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Committee Secretary

Joint Standing Committee on Treaties

PO Box 6021

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Canberra ACT 2600

Dear Committee Secretary,

Please find attached my submission in relation to the Joint Standing Committee on Treaties inquiry into the 2022 Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan.

Yours sincerely,

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Professor of International Law

AGREEMENT BETWEEN AUSTRALIA AND JAPAN CONCERNING THE FACILITATION OF RECIPROCAL ACCESS AND COOPERATION BETWEEN THE AUSTRALIAN DEFENCE FORCE AND THE SELF-DEFENSE FORCES OF JAPAN

Executive Summary

The 2022 Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan (RAA) is a form of Status of Forces Agreement. It addresses multiple international and national legal issues associated with the exchange of forces between the two countries, including land, air and sea forces and the associated civilian component. It seeks to allow Australia and Japan to build a deeper defence relationship. Two particular issues are raised with respect to the RAA as they relate to the freedom of navigation and compulsory pilotage within the Torres Strait, and Japan's stance on capital punishment. Any irregularities and ambiguities in the RAA and its associated instruments can be resolved by adjustments and modifications prior to ratification, including an additional set of Agreed Minutes.

Introduction

1. The 2022 Agreement between Australia and Japan concerning the Facilitation of Reciprocal Access and Cooperation between the Australian Defence Force and the Self-Defense Forces of Japan (RAA) was concluded in Canberra and Tokyo on 6 January 2022. It reflects the outcome of long standing negotiations between Australia and Japan over the finalisation of such an Agreement. A number of contentious issues associated with the Agreement were discussed in the public domain during the negotiation process and there would have been an awareness within the Australian government as to the content of those issues.[1]

2. The RAA is a form of 'Status of Forces Agreement' that allows for the exchange between two States of military forces and an associated civilian component; referred to collectively in the RAA as 'Visiting Forces' and 'Civilian Component' (VFCC). These Agreements seek to resolve a number of international and domestic legal issues that arise when military forces are exchanged, and are especially important when it is envisaged that there will be ongoing cooperation between military forces arising from alliance or military

[1] Donald R. Rothwell "Legal hurdles remain in the Australia–Japan Reciprocal Access Agreement" *East Asia Forum* (1 December 2020) <www.eastasiaforum.org/2020/12/01/legal-hurdles-remain-in-the-australia-japan-reciprocal-access-agreement/>.

partnership arrangements. An RAA or Status of Forces Agreement are commonplace between military forces that engage in exchange and military collaboration and cooperation in the territory of each other.

3. Australia currently has in place a number of Status of Forces Agreements or their equivalent, including:

    i. 1998 Agreement between the Government of Australia and the Government of New Zealand concerning the Status of their Forces;[2]

    ii. 2006 Agreement between the Government of Australia and the Government of the French Republic regarding Defence Cooperation and the Status of Forces;[3]

    iii. 1997 Agreement between the Government of Australia and the Government of Malaysia concerning the Status of Forces;[4] and,

    iv. 1963 Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America concerning the Status of United States Forces in Australia, and Protocol.[5]

4. Japan does not have the same extensive experience as Australia has had with similar Status of Forces Agreements. To date, the only equivalent Agreement Japan has concluded is the 1960 Agreement regarding the Status of United States Armed Forces in Japan, [6] though that Agreement does not contemplate Japanese forces being located, or stationed in the United States of America. The Japanese Ministry of Defense announced in October 2021 that a Japan-United Kingdom RAA was under negotiation.[7]

Principal Provisions

5. The RAA follows a template-type approach similar to that found in many Status of Forces Agreements to which Australia is a party. The RAA addresses legal issues associated with:

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[2] [2005] ATS 12.
[3] [2009] ATS 18.
[4] [1999] ATS 14.
[5] [1963] ATS No. 10.
[6] Ministry of Foreign Affairs of Japan, Agreement regarding the Status of United States Armed Forces in Japan, at <www.mofa.go.jp/region/n-america/us/q&a/ref/2.html>.
[7] Ministry of Defense (Japan), "The Government of Japan and the UK Government will commence negotiations for the conclusion of the Japan-UK RAA", at <www.mod.go.jp/en/article/2021/10/a9f88a37b29ea23c4816ee95f15c74e62d34dc6e.html>.

i. Definitions and Purpose (Articles I and II);

ii. Duties and Scope (Articles III-IV);

iii. Entitlements and Obligations (Articles V-VI);

iv. Fiscal Laws, Access to Facilities, Vehicles, Licenses and Permits (VII-XI, XIX);

v. Military activities, weapons (Article XII-XIV);

vi. Personal information, medical requirements (Article XV-XVI);

vii. Materials used by Visiting Forces and Costs (Article XVII-XVIII);

viii. Implementation (Article XX);

ix. National Command, Jurisdiction, and Privileges (Article XXI-XXVI); and,

x. Joint Committee and Final Provisions (XXVII-XXIX).

6. In addition to the 29 substantive articles of the Agreement, there is:

   i. An Annex that relates to Article XXI;

   ii. Agreed Minutes to the Agreement; and

   iii. A Record of Discussion on Article XXI (RD).[8]

7. The RD is an unusual feature of this Agreement and it merits separate consideration below. What can initially be observed is that the RAA is contained across four instruments, which is exceptional for a newly negotiated treaty. To read the Agreement and to take into account its legal intent, it is therefore necessary to consider:

   i. The main body of the Agreement (Preamble and Articles I – XXIX);

   ii. Annex relating to Article XXI;

   iii. Agreed Minutes; and,

   iv. Record of Discussion on Article XXI.

   The legal status of the Agreed Minutes and RD are ambiguous and are considered below.

8. It should also be observed that the Agreement concludes as follows:

   > DONE, in duplicate at Canberra and Tokyo, on this sixth day of January, 2022 in the English and Japanese languages, both texts equally authentic.

[8] [2022] ATNIA 2, 8-9

This provision is not exceptional,[9] and is consistent with Article 33, 1969 Vienna Convention on the Law of Treaties (VCLT),[10] to the same effect. When there are two equally authentic versions of a treaty text in two different languages, there arises a possibility that different interpretations may occur between the two versions. The VCLT rule in that instance is that:

> Article 33 (3)
>
> The terms of the treaty are presumed to have the same meaning in each authentic text.

Nevertheless, it needs to be highlighted that there remains a potential for disagreement between Australia and Japan over differences in interpretation of the English language version and the Japanese language version of the treaty and this is particularly relevant with respect to aspects of the treaty that are unclear or ambiguous.

Warships, Freedom of Navigation and Compulsory Pilotage

9. The Agreement includes some general provisions that are particularly applicable to vessels. Foreign naval vessels may only enter an Australian port following the issuing of diplomatic clearance, and this is reflected in Article V (1). As such, a Japanese warship could not make a port visit to Sydney Harbour without first having obtained such clearance. The Agreement does not otherwise address the freedom of navigation of warships in the territorial sea and exclusive economic zone of Australia and Japan. Navigation by Australian and Japanese warships in those circumstances is regulated by the 1982 United Nations Convention on the Law of the Sea[11] to which both States are parties and the application of which is generally acknowledged in clause 6 of the Preamble which states:

> Acknowledging their respective obligations under international law.

10. The Agreement in Article V (2) deals with the movement of vessels of the Visiting Forces between facilities and areas that are to be made available to the Visiting Forces and Civilian Component. Article V (3) further supplements this provision by indicating the need for consultation on routes to be used by Visiting Forces and that the Receiving State may “prescribe such routes to be used, impose restrictions on movements within the

[9] See eg. 2018 Free Trade Agreement between Australia and the Republic of Peru [2020] ATS 6, Article 29.6,
[10] [1974] ATS No. 2.
[11] [1994] ATS 31.

Receiving State and prohibit access to and passage through specified areas". These two clauses of Article V are relevant in the context, for example, of where a Japanese warship is moving from one place to another in Sydney Harbour, and likewise for an Australian warship within a Japanese port of harbour. This provision does not, however, sit comfortably with the right of innocent passage under the 1982 United Nations Convention on the Law of the Sea which the warships of both countries are entitled to exercise within the territorial sea of Australia and Japan respectively.[12] One interpretation of this provision is that Japan could seek to prescribe the navigation route for an Australian warship as it moves from one Japanese port to another. This would remove the autonomy of the RAN officer in charge.

11. Article V (6) provides as follows:

> 6. The vessels of the Visiting Force shall be subject to compulsory pilotage in accordance with the laws and regulations of the Receiving State, and if a pilot is taken, pilotage shall be paid for by the Sending State at appropriate rates.

This raises two issues. The first is that warships of the Visiting Force would be subject to Compulsory Pilotage when entering designated compulsory pilotage areas of the Receiving State. Compulsory Pilotage is not defined in the Agreement but it can be taken to mean a legal requirement to take on board a ship an accredited pilot for the purposes of ensuring safe navigation through congested or hazardous waters. This can include the waters of a port, harbour, or other waters either within the internal waters of a coastal state or the territorial sea of that coastal state. Taking on board a pilot within such waters is not exceptional, and will be prescribed by the relevant local law that applies within the port or harbour.[13] Japan currently has compulsory pilotage in the following areas: Tokyo Bay, Ise Mikawa Bay, Osaka Bay, Seto Inland Sea, Kanmon Channel, Sasebo, and Naha.[14] Unless granted an exemption, or sovereign immunity was recognised consistently with international law, Australian warships would therefore need to take on board and pay for an accredited pilot when within these waters.

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[12] Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* 2nd (2016) 289-292.
[13] Maritime Safety Act 1998 (NSW), s. 74.
[14] Japan, "Compulsory Pilotage" (N.D.) at <www.pilot.or.jp/english/contents/06_compulsory_pilotage.pdf>.

12. The second issue that arises is with respect to the compulsory pilotage of Japanese warships within the Torres Strait and Great Barrier Reef. Australian has a unique compulsory pilotage regime within these two bodies of water. They are:

    i. Compulsory pilotage within internal waters and the territorial sea of the Great Barrier Reef adopted in 1991;[15] and,

    ii. Compulsory pilotage within the territorial sea of the Torres Strait adopted in 2006.

    Compulsory pilotage within the Great Barrier Reef was adopted with the oversight of the International Maritime Organisation and has been very successful in avoiding major shipping incidents within those vulnerable waters. Given the hazards to shipping of the Great Barrier Reef and the sensitivity of the marine environment and associated islands and coastal areas, these waters are rarely frequented by foreign warships. It would therefore be unusual for Japanese warships to pass through the Great Barrier Reef.

13. The Torres Strait compulsory pilotage regime has been more contentious principally because the strait is a recognised international strait under the 1982 United Nations Convention on the Law of the Sea. International straits are under Article 38 of the Convention straits utilised by international shipping where the right of transit passage can be exercised to freely move through the strait and where the right of passage cannot be hampered.[16] Australia and Papua New Guinea were able to have a compulsory pilotage regime for the Torres Strait endorsed by the International Maritime Organisation. When amendments were made to the Navigation Act 2012 (Cth) to give effect to the Torres Strait compulsory pilotage regime, Singapore and the United States protested Australia's conduct.[17] To address those concerns, Australia exempted from compulsory pilotage sovereign immune vessels and vessels of a certain length.[18] Torres Strait compulsory pilotage has proven to be successful in ensuring the safety of maritime navigation in the strait and providing environmental protection for the waters of the strait, its natural

[15] Australian Maritime Safety Authority, "Coastal Pilotage Exemptions" at <www.amsa.gov.au/safety-navigation/navigating-coastal-waters/coastal-pilotage-exemptions>.
[16] 1982 United Nations Convention on the Law of the Sea, Article 44.
[17] Robert C. Beckman "PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS" (2007) 38 *Ocean Development & International Law* 325-357.
[18] Donald R. Rothwell, "Compulsory Pilotage and the Law of the Sea: Lessons Learned from the Torres Strait" ANU College of Law Research Paper No. 12-06

resources, and for Torres Strait islanders.[19] Foreign navies, such as the People's Liberation Army Navy (China), have recently transited Torres Strait without a pilot consistently with Australian law.[20] As Australian law does not require sovereign immune vessels to carry on board a pilot, then Japanese warships visiting Australia would under the terms of the Agreement not be required to take on board a pilot within the Torres Strait.

Death Penalty

14. A core aspect of any Status of Forces Agreement or equivalent are the legal mechanisms established for the application of the laws of the Visiting Forces to those forces whilst in the Receiving State, and the application of laws of the Receiving State. Immunities enjoyed by Visiting Forces from the laws of the Receiving State must be balanced against the need to ensure that the conduct of Visiting Forces are subject to legal regulation, and that certain local criminal laws in particular are respected. In that respect, it needs to be recalled that the Defence Force Discipline Act 1982 (Cth) applies extraterritorially with the effect that ADF members remain subject to the Act whilst serving overseas.[21]

15. Article XXI of the Agreement is the principal provision dealing with the application of criminal law to members of the VFCC. The generally applicable principle is that the Visiting Forces remain subject to the law of the Sending State while within the Receiving State, and in the case of disciplinary matters exclusive jurisdiction is recognised. As such, ADF members would be subject to the Defence Force Discipline Act whilst visiting Japan, and Japanese forces would be subject to the Japanese equivalent whilst visiting Australia.

16. While Article XXI applies the basic principle noted above, there are a number of exceptions, which make operation of the provision complex. The key points to note are as follows:

[19] Sam Bateman & Michael White, "Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment" (2009) 40 *Ocean Development & International Law* 184-203.
[20] Andrew Greene, "Prime Minister Scott Morrison accuses Chinese warship of 'reckless and irresponsible' act after laser was shone at RAAF aircraft" ABC News (19 February 2022) at <www.abc.net.au/news/2022-02-19/defence-accuses-chinese-warship-of-dangerous-act-laser-shone/100845702>.
[21] Defence Force Discipline Act 1982 (Cth) s. 9.

i. The Receiving State has criminal jurisdiction over VFCC members for offences committed within the Receiving State (Art XXI (2)(b));

ii. The Receiving State has exclusive jurisdiction over VFCC members with respect to offences punishable by the law of the Receiving State but not the law of the Sending State (Art XXI (3)(b));

iii. Where jurisdiction is concurrent, the Sending State shall have the primary right to exercise jurisdiction in certain defined instances, and in all other instances the primary right to exercise jurisdiction will exist with the Receiving State (Art XXI 4)).

The significance of these provisions is that their effect is that if a VFCC member whilst off duty and outside of a military base, barracks, or their ship commits a criminal act against a Receiving State civilian, the criminal law of the Receiving State would apply. This would especially be the case for very serious crimes such as manslaughter and murder.

17. A challenge in drafting Article XXI is the multiple factual scenarios that may arise from where an alleged criminal act has taken place, the mobility of a VCFF member, and the role of the Visiting Force to conduct an investigation to assist the authorities of the Receiving State who are conducting a criminal prosecution. This could extend from the taking a statement from a VFCC member, collecting evidence, and eventually their arrest and detention. Article XXI (5) (6) seeks to address these mutual legal assistance issues. In interpreting these provisions there is a need to take into account the respective international human rights law obligations of each party, and the constraints imposed by international law and national law upon how a Visiting Force can respond to requests for mutual assistance from the Receiving State in a criminal investigation. Article XXI (7) (8) deals with the rights of an accused and convicted person and is consistent with international human rights standards such as the rule prohibiting double jeopardy, and rights to a fair trial.

18. Japan retains the death penalty for certain offences and persons have been executed in Japan as recently as 2021.[22] A fundamental flaw with Article XXI and the associated

[22] "Japan hangs three death-row inmates in first executions since 2019" *Japan Times* (December 21, 2021) <www.japantimes.co.jp/news/2021/12/21/national/japan-executions-2019/>.

provisions of the RAA, including the RD, is that there is no prohibition placed on the imposition of the death penalty for a capital offence against VFCC members.

19. Australia has abolished the death penalty under Commonwealth, State, and Territory law.[23] Australia has also adopted all relevant international treaties that prohibit the imposition of the death penalty,[24] and has been a strong and consistent voice calling for the global abolition of the death penalty.[25] The Australian Government has historically advanced a clear position that it opposes the death penalty upon conviction of an Australian citizen of a capital crime. This was highlighted by the advocacy, diplomacy and legal options advanced by the Australian government to halt the executions of Australian citizens Nguyen Tuong Van (Singapore, 2005), and Andrew Chan and Myuran Sukumaran (Indonesia, 2015). The role of the Australian Federal Police in assisting the Indonesia authorities investigate the drug trafficking activities of the so-called 'Bali Nine' was a matter of political and legal controversy in Australia,[26] resulting in modification of AFP procedures in these matters. Australia's current policy position on this issue is reflected in 'Australia's Strategy for Abolition of the Death Penalty' released by the Department of Foreign Affairs and Trade in 2018. The 'Statement of Intent' associated with that Strategy is as follows:

> **Australia opposes the death penalty in all circumstances for all people.**
>
> We support the universal abolition of the death penalty and are committed to pursuing this goal through all the avenues available to us.

20. The legal flaw in Article XXI and the associated RAA instruments are as follows:

    i. There is no absolute prohibition on Australian authorities providing mutual assistance to Japanese authorities investigating a capital offence alleged to have been committed by a VFCC member;

    ii. Procedural safeguards identified with respect to "cruel punishments" in Annex clause 7 (b) are not sufficiently precise to exclude the death penalty being applied following conviction of a capital offence;

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[23] Death Penalty Abolition Act 1973 (Cth).
[24] Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty [1991] ATS 19.
[25] Department of Foreign Affairs and Trade, *Australia's Strategy for Abolition of the Death Penalty* (2018).
[26] *Rush v Commissioner of Police* [2006] FCA 12.

iii. The RD is not legally binding and makes clear that it "does not alter the scope of the Parties' domestic laws and regulations";

iv. The mutual assistance expectation under paragraph 2 of the RAA Annex is not absolutely bared because of the potential that a VFCC member could be subject to the death penalty, rather that it would be assessed on a 'case-by-case' basis;

v. That the reference in paragraph 3 of the RD clarifying the status of paragraph 2 (c) 'relevant assurances' not to seek the death penalty is no more than a political assurance and not a legal undertaking or acceptance of a legal obligation on the part of prosecutors not to seek the death penalty; and,

vi. Australia's consideration as to whether it will cooperate with Japan on matters associated with Australian VFCC members who could be subject to the death penalty rely upon "representations" and "relevant assurances" provided by Japan as per paragraph 5 of the RD.

Treaty Interpretation

21. A challenge associated with the interpretation of the RAA and its associated instruments is that they encompass four instruments with varying status. As a general proposition of treaty law that is an unsatisfactory outcome for a freshly negotiated bilateral treaty and immediately creates challenges for the parties in interpreting and applying the treaty, and for this Committee in understanding the various component parts. This is especially relevant with respect to the interpretation of Article XXI.

22. With respect to the Annex of the RAA, Article XXIX (4) makes clear that:

> 4. The Annex to this Agreement shall form an integral part of this Agreement.

Article 2 (1)(a) of the Vienna Convention on the Law of Treaties makes clear that a treaty may be "embodied in a single instrument or in two or more related instruments and whatever its particular designation". On the basis of Article XXIX (4) RAA and Article 2 (1) (a) of the Vienna Convention rule it is clear that the Annex is to be read alongside the main text of the RAA with respect to the interpretation of Article XXI.

23. The Agreed Minutes to the RAA are said to:

> hereby reflect the following understanding which they have reached during the negotiations for the Agreement.

The Agreed Minutes are not part of the RAA and are to be distinguished from the Annex as discussed above. As such, the Agreed Minutes are not part of the treaty for the purposes of the Vienna Convention on the Law of Treaties and would not be considered in the general interpretation of the treaty consistently with Article 31 of the Vienna Convention. The Agreed Minutes do, however, fall within the ambit of the Article 32 Vienna Convention rule with respect to supplementary means of interpretation. Article 32 provides that recourse may be had to supplementary means of interpretation "including the preparatory work of the treaty and the circumstances of its conclusion" to confirm the meaning of the treaty in instances of where following the general rules of treaty interpretation there exists:

- An ambiguous or obscure meaning; or
- A result which is manifestly absurd of unreasonable.[27]

The Agreed Minutes can therefore be taken into account with respect to Articles I, V, X, XVII, and XXIII if those circumstances arise.

24. The status of the RD and its implications for the purposes of Article XXI is much more ambiguous. Of particular relevance is that the RA states:

> It is not legally binding and does not alter the scope of the Parties' domestic laws and regulations or international legal obligations arising under, or existing independently of, the Agreement.

The NIA to the RAA refers to the RD as being a less-than-treaty-status instrument.[28] While the RD cannot be equated to the text of the RAA, or the Annex, it may be considered equivalent in status to the Agreed Minutes and taken into account in the interpretation of the RAA consistently with Article 32 Vienna Convention on the Law of Treaties. However, the capacity of the parties to have recourse to the RD is qualified by the Article 32 rule as discussed above the consequence of which is that in the absence of an ambiguous or obscure meaning, or a result which is manifestly absurd of unreasonable, the RD cannot be formally taken into account.

25. Given the importance of the RD with respect to the interpretation of Article XXI, it is unclear why the interpretations recorded in the RD are not reflected in the Annex, especially given the Annex specifically relates to Article XXI. A clearer treaty law solution

[27] Anthony Aust, *Modern Treaty Law and Practice* 3rd (2013) 217-220.
[28] [2022] NIA 2 [10, 14, 16].

would have been for the content of the RD to be incorporated into an amended or extended Annex.

Conclusion

26. The following concluding points are made with respect to the RAA:

i. Australian warships would be subject to compulsory pilotage in Japanese waters;

ii. Japanese warships would not be subject to compulsory pilotage in certain Australian waters, especially the Torres Strait;

iii. The RAA does not create a clear bar upon Australia providing mutual assistance to Japanese authorities investigating Australian VFCC members for capital offences;

iv. Australian VFCC members remain subject to potential prosecution and conviction of capital crimes in Japan;

v. For certainty as to the legal effect of the RD its terms should be incorporated into the Annex;

vi. In the alternate, a clearer set of Agreed Minutes should be concluded prior to Australian ratification to make absolutely clear that the death penalty would not be applied to Australian VFCC members; and,

vii. As currently drafted, Australian ratification of the RAA would not be consistent with Australian law, and Australian policy as reflected in the 2018 Department of Foreign Affairs and Trade ‘Australia's Strategy for Abolition of the Death Penalty’.

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