The Fiscal Impact of the Trans-Tasman Travel Arrangement: Wither CER?

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ABSTRACT

The trans-Tasman travel arrangement allows Australian and New Zealand citizens to work and live in each other’s country with minimal restriction and is seen as being a key part of the closer economic arrangement (CER) between the two countries. This arrangement has its origins back to 1920 and predates the CER agreement between the two countries in by over six decades. The travel arrangement and the CER agreement, is also complemented by a comprehensive double tax agreement (DTA) and social security agreement (SSA) between the two countries.

The trans-Tasman travel arrangement was of little significance until the late 1960s when a significant pattern of migration emerged of New Zealand citizens to Australia. It has been estimated that by 2012 that over 648,000 New Zealand citizens now live in Australia.

The trans-Tasman travel arrangement underwent a significant modification when in 2000 Australia unilaterally enacted a new category of non-immigrant visa for New Zealand citizens settling there. While the basic principle of allowing New Zealand citizens the right to work and live in Australia with minimal restriction remained, migrants after February 2001 are no longer treated as permanent residents of Australia and are ineligible for a wide range of social assistance irrespective of the time they are resident in Australia. Nor are they eligible to apply for Australian citizenship unless they qualify for permanent residence status. Thus New Zealand citizens who have settled in Australia since 2001 remain essentially “guest” workers on an indefinite basis.

This paper examines the fiscal impact arising from the trans-Tasman travel arrangement after the changes in 2001. It is suggested in this paper that the existing frameworks underpinning the social security and income tax agreements between the two countries are inconsistent with the changes unilaterally made by Australia in 2001 to the trans-Tasman travel arrangement. The effects of these current policy settings mean that New Zealand citizens must return to New Zealand if they are in need of social assistance with the cost borne by the New Zealand taxpayer. Longer term if CER is to achieve the benefits sought from a single market, a more coordinated and bilaterally negotiated approach to tax, social security and labour movement needs to be adopted.
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1. INTRODUCTION

The Trans-Tasman Travel Arrangement (TTTA) allows Australian and New Zealand citizens to work and live in each other’s country with minimal restriction and is seen as being within the umbrella of the closer economic relations agreement (CER) between the two countries, comprehensive double tax agreement (DTA) and social security agreement (SSA) between the two countries.

Its origins can be traced back to the early 1920s and predates the CER agreement between the two countries in by over six decades. It was of relatively little significance until the late 1960s when New Zealand citizens started migrating to Australia in significant numbers.1 While the net flow of migrants from New Zealand to Australia has varied according to the fluctuations in the economic climate of each country, it has been estimated that by 2012 over 648,000 New Zealand citizens were living in Australia.2 The basic right of New Zealand and Australian citizens to live and work in each other’s’ country with minimal restriction remains in place today.

While that basic right remains, the TTTA effectively underwent a significant change when in 2000 negotiations for a revised social security agreement reached an impasse after Australia sought the New Zealand to reimburse the cost of funding social security payments to New Zealand citizens living in Australia. From 26 February 2001 any New Zealand citizen arriving in Australia became ineligible for a range of Australian social security benefits under

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2 Estimate of Department of Immigration and Border Protection, Australia. Refer Fact Sheet 17 – New Zealanders in Australia, National Communications Branch, Department of Immigration and Border Protection, Canberra, June 2013. This figure will include New Zealand citizens on temporary visits not intending to take up residence in Australia. It is estimated that around 506,000 to 540,000 residing in Australia (Australian Government Productivity Commission and the New Zealand Productivity Commission, Supplementary Paper D, Strengthening Trans-Tasman Economic Relations A Joint Study Final Report, 2012, at page 8). Measurement is complicated by census figures taken on country of birth, not citizenship and how persons who hold both Australian and New Zealand citizenship are classified.
Australian domestic law. In addition, a direct path to obtaining Australian citizenship was removed placing them on the same basis as citizens from other countries. These changes to the Australian social security rules after February 2001 has made a fundamental change to the TTTA for New Zealand citizens making the TTTA for them more akin to a guest worker programme.

The objective of this paper is to examine the fiscal obligations and rights of the two countries after the 2001 changes arising under the double taxation and social security agreements between the two countries. It will be argued that the changes made in 2001 to the status of New Zealand citizens in Australia under the TTTA has long-term fiscal consequences to New Zealand which may in future place it under considerable pressure as well as adverse social outcomes for Australia in hosting New Zealand citizens. These changes also mean that while New Zealand and Australia continue initiatives towards developing a single economic market of considerable breadth under CER, the labour market existing between the two countries is moving in the opposite direction. There is also the possibility that the changes made in 2001 will in the long-term create instabilities that will necessitate existing policy settings to be revised either towards greater integration or further separation of the trans-Tasman labour market.

2. WHAT IS THE TRANS-TASMAN TRAVEL ARRANGEMENT (TTTA)?
The Trans-Tasman Travel Arrangement (TTTA) is a unique arrangement established between Australia and New Zealand which allows citizens of both countries who meet minimal health and character requirements to travel between, live and work in both countries without any time limit. The absence of any qualification requirement, a common feature of most other working or permanent residence visas (beyond family or spousal visas), is particularly unusual by modern standards. The TTTA stands out when contrasted with the complex and restrictive rules over migration enforced by most developed and many developing countries today.

The origins of the TTTA date back to early colonial times and can be seen as a remnant of immigration arrangements commonly found over one hundred years ago where persons of
European origin could migrate between the various dominions of the British Empire and the United States with little formal restriction.3

The TTTA came out of joint communiqué issued by the Prime Ministers of Australia and New Zealand on 22 January 1973.4 It is an informal arrangement based on a “series of Ministerial-level agreements and understandings”5 rather than under any international treaty. Operationally it exists as specific provisions within each country’s immigration laws and regulations which reflect the intent of the two governments in making the Agreement.6 These understandings allow each other’s citizens to live and work in their country without formal restriction or time limit, and are not directly linked to other agreements (such as CER) between the two countries.

The absence of a bilateral treaty is unusual in the context of other many other arrangements between the two countries (such as CER, social security and taxation) which are covered by treaty setting out specific obligations and rights of the respective signatory states. The TTTA was established well before CER was negotiated and is not formally included as part of any CEDR agreement although there is reference to the free movement of labour with the free-trade area in the preamble of that agreement.7

The TTTA merely regularised in 1973 what had been in effect an open border for white citizens of British origin since European colonies were established in both countries. Immigration of British and Irish citizens within the British Empire and later Commonwealth had been subject to little control up to the 1960s but finally came to an end in the early 1970s

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4 Joint Communiqué Hon E G Whitlam and Hon N Kirk, Australia – New Zealand Cooperation, Wellington, 22 January 1973. It was mentioned that the TTTA would apply also to permanent residents of either country from other Commonwealth countries however that has not been upheld by Australia. New Zealand continues under the TTTA to extend the same benefits to Australian permanent residents of third countries not just Commonwealth ones.
5 From Department of Immigration and Border Protection website “New Zealand Citizens” page. The New Zealand Ministry of Foreign Affairs and Trade’s website describes the TTTA as being “not expressed in the form of any binding bilateral treaty between New Zealand and Australia, but is a series of immigration procedures applied by each country and underpinned by joint political support”.
7 Australia New Zealand Closer Economic Relations Trade Agreement and Exchange of Letters, Signed at Canberra, 28 March 1983.
when immigration between the UK and Australia/New Zealand became more restrictive around the time the UK joined the European Community in 1973. The TTTA did, however, establish rights for non-white New Zealand citizens, something that had been not available to them prior to 1973.\footnote{Refer Hawkins, F, \textit{Critical Years in Immigration: Canada and Australia Compared}, McGill-Queen’s University Press, Montreal, 1989 at page147.} Lockhart and Money summarise this background of the TTA:

\begin{quote}
The creation of the TTTA [in 1973] was the culmination of an idiosyncratic experience based largely on geographical proximity, shared colonial ties, and cultural heritage. Residents of Australia and New Zealand have been travelling back and forward across the Tasman for decades by the time the agreement [sic] was signed. The agreement was simply a recognition of an existing reality, not a proactive decision to integrate the two countries. Because the net flows across the Tasman were comparable and the wealth disparity fairly small, there was no reason for either side to oppose a codification of the trans-Tasman travel that was already occurring.\footnote{Lockhart and Money, \textit{ibid}, at page 51.}
\end{quote}

Compared to arrangements between countries established under a treaty or convention, the TTTA has a number of limitations. Firstly, because it is only an “understanding” it does not have the backing or formality of an international agreement which binds states (at least for some period of time) to particular obligations. Secondly, because of its informal nature there are no rights or obligations established with respect to social security, health, education and taxation law in each state. Thirdly, there is no obligation for “grandfathering” of rights or standing should a state wish to vary the arrangement – in fact citizens of one country resident in the other are totally present at the pleasure of the host government.

\section*{2.1 What Fiscal Issues Arise Under the TTTA?}

The TTTA permits New Zealand and Australian citizens to work and live in each other's country for an indefinite period. As a consequence this migration affects the rights of the two countries to impose tax on these migrants primarily income tax but also indirectly consumption taxes.

Once an individual establishes residence in a country, they are at some stage likely to need health and education services which are typically funded and provided by the state where they live. There is also the possibility that individuals living in a country may experience poverty or social deprivation from adverse events (such as unemployment, marital breakup,
sickness) producing the need for income and other social assistance which again is usually state funded and provided.

Similar risks can also arise with foreign tourists on short-term visits should they become sick or indigent during their stay. For this reason, a number of countries require foreign visitors to hold a return air ticket out of the country and to demonstrate a minimal financial capacity (or sponsorship) as a condition for entry or for the issue of a visa. These conditions are designed to ensure that visiting tourists do not get trapped in a country through poverty and also reduces the likelihood that they will work illegally.

2.2 How is the TTTA Applied in Practice?

The TTTA while allowing citizens of each country to work and live in the other country, it does not oblige either country to accord those citizens specific rights or privileges beyond those two basic principles. There are no specific rights to access social benefits such as social security, medical care, educational benefits or other social assistance which may arise from residency.

2.2.1 Australia

Since the TTTA came into existence in 1973, the manner in which it is applied under Australian immigration law has changed. Until 1981 passports were not needed for trans-Tasman travel by Australian and New Zealand citizens but this requirement has been enforced since July 1981 at Australia’s request although it is not a demanding requirement especially in the absence of national identity cards issued by either government. In 1994 Australia extended its visa requirements to all non-Australians arriving in Australia, however for most New Zealand citizens this change was not noticeable as a special category visa (SCV) was automatically granted on arrival without the need for prior application (although airlines are required to forward details of passengers en route to Australia and New Zealand through the APIS system from when they check in). The SCV visa is regarded as a temporary visa\[10\] under immigration rules although holders can remain indefinitely in Australia. For some other purposes it may be treated as a permanent visa, thus being somewhat of a hybrid giving rise to a number of problems.

\[10\] It is regarded as temporary as eligibility for, and retention of, the visa is conditional on the holder being and remaining a New Zealand citizen.
When the TTTA first became operational, each country accorded the same status to each other’s citizens which was almost equivalent to their own with respect to social security and other benefits (such as health and education). As the trend emerged from the late 1960s for migration under the TTTA to be largely in one direction (from New Zealand to Australia) and anecdotes of welfare abuse by some New Zealand migrants, social security arrangements between the two countries were renegotiated several times as well as domestic social security rules revised. Initially a stand down period of 6 months was introduced in Australia for access to the unemployment benefit in 1986. When Australia introduced the SCV for New Zealand citizens in 1994, the 6 month waiting period was extended to single parent benefits. In 2000 a two year stand down period was introduced which was also extended to widows and partners of age and disability pensioners which brought them into line with other permanent residents of Australia.

In addition to access to social security, New Zealand citizens also had access to Australian citizenship after a period of residency as the SCV was treated as a residence visa for citizenship purposes. In practice few New Zealand availed themselves of this opportunity due to the cost involved and the relatively few additional benefits citizenship would bring (such as the right to vote and work for the Australian civil service).

As a result of negotiations for a revised social security arrangements in 2000 and 2001, a distinction was made between New Zealand citizens who had received a SCV prior to 26 February 2001 and those that obtained it after that date. Individuals who received the visa prior to 26 February 2001 are known as “protected SCV holders” while those afterwards are termed “non-protected SCV holders”. Non-protected SCV holders are ineligible for certain Australian social security and other related benefits irrespective of their time of residency in Australia. While these non-protected SCV holders and their children are still eligible for Commonwealth funded places in higher education they are ineligible for the HECS-HELP

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12 The main benefits denied are the major ones for unemployment (Newstart Allowance), youth (Youth Allowance), sickness (Sickness Allowance) and emergency benefit (Special Benefit). Some benefits can be paid for up to 6 months following 10 years residency on a one-off basis. Access to Child related benefits (Family Tax Benefit, Baby Bonus, Child Care Benefit and Parental Leave Pay) are retained as is access to healthcare assistance (Medicare).
scheme to fund tuition fees. They are also ineligible for other income related support for tertiary study (Austudy and Commonwealth Scholarships etc).

The restrictions introduced in 2001 by the Federal Government have flowed on to a number of other Federal programmes (HELP-HECs scheme mentioned earlier and the newly introduced NDIS) and has also adopted by a number of states and territories as well as charitable institutions affecting access to housing and disability support, although there was no requirement by the Federal Government for them to do so. Disaster relief assistance was another area where non-protected SCV holders were denied assistance although there was special dispensations made for the 2011 Queensland floods. New Zealand citizens remain also eligible for the Australian Age Pension, Disability Support Pension and the Carer Payment which are covered by the SSA between the two countries. New Zealand may, however, be required to contribute to the funding of those benefits to a disproportionate degree which is discussed later in this paper.

It has been argued that the non-protected SCV holders are in general treated more generously than temporary residents from other countries, however, that is somewhat balanced by the SCV being not time limited and at this stage allowing holders to reside indefinitely as well as being liable to pay Australian income tax.

A further change also enacted in 2001 was to remove the direct route to Australian citizenship available to New Zealand citizens. Non-protected SCV holders can no longer apply for Australian citizenship unless they secure Australian permanent residency on the

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13 Some of the restricted access for HECS concessions date back to the 1990s before the non-protected SCV category was introduced. There is a proposal to restore some HELP benefits from 1 January 2015 but the applicants must have arrived in Australia as a child and have lived in Australia for the previously 10 years. This is proposal on enabling legislation being passed by the newly elected Abbott Government.


15 Non-protected SCV holders affected by the Queensland floods were initially denied any flood relief assistance in 2011 but it was later restored on a one-off basis by the Federal Government. Noted by Australian Government Productivity Commission and the New Zealand Productivity Commission Paper D, *ibid*, at page 24.

same grounds as citizens from other countries despite being able to reside indefinitely in Australia. This was done to ensure the social security changes could not be side-stepped by individuals taking out Australian citizenship. Access to permanent residency is quota limited and primarily available to people with skills on an occupational shortage list below the age of 50.

2.2.2 New Zealand

Until November 2010 Australian citizens were allowed to remain in New Zealand indefinitely as they were provided with an exemption to hold a New Zealand visa. From 29 November 2010 Australian citizens arriving in New Zealand are now granted a residence visa on arrival subject to character requirements. No application is required prior to arrival. The effect of this change for Australian citizens is in practice unnoticeable as they can still remain in New Zealand indefinitely enjoying the same advantages as residents from other countries including the right to vote, take up government employment (with one or two exceptions) and apply for New Zealand citizenship after 5 years of residency. Thus in practice New Zealand applies the TTTA for Australian citizens largely without change from when it was agreed to in 1973.

From May 2007 New Zealand imposed a 2 year stand down for the main types of income assisted social security benefits in addition to the existing requirements to be “ordinary resident in New Zealand”. This, however, applies to all claimants including New Zealand citizens as well as other permanent residents including Australian citizens. In practice this stand down period is of little effect as destitute New Zealand citizens and permanent residents can apply for an emergency benefit.

In respect of Australian citizens living in New Zealand it has been concluded:

Arrangements for Australian citizens and permanent residents living in New Zealand are simple and rarely leave individuals and families without access to a safety net if required.

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17 Children born in Australia to New Zealand citizens are still eligible for Australian citizenship if they live continuously in Australia for 10 years after their birth.
18 Section 74AA Social Security Act 1964 (New Zealand).
19 Note refugees and protected persons are relieved from the 2 year residency rule - section 74AA(1)(c) Social Security Act 1964.
New Zealand did not make any changes to its domestic social security rules in 2001 in response to the Australian changes for non-protected SCV holders. There was some discussion that the cost of introducing matching restrictions for Australian citizens in New Zealand might be roughly equal or greater than the cost savings derived. There may also have been some desire to leave New Zealand’s rules unchanged to generate goodwill with Australia perhaps hoping that the changes Australia made would be short lived and revised at a later point although twelve years later very little has changed. There is a risk that the absence of any response by New Zealand could be interpreted as a weakness on New Zealand’s part to assert itself and it may encourage new demands from Australia for further concessions at some later date.

2.3 What Patterns of Migration Have Emerged Under the TTTA?
Since the late 1960s there has been a substantial movement of New Zealand citizens to Australia under the TTTA and also a pattern of return back to New Zealand by some although less widely understood. Considerable research has been done in earlier decades on migration under the TTTA based mainly on census data and immigration departure and arrival cards.\footnote{21} A detailed study by the New Zealand Department of Labour in 2010\footnote{22} concluded:

- New Zealanders working in Australia were more likely to be working in lower skilled jobs and were concentrated in certain industries (mining and construction);
- They tended to have similar qualifications to those who had remained in New Zealand (giving rise to the idea that the profile of New Zealand citizens in Australia was a “slice” of New Zealand society\footnote{23}), although less well qualified than the Australian workforce.\footnote{24} (Does this suggest that New Zealand migrants were more likely to be over qualified for the Australian jobs they secured?)

\footnote{22} Haig, R; Workforce 2020, Working across the ditch – New Zealanders working in Australia, Department of Labour, Wellington, 2010 at pages 3-5.
\footnote{23} Refer Bushnell, P and Choy, W K, Go West, Young Man, Go West!, Treasury Working Paper 01/07, Wellington, New Zealand, 2001, at page 10. They note that immigration to Australia under the TTTA occurs roughly in the same proportion as the population as a whole.
\footnote{24} Hugo concludes that other than being a younger cohort, there is little to distinguish the New Zealand born from the Australian born once age is taken into account. Refer Hugo, G, “New Zealanders in Australia in 2001”, New Zealand Population Review, Vol 30, No.s 1&2, 2004, at page 91.
• Incomes earned in Australia were on average 25% higher than if they had remained at home with the greatest gains accruing to medium to low skilled occupations and less to professional ones.

• New Zealand workers earned on average more than Australian workers with the great difference in lower-skilled occupations. (Due to willingness to do more overtime? Premiums for jobs in remote locations?)

• New Zealanders have a high rate of employment compared to the Australian population (which is consistent with the economic motive to migrate). 25

• There are considerable migratory flows back to New Zealand over a 5 year period with around 4 out of 10 likely to return. Unskilled workers were less likely to return which is perhaps consistent with the greater income gains accruing to them from migration. 26 Migration flows between the two countries appear driven by differences in the economic climate in the two countries.

Less research has been undertaken into Australians living in New Zealand. Around 65,000 Australian born persons live in New Zealand, a number which has been relatively constant over several decades. 27 A study dating back to 1993 found that many of the Australian born were either married or in relationships with New Zealand citizens, children of New Zealand citizens who had returned to the country (often with a sole parent) and inter-company and professional transferees 28 as part of a career move to enhance development of their career upon return to Australia. 29

3. WHAT IS CER?

CER is a comprehensive free trade agreement negotiated by Australia and New Zealand in 1983. It superseded the earlier 1965 New Zealand Australia Free Trade Agreement and predecessor agreements going back to 1933 and 1922.

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25 Statistics from Department of Immigration and Citizenship quoted by Faulkner, D, ibid, at page 13.
27 Refer Poot, J, ibid, Figure 1, page 3.
28 Refer Hugo, ibid, at page 34 where he speaks of a “brain drain” from Australia to New Zealand.
Trade between Australia and New Zealand until the post WW II period was relatively small for a variety of reasons including protectionist pressures in each country (sometimes disguised on photosanitary grounds) and each countries’ preferential trade relationship with the UK. While New Zealand and Australia had signed trade agreements in 1922 and 1933, neither had the effect of stimulating trade between the two countries and New Zealand’s export performance to Australian waned in this period although Australia’s in the opposite was more substantial and consistent. It was not until 1965 that an agreement was signed by both countries to promote trade (being the New Zealand Australia Free Trade Agreement) which did result in increased trade between the two states.

While the 1965 NAFTA agreement did result in increased trade, it eventually outlived its usefulness as it was perceived as increasingly complex and bureaucratic. In 1982 the prime ministers of both countries agreed that the NAFTA needed replacement rather than revision, which then lead to the conclusion of the Close Economic Relations Agreement of 1983. Under the CER agreement, trade between the two countries in goods and services have been completely liberalised unless specifically excluded. Since the introduction of CER there has been a rapid expansion of trade between the two countries. Virtually all restrictions upon the trade of goods and services have been eliminated between the two countries with a few minor exceptions. CER is widely regarded as being a huge success with a huge increase in trade and investment between the two countries.\(^3^0\) It has been described as “one of the most open trade agreements in the world”\(^3^1\) and by the World Trade Organisation as “the world’s most comprehensive, effective and mutually compatible free trade agreement”.\(^3^2\)

In 1994 the CER agreement evolved into the concept of a Single Economic Market (SEM) which was designed to harmonise the business environment between both countries to further support business and further integration between the two countries. This has led to the single aviation market (after some missteps), mutual recognition of occupational licencing amongst

\(^3^0\) [www.tera.govt.nz](http://www.tera.govt.nz) at page 2. Cites a 500% increase in trade in 20 years.


\(^3^2\) Sutton, *ibid*. 
many other market liberalisation initiatives. Work continues to be undertaken on identifying further impediments which exist to creating a true single economic market.

CER is also seen as being underpinned by several other agreements and arrangements between the two countries which were in place prior to NAFTA and CER. These include the TTDA, social security agreements (the first of which dated back to 1944) and double tax agreements (since 1960). It should be noted, however, that none of these other arrangements or agreements have been explicitly revised in light of CER and its extension although some parts of the 2009 Australia - New Zealand DTA reflect the realities of labour movement under the TTDA.

4. ARE FREE TRADE AGREEMENTS AND FREE LABOUR MARKETS LINKED?

Negotiation of bilateral and multilateral free trade agreements have become common place throughout the world as more economically liberal states work to promote international trade and overcome stalled progress at the WTO. As these agreements are designed to open up trade between countries, they have to potential to affect demand for labour in respective states as well as economic development. A number of these agreements have incorporated relatively limited provisions for migration of workers, while it has also been documented the effects of these agreements on migration patterns (legal and illegal) outside any provision of the free trade agreements themselves.

There is, however, no automatic link between the movement of workers under these agreements and the liberalisation of trade in goods in services. Strutt, Poot and Dubbeldam note after reviewing a range of multilateral, regional and bilateral trade agreements that:

33 For a detailed list of CER core documents refer Sutton, ibid, at pages 35-36.
34 Refer Australian Government Productivity Commission and the New Zealand Productivity Commission, ibid, at page 167.
36 Refer Sutton, ibid, at page 21.
38 Ibid.
the treatment of labour in trade agreements is currently very patchy, but will be supplemented to some extent by separate international labour agreements. While international trade agreements tend to be rather limited in permitting liberalisation in the movement of people, a number of bilateral and regional agreements exist that facilitate movement between selected countries, particularly between ‘similar’ developed countries such as Australia and New Zealand, Ireland and the United Kingdom, and the European Union…

Where free trade agreements have include provisions for migration of workers, they more typically have been designed to facilitate business visits, provision of cross-border services and sometimes the temporary movement of specific types of workers. Some of the free trade agreements New Zealand has negotiated include provisions relating to the movement of certain skilled labour as part of a trade off to provide additional economic benefits to the other state by allowing their skilled workers to access more highly paid jobs in New Zealand. Some countries are more assertive in making the temporary work visas exclusively temporary while others are happy to allow individuals on temporary visas to transition to permanent residency depending on their circumstances.

The issue with bilateral free trade agreements between two countries of different sizes and economic strengths such as CER is that businesses become more integrated and the smaller country becomes a branch economy of the larger state. As Australian investment in New Zealand has increased, and improvements in communication technology have arisen the New Zealand operations of Australian companies are increasing becoming more of a branch rather than a standalone subsidiary. This raises the risk that higher skilled and advanced level jobs more likely to be found offshore where head offices are located leaving the smaller country hollowed out with lower skilled operations only.

The problem associated with the absence of comprehensive provisions for labour movement in free trade agreements have arisen with other free trade agreements. The former Mexican Foreign Minister Jorge Castaneda commented recently with respect to the North American Free Trade Agreement (NAFTA) (which did not include labour movement) that:

> Without replicating the European model, the inclusion of items excluded in 1994 - energy, immigration, infrastructure, education and security - is better

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39 Page 18.
40 New Zealand - Thailand FTA for Thai chefs and the New Zealand – China FTA for 1,000 persons in skilled occupation classes for which there is a shortage in New Zealand.
than travelling the same road again. The answer to NAFTA's failings maybe more NAFTA, not less.\textsuperscript{41}

An Australian economist John Humphreys makes the case for free immigration agreements and argues that they would be better than free trade agreements although he does suggest that provisions have to be made to prevent social security abuse.\textsuperscript{42}

5. INCOME TAX COORDINATION BETWEEN AUSTRALIA & NEW ZEALAND

New Zealand and Australia first concluded a double tax agreement (DTA) in 1960. They have subsequently negotiated revised DTAs in 1972, 1996 and 2009. A separate agreement was negotiated in 2003 to address “triangular taxation” issues and allocation of imputation credits.

The latest DTA negotiated in 2009 is based upon the OECD Model Agreement as was the earlier 1996 one. Like nearly all DTAs, taxing rights are allocated on a source and residence basis overlaying each respective state’s domestic law. Double taxation is relieved primarily by either reserving the right to tax certain types of income to one state only, or if both states have the right to tax an amount of income then the residence state must provide a foreign tax credit. Unusually the 2009 DTA does include one instance where there is a dual exemption for certain types of pension income.\textsuperscript{43}

Individuals moving between the two states can potentially be subject to double taxation if the individuals become resident for income tax purposes in both states at the same time. Article 4 of the DTA contains a residence “tie-breaker” provision which largely follows the same article from the OECD Model Agreement\textsuperscript{44} except subparagraph (2)(d) from the OECD Model Agreement requiring resolution of dual tax residency by mutual agreement of a competent authority as a final basis for determination does not appear in the Australia-New Zealand DTA.


\textsuperscript{43} Article 18(1).

\textsuperscript{44} There is a slight variation in the wording of (2)(a) and (b) where the reference to no home being available to the taxpayer in either state has been shifted from subparagraph (b) in the OECD Model to subparagraph (a) in the Australia-New Zealand DTA.
5.1 Relief for New and Temporary Tax Residents

While both countries’ domestic tax law impose tax on a residency and source basis, both countries also have an intermediate category for new tax residents. New Zealand has a transitional resident provision which exempts foreign-sourced passive income of a new tax resident for up to four years.\(^{45}\) This status is available to Australian citizens settling in New Zealand, however, under Article 4(4) of the DTA no relief is available under the DTA for such individuals if any Australian income they have is exempt from New Zealand tax by virtue of being a transitional resident.

Australia also has rules for “temporary residents” which apply to individuals who would normally be regarded as tax residents under the standard Australian tax residency tests but are present in Australia on a temporary visa under the Migration Act 1958. These individuals are, in general, not subject to Australian tax on their foreign source income.\(^{46}\) In addition, any capital gains they derive from disposals of Australian assets are assessed on the basis that they are non-residents and thus only certain types of capital gain are subject to Australian tax. Unlike the New Zealand transitional resident rules, there is no time limit attached to the temporary resident status despite the use of the word “temporary”.

New Zealand citizens settling in Australia as non-protected SCV holders are eligible to be classified as “temporary residents” for income tax purposes unless they are in a relationship with an Australian citizen or permanent resident. While this status is unlikely to be of much benefit to an individual working in Australia, but for those with large amounts of foreign-sourced income it could be very attractive as Australia could be a tax haven for New Zealand citizens of means. The attractiveness of this would be enhanced if New Zealand was to introduce a comprehensive capital gains tax due to the right to tax certain types of capital gain falling to the residence country only under most DTAs.

5.2 Provisions Applying to Cross-Border Services

The DTA contains a number of provisions which reflect the free movement of labour between the two countries under the TTTA. One of these arises with the provision of cross-border services made possible with the free movement of citizens under the TTTA.

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\(^{45}\) Section HR 8, Income Tax Act 2007 (NZ).

Article 5, which defines what a “permanent establishment” (PE) is for the purposes of the treaty, contains several provisions which depart significantly from the corresponding article in the OECD Model. Article 5 incorporates special provisions for independent personal services adopting an option outlined in paragraph 42.23 of the Commentaries to Article 5 of the OECD Model. These provisions apply to activities that were previously within the scope of the former Article 14 prior to its deletion from the OECD Model in 2000.

Under Article 5(4) of the 2009 Australian DTA, a PE arises if a taxpayer performs services in a contracting state for more than 183 days in any 12 month period and more than 50% of the gross revenues attributable to the active business of the enterprise are attributable to those activities. A PE also arises if such services are provided for more than 183 days in any 12 month period for the same or connected project through one or more individuals being present in the state. In applying this second limb, visits not exceeding 5 days are not taken into account unless the services are performed by that individual on a regular basis. These rules for cross-border services are the unique among New Zealand’s DTAs (although they were subsequently followed in the new Hong Kong DTA) and are appropriate given the extent of the trade in services between the two countries as they provide an efficient and convenient basis for taxing such services.

Reflecting the tenor of the provisions for independent personal services above, there is a new provision in Article 14(4) (Income from Employment) applying to short-term secondments. The income from such secondments would normally be taxable in the state where the work was performed because the employer is either resident or has a PE there. However, under this new DTA if such secondments do not exceed 90 days in any 12 month period then the employee remains taxable in respect of their employment income only in the contracting state where they are usually based.

5.3 Cross-Border Pensions

Both New Zealand and Australia have adopted domestic tax rules for superannuation (pension) schemes whereby benefits paid from approved schemes are exempt from tax in

47 Article 5(4)(a)(ii).
48 Article 5(5). This five day exclusionary rule does not appear in the Commentaries to the OECD Model and appears unique to the Australian-New Zealand DTA.
members’ hands. The 2009 DTA contains a revised pension article which extends this tax exemption when pensions are paid between the two countries.\textsuperscript{49} This mutual exemption is a departure from the usual tax treatment of pensions in the OECD Model.\textsuperscript{50} The revised pension article, however, still allows New Zealand to tax offshore payments (known as “portable payments”) of New Zealand Superannuation although it currently does not do so under domestic law.\textsuperscript{51}

Foreign taxation of New Zealand pensions paid offshore has often disadvantaged New Zealanders pensioners living overseas as the New Zealand domestic exemption for pension payments is not usually recognised overseas resulting in further taxation without any foreign tax credit being available as they were exempt in New Zealand. While these revised pension tax rules in the Australia DTA will be welcomed by taxpayers, it has only been possible to negotiate this mutual recognition of exempt pensions because both countries provide for exempt pensions in their domestic law. Additionally, New Zealand sees these arrangements as unique in the context of the open market with Australia and the free movement of labour between the countries.

In addition to the DTA, agreement has also been reached so that transfers can be made between Australian superannuation schemes and KiwiSaver accounts.\textsuperscript{52} These changes reduce tax impediments for wealthier individuals to move between the two countries.

\textbf{6. SOCIAL SECURITY COORDINATION}

New Zealand and Australia first entered into a social security agreement in 1944 around the time that Australia extended its domestic social security regime during WWII. Since then revised agreements were negotiated in 1949, 1987, 1989, 1995 and 2001. Around the time SSAs were first negotiated by the two countries, both imposed separate social security levies however these were abolished in Australia in 1950 and in New Zealand in 1968. Both

\textsuperscript{49} Article 18(1).

\textsuperscript{50} This treatment is discussed as an option in the Commentary to Article 18. (Refer paragraphs 22-23 at 281-2.)

\textsuperscript{51} Exempt under section CW 28 (1)(c) and (d), Income Tax Act 2007 (NZ).

\textsuperscript{52} On 16\textsuperscript{th} July 2009 the New Zealand and Australian Governments signed an agreement titled \textit{Arrangement between the Government of New Zealand and the Government of Australia on Trans-Tasman Retirement Savings Portability} to allow for the portability of superannuation interests between Australia and New Zealand funds. Legislation to bring this agreement into effect was passed by the New Zealand Parliament in November 2009.
countries now fund social security largely out of general taxation unlike most OECD countries where separate levies are still found.

The earlier SSAs between Australia and New Zealand covered all major social security benefits with each country treating citizens from the other almost as their own. Responsibility for paying benefits in each country in respect of citizens from the other was on a “knock-for-knock” basis where the host government picked up the full cost, something only sustainable where migration between the two countries was largely balanced. However, as labour began to move under the TTTA in largely one direction (from New Zealand to Australia) and response to anecdotal evidence of welfare abuse by recent New Zealand migrants, tensions arose over the social security arrangements between the two countries.

Starting in 1986 a stand down period was introduced requiring new migrants to wait 6 months before claiming income support benefits. In 1994 this stand down provision was extended to solo parent benefits.

In 1988 agreement was reached for New Zealand to make a direct annual reimbursements to Australia towards meeting the costs of certain benefits paid to New Zealand citizens living in Australia using a sliding cost sharing formula based on a 10 year residency period.

In 1994 a new SSA was negotiated which applied to only old age, sole parent, veteran’s and disability pensions removing all other social security benefits from the scope of bilateral coordination. This means that for citizens from one country applying for benefits in the other after 1994 they were subject solely to the domestic social security laws of the state of which they were claiming without any protection of the SSA.

Despite these cost-sharing arrangements being in place, tensions continued to arise over social security issues especially around benefits not covered by the SSA (unemployment, sickness). In August 1999 both Governments agreed to review social security arrangements and in October 2000 negotiations commenced for revised social security arrangements. Australia sought New Zealand to increase its reimbursement for the cost of social security benefits paid to New Zealand citizens living in Australia which at that point covered only age, veterans, single parent and disability pensions. Negotiations foundered on the amount to
be reimbursed ($300 million vs. $1 billion)\textsuperscript{53} and the reluctance of Australia to take into account the amount of tax paid by New Zealand residents in Australia quoted at being around $2.5 billion.\textsuperscript{54}

A compromise was reached that any cost-sharing arrangements between the two countries would be limited to age, veterans and disability pensions only and that “policy on access to the broader range of benefits remained a policy matter for each Government”.\textsuperscript{55} Australia at the same time removed any newly arrived New Zealand migrant’s right under the SCV to claim other social security benefits in Australia. This was effected by making the SCV granted to New Zealand citizens on arrival after 26 February 2001 a temporary visa with no automatic right to apply for permanent residence in Australia and no pathway to Australian citizenship irrespective of the length of Australian residency.

A new SSA was negotiated coming into force on 1 July 2002. They key change with the 2001 SSA was that funding for the benefits covered by the SSA (being age, veterans and disability pensions) would be assessed on a case by case basis with funding being shared between the two countries based on the time the applicant had lived in each country during their working lives. There would also be a mechanism for dealing with residency in third countries. While the 1995 SSA remained in force, it would apply only to individuals who had sought benefits under the 1995 SSA before the 2001 SSA came into effect. As time progresses, fewer and fewer pensioners will be claiming benefits under 1995 SSA and New Zealand no longer makes annual payments to the Australian Government under that SSA having made one final lump sum payment in 200X.

\textsuperscript{53} Amounts mentioned by Helen Clark in the Transcript of the Joint Press Conference of Prime Ministers Helen Clark and John Howard in Wellington 26 February 2001. It appears that the figure of $300 million was based on research undertaken by the Ministry of Social Policy by the New Zealand Institute for Economic Research (NZIER) – refer McWha, V and Briggs, P, \textit{The Opportunity Cost of Unrestricted Trans-Tasman Migration – Report to the Ministry of Social Policy}, New Zealand Institute of Economic Research, Wellington, November 2000, at page 3. The amount is calculated as the additional costs incurred by the Australian Government by allowing the migration of lower skilled New Zealand citizens under the TTTA that would other not meet the immigration standards imposed by Australia for migrants from other countries.

\textsuperscript{54} Ministry of Foreign Affairs and Trade, National Interest Analysis, New Zealand - Australia Social Security Agreement, Wellington, 2001, paragraph 3.

\textsuperscript{55} \textit{Ibid.}
It was noted that the 2001 SSA would result in cost savings for New Zealand. The trade-off required to secure the agreement was stated in the national interest analysis as:

In assessing the costs of the new Agreement it should also be borne in mind that to maintain access to the full range of social security benefits currently enjoyed by New Zealanders in Australia would have required incorporation of additional benefits within the scope of the bilateral cost-sharing Agreement. A substantially larger burden on New Zealand, perhaps in the region of several hundred dollars would have resulted, if this course had been adopted. The Government did not consider that New Zealand taxpayers should be expected to take up this extra burden in order to guarantee the full range of social security benefits for their compatriots who in future chose to live, work and pay taxes in Australia.

Although not directly mentioned, some of the cost savings would arise due to the removal of single parent payments from the 2001 SSA.

### 6.1 Cost Sharing Formula in the 2001 SSA

The 2001 SSA continues to include totalisation provisions whereby residency in one state is deemed to be residency in the other state for the purposes of pension eligibility.

The key difference of the 2001 SSA is a cost-sharing formula which is applied on a case-by-case basis rather than an aggregated basis at the national level. Both states agrees to pay a pro-rata pension offshore to an eligible person who has migrated to the other state, based on how long the person had resided in the state they migrated from. In calculating the amount to be paid offshore, no account can be made of any pension payable by the state where they reside.

While the New Zealand and Australian Governments are initially required to pay their share of pension and disability benefits based on the number of years a claimant spent in each country between 20 and 65 years of age, the amount ultimately paid to a claimant remains *solely determined* by the pension rules of the state where they retire. In practice this will

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58 This prevents New Zealand from applying its deduction policy when New Zealand Superannuation is paid overseas under the SSA. Under section 70(1A) of the Social Security Act 1964 (NZ) a deduction is not made for any foreign pensions received when New Zealand Superannuation is paid overseas under the general portability rules in section 26 New Zealand Superannuation and Retirement Income Act 2001. The deduction is made, however, for foreign pensions when New Zealand Superannuation is paid under the Pacific Islands portability provisions.
mostly limit the amount of New Zealand Superannuation payable to someone retired in Australia rather the amount of New Zealand Superannuation paid to former Australian residents in New Zealand. This provision is designed to ensure that someone who has split their working lives between Australia and New Zealand and retired in one of the states does not receive more than someone who has spent their whole working life in that state and has retired there. It also means that an individual claiming a benefit under either the 1994 or 2001 SSA will receive the same amount of the two SSAs if their circumstances are otherwise the same.

Where an individual retires in Australia but has spent part (or all) of their working life in New Zealand, they can still receive New Zealand Superannuation apportioned according to their length of residency in New Zealand, however, the amount of New Zealand Superannuation payable cannot exceed the Australian Age Pension they would have been entitled to receive (after the application of the asset and income tests) as if they had spent all their lives in Australia. Any New Zealand Superannuation payable is deducted from the Australian Age Pension.

In the other direction, if an individual retires in New Zealand but has spent part (or all) of their working life in Australia, they will receive an Australian Age Pension based on their period of residency in Australia (after application of the relevant asset and income tests) which is deducted from New Zealand Superannuation. If they are not entitled to any Australian Age Pension, they will receive New Zealand Superannuation at the full rate the cost of which is met entirely by the New Zealand Government.

This funding formula leads to an anomaly in that New Zealand will often end up being liable for a disproportionately greater share of funding the pension of someone retired in Australia and also of New Zealand Superannuation paid to Australians who have retired in New Zealand than what the period of residency in each country would otherwise produce. This is because the Australian Age Pension is income and asset tested while New Zealand Superannuation is universal benefit without any asset or income tests.

59 Article 26, 2001 Australian SSA.
60 Both benefits have relatively short residency qualification requirements (10 years) and totalisation provisions are contained in the 1994 and 2001 SSAs. This is also noted by Lazonby, A, Passing the Buck –The impact of the direct deduction policy on recipients of overseas pension benefits in New Zealand.
Since the introduction of the Superannuation Guarantee in 1992, many Australian employees have built up sizeable balances in their superannuation accounts with the consequence that upon retirement they may not qualify for an age pension or an abated one. If they were to retire to New Zealand, under the 2001 SSA they will be eligible for New Zealand Superannuation at the full rate (because it is a universal benefit) but the Australian Government will be liable to pay only a small amount (if anything) which would be disproportionately small in comparison to the time the employee has lived in Australia. At one extreme someone who has spent their whole working life in Australia and is not entitled to any Age Pension due to their private wealth, will receive New Zealand Superannuation at the full rate if they retire in New Zealand and the cost will be met entirely by the New Zealand Government.\footnote{Under the totalisation provisions, residency in Australia counts for residency in New Zealand for determining entitlement to New Zealand Superannuation.}

In determining the proportions that each government will contribute towards the payment of New Zealand Superannuation to former Australian residents living in New Zealand, the New Zealand social security agency Work and Income New Zealand (WINZ) must get the applicant for New Zealand Superannuation to also complete an application for the Australian Age Pension. The difficulty is that this application is only made once at the time New Zealand Superannuation is applied for, and thus freezes the contribution Australia will make for whole period New Zealand Superannuation is paid to that person in New Zealand. Should their financial position deteriorate after the time of their application, New Zealand is unable to have the amount of their Australian Age Pension revised upwards. The same also applies should the individual enjoy a windfall gain (i.e. from an inheritance or lottery win) after the application is made.

Another future issue to contend with is that since the 2001 SSA was negotiated, Australia has raised the qualifying age for the age pension to 67 years while the qualifying age for New Zealand Superannuation still remains at 65 years. It appears that Australians will still be able to access New Zealand Superannuation at 65 years as they are subject to the New Zealand domestic rules with the benefit of totalisation under the SSA.
In the other direction, the amount of New Zealand Superannuation payable to someone retired in Australia is determined *solely* by the Australian Age Pension rules including the income and asset tests. The New Zealand Government is liable to pay an amount of New Zealand Superannuation based upon the time the person has spent their working life in New Zealand, however, that amount payable into Australia cannot exceed the amount of Australian Age Pension the person would have been entitled to if they had spent their whole working life in Australia. If a person is only entitled to a part Age Pension (because of their other income and assessable assets), a disproportionately large amount of that Age Pension will be met by the New Zealand Government under this formula when compared to the time that person has spent in each country during their working life.

If a person is not entitled to any Australian Age Pension due to the income and asset tests, New Zealand is relieved from having to pay New Zealand Superannuation at all. This is to be contrasted to them receiving New Zealand Superannuation at the full rate if they had retired in New Zealand. The Australian SSA is almost unique among New Zealand’s SSAs because it can make an individual considerably worse off in comparison to what they could be entitled to under the general portability provisions for New Zealand Superannuation.

7. WHAT ARE THE FISCAL IMPLICATIONS OF THE CURRENT SOCIAL SECURITY AND STATUS OF MIGRANTS UNDER THE TTTA?

There are some grounds for concluding that the current arrangements for social security between the two countries under the SSA and the Australian domestic rules for non-protected SCV holders in Australia expose New Zealand to undue fiscal risks.

7.1. Cost of Social Security Benefits Falling Outside the Social Security Agreement

Until 1986 both countries provided each other’s citizens with comprehensive access to social security benefits in the country where they resided. These were funded on a “knock-for-knock” basis in that the host country picked up the full cost of providing these benefits irrespective of whether the claimant had worked or lived for any substantial period of time. Such an arrangement was sustainable where migration flows were similar in both directions and both countries enjoyed similar per capita income levels.
While New Zealand has no direct liability for funding any social security benefits to non-protected SCV holders outside those within the scope of the 2001 SSA, there is a residual liability that denial of social security benefits in Australia may force New Zealand citizens to return to New Zealand for assistance. Although not explicitly mentioned by either Government, there is an underlying assumption that New Zealand must ultimately accept responsibility for the welfare of its citizens irrespective of the time lived in Australia of their contribution to its tax base when working. This is concluded by Birrell and Rapson:

Ironically it is those who find trouble gaining employment who are the most likely to return to New Zealand because that is where the social security safety net is. 62

While there is a two-year stand down for new (and returning) residents claiming welfare benefits, in practice New Zealand citizens can access income support immediately upon their return under the emergency benefit. To date it is not entirely clear how much this has led to returns to New Zealand for welfare support but as at September 2013 4,515 persons of working age were receiving an emergency benefit and another 4,799 persons of non-working age. 63 These people would be receiving these benefits due to ineligibility to receive other benefits, one ground being the inability to meet the residential qualification of 2 years.

Under the current policy settings Australia benefits from taxes collected from non-protected SCV holders residing in Australia but New Zealand retains the fiscal liability for their support if they suffer adverse life events in Australia irrespective of how long they have contributed to the Australian tax base. This issue has also become contentious within the EU as fiscal pressures mount and concerns arise about migration from new EU members. 64

While it is not unreasonable for a country to not accept responsibility for the welfare of new residents, it also seems unreasonable to deny long term residents from such support given their contribution to the tax base. Australia has rejected this view on grounds that since they cannot select the type of migrant it accepts under the TTTA and with the income gaps

63 Ministry of Social Development (NZ), National Data Tables.
between the two countries, by providing non-protected SCV holders open access to Australian benefits it exposes Australia to unacceptable fiscal risks.\textsuperscript{65} But surely there must be some point at which the host country should assume some liability given the contributions a claimant might have made?

7.2. Education Issues

While both countries provide access to each other’s citizens for funded places in primary, secondary and tertiary education, denied access to the HELP-HECS schemes to fund tertiary education fees has meant that children of non-protected SCV holders are often prevented from accessing tertiary education because of the need to fund tertiary fees upfront. There is some anecdotal evidence of such children returning to New Zealand to attend university securing loans and other financial support available to New Zealand citizens for tertiary study.

Another issue, beyond the scope of any bilateral agreement, is the “brain-drain” of highly educated New Zealand citizens to more highly paid Australian jobs. In addition, there is an increasing issue of job-skills match where many highly skilled jobs have gone from New Zealand to Australia as New Zealand businesses are increasingly Australian owned and their New Zealand operations are no longer standalone operations but merely branches of an Australian enterprise. Again the cost of education is borne by New Zealand but the wider benefits accruing to the economic from an educated workforce accrues to Australia.

7.3. Cost of Social Security Benefits Falling Within the Scope of the Social Security Agreement

While the 2001 SSA contains a cost-sharing formula applied on a case-by-case basis, the way in which the formula applies means that New Zealand may disproportionately bear the cost of pensions where an individual is only entitled to an abated Australian age pension. If the person retires in Australia, New Zealand may pay all of the pension, while if they retire in New Zealand a majority of the New Zealand Superannuation payable to them will be borne by New Zealand. The only gain that may accrue to New Zealand is if someone with a period

\textsuperscript{65} It also fails to recognise that social security benefits are comparatively less generous in Australia than New Zealand. Refer Supplementary Paper D, Australian Productivity Commission, \textit{ibid}, at pages 57-58.
of New Zealand residency during their working life retires in Australia and is not entitled to any age pension due to their assets and income.

New Zealand cannot get increased contributions from Australia should a superannuitant’s financial position deteriorate. Changes to the pension eligibility age in Australia increases the age of eligibility for those born after 1 January 1957 to 67 years from 2023 may increase the attraction of retiring to New Zealand.

Whether the 2001 Australian SSA favours Australia or New Zealand fiscally depends upon migration patterns and the wealth of migrants. Where retirees have no substantial assets (other than their home) or other income, the cost of meeting their pensions will be met by the two states largely in proportion to the time the person spent their working life in each state. For individuals with wealth or other income, the fiscal outcome will vary considerably depending on where they retire. New Zealand gains fiscally if wealthy, former New Zealand residents retire in Australia as they will forgo New Zealand Superannuation either partially or completely. On the other hand if wealthy, former Australian residents retire in New Zealand, they will receive New Zealand Superannuation at the full rate and Australia will be liable to contribute very little (if anything) towards that even where the person has spent all of their working life in Australia.

It seems undesirable that the New Zealand has such potentially a large liability to pay New Zealand Superannuation to wealthy Australians retiring in New Zealand if they have not contributed to the New Zealand tax base during their working lives. Such persons can be argued to be “double-dipping” from two different governments as they are likely to have large Australian superannuation interests which will have benefitted from large tax preferences in Australia. Since these private pensions are not subject to the deduction policy under section 70 of the Social Security Act 1964 (NZ), they are able to retain the benefit of both.

In July 2007 there were 20,000 former New Zealand residents retired in Australia or the UK where those Governments met the entire cost of their pensions (although there is the direct reimbursement by the New Zealand Government to Australia) which is probably favourable to New Zealand. Under the 2001 Australian SSA, nearly 3,900 individuals who retired in New Zealand brought with them Australian Age Pensions totalling $13.2 million in 2007.
although these numbers do include individuals who were ineligible for any Australian age pension due to the asset and income tests.

New Zealand Superannuation totalling NZ$51.5 million was paid in Australia covering 8,000 persons in 2007 although again this excludes former New Zealand residents who became ineligible for any New Zealand Superannuation due to the income and asset tests for the Australian Age Pension. It is not clear what savings New Zealand has enjoyed from not having to pay New Zealand Superannuation to former residents who have retired in Australia and whether this is balanced by paying New Zealand Superannuation to former Australian residents living in New Zealand who are not entitled to an Australian Age Pension. One issue not disclosed in these statistics is what factors determined the amounts paid - was it just the time spent the individual has lived in either country or was it due to pension abatement under the Australian age pension assets and income for payments of New Zealand Superannuation made to Australia.

Part of these problems result from the incompatibility of the two countries’ pension schemes (one being targeted the other universal) and also provisions that the state of residence determines the amount of the pension to be paid. The latter is probably influenced by both the Australian Government's desire to not undermine their asset and income testing regime and the grandfathering provisions applying to those already claiming pensions under earlier SSAs. Both governments would be wary of changing arrangements that would lead new claimants to be worse off than those already receiving pensions under earlier SSAs although limiting former Australian resident’s access to New Zealand Superannuation could probably be justifiable from a political perspective if they were very wealthy. Any new SSA which enhanced benefits for former New Zealand residents who had retired in Australia would have an increased cost to New Zealand and these benefits would probably have to be extended to those falling under the earlier Australian SSAs on equity grounds.

Precise statistics are not available, but at the moment the amount of New Zealand Superannuation paid to former Australian residents is probably less than the New Zealand Superannuation forgone by former New Zealand residents who have retired to Australia. However, if that situation was to reverse it will probably be too late for New Zealand to do much about it as by then there will a body of persons with grandfathered rights to continue receiving New Zealand Superannuation at the full rate. The fiscal risk to the New Zealand
taxpayer is potentially huge and is another issue to be considered regarding the sustainability of the current New Zealand Superannuation regime.

7.4. Cost of Maintaining the TTTA to New Zealand

The basic principles underpinning the TTTA have remained unchanged since its announcement in 1973. Many of the regimes affecting persons migrating under the TTTA such as social security and other social assistance programmes have done so partly due to policy divergences in areas such as retirement income and immigration.

The current arrangements allow Australia to “cherry pick” the New Zealand workforce taking the most skilled and valuable.66 Australian employers can get New Zealand workers easily with minimal formalities when needed but Australia has little responsibility for them if there is an economic downturn making New Zealanders essentially guest workers admittedly on better terms than 457 class visa holders.

While it has been cited that New Zealand has gained under the revised SSA and Australian migration rules as it removes significant points of disagreement between the two governments,67 this has only occurred because New Zealand has been forced to allow Australian interests to prevail although admittedly not to the extent originally sought if New Zealand had agreed to harmonisation of migration policies and $1 billion of social security reimbursements. The key issue is whether New Zealand will be eventually forced to revise its current policy settings in these areas to converge with Australia’s in order to maintain the TTTA with the resulting loss of sovereignty?68

8. OTHER ISSUES

8.1. What Issue Really Drove Australia to Make the Changes in 2001?

It is not entirely clear what underlying issues were concerning the Australian Government over the TTTA and related social security and other access. They appeared to vary from time to time in the decade leading up to the 2001 changes, but the following themes have surfaced:

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66 Birrell and Rapson, ibid, at page 72. Also Lockhart and Money, ibid, page 60.
67 Refer Goff, ibid, at pages 4-5; MFAT National Interest Analysis, ibid, paragraph 6.
The TTTA did not allow Australia to select the type of migrant that settled in the country nor those who could seek Australian citizenship other than some basic health and character checks. Semi-skilled and unskilled individuals could migrate to Australia without any limit, something not possible for individuals from other countries unless they fell within spousal, family reunification and refugee categories.

The fiscal exposure from providing social security and other benefits to "low quality" New Zealand migrants under the TTTA i.e. persons that would be unlikely to secure Australian residence if they had originated from other countries. This was despite evidence that New Zealand migrants did not disproportionately make claims for social security in Australia and have high work force participation rates.

New Zealand was acting as a "back-door" for migrants from third countries allowing entry to persons who would otherwise be unlikely to secure Australian permanent residence as New Zealand set lower standards for migrants to that country. Again this presented loss of control over migration to Australia. Indeed there had been pressure in the 2001 negotiations and prior for both countries to adopt a common immigration policy. Another "back-door" migration issue arose from the migration of Pacific Islanders with New Zealand citizenship obtained with special arrangements in place for former New Zealand dependent territories (Cook Islands, Niue, Tokelau and Samoa). They had no right of migration to Australia prior to the TTTA in 1973 along with New Zealand Chinese.

Australia was doing New Zealand a favour by accepting large number of migrants allowing it to shirk the cost of social security for these migrants. This however failed to recognise the contribution New Zealand migrants have made to the Australia economy especially those who are highly skilled and educated at New Zealand expense.

In addition the author also wonders whether friction between the two Governments on other issues (such as the ANZUS pact, defence arrangements, aspects of New Zealand’s economic

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69 Birrell and Rapson, *ibid*, at page 63.
70 The health and character tests were more easily applied to applicants for citizenship than those who chose to settle but not seek citizenship. There are initiatives underway for exchange of criminal records which will make enforcement of character checks on all trans-Tasman travellers more rigorous.
71 Birrell and Rapson, *ibid*, at p 71.
73 Refer Faulkner, *ibid*, at page 8 and Birrell and Rapson, *ibid*, at page 70.
reform programme in the early 1990s) also garnered hostility towards New Zealand along with the perception New Zealand was benefitting unduly from the TTTA and also CER. There may have also been opportunism on the part of Australia to bail New Zealand up for additional social security funding perceiving its negotiation position was weak and that retaining the TTTA would be a major political imperative for any New Zealand Government.

8.2. Social Costs for Australia

The result of changes to the TTTA in 2001 is that a significant (and increasing number) of New Zealand citizens living in Australia do not have access to full social security and educational rights, irrespective of the time they have lived and paid tax in Australia. The discrimination against non-protected SCV holders has been extended down to social programmes at the state level particularly in Queensland and Victoria but also has spread to other states.74

The disadvantage non-protected SCV holders suffer is passed on to their children. May have lived in Australia for a major part of their lives but are outsiders in a number of key respects. They have no path to Australian citizenship and face additional barriers accessing other social supports. Other commentators have referred to increased criminal activity from children of non-protected SCV holders.75 Furthermore, the changes introduced in 2001 were not made in a consistent or integrated manner with other rules. For example, someone requiring (but ineligible) for income support due to unemployment or break up of a marriage may not be able to leave Australia with their children under child custody rules.76

The risk is that non-protected SCV holders suffering deprivation will lead to crime and other social malaises resulting in a public backlash against New Zealand migrants and calls for restrictions on trans-Tasman migration. There are already signs of this occurring now with the slowdown in the Australian economy and concentration of Maori and Pacific Islanders in Southern Queensland.77

74 Faulkner, *ibid*, at pp 31-33.
75 Faulkner, *ibid*, at pp 28, 30-31.
76 Faulkner, *ibid*, at page 29.
77 Bita, N, “Kiwi layabouts are flooding in”, *NT News*, 28 December 2013 at page 11.
As the numbers of non-protected SCV holders grow there will be issues about social cohesion and the sustainability of arrangements to discriminate throughout the country for people who are otherwise non-distinguishable from other Australians. The treatment of non-protected SCV holders also appears inconsistent with a number of multilateral treaties Australia is a signatory to on a range of social issues such as discrimination and rights of children. The State of Queensland has had to amend some of its anti-discrimination laws to accommodate its treatment of non-protected SCV holders in respect of other matters.

8.3. Effects on the Labour Market & CER
The major effect of the 2001 changes is that the TTTA becomes a temporary labour or guest worker programme for Australia and one that is administratively simple and cheap to run. Shortages in the workforce can be filled easily from New Zealand with little liability if they are no longer wanted. Australia can “cherry pick” the most desirable migrants leaving New Zealand ultimately responsible for those who are not. While the two economies have almost merged under CER, the labour markets have grown further apart. This is even more ironic given the mutual recognition of professional qualifications and occupational licencing under CER designed to integrate labour markets.

8.4. New Zealand’s Neglect of the TTTA?
It is the author’s belief that New Zealand has not managed its side of the TTTA well after its establishment. In fact one can question why both parties were happy to leave it as an informal understanding anyway back in 1973 rather than negotiate a treaty which would spell out rights and obligations. Perhaps it reflected the balmy economic and social conditions at that time.

New Zealand opposed the requirement of passports for trans-Tasman travel after July 1981 despite legitimate concerns from Australia. Such a requirement was hardly burdensome and also had benefits for New Zealand. One prime minister joked that when a New Zealander migrated to Australia the average IQ in both countries was raised despite some of that migration arising due to poor economic management by that prime minister. Later on in early 1990s New Zealand introduced poorly designed migration policies resulting in an

78 Refer Faulkner, ibid, pp 38-48.
79 Birrell and Rapson, ibid, at page 72.
80 Refer footnote 66.
inappropriate group of migrants (from a skills perspective) with little consideration of the possible flow on effects to the TTTA and the pressures that might result.81

New Zealand’s response to the changes introduced by Australia in 2001 have also been questionable. It did not respond with reciprocal restrictions for Australian living in New Zealand under the TTTA. This was later justified that the administrative costs involved would be greater than any cost savings although there may be some merit in this that the three distinct groups of Australian migrants to New Zealand (the high skilled, Australian citizens either born to New Zealand citizens or in relationships with one) would secure permanent residency or citizenship outside the TTTA. Not long after the TTTA changes were announced in February 2001, New Zealand volunteered to take illegal migrants from the Tampa in August 2001 to assist Australia despite the adverse changes to New Zealand citizens earlier that year and the risk that these refugees could eventually end up in Australia once they secured New Zealand citizenship. These events may suggest that New Zealand saw the February 2001 changes as temporary and by continuing to uphold the TTTA in a generous way for Australians it would generate goodwill, but there are risks that such reactions will be perceived as weakness on New Zealand’s part and encourage Australia to seek additional concessions at some later time on grounds of maintaining the existing TTTA.

8.5. Sustainability of the TTTA?

One of the gains New Zealand cites from the 2001 agreement and other changes Australia unilaterally made at the same time is that it removed a major irritant in the trans-Tasman relationship.82 This appears so, but it should be viewed in the context Australia sought to reduce social security costs associated with New Zealand migration and achieved that (although not as much as initially sought) and also after 2001 the Australian economy has performed exceptionally well with low unemployment and a strong job market. Australia’s views about the TTTA might well change further if pressures build during a period of recession or downturn in the Australian economy. Budgetary pressures in respect to

81 Birrell and Rapson, *ibid*, at pp 64-66.
healthcare\textsuperscript{83} and education may raise the issue of non-protected SCV holders’ access to Medicare and tertiary education at some future date.

The fiscal cost of maintaining the TTTA has become higher to New Zealand and it has substantial contingent liabilities under the SSA should there be a movement of retirees to New Zealand. The liability under the SSA remains even if it is terminated due to grandfathering clauses for individuals claiming benefits under the SSA. Fiscal obligations under the SSA and TTTA may lead to pressure to harmonise a number of New Zealand’s policies with Australia’s in areas such as pensions and immigration resulting in loss of sovereignty. At some stage it may have to balance whether the benefits of Australia acting as a safety valve for excess labour is worth the other fiscal costs of free migration under the TTTA.

\textbf{9. CONCLUDING COMMENTS}

The TTTA is a very unusual arrangement by international standards. Very few countries have now arrangements which allow persons to move between them with such little restriction (outside the EU) and can be seen as a remanent of a much earlier era when immigration was lightly regulated.

While New Zealand made some savings under the 2001 SSA, the arrangements put in place then shift some costs on to New Zealand in potentially disproportionate manner and also have created contingent liabilities either directly under the 2001 SSA or indirectly if non-protected SCV holders return to New Zealand for social welfare.

The 2001 changes have also resulted in the trans-Tasman labour market moving in the opposite direction to other markets between the two countries under CER. This is remarkable given other initiatives under CER for mutual recognition of professional qualifications among others which are design the SEM under CER. It is also worth considering that another fiscal issue arising under CER, the reciprocal recognition of imputation credits, has also not proceeded far despite on and off discussions for over 20 years perhaps allowing one to conclude that CER might stall on where issues concerning fiscal integration arises.

\textsuperscript{83} For evidence of counting fiscal pressure in Australian healthcare refer Wade, M, “Why Tony Abbott wants to charge a fee for visiting bulk-billing doctors”, \textit{Sydney Morning Herald}, 29 December 2013.
In hindsight it is regrettable that the TTTA was not formalised as a treaty in 1973 or incorporated formally into the CER arrangements. This would have led to more fundamental discussions about at what point a country became responsible for the social costs associated with migrants.

There are grounds for arguing that the current treatment of non-protected SCV holders is not sustainable in the longer term due to the social costs incurred by Australia having a sub-class of resident that is denied many benefits despite residing there. This is likely to lead to further pressure for reform of the TTTA possibly with introduction of quotas and working visas which must obtained prior to travel. New Zealand has limited power in any negotiations over the TTTA and it is possible it might gain economically in the longer term if migration to Australia became more restricted resulting in less migration outwards.