

**National Interest Analysis [2014] ATNIA 19  
with attachment on consultation**

**The Force Posture Agreement between the Government of Australia and the  
Government of the United States of America  
(Sydney, 12 August 2014)**

**[2014] ATNIF 24**

# NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

## SUMMARY PAGE

### **The Force Posture Agreement between the Government of Australia and the Government of the United States of America (Sydney, 12 August 2014) [2014] ATNIF 24**

#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is to bring into force *The Force Posture Agreement between the Government of Australia and the Government of the United States of America*, signed at Sydney on 12 August 2014 (“the Agreement”). The Agreement will enter into force on the date of the later diplomatic note between Australia and the United States (US) to be exchanged once all domestic requirements to give effect to the Agreement have been met (Article XXI). It is proposed that Australia notify the United States via diplomatic note as soon as practicable following consideration of the Agreement by the Joint Standing Committee on Treaties.

#### **Overview and national interest summary**

2. First announced in 2011, the US force posture initiatives in Australia currently involve annual rotational US Marine Corps (USMC) deployments and enhanced aircraft cooperation activities with the US Air Force (USAF) in northern Australia. The USMC rotations occur for around six months at a time during the northern dry season. This year’s rotation comprised approximately 1150 personnel, with the size of the rotations to increase in the coming years to around 2500 personnel, equipment and aircraft. The enhanced aircraft cooperation initiative involves an extension of long-standing bilateral activities, building on USAF visits for exercising and training. The force posture initiatives are an important element of the Australia-US alliance and are an expression of Australia’s support for a strong US presence in the Asia-Pacific.

3. The Agreement provides a legal, policy and financial framework to govern the US force posture initiatives in Australia and contains important protections and assurances for both Parties. It provides the legal certainty required to facilitate full implementation of the two force posture initiatives announced in 2011, while being sufficiently flexible to accommodate any future initiatives agreed to by the Parties. It requires, for example, respect for Australian sovereignty and the laws of Australia, imposes obligations for consultation, and affirms that the initiatives will occur at Australian facilities, consistent with our long-standing policy that there are no foreign military bases on Australian soil. It also provides certainty around the conditions for US access to Australian owned facilities as well as the types of activities that US Forces will be able to conduct under the initiatives. The Agreement provides the certainty needed for both Parties to maximise the benefits of the initiatives while protecting their sovereign interests.

#### **Reasons for Australia to take the proposed treaty action**

4. Australia’s commitment to the force posture initiatives supports our efforts to deepen our long-standing alliance with the United States and further our strategic interests in

maintaining a strong US presence as an anchor of stability in the Asia-Pacific. The force posture initiatives provide an important means to improve interoperability with US Forces and maintain high-end Australian Defence Force (ADF) skills through enhanced training opportunities. The initiatives are also intended to provide opportunities for Australia and the United States to work with regional partners on common contingencies, such as humanitarian assistance and disaster relief.

5. The Agreement builds upon existing agreements and arrangements between Australia and the United States – including the *Agreement between the Government of Australia and the Government of the United States of America Concerning the Status of United States Forces in Australia, and Protocol* (“the SOFA”)<sup>1</sup> – and only extends or abrogates existing agreements and arrangements where necessary to achieve implementation of the force posture initiatives in a mutually beneficial manner. It is limited in scope to the force posture initiatives only, with the SOFA remaining the baseline for the US’ military presence in Australia.

6. Failure to bring the Agreement into force could significantly complicate and delay the full implementation of the force posture initiatives in Australia, increasing legal and financial risks for both Australia and the United States. It would also undermine Australia’s long-standing alliance with the United States, with potential ramifications for our bilateral defence cooperation and national security policy. The force posture initiatives represent an important new element in our defence cooperation with the United States; failure to take appropriate steps to provide for their full implementation would likely be seen by the United States as a diminution in Australia’s commitment to the alliance. It would also curtail opportunities for the ADF to maintain and enhance skills and interoperability with US Forces.

### **Obligations**

7. The Agreement defines the obligations, responsibilities and arrangements between Australia and the United States for the presence of rotational deployments of US personnel in Australia for the purposes of the force posture initiatives.

8. Article I sets out the definitions of key terms used in the Agreement.

9. Article II sets out the scope and purpose of the Agreement. It provides authorisations for the United States to conduct mutually determined activities under the force posture initiatives as well as authorisations for the presence of US Forces in Australia and, in specific situations, the activities of US Contractors present in Australia. The Agreement is limited to the force posture initiatives; it will apply only to activities conducted pursuant to the initiatives announced in 2011 and any other initiatives as mutually decided upon. The activities that will be conducted by the United States under the initiatives will be mutually determined through consultation with Australia. In recognition that the initiatives will occur in Australia, the Agreement maintains the primacy of Australian interests by stipulating that its implementation shall not adversely impact upon the readiness or capability of the ADF or the functions of Australian Commonwealth, State, or Territory Governments.

10. Article III sets out the consultation requirements between the Parties for the conduct of activities under the force posture initiatives. Implementing Arrangements will be used to document in further detail the conditions and requirements for consultation. The conditions and requirements for consultation shall ensure that relevant mutually determined activities are

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<sup>1</sup> [1963] ATS 10

conducted in accordance with Australia's long-standing policy of Full Knowledge and Concurrence, where applicable.

11. Article IV governs access to and use of Agreed Facilities and Areas in Australia by the United States for the purposes of the force posture initiatives. It also specifies the types of activities that US Forces will engage in while accessing and using Agreed Facilities and Areas. Where Australia has determined that it will provide the United States with access to an Agreed Facility or Area, or portions thereof, it will do so without rental or similar charges. The Australian Department of Defence (ADOD) will retain the right of access to all Agreed Facilities and Areas. The United States will be granted access such that its ability to conduct activities is not impeded. In the event that the United States undertakes construction in or on an Agreed Facility or Area, or portion thereof, the United States will be granted operational control for the duration of the construction activity. This will provide for US control of a designated construction site, including of US Forces' equipment, supplies and materiel, which is the requisite basis under US law for funding of such military construction projects overseas. The United States is obligated to consult with the ADOD on such construction, alterations or improvements, with the technical and construction standards to be consistent with the requirements and standards of both Parties. Where an Agreed Facility or Area, or significant portion thereof, is jointly used by Australia and the United States, both Parties will be responsible for operation and maintenance costs on the basis of proportionate use.

12. Article V outlines the roles of both Parties' representatives for day-to-day implementation of the Agreement and administrative matters. The United States will be responsible for ensuring US Forces are fully advised of the terms of the Agreement and any Implementing Arrangements. US Commanding Officers will be responsible for ensuring that US Forces comply with the Agreement as well as the SOFA, other relevant and applicable agreements and Implementing Arrangements, and directions issued by Defence officials responsible for administering Agreed Facilities and Areas. The United States is obligated to inform Australia as soon as practicable of all instances of conduct by US personnel that is likely to attract adverse public or media attention or otherwise bring the ADOD into disrepute. Article V also obligates the Parties to develop procedures to address incident and accident responses.

13. Article VI governs the security arrangements for Agreed Facilities and Areas, as well as for US personnel, equipment and information. In recognition that activities under the force posture initiatives will occur at Australian owned facilities and areas, Australia shall at all times have primary responsibility for security of Agreed Facilities and Areas. Both Parties are obligated to cooperate to take mutually acceptable measures to ensure the protection, safety, and security of US personnel, equipment and information. The details of such mutually acceptable measures may be contained in jointly developed Implementing Arrangements.

14. Article VII governs the prepositioning and storage of defence equipment, supplies, and materiel. This includes access to Agreed Facilities and Areas as well as aerial ports and seaports for the purposes of prepositioning such items. The United States will be required to notify Australia in advance of the types, quantities and delivery schedule for such equipment, supplies, and materiel. The United States is obligated not to preposition any items to which Australia has objected on the basis that they are prohibited by Australian law. Article VII also stipulates that it is the duty of members of the US Forces to respect the laws of Australia with regard to prepositioned materiel. These provisions will ensure that Australia is able to comply with its domestic and international obligations with respect to certain types of prohibited

defence equipment. The United States will have exclusive use of its prepositioned materiel, and Agreed Facilities and Areas designated for storage of such materiel. The United States will also retain full title to all such prepositioned materiel, as well as the right to remove prepositioned materiel from Australia.

15. Article VIII entitles the United States to access first aid, as well as emergency medical and dental services, and sets out the obligations for payment for such services. The United States is obligated to immediately inform the ADOD of any imminent risk of outbreaks or infectious diseases that may be related to its presence in Australia.

16. Article IX governs the provision of logistics support by the ADOD to US Forces for mutually determined activities under the Agreement. It obligates the United States to pay reasonable costs for logistics support. The United States will be accorded treatment no less favourable than that accorded to the ADOD, including with respect to rates for logistics support. Both Parties will consult in advance on the requirements of US Forces for logistics support, with logistics support to be provided in accordance with existing bilateral logistics support agreements, or other specific arrangements, as mutually determined by the Parties.

17. Article X sets out how costs will be shared between the Parties, including with respect to the development, construction, operation and maintenance, of Agreed Facilities and Areas. Costs are to be shared on the basis of proportionate use, with the Parties to determine the proportionate share of their costs and use, as well as payment mechanisms, in subordinate Implementing Arrangements. This will ensure that the United States substantially meets the costs of any facilities that are built specifically for US requirements and the operating costs of US rotational deployments. Where facilities are jointly used by Australia and the United States, the Parties will share the development, construction, operation and maintenance costs on the basis of their proportionate use of the facilities.

18. Article XI provides for arrangements with respect to the recognition of drivers' licenses and professional qualifications of US personnel in Australia. Recognition of US drivers' licences for the operation of vehicles owned by, or on exclusive hire or lease to, the US Government will be extended to members of US Forces and the Civilian Component (i.e. US civilian officials). Australia will assist US Forces and US Contractors to obtain, or obtain recognition of, driving licences for the operation of private vehicles. Paragraph 3 of Article XI affirms that recognition of US professional qualifications required for official duties will be extended to members of the US Forces, consistent with existing Australian legislation and regulations. Australia will assist US Contractors to obtain recognition of US professional qualifications that are necessary to undertake their activities under the Agreement.

19. Article XII provides for the movement of US aircraft, vessels and vehicles into, out of and within Australia in connection with the force posture initiatives, free from relevant charges or restrictions. It also affirms that US Government vehicles are self-insured and that no further insurance against third-party risk or proof thereof shall be required to operate such vehicles.

20. Article XIII governs the import, export, re-export and use of currency by the United States and its personnel in Australia in connection with the force posture initiatives.

21. Article XIV sets out obligations with respect to ownership of property. Australia shall retain ownership of and title to all Agreed Facilities and Areas and retain ownership of any

building, non-relocatable structures and assemblies affixed to land in Agreed Facilities and Areas, including those altered or improved by the United States. Where the United States has constructed permanent buildings, they become the property of Australia once constructed. The United States will have utilisation of permanent buildings that it constructs until no longer required. The United States will also have access to and use of all buildings, non-relocatable structures and assemblies constructed, altered or improved by the United States in accordance with the Agreement. The United States is obligated to return as the sole and unencumbered property of Australia any Agreed Facility or Area, or portion thereof, once no longer required by the United States, with the Parties to consult on the terms of the return.

22. Article XV provides for US Forces and US Contractors to access basic utilities, with US Forces to pay costs equal to their pro rata use. US Forces will be able to utilise the radio spectrum, with frequencies to be allocated by Australian authorities through the ADOD at no cost to the United States. US Forces are obligated not to interfere with frequencies in use by Australia or any entity licensed by Australia unless in consultation with the ADOD.

23. Article XVI sets out obligations with respect to human health and safety and protection of the environment. Both Parties will pursue a preventative rather than reactive approach to environmental protection, and cooperate to deal immediately with any problems that arise to prevent lasting damage to the environment or endangerment of human health. The United States is obligated to apply the more protective of either US or Australian environmental compliance standards. This will ensure that, at a minimum, US Forces comply with Australian environmental standards. The United States is obligated to take expeditious action to contain and address environmental contamination resulting from an unintentional release of hazardous materials or hazardous waste. Australia is obligated to promptly inform the United States about potential environmental, health and safety emergencies in Australia that may affect US personnel or activities, and the United States is obligated to promptly inform the ADOD of any potential environmental, health and safety emergencies arising from its activities in Australia.

24. Article XVII governs arrangements for US Contractors and the soliciting, awarding and administration of contracts by the United States. Subject to the grant of the relevant visa, US Contractors will be able to enter and exit Australia for the force posture initiatives. The United States will be able to solicit, award, and administer contracts, in accordance with the laws and regulations of the United States, for any materiel, supplies, equipment, and services to be furnished or undertaken in Australia, with full respect of Australian law. This will be undertaken without restriction as to the choice of contractor, supplier, or person who provides such materiel, supplies, equipment, or services. The United States is obligated to strive to use Australian goods, products and services, including Australian workers and commercial enterprises, to the greatest extent practicable. Paragraphs 3 through 6 of Article XVII contain taxation provisions modelled on the *Agreement between the Government of Australia and the Government of the United States of America relating to the Operation of and Access to an Australian Naval Communication Station at North West Cape in Western Australia*<sup>2</sup>. These provisions will ensure that income derived by a person (who is not an Australian national or resident) or company (other than a company incorporated in Australia) under contract to the US Government for the purposes of the force posture initiatives is not taxed in Australia, provided they are taxed in the United States. This is to avoid a situation where such persons or companies could be taxed in both jurisdictions.

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<sup>2</sup> [2011] ATS 36

25. Article XVIII sets out the respective obligations of the Parties with respect to customs and quarantine procedures. Australia is obligated to take all appropriate measures to ensure efficient clearing of US imports and exports, with the procedures for customs inspections to be mutually determined by the Parties. The United States is obligated to inform Australia if any of its activities are inconsistent with Australian quarantine laws and regulations.

26. Article XIX contains a commitment that the Parties meet annually to consult on implementation matters. The Parties or their Executive Agents may enter into Implementing Arrangements, subordinate instruments of less-than-treaty status, to carry out the provisions of the Agreement.

27. Article XX relates to disputes. Both Parties are obligated to resolve disputes at the lowest possible level, with referral to higher authorities only if resolution cannot be reached at lower levels. Both Parties are also obligated not to refer disputes or other matters subject to consultation to any domestic or international court, tribunal, similar body or other third party for settlement unless mutually agreed.

### **Implementation**

28. Minor legislative amendments will be required for Australia to fulfil its obligations under the Agreement. This will entail amending the *Income Tax Assessment Act 1936*. Consistent with the provisions of Article XVI, this legislative amendment will ensure that income derived by a person (who is not an Australian national or resident) or company (other than a company incorporated in Australia) under contract to the US Government for the purposes of the force posture initiatives is not taxed in Australia, provided they are taxed in the United States.

29. A regulatory change will also be required for Australia to fulfil its obligations under the Agreement. This will entail a change to the *Defence (Visiting Forces) Regulations 1963*. Consistent with Article XI, this will provide that vehicles under exclusive hire to or lease by the US Government can be operated by members of the US Forces and the US Civilian Component, without the need to obtain an Australian driver's licence.

### **Costs**

30. The Agreement imposes limited foreseeable direct financial costs on Australia. Australia will not receive any financial benefit under the Agreement, except through the possible contracting of Australian commercial enterprises. Article IX obligates the United States to pay reasonable costs for logistics support provided by Australia for activities under the Agreement, which is not expected to generate a financial benefit for Australia. Pursuant to Article X, the United States will share the cost of any development and construction, as well as operation and maintenance, at Agreed Facilities and Areas on the basis of proportionate use. Pursuant to Article XV, the ADOD will allocate radio frequencies for US use at no cost to the United States. Article XXI ensures that the termination of the Agreement will not extinguish any costs incurred while the Agreement is in force.

### **Future treaty action**

31. Article XXI provides that the Parties may agree to amend the Agreement at any time. Such amendments would enter into force upon an exchange of notes confirming that each Party had completed its domestic requirements to give effect to the amendment. Any

amendment would be subject to Australia's domestic treaty-making process.

32. Article I provides that Agreed Facilities and Areas may be listed in Annex A. Annex A would be negotiated at a later date, should the Parties agree it is required. Article XIX provides that any appended annex shall form an integral part of the Agreement. The addition of an annex to the Agreement would constitute an amendment to the Agreement and be subject to Australia's domestic treaty-making process.

### **Withdrawal or denunciation**

33. Pursuant to Article XXI, the Agreement will remain in force for a period of 25 years, and will thereafter continue in force, but may be terminated at any time upon one year's written notice. Any decision to terminate the Agreement will be subject to Australia's domestic treaty-making process.

34. Unless otherwise agreed, termination of the Agreement will automatically terminate all Implementing Arrangements made pursuant to the Agreement. Termination of the Agreement will not, however, release the Parties from the execution of obligations resulting from its implementation concerning costs, claims, security of classified information, and disputes.

### **Contact details**

Deputy Secretary Strategy  
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## ATTACHMENT ON CONSULTATION

### **The Force Posture Agreement between the Government of Australia and the Government of the United States of America (Sydney, 12 August 2014) [2014] ATNIF 24**

#### CONSULTATION

35. The State and Territory governments have been consulted on the Agreement through the Commonwealth-State-Territory Standing Committee on Treaties' (SCOT) biannual schedule of treaty action under negotiation, consideration and review. No comment has been received from State and Territory governments to date.

36. The Australian Department of Defence consults with the Government of the Northern Territory on the force posture initiatives on a regular basis at both senior and working levels. Defence's Chief Operating Officer met most recently with the Chief Minister of the Northern Territory on 16 July 2014 to provide an update on the Agreement and implementation of the force posture initiatives more broadly.

37. Defence utilises established forums to conduct regular consultations with the Government of the Northern Territory on the implementation of the force posture initiatives. This includes the Defence and Northern Territory Government Consultative Forum, which meets annually and is supported by a bi-annual meeting of its working group. To date, these discussions have focussed on support for the US Marine Corps rotations and the manner in which Defence will coordinate the support arrangements.

38. Defence's Commander Northern Command, in their role as Senior Officer Northern Territory, maintains an on-going relationship with the Government of the Northern Territory. Commander Northern Command liaises with the Northern Territory Government on an as-required basis to identify and discuss matters of mutual interest and concern. Defence officials also liaise regularly on the implementation of the force posture initiatives with the Government of the Northern Territory through the Director Strategic Defence Liaison in the Department of the Chief Minister. In general, interlocutors have been positive about the initiatives.

39. Defence has also conducted wider public consultations on the force posture initiatives. In May 2013, Defence released the outcomes of assessments of the social and economic impacts associated with rotations of 1100 US Marines in northern Australia in 2014. The assessments found that most impacts resulting from a rotation of 1100 Marines were expected to be positive or neutral, and that the economic impact would be modest and positive.

40. The Social Assessment noted that there was limited scope for a rotation of 1100 Marines to have a major social impact. While there was potential for some negative social impacts, these were not judged to be large enough in likelihood to cause concern to the great majority of people consulted.

41. The Economic Assessment suggested that a rotation of 1100 Marines was expected to contribute an additional \$5.6 million to the Northern Territory Gross State Product in 2011-12 dollars, or \$5090 per Marine. It found that the impact on Northern Territory industry would most strongly benefit the retail trade, transport, recreational and other business service sectors.

It also noted that assumptions underlying the economic modelling were conservative, and it was likely that there would be additional expenditure into the Australian economy over and above these conservative estimates.