cost would be met by New Zealand due to the period of their

⁵⁵ Article 15. Persons who took up residency in New Zealand prior to 1 January 1970 are not subject to the deduction policy under this Article.

⁵⁶ Except where their UK pension is in excess of the New Zealand Superannuation.

working life the claimant had been resident in New Zealand. If, however, the claimant is not entitled to any Australian Age Pension because they did not meet the income and asset tests, New Zealand is relieved from having to pay any New Zealand Superannuation to them. This means the claimant cannot even retain an apportioned amount of New Zealand Superannuation based on the time they had spent in New Zealand during their working life. Because of these provisions, the Australian SSC is unique amongst New Zealand's SSCs in that it can make an individual worse off than what they could be entitled to under the general portability provisions for New Zealand Superannuation.

In the other direction, while the Australian contribution to a New Zealand pension is still based upon the period the claimant previously lived in Australia, the amount of the Australian Government's contribution is determined by applying the income and asset tests used for the Australian Age Pension at the time the person first claims New Zealand Superannuation. Once these tests are applied at the time of application, the amount determined cannot be subsequently reviewed. Therefore, if a claimant's financial position deteriorates after they applied for the New Zealand pension, the Australian Government is not required to increase their contribution even though the claimant would be entitled to a larger Australian pension if they continued to reside in Australia.⁵⁷ In July 2007, the Australian Government relaxed the income and asset tests for the Australian Age Pension and it is unclear whether Australian retirees living in New Zealand will be reassessed to determine if the Australian Government can be required to make an increased contribution to the New Zealand Government for those retirees.

Whether these provisions in the Australian SSC favour Australia or New Zealand from a fiscal perspective, depends upon the relative flows of retired persons between the two countries and the wealth of these persons. For retirees with no substantial assets, the cost of meeting their pensions is met by the two states largely in proportion to the time the individual spent their working life in each state and from a fiscal perspective, favours neither state particularly. For individuals with wealth, New Zealand gains if they retire in Australia as they may forgo New Zealand Superannuation at the full rate with the possibility of New Zealand having to pay nothing in some circumstances. On the other hand if wealthy individuals retire in New Zealand, New Zealand is likely to have to assume a

⁵⁷ The underlying administration problem is for the Australian Government contribution to be reviewed annually once the claimant has retired in New Zealand, claimants would have to undergo an annual review of their income and assets. It would be difficult to secure their cooperation as the review would have no effect upon the amount of New Zealand Superannuation they would receive in New Zealand nor would other recipients of New Zealand Superannuation be required to undergo such a review.

substantial portion (if not all) of the costs of paying them New Zealand Superannuation at the full rate, even where the retiree spent all of their working life in Australia. Given the size of some individual's superannuation interests in Australia, the likelihood of Australians retiring in New Zealand being relatively wealthy may not be insubstantial.

With the six remaining SSCs, a different approach is taken to pensions. Each contracting state agrees to pay a pro-rata pension to an eligible person residing in the other contracting state based on how long the person has resided in the first mentioned state. In calculating the amount to be paid by each state, the equivalent of the "source" state is prohibited from taking into account any pension a person would receive in the other contracting state where the benefit is claimed (i.e. "residence state"). This precludes New Zealand from applying its deduction policy where New Zealand Superannuation is paid overseas pursuant to the SSC.

On the other hand, the SSCs do not restrict the application of the domestic pension law of the state where the person retires (i.e. "residence" state) in calculating the amount of pension that state will pay. Accordingly this does not prevent New Zealand applying its foreign pension deduction policy under its domestic law. Only one of these six SSCs however contains a reference to the deduction policy. Under Article 18 of the Danish SSC, any Danish pension payable under the SSC is to be directly deducted from "the New Zealand benefit in accordance with New Zealand legislation" although the states who are the other party to other five SSCs would be aware that New Zealand would apply such treatment. Surprisingly, the SSC does not contain any similar reciprocal provision for Denmark.

These arrangements for pensions under these SSCs have some similarities to the way double taxation is relieved for cross-border income flows under a DTA. None of the SSCs place any limit upon the state where an individual has retired as to the amount of benefit that must be paid. This is similar to most DTAs where there is no explicit limitation placed upon the residence state as to how much they can tax their residents.⁵⁸ The deduction policy enforced by New Zealand is akin to a foreign tax credit where the residence state determines the amount of tax payable in respect of foreign income with the residence state collecting the residue of tax after a credit for any foreign tax paid. The proportional system used in the other direction under most of New Zealand's SSCs is more akin to an exemption for foreign-source income.

⁵⁸ Unless the residence state is required to exempt an amount from tax.

5.2.5. *Cross-Border and Posted Workers*

Five of New Zealand's SSCs contain special articles⁵⁹ applying to posted or seconded workers sent from one contracting state to the other contracting state in the service of an employer from the first mentioned state. The posted worker articles in these five SSCs vary to a significant degree as can be seen in the following table:

--- INSERT TABLE 3 HERE ---

Of the five New Zealand SSCs that contain a posted worker article, two of them only apply to persons seconded to New Zealand from the other contracting state (Greece, The Netherlands) but not to New Zealand persons seconded in the opposite direction. The remaining three SSCs apply to posted workers in both directions.⁶⁰ The period of secondment covered by the relevant articles also varies significantly from two to five years, although in all cases it can be extended in special circumstances. In two of the SSCs, the article is permissive which allows the contracting state to apply the article if they so wish, while with two (Denmark, Guernsey/Jersey) the provision is a requirement. Only the Danish SSC contains provisions to make it clear that the posted worker article does not apply to workers employed in international transportation enterprises. It is presumed that the same exclusion would apply to persons under the other SSCs despite the absence of any specific reference. The relevant article in the Danish SSC also accords the treatment specified to accompanying family members of the principal employee, which is also not found in the other SSCs.

5.2.6. *Anti-Discrimination Clauses*

All but one of New Zealand's SSCs contain an anti-discrimination article -usually Article 4 of the convention. The exception is the UK SSC. The anti-discrimination article is usually termed an "Equality of Treatment" Article and requires each contracting state to treat persons with rights arising under provisions of the SSC equal treatment under the applicable legislation of each contracting state. In some SSCs (Greece, Ireland) include specific mention that the equality of treatment undertaking apply also to persons never subject to the laws of Ireland or Greece and to dependents and survivors of such persons.

⁵⁹ Sometimes termed "Detached Workers" or "Special Persons" in SSCs.

⁶⁰ A possible reason for this article applying in only one direction with the Greek and Dutch SSCs is the absence of any social security taxes in New Zealand.

Around half of New Zealand's DTAs also include non-discrimination articles. New Zealand as a matter of policy has resisted inclusion of such articles in its DTAs and only 16 out of 35 DTAs contain such an article.⁶¹

5.2.7. "Most Favoured Nation" Clauses

Unlike with DTAs, New Zealand's SSCs do not contain any "most-favoured nation" (MFN) provisions. Most New Zealand DTAs contain such provisions usually in respect of two matters. The first is withholding tax rates applying to payments of dividends, interest and royalties paid by New Zealand residents to non-residents. The second is with respect to inclusion of non-discrimination clauses in future DTAs where New Zealand has resisted the inclusion of such an article in the one negotiated.⁶² Such MFN clauses place restrictions upon New Zealand's ability to negotiate future DTAs without extending concessions in those areas to existing DTA states. In the area of social security the absence of MFN clauses means that New Zealand has greater freedom in negotiating future SSCs.

5.2.8. Dispute Settlement

All of New Zealand's SSCs contain provision for resolution of disputes. In the Greek and Irish SSCs, the undertakings are limited and require the competent authorities of the Contracting Parties to "resolve, to the extent possible, any difficulties which may arise in interpreting or applying this Agreement according to its spirit and fundamental principles". There is no provision for arbitration.

A number of SSCs contain the same provision but are supplemented by additional undertakings. The Danish, Canadian, Dutch and Australian SSCs contain the same provision supplemented by undertaking for arbitration if the dispute has not been settled within 6 months. The arbitration tribunal is to be composed by persons agreed to by both contracting states with the tribunal's procedure to be similarly agreed in advance.

The British and Guernsey/Jersey SSCs contain a similar dispute settlement article initially providing for the dispute to be settled by the competent authorities. Failing that the UK SSC requires the

⁶¹ Another eight countries have the right to enter into negotiations for the inclusion of a non-discrimination article into their existing DTA with New Zealand but have not yet done so.

⁶² Of the 35 DTAs New Zealand has negotiated, 16 contain a non-discrimination clause. Another eight DTAs contain MFN clauses which allow the other contracting state the right to enter into negotiations for the inclusion of a non-discrimination clause in their DTA if New Zealand subsequently agrees to such an article in any subsequent DTA negotiated. With all of these eight New Zealand has subsequently agreed to such articles in another DTA but these states have not yet exercised their right to negotiate for inclusion of a non-discrimination clause in their DTA.

matter to be settled by an arbitration tribunal, the composition of which is explicitly specified in the Article. Provision is made also to refer the matter to the President of the International Court of Justice or similar person. Tribunal decisions are to be made on a majority vote and costs shared by both contracting states.

The Guernsey/Jersey SSC has a similar provision, except a dispute unable to be resolved by the competent authorities is to be referred to a “joint commission” with the concurrence of the UK. This joint commission is roughly the same as the arbitration tribunal specified in the UK SSC. There is no power to refer the dispute to the President of the International Court of Justice, however.

5.2.9. Recovery of Debts

Most of New Zealand’s SSCs contain provisions that require each contracting state to recover overpayments from amounts being paid to a claimant by the other contracting state. The exceptions are the SSCs with Canada and Guernsey/Jersey, which do not contain such articles. The recovery provisions, however, do not allow the competent authority of one contracting state to access the courts of the other contracting state to enforce collection of any overpayments. This is consistent with the principle of international law that the courts of one jurisdiction do not enforce the administration of revenue law of another state nor collection of revenue debts.

New Zealand has entered into arrangements with Australia and The Netherlands that allow enforcement recovery of New Zealand tax debts in those countries. In the case of Australia this right arises under New Zealand law⁶³ and also in the DTAs with Australia,⁶⁴ Poland and the UK⁶⁵ while with the Netherlands a special tax recovery agreement has been entered into.⁶⁶ The SSCs with these two countries also contain similar provisions with respect to the recovery of overpayment of benefits. In the Dutch SSC, Article 22 covers assistance with recovery, while Part A of the Schedule to the Australian SSC contains similar (but more extensive) provisions.

⁶³ Sections 8A to 8I, Reciprocal Enforcement of Judgments Act 1934.

⁶⁴ Article 27 inserted by a Protocol to amend the DTA signed on 15 November 2005 with effect from 22 January 2007.

⁶⁵ Article 25A inserted by a Protocol to amend the DTA signed on 11 November 2003 with effect from 28 August 2008.

⁶⁶ Mutual Recovery Assistance Tax Recovery (Netherlands) Order 2004. Refer Smith, A M C; “New Zealand Moves Towards International Tax Recovery Agreements”, *Asia-Pacific Journal of Taxation*, Volume 5, No. 3, Autumn 2001, pages 53-64. In addition the DTA negotiated with Poland contains a Recovery of Tax Article (Article 25) in the original DTA.

6.0. ANALYSIS

In common with DTAs, SSCs have revenue implications for the states that are parties to the SSC. Unlike DTAs, which deal with many types of income, the ultimate fiscal impact of a SSC is to some degree influenced by immigration regulations which can place considerable barriers to individuals working and residing outside their country of origin. Thus, movement of individuals between countries for employment and residency is much more tightly controlled than is the flow of capital in the global economy. Unlike the risk of treaty-shopping arrangements arising to take advantage of certain favourable provisions of a DTA, individuals are not easily able to migrate to another country because of a favourable SSC with a third country.

New Zealand Governments for more than two decades have been concerned about the future costs of New Zealand Superannuation. While the decision to start negotiating SSCs in 1990s was justified upon cost grounds, the practical impact of the five more recently negotiated SSCs will be very small. The potential gains from the future negotiation of SSCs with other Western European countries is also likely to be small given that very few migrants have settled in New Zealand from those countries. Given the patterns of recent migration to New Zealand, greater efforts should be made to negotiate SSCs with countries that have provided a more significant number of migrants to New Zealand such as South Africa or Korea.

Where the greatest fiscal risks in the international arena arise for New Zealand Superannuation are in two main areas. The first is the decision to introduce general portability for New Zealand Superannuation in the early 1990s and the second is the SSC with Australia. A more basic problem that underpins these risks is that the residency (eligibility) requirement for New Zealand Superannuation is very short (10 years) when compared to an individual's working life.

6.1. Fiscal Risks From General Portability

Despite concerns about meeting the future costs of New Zealand Superannuation arising from the mid 1980s, in the early 1990s New Zealand introduced general portability of New Zealand Superannuation to all non-SSC countries at 50% of the domestic rate free of New Zealand tax. Later this was extended by providing full-rate payments (free of tax) to persons retiring to 22 Pacific Island territories. These general portability rules have allowed elderly people who have migrated to New Zealand with their adult children as dependents, to become eligible for New Zealand Superannuation after 10 years of residency and return to their country of origin with a half-pension without any major contribution to the New Zealand tax base.

The changes to general portability which will take effect when the Social Assistance (Payment of New Zealand Superannuation and Veterans Pension Overseas) Amendment Bill 2009 is passed will address some of the concerns raised above where a portable pension can be obtained with only 10 years of residency. On the other hand, the more generous levels of portable pension that may become available to those who have been resident in New Zealand for more substantial periods of time may encourage other New Zealand superannuitants to relocate offshore. This is not unrealistic given that a number of developing countries offer special “retirement” visas to attract retirees to their country.⁶⁷ Such relocation may enable superannuitants to achieve a higher standard of living (given the lower cost of living in developing countries) as well as a warmer climate –an issue often of concern to older people. The pension portability provisions, however, may relieve New Zealand of some health care costs associated with older individuals as they are likely to have to meet the costs themselves in the country where they relocate to.

The portability provisions can be criticised on grounds that payments of New Zealand Superannuation outside of New Zealand are made free of New Zealand tax. This means that the net fiscal cost of these pensions will be greater than for those paid to those who are retired in New Zealand. In addition, no GST will be collected as the superannuitant is unlikely to consume goods and services within New Zealand’s borders. The decision to exempt payments of New Zealand Superannuation from tax when paid outside New Zealand probably reflects the prevailing treatment of pensions under most DTAs for the source state to concede taxing rights in favour of the state where the pensioner is resident. There is no need, however, for New Zealand to follow this in its domestic law treatment. By imposing New Zealand tax on such payments the superannuitant may be able to claim a foreign tax credit in the country of residence, while if the pension is exempt offshore,⁶⁸ the superannuitant will not be in a more advantageous position tax wise than an superannuitant who had remained resident in New Zealand.

6.2. Fiscal Risks From The Australian SSC

The SSC with Australia also has fiscal risks for New Zealand. Unlike the other SSCs New Zealand has entered into, immigration controls upon citizens moving between the two countries are minimal. Therefore the potential impact of the SSC could be substantial given the ability of citizens of either

⁶⁷ For example, Malaysia, Thailand, Costa Rica.

⁶⁸ Two of the countries that offer retirement visas (Malaysia, Thailand) will exempt foreign-sourced income derived by retirees from tax.

country to move to the other country. While at the moment the amounts paid to Australian originating pensioners in New Zealand pursuant to the SSC are low, the cost could significantly increase if persons who have spent a large part of their working lives in Australia decide to retire in New Zealand. This may not necessarily be a remote possibility given the first large numbers of New Zealanders who migrated to Australia in the late 1960s-early 1970s are now reaching retirement age and may have some desire to return to New Zealand.

While the SSC with Australia allocates the cost of paying pensions between the two countries according to time spent in each, the problem arises whereby the amounts paid are determined according to the each country's own pension rules. As New Zealand Superannuation is universal, any other income is not taken into account which means in the case of a wealthy person who retires in New Zealand, the Australian Government may pay very little in respect of that person's residency in Australia and the full cost of the pension will fall to New Zealand. Because the deduction policy is not applied to private pensions, any such pension the person may have is not taken into account. In the other direction, if a person who has spent most of their working life in New Zealand retires in Australia, the New Zealand Government can avoid the cost of providing a pension to them if the person has other income.⁶⁹ Ironically this could make them worse off than if they had retired to any other country given the general portability provisions. This anomaly arising from the Australian SSC has probably favoured New Zealand to date as more New Zealanders are likely to have retired to Australia than the reverse, but there is no assurance that this will continue to always be the case.

While a subsidiary issue, another impediment to the movement of retired persons between Australia and New Zealand has been the different tax treatments of private pensions. Since 1988 all pension payments from New Zealand pension funds are exempt from New Zealand tax. This exemption does not extend to private pension payments from foreign pension funds received in New Zealand. From 1 July 2007 certain pension payments from Australian private pension plans have become exempt from tax in Australia. Under current New Zealand law, this exemption will not be recognised in New Zealand if an individual with an Australian private pension retires in New Zealand. In recognition of this problem, the two governments have announced that a study will be made into harmonising the trans-Tasman tax treatment of cross-border pension payments. as well as

⁶⁹ In October 2008 the New Zealand Court of Appeal heard an appeal by a New Zealand woman who has retired in Australia challenging a ruling that she cannot receive New Zealand Superannuation in Australia because she does not qualify for an Australian Age Pension due to the income and asset tests. Refer "Court hears appeal for super in Australia", *The Dominion Post*, Thursday 2 October 2008, page A4.

examining whether some form of harmonisation can be made between Australian superannuation schemes with the newly established KiwiSaver scheme.⁷⁰ If some sort of harmonisation is established as to the tax treatment of private pensions in both countries, then an impediment to movement of retired persons between Australia and New Zealand will be removed. This could create incentives for Australian retirees to relocate to New Zealand in order to gain access to a universal pension. The cost of this could fall solely on the New Zealand taxpayer (not an unreasonable assumption given the increasing size of some Australian's private superannuation interests) when the pensioner would have made no contribution to the New Zealand tax base during their working life.

This issue is ultimately connected to a wider issue of whether overseas private pensions should be taken into account under the deduction test. As an increasing number of countries are moving towards mandatory private pensions in substitution for public ones and often with generous tax preferences and subsidies, the artificial delineation between public and private pensions in respect of the deduction test may no longer be appropriate. Inclusion of private Australian pensions under the deduction test may be one way of addressing the fiscal risks arising under the SSC with Australia. It is also arguably appropriate given that private pensions are essentially mandatory in Australia and the significant tax preferences such arrangements receive.

7.0. CONCLUSION

New Zealand has entered into a limited number of SSCs, the majority of which were negotiated in the 1990s after a change of policy enabling New Zealand residents to access New Zealand Superannuation outside New Zealand. Until now New Zealand has encountered difficulties in negotiating further SSCs due to its insistence upon maintaining the deduction policy for foreign public pensions. The proposed changes to the deduction policy contained in the Social Assistance (Payment of New Zealand Superannuation and Veterans Pension Overseas) Amendment Bill 2009 may assist New Zealand to negotiate further SSC especially with the US.

The most important SSCs New Zealand has negotiated to date are with Australia and the UK given the migration connections New Zealand has had with these two countries. Both these SSCs are very different to the six others negotiated in the 1990s. The Australian SSC is unusual in that it

⁷⁰ It has been announced that Australia has signed a memorandum of understanding with New Zealand to allow for portability of superannuation interests between Australia and New Zealand. This would allow New Zealanders with Australian Superannuation interests to be transferred into a New Zealand "Kiwisaver" account. Refer Tamsyn Parker, "Australians agree to mobile super", *New Zealand Herald*, Tuesday, 19 May 2009.

may leave New Zealand claimants resident in Australia much worse off than if they had claimed their benefits solely under the general portability provisions in New Zealand domestic law. It also has significant fiscal risks if significant numbers of eligible Australians decide to retire in New Zealand.

The proposed changes to general portability contained in Social Assistance (Payment of New Zealand Superannuation and Veterans Pension Overseas) Amendment Bill 2009 may also create fiscal risks to New Zealand; however, the proposals are fairer to those claimants who have lived in New Zealand a long time. It is also questionable whether New Zealand Superannuation should be paid free of New Zealand tax under the general portability provisions.

TABLE 1: List of New Zealand SSCs

Australia*	2002^^
Canada*	1996
Denmark*	1997
Greece	1993
Ireland*	1993
Italy* #	
Jersey and Guernsey	1996
Netherlands*^	1990/2003
United Kingdom*	1990**

- Notes: * DTA also in force with this country.
^ Separate Tax Recovery Agreement in force with this country.
SSC negotiated but not yet ratified.
^^ Replaces a number of earlier agreements dating back to 1948.
** Replaces earlier agreements signed in 1955 and 1969.

TABLE 2: List Benefits Covered By New Zealand SSCs

	New Zealand Superannuation	Veterans' Pension	Invalids' Benefit	Widows' Benefit	Domestic Purposes Benefit	Unemployment Benefit	Sickness Benefit	Orphans' Benefit	Funeral Grant
Australia	X	X	X						
Canada	X	X	X	X	X				
Denmark	X	X	X	X	X				
Greece	X	X	X	X	X*			X	X
Ireland	X	X	X	X	X*			X	
Italy [^]									
Jersey and Gurnsey	X	X	X	X	X*		X		
The Netherlands	X	X	X	X	X				
United Kingdom	X	X [#]	X	X		X	X	X	

Notes:

* Widowers only.

[^] Negotiated but not yet ratified.

[#] Covered by separate arrangements outside the SSC.

TABLE 3: Analysis of Detached Worker Article In New Zealand SSCs

	<i>Denmark</i>	<i>Greece</i>	<i>Guernsey & Jersey</i>	<i>Ireland</i>	<i>The Netherlands</i>
Article No. in SSC	7	5	5	5	5
Permissive (P) or Requirement (R)	R	P	R	P	P
Period of Secondment	2 years	5 years	36 months	24 months	5 years
Direction of Article	Dual	One-Way	Dual	Dual	One-Way
Special Rules for Intl. Transport Workers	Yes	No	No	No	No