National Interest Analysis [2024] ATNIA 21

with attachment on consultation

Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for Defence and Security Cooperation

(Canberra, 21 March 2024)

[2024] ATNIF 39

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for Defence and Security Cooperation

(Canberra, 21 March 2024)

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Nature and timing of proposed treaty action

1. The proposed treaty action is the entry into force of the *Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for Defence and Security Cooperation* (the Agreement) through the exchange of diplomatic notes. The Agreement was signed by Australia and the United Kingdom on 21 March 2024 in Canberra, Australia.

2. The Agreement would replace the *Treaty between the Government of Australia and the Government of the Kingdom of Great Britain and Northern Ireland for Defence and Security Cooperation* (the 2014 Treaty), which entered into force on 30 July 2014. Upon entry into force of the Agreement, the 2014 Treaty will be terminated pursuant to Article 13(2) of the 2014 Treaty.

3. For the Agreement to enter into force, each Party must notify the other in writing that it has completed its domestic requirements necessary for entry into force. The Agreement will enter into force on the date that the last Party presents written notification to the other (Article 14(1)). Australia intends to present its written notification as soon as practicable following the completion of its domestic requirements.

Overview and national interest summary

4. The purpose of the Agreement is to deepen Australia's close and enduring defence partnership with the United Kingdom. The Agreement builds upon and enhances defence and security activities under the 2014 Treaty to address contemporary challenges and support increased cooperation. The Agreement establishes a framework governing the reciprocal legal status of members of a Visiting Force and its Civilian Component and Dependants while present in the each other's territory (Annex 1), and formalises our practice of consulting on critical issues that affect our sovereignty and security.

Reasons for Australia to take the proposed treaty action

5. The United Kingdom is Australia's oldest defence and security partner. Our partnership is strong, cooperative and enduring. We share a firm commitment to a peaceful, stable and prosperous Indo-Pacific, and to an international system based on rules and laws. Our militaries have operated closely together in support of peace and security since the beginning of the Commonwealth of Australia.

6. In 2023, at the Australia-United Kingdom Ministerial Consultations, Ministers agreed to update the 2014 Treaty comprehensively to reflect the present state of the Parties' defence relationship in the current and evolving global strategic environment. The Agreement will make it easier for the Parties' forces to operate together, and to operate in each other's territory.

Obligations

7. The Agreement is a treaty-level instrument that comprises fourteen (14) articles in the head Agreement and a further eighteen (18) articles in Annex 1, titled Status of Forces. The head Agreement sets out the Parties' key rights and obligations, including articles on defence and security cooperative activities, the handling of claims, and the resolution of disputes arising under the Agreement. Annex 1 sets out the legal status of members of a Visiting Force, its Civilian Component and Dependants of the Sending State in the Receiving State while undertaking defence and security cooperation activities pursuant to the Agreement.

Head Agreement

Scope and Purpose

8. The Agreement provides an overarching strategic framework for the conduct of defence and security cooperative activities to strengthen and focus the bilateral defence relationship between the Parties. This is reflected in Article 2(1) of the Agreement which sets out the scope and purpose of the Agreement. The Agreement is intended to promote, among other things, the mutual prioritisation of defence cooperation between the Parties, and the efficiency and effectiveness of sending military and civilian personnel from the Sending State to the Receiving State by defining the status of such personnel.

9. Article 3 of the Agreement outlines a non-exhaustive list of areas in which the Parties shall cooperate where possible, including: capacity to deploy and operate in peacekeeping and military operations (Article 3(2)(a)); participation in multilateral security mechanisms (Article 3(2)(b)); and cooperation and exchange of information related to the trilateral security AUKUS partnership (Article 3(2)(c)), among others.

10. Article 4(1) of the Agreement provides that written arrangements may be entered into by the Parties to implement cooperative activities pursuant to the Agreement. Article 4(4) states that Annex 1 to the Agreement, which concerns the status of visiting personnel, is an 'integral' part of the Agreement and the terms and conditions set out in that Annex shall apply to cooperative activities pursuant to the Agreement.

11. Article 5(1) of the Agreement commits the Parties to consult each other on contingencies that may affect their sovereignty and regional security interests, and consider measures in response. Article 5(2) of the Agreement reflects Australian policy requirements regarding full knowledge and concurrence. The Parties recognise the Receiving State's right to know, understand and agree to foreign military and intelligence activities conducted in, from, or through its territory and through the use of its assets. To that end, Article 5(2) of the Agreement provides that concurrence for

the presence of a capability, function or activity is to be based on a full and detailed understanding of that capability, function or activity.

12. Article 6 of the Agreement confirms that the Parties shall inform each other of available facilities, areas, equipment and support functions, and where possible provide access when needed.

13. Article 9 of the Agreement concerns the exchange and protection of information related to cooperative activities under the Agreement. In particular, the Parties shall protect classified information exchanged or communicated (Article 9(2)). The Agreement does not authorise or govern the release, use, exchange or disclosure of information in which intellectual property rights exist, unless written authorisation of the owner of those rights has been obtained (Article 9(4)).

Claims and Liability, and Disputes

14. Article 10 of the Agreement outlines how claims and liability will be handled between the Parties, and for third party claims arising from an act or omission of the Parties, in connection with the Agreement. Article 10(1) of the Agreement requires both Parties to waive all claims against the other Party arising from any damage to or loss of its property, or for any injury to, or death of its personnel caused by the acts or omissions of the other Party's personnel, servants or agents (excluding contractors) in the performance of their official duties in connection with the Agreement.

15. Article 10(2) of the Agreement concerns the apportionment of liability for third party claims (excluding contractual claims) for any damage to, or loss of property, or for any injury or death or any other loss which arises from any act or omission of either Party in connection with the Agreement. Where the Parties agree that responsibility can be attributed to one Party, the cost of handling and settling the claim shall be the sole responsibility of that Party (Article 10(2)(a)). Where the Parties agree they are both responsible, the Parties shall consult to resolve the handling and settling of the claim, with each Party paying an apportioned share based on their degree of responsibility (Article 10(2)(b)). Where it is not possible to attribute responsibility, or where the Parties cannot reach agreement, the costs of handling and settling the claim shall be apportioned equally between the Parties (Article 10(2)(c)). The Party who receives notice of any third party claim shall inform the other Party as soon as practicable, and both Parties shall assist each other in in the procurement of evidence related to such claims (Article 10(4)).

16. In relation to Articles 10(2) and (3), where both Parties agree that damage, loss, injury or death is caused by reckless acts, reckless omission, wilful misconduct or negligence, the costs which arise shall be borne entirely by the Party of the culpable person (Article 10(3)).

17. Article 10(5) provides that the Sending State shall waive any immunity from the civil jurisdiction of the courts of the Receiving State with respect to any act or omission by a member of its Visiting Force or its Civilian Component or Dependants in the Receiving State. Article 10(8) of the Agreement confirms that Parties are not prevented from entering into another international agreement or arrangement, whether under the Agreement or otherwise, regarding claims and liabilities for cooperative

activities which require specific apportionment of liability.

18. Article 12 of the Agreement provides that any dispute regarding the interpretation or application of the Agreement shall be resolved by consultation and negotiation between the Parties. Where a dispute cannot be resolved by consultation and negotiation, the Parties may refer the dispute to a dispute settlement mechanism as agreed between the Parties.

Annex 1 to the Agreement - Status of Forces

Respect for Local Law, Disciplinary Matters, and Criminal Jurisdiction

19. Article 1 of Annex 1 provides that members of the Visiting Force and its Civilian Component and Dependants present in the territory of the Receiving State shall respect the laws and regulations of the Receiving State, subject to Articles 2 and 3 of Annex 1.

20. Article 2 of Annex 1 provides that the Sending State shall have the right to exercise administrative and disciplinary authority over members of the Visiting Force and its Civilian Component when in the Receiving State in accordance with the Sending State's laws and regulations (Article 2(1)). Accordingly, Australia would retain competence regarding administrative and disciplinary matters over members of the Australian Visiting Force and its Civilian Component when they are in the United Kingdom under this Agreement. Where practicable the Sending State shall inform the Receiving State of the nature of possible disciplinary punishment before carrying it out (Article 2(2)). The Receiving State may request that the member of the Visiting Force or its Civilian Component be repatriated to the Sending State for disciplinary punishment (Article 2(3)).

21. Article 3 of Annex 1 sets out the basis for determining which Party shall have jurisdiction over criminal matters. Articles 3(1) and (2) provide that the Receiving State shall have criminal jurisdiction over the Sending State's Visiting Force, its Civilian Component and Dependants with respect to offences committed in the Receiving State, that are punishable by the laws of the Receiving State but not by the law of the Sending State. The Sending State shall have criminal jurisdiction over its Visiting Force and its Civilian Component and Dependants who are in the Receiving State, with respect to offences committed in the Receiving State and punishable by the law of the Sending State but not by the law of the Receiving State.

22. Article 3(3) confirms which Party shall have the primary right to exercise jurisdiction where an act or omission is an offence under the laws of both the Sending State and the Receiving State (referred to as concurrent jurisdiction). The Sending State shall have the primary right to exercise its jurisdiction where the offence is: solely against the property or security of the Sending State (Article 3(3)(a)(i)); solely against the person or property of another member of the Sending State's Visiting Force or its Civilian Component or Dependants (Article 3(3)(a)(i)); or has arisen out of an act or omission done in the performance of official duty (Article 3(3)(a)(ii)). The Receiving State shall have the primary right to exercise jurisdiction over all other offences (Article 3(3)(b)). A Party that has the primary right to exercise jurisdiction shall notify the other Party as soon as practicable if it elects not to exercise jurisdiction

(Article 3(3)(c)). The Parties shall give sympathetic consideration to a request from the other Party to waive the primary right to exercise jurisdiction (Article 3(3)(d) - (e)). Such a decision may be given on conditions, including that proceedings be commenced by the requesting Party (Article 3(3)(e)). The Parties shall notify each other as soon as practicable of the disposition of all cases where the right to exercise jurisdiction is concurrent (Article 3(3)(f)).

23. Article 3(4) of Annex 1 requires the Parties to cooperate in the arrest of members of the Visiting Force or its Civilian Component or a Dependant and in handing them over to the authorities of the Party that is to exercise jurisdiction. The Sending State shall promptly notify the Receiving State should it arrest or detain a member of the Visiting Force or its Civilian Component or a Dependant where that person is subject to the primary jurisdiction of the Receiving State (Article 3(5)). The Receiving State shall promptly notify the Sending State of the filing of a complaint against, or the arrest or detention of, any member of the Visiting Force or its Civilian Component or a Dependant (Article 3(6)). Where the Receiving State is to exercise jurisdiction over a member of the Visiting Force or its Civilian Component or a Dependant, it shall give sympathetic consideration to a request from the Sending State to be entrusted with the custody of that person pending the conclusion of all judicial proceedings. The Sending State shall make that person available for the purposes of investigation or trial upon request (Article 3(7)). The Parties shall cooperate in the investigation of offences, including the collection and production of evidence (Article 3(8)).

24. Articles 3(9)–(11) of Annex 1 set out a number of procedural safeguards in respect of criminal proceedings that shall be accorded to members of the Visiting Force or its Civilian Component or a Dependant. Whenever a member of the Visiting Force or its Civilian Component or a Dependant is taken into custody, detained or prosecuted by the Receiving State, the Receiving State shall accord that person all generally accepted procedural safeguards pursuant to the international law obligations of the Receiving State and no less than those provided to its nationals (Article 3(10)). For this purpose, the Agreement includes a list of minimum procedural safeguards that must be accorded (Article 3(10)(a)-(l)). In addition, where the Receiving State is to exercise jurisdiction over members of the Visiting Force or its Civilian Component or a Dependant, proceedings must only be commenced in the courts of ordinary jurisdiction of the Receiving State, and must not take place under the military jurisdiction of the Receiving State (Article 3(11)). Further, any person convicted or acquitted for an offence by one Party cannot be retried by the other Party for an offence that is substantially the same (Article 3(9)).

Arrangements to Facilitate Cooperative Activities

25. Article 4 of Annex 1 obliges each Party to take specific steps to facilitate the entry into and departure from the Receiving State's territory of the Visiting Force, its Civilian Component and Dependants for the purpose of cooperative activities under the Agreement. This includes providing notice of arrival and departure dates (Article 4(1)); exemption from the requirement to apply for a visa (Article 4(2)); and permitting entry with specific documents (Article 4(3)-(4)). The Receiving State shall provide reasonable prior notice to the Sending State of additional documentary requirements in satisfaction of its national health, biosecurity and quarantine laws and regulations (Article 4(5)). If a person ceases to be a member of a Visiting Force

or of a Civilian Component or to be a Dependant, the Sending State shall promptly inform the Receiving State and promptly take appropriate steps to effect the departure of that person from the Receiving State (Article 4(7)). If the Receiving State reasonably requests the departure of a member of the Visiting Force or Civilian Component or a Dependant of the Sending State, the Sending State shall promptly take reasonable steps to effect the departure of that person and meet any reasonable costs incurred by the Receiving State in removing the person (Article 4(8)).

26. Article 5 of Annex 1 concerns diplomatic clearances and movement of personnel and aircraft, vessels and official motor vehicles of the Visiting Force and any Civilian Component. The Receiving State shall provide the appropriate permanent or occasional flight or ship diplomatic clearances for State and military aircraft and vessels to the Sending State (Article 5(1)). Aircraft and vessels operated by or for the Visiting Force and its Civilian Component may enter the Receiving State upon approval by the authorities of the Receiving State in connection with activities mutually approved by the Parties (Article 5(2)). Individual members of the Visiting Force and its Civilian Component are afforded freedom of movement in the territory of the Receiving State for the purpose of lawful activities (Article 5(5)). The Visiting Force shall be subject to the same conditions in respect of harbour and airport charges and fees, and road tax and fees as those of the Receiving State (Article 5(6)-(7)).

27. Article 6 of Annex 1 provides for the importation and exportation of goods to and from the Receiving State, including items that may be imported and exported free of duty and taxes. The benefits provided under Article 6(3)-(5), Article 6(6)(a), Article 6(10) and Article 8(1) shall only apply to the extent permitted by the laws and regulations of the Receiving State (Article 6(12)). The Sending State shall also take appropriate measures to ensure that the Visiting Force, its Civilian Component and Dependants pay any duty and fines due to the Receiving State (Article 6(11)).

28. Article 7 of Annex 1 concerns the importation, transportation, storage, use and carriage of weapons, ammunition and dangerous goods. Members of the Visiting Force may possess and carry weapons when authorised by the Sending State and in circumstances previously approved by the Receiving State (Article 7(1)). The Receiving State shall specify, in consultation with the Sending State, the quantity and type of weapons, ammunition and dangerous goods which may be imported, transported, stored and used in the Receiving State, and this shall be done accordance with the laws, regulations and policies of the Receiving State (Article 7(2)-(3)).

29. Article 8 of Annex 1 concerns local purchases and employment. In particular, the Sending State and its contractors shall endeavour to purchase local goods and services to undertake cooperative activities while in the Receiving State to the greatest extent practical, provided they are available at a price no less favourable than and subject to the same terms in respect of any tax or fee as the Receiving State's force and are of the standard required (Article 8(1)). Where the Sending State and its contractors engage local labour while in the Receiving State, the conditions of employment and work shall comply with the minimum standards laid down by local laws and regulations of the Receiving State (Article 8(2)).

30. Article 9 of Annex 1 relates to personal taxation of members of the Visiting Force or its Civilian Component and Dependants, and confirms that any taxes and duties which

are not already covered under the Agreement shall be governed by any applicable agreement in force between the Parties and that has been implemented under the laws of both Parties.

31. Article 10 of Annex 1 confirms that members of the Visiting Force may wear the uniforms and military insignia of their force while performing their official duties in the territory of the Receiving State.

32. Article 11 of Annex 1 requires both Parties to cooperate to ensure the security of installations and areas made available in the Receiving State to the Visiting Force, as well as their property, official records and information (Article 11(1)). The Sending State shall have the right to maintain military police in order to maintain discipline and good order within the Visiting Force (Article 11(2)). The Receiving State shall retain responsibility for security outside the installation and areas made available to the Visiting Force (Article 11(3)-(4)).

33. Article 12 of Annex 1 provides certain arrangements regarding driving licences and official vehicles. Article 12(1) confirms that the Parties shall mutually determine the applicability of exemptions from registration and licensing laws in respect of vehicles, aircraft, vessels and other equipment necessary for cooperative activities. Article 12(2) requires the Receiving State to accept the validity of a driving permit issued by the Sending State for the purpose of driving official vehicles in the performance of official duties.

34. Article 13(1) of Annex 1 provides that members of the Visiting Force and its Civilian Component with professional, technical or trade licences and qualifications shall be allowed to perform their relevant official duties, and shall not be required to obtain any permission from the Receiving State to conduct such official duties. Article 13(2) of Annex 1 provides that medical professional members of the Visiting Force or Civilian Component shall be allowed to provide medical treatment, prescribe and dispense medical drugs, and use medical products or devices for the benefit of the members of the Visiting Force or Civilian Component.

35. Articles 14(1)–(2) of Annex 1 provide that the Sending State shall only install communication systems with the permission of the Receiving State and only operate these within allocated frequencies. The Receiving State is required to give fair and expeditious consideration to a request to install a communication system (Article 14(1)). The Parties must take reasonable measures to avoid interference with each other's communications networks (Article 14(3)).

36. Article 15 of Annex 1 concerns arrangements relating to public health, biosecurity and medical treatment. The Sending State must ensure that members of the Visiting Force are medically and dentally fit to conduct cooperative activities upon entry into the Receiving State (Article 15(1)). Any medical or dental fees (including with respect to aeromedical evacuation) incurred by the Receiving State shall be fully recoverable from the Sending State (Article 15(2)). The Sending State shall ensure that all members of the Visiting Force, Civilian Component and Dependants comply with the biosecurity laws and regulations of the Receiving State, and all costs in relation to this shall be borne by the Sending State (Article 15(3)).

37. Article 16 of Annex 1 concerns environmental protection. Both Parties shall implement the Agreement in a manner consistent with the protection of the environment, cultural heritage, and human health and safety of the Receiving State, and shall consult and exchange information regarding these issues (Article 16(1)-(2)). In cooperation with the Receiving State, the Sending State will take appropriate measures to address any damage or potential damage made to the environment, cultural heritage, and human health and safety (Article 16(3)).

38. Under Article 17 of Annex 1, in the event of the death of a member of the Visiting Force or its Civilian Component or a Dependant in the Receiving State, the Sending State shall inform the Receiving State who shall issue a death certificate (Article17(1)). Subject to the laws and regulations of the Receiving State, the Sending State shall have the right to take and retain charge of and make arrangements for the disposition of the remains of the deceased person upon notification from the Receiving State (Article 17(3)). If requested and where circumstances permit, the Receiving State shall assist with arrangements to return the deceased person's remains to the Sending State (Article 17(3)). If a member of the Visiting Force or its Civilian Component was believed to be dead but their remains had not been recovered, the Receiving State shall permit the Sending State to be involved in the search and recovery of those remains, subject to the Receiving State's laws and regulations (Article 17(4)). If the remains of the deceased person are to be disposed of in the Receiving State instead of being repatriated, the Receiving State shall have regard to any requests by the Sending State as to the method of disposal and any costs shall be borne by the Sending State (Article 17(5)).

39. Article 18 of Annex 1 concerns investigations of accidents. Where there is an accident or incident in the Receiving State involving only official aircraft, vessels or vehicles of the Sending State or official aircraft, vessels or vehicles of the Sending State and any aircraft, vessels, vehicles or personnel of the Receiving State or a third party, the Parties shall assist each other in undertaking investigations (Article 18(1)). Upon the request of the Receiving State, the Visiting Force and its Civilian Component shall, wherever possible, assist the Receiving State to secure the accident site and take custody of all applicable wreckage involving official aircraft, vessels or vehicles of the Sending State (Article 18(2)).

Implementation

40. Cooperative activities are to be implemented by the Parties' national defence organisations as mutually determined in accordance with applicable international law and the Parties' respective national laws, regulations and policies (Article 3(1)).

41. To the extent that provisions of the Agreement are implemented by the *Defence (Visiting Forces) Act 1963* (the Act), the United Kingdom has been declared in Schedule 1 of the *Defence (Visiting Forces) Regulations 1963* as a country to which the provisions of the Act apply.

42. To ensure consistency with the Agreement, regulatory amendments to the *Defence (Visiting Forces) Regulations 1963* and the *Migration Regulations 1994* are required. This regulatory action would be completed before entry into force of the Agreement for Australia can occur.

43. The Agreement will not change the existing roles of the Commonwealth Government or the State and Territory Governments.

Costs

44. Pursuant to Article 8 of the Agreement, each Party shall bear its own costs of participation in cooperative activities pursuant to the Agreement, unless otherwise mutually determined by the Parties.

Future treaty action

45. In accordance with Article 13(1) of the Agreement, the Agreement may be amended at any time where both Parties agree in writing. Any amendment would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties. Any amendment would enter into force on the date that the last Party presents written notification confirming that it has completed its domestic requirements for entry into force of the amendment.

Termination

46. In accordance with Article 14(2) of the Agreement, the Agreement may be terminated by either Party giving twelve (12) months' written notice to the other Party of its intention to terminate the Agreement, or by mutual written consent of the Parties.

47. Rights and obligations relating to protection of information including classified information, intellectual property rights, jurisdiction, claims and liabilities, and disputes shall continue to apply notwithstanding the termination of the Agreement (Article 14(3)).

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ATTACHMENT ON CONSULTATION

Agreement between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for Defence and Security Cooperation

(Canberra, 21 March 2024)

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CONSULTATION

Commonwealth Departments

1. The Department of Defence consulted across the Department as well as with the Australian Signals Directorate, the Australian Submarine Agency, the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, the Attorney-General's Department, the Department of Agriculture, the Department of Home Affairs and the Department of the Treasury. No concerns have been identified. The text of the Agreement was agreed by the Federal Executive Council in February 2024.

State and Territory Governments

2. State and Territory Governments have been consulted through the Interjurisdictional Working Group's Standing Committee on Treaties. No requests for further information or comments on the Agreement have been received to date from the State and Territory Governments. No action will be required from States or Territories to implement the Agreement.