

The Force Posture Agreement between the Government of Australia and the Government of the United States of America

Introduction

- 2.1 The proposed treaty action is to bring into effect *The Force Posture Agreement between the Government of Australia and the Government of the United States of America* signed at Sydney on 12 August 2014.¹

Overview and national interest summary

- 2.2 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 1 150 personnel, with the size of the rotations to increase in the coming years to around 2 500 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. According to the NIA, 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.²

1 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*, done at Sydney, 12 August 2014 [2014] ATNIF 24 (hereinafter referred to as 'NIA'), para 1.

2 NIA, para 2.

- 2.3 The NIA states that 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 Australia's long-standing policy that there are no foreign military bases on Australian soil. The NIA states that 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.³

Reasons for Australia to take the proposed treaty action

- 2.4 According to the NIA, Australia's commitment to the force posture initiatives supports Australia's efforts to deepen its long-standing alliance with the United States and further its 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.⁴
- 2.5 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').⁵ The NIA maintains that the Agreement 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

3 NIA, para 3.

4 NIA, para 4.

5 [1963] ATS 10.

for the US' military presence in Australia.⁶ The Department of Defence told the Committee:

The force posture agreement is not designed to introduce a broad new architecture for US forces in Australia. Rather it builds upon and complements our existing agreements and arrangements with the United States ... The force posture agreement has been negotiated to apply to the force posture initiatives and the activities under the agreement that have been mutually agreed by the two governments. The agreement reaffirms that the initiatives will occur at Australian owned facilities.⁷

- 2.6 The NIA suggests that 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 could also undermine Australia's long-standing alliance with the United States, with potential ramifications for Australia's bilateral defence cooperation and national security policy. The force posture initiatives represent an important new element in Australia's defence cooperation with the United States and, according to the NIA, failure to take appropriate steps to provide for their full implementation could be seen by the United States as a diminution in Australia's commitment to the alliance. It could also curtail opportunities for the ADF to maintain and enhance skills and interoperability with US Forces.⁸

Obligations

- 2.7 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.⁹
- 2.8 **Article I** sets out the definitions of key terms used in the Agreement.¹⁰ **Article I** also provides that Agreed Facilities and Areas may be listed in

6 NIA, para 5.

7 Mr Peter Baxter, Deputy Secretary Strategy, Department of Defence, *Committee Hansard*, 22 September 2014, p. 1.

8 NIA, para 6.

9 NIA, para 7.

10 NIA, para 8.

Annex A which would be negotiated at a later date, should the Parties agree it is required.¹¹

- 2.9 **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.¹²
- 2.10 **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 conducted in accordance with Australia's long-standing policy of Full Knowledge and Concurrence, where applicable.¹³
- 2.11 **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
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11 NIA, para 32.

12 NIA, para 9.

13 NIA, para 10.

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.¹⁴

- 2.12 **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 are 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.¹⁵
- 2.13 **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.¹⁶
- 2.14 **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

14 NIA, para 11.

15 NIA, para 12.

16 NIA, para 13.

to which Australia has objected on the basis that they are prohibited by Australian law.¹⁷

- 2.15 **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, for example, cluster munitions and depleted uranium.¹⁸
- 2.16 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.¹⁹
- 2.17 **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 of infectious diseases that may be related to its presence in Australia.²⁰
- 2.18 **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.²¹
- 2.19 **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

17 NIA, para 14.

18 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 5.

19 NIA, para 14.

20 NIA, para 15.

21 NIA, para 16.

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.²²

- 2.20 **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.²³
- 2.21 **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.²⁴
- 2.22 **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.²⁵
- 2.23 **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
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22 NIA, para 17.

23 NIA, para 18.

24 NIA, para 19.

25 NIA, para 20.

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.²⁶

2.24 **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.²⁷

2.25 **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.²⁸

2.26 **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

26 NIA, para 21.

27 NIA, para 22.

28 NIA, para 23.

to use Australian goods, products and services, including Australian workers and commercial enterprises, to the greatest extent practicable.²⁹

2.27 Defence expects that a 'relatively small number of US contractors' will be required to support 'highly specialised tasks' associated with the US deployments. Otherwise, the normal tender process will be followed for the majority of work, including housing and other infrastructure, allowing Australian services and suppliers to bid for contracts.³⁰

2.28 The Committee asked what opportunities the Agreement was expected to provide for Australian businesses and how these differed from opportunities under existing provisions. Defence pointed out that, in contrast to previous short-term exchanges, under the force posture initiatives, large numbers of personnel would be deployed over extended periods of time, opening up the prospect of ongoing economic opportunities:

... the commercial opportunities that will be provided to Australian business will in a sense be different because ... the agreement has a 25-year life period, and we are setting up this initiative on a long-term basis. So there will be investments made in infrastructure that will support the force posture initiatives throughout the duration of the agreement. So they will be of a different nature from short-term deployments of US forces to participate in exercises or other activities in Australia.³¹

2.29 An economic assessment conducted by Defence in 2013 predicted that a rotation of 1 100 marines was 'expected to contribute an additional \$5.6 million to the Northern Territory Gross State Product in 2011-12 dollars'. Industries that would most strongly benefit included the 'retail, transport, recreational and other business service sectors'.³²

2.30 With regard to employment opportunities, Defence reminded the Committee that it will be operating in a very competitive market as there is a high demand for skilled labour in northern Australia, particularly due to the demands of the mining sector.³³

2.31 Defence expects the supply of fresh produce and provisions to be provided through existing contracts:

29 NIA, para 24.

30 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 2.

31 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 3.

32 Department of Defence, *Submission 1*, p. [1].

33 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 3.

Garrison and specialist military support services for 2014 have been delivered to United States Forces via extant Defence contracts. Such support is provided by local contractors or by national-level contractors employing Northern Territory residents. When developing logistics support contractual arrangements for services, defence ensures surge provisions are included to cater for increased service requirements. These contracts are currently adequate to meet the level of support required by the US Marine Corps.³⁴

- 2.32 Considering that the facilities requirements will more than double with the new arrangements, the Committee suggested that it might be more equitable for new tenders to be let, opening up opportunities for new suppliers. Defence explained that, within current legal obligations under existing tenders³⁵, it will be reviewing the arrangements:

Should planning activities identify requirements that cannot be met from within extant arrangements then these will be discussed and sourced through additional procurement if required.

Any procurement activities for United States Forces have been and will be undertaken in accordance with the Australian Government's Commonwealth Procurement Rules.³⁶

- 2.33 The Committee asked how the implementation would be monitored to ensure that Australian contractors, suppliers and workers were used to the 'greatest extent practicable'. Defence assured the Committee that there would be ongoing monitoring of the process and the United States were well aware of the importance of utilising Australian goods and services:

We will have both formal and informal consultation mechanisms with the United States to monitor the implementation of the agreement. The United States defence force is very aware of the need to ensure that the implementation of the US force posture initiatives engenders broad support from the communities in which the force posture initiatives will take place. But we will monitor, with the United States, the way in which the contracting processes take place, and we will obviously be able to report on that as the initiatives move to full maturity.³⁷

- 2.34 **Paragraphs 3 through 6 of Article XVII** contain taxation provisions modelled on the *Agreement between the Government of Australia and the*
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34 Department of Defence, *Submission 1*, p. [2].

35 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 5.

36 Department of Defence, *Submission 1*, p. [3].

37 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 3.

*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.*³⁸ 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.³⁹

- 2.35 **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.⁴⁰
- 2.36 **Article XIX** contains a commitment by the Parties to 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.⁴¹ **Article XIX** also 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.⁴²
- 2.37 **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.⁴³
- 2.38 **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

38 [2011] ATS 36.

39 NIA, para 24.

40 NIA, para 25.

41 NIA, para 26.

42 NIA, para 32.

43 NIA, para 27.

requirements to give effect to the amendment. Any amendment would be subject to Australia's domestic treaty-making process.⁴⁴

Implementation

- 2.39 According to the NIA, 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.⁴⁵
- 2.40 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.⁴⁶

Costs

- 2.41 According to the NIA, 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

44 NIA, para 31.

45 NIA, para 28.

46 NIA, para 29.

that the termination of the Agreement will not extinguish any costs incurred while the Agreement is in force.⁴⁷

2.42 The Committee requested further details regarding the 'limited foreseeable direct financial costs to Australia'⁴⁸ and were told that the limited costs to date related to 'the messing, and living and accommodation charges'.⁴⁹ To date, some costs had been absorbed, such as the cost of temporary accommodation provided for the smaller rotations of US marine forces, currently approximately \$11 million.⁵⁰

2.43 Despite the fact that infrastructure development was still in the planning stage with the United States⁵¹, there is provision in the 2014–15 Budget for \$2.2 billion for infrastructure works across the forward estimates. The actual details of the costs will depend on the 'nature of the initiatives themselves':

... we are in the process of planning with the United States the gradual increases over the coming years to get to the full 2 500 marine rotation, and the bringing online of the air force component. So as those details become clearer we are then able to do our infrastructure and investment planning on the back of that.⁵²

2.44 Defence stressed that costs will be shared with the US on the basis of 'proportionate use' and that costs incurred to date will be reimbursed where appropriate:

Where infrastructure is upgraded or new facilities built, it is appropriate that the United States contributes to the cost. That is why the agreement contains a commitment to share costs on the basis of proportionate use. At its most basic, this will see the United States pay for infrastructure that is unique to US requirements and, where there is shared benefit, for the costs to be apportioned on the basis of proportionate use.⁵³

47 NIA, para 30.

48 NIA, para 30.

49 Mr Adam Culley, Chief Finance Officer, Chief Operating Officer Division, Department of Defence, *Committee Hansard*, 22 September 2014, p. 5.

50 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 5.

51 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 4.

52 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 4–5.

53 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, pp. 2 and 6.

Conclusion

- 2.45 The Committee understands that the Agreement will provide the legal certainty required for the full implementation of the two force posture initiatives announced in 2011, particularly considering the significant increase in US personnel that will be involved.
- 2.46 The Committee encourages Defence to ensure that Australian contractors and workers are given every opportunity to take advantage of the commercial prospects opened up by the force posture initiatives and the expanded US deployment.
- 2.47 The Committee supports Australia's ratification of the proposed Agreement and recommends that binding treaty action be taken.

Recommendation 1

- 2.48 **The Committee supports the *The Force Posture Agreement between the Government of Australia and the Government of the United States of America* and recommends that binding treaty action be taken.**