The Parliament of the Commonwealth of Australia
Joint Standing Committee on Treaties

Report 145

Treaties tabled on 26 August and 2 September 2014

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

Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology (Canberra, 8 July 2014)

Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information (Canberra, 27 August 2014)

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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;

b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:

   (i) either House of the Parliament, or

   (ii) a Minister; and

such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.

List of abbreviations

ADF	Australian Defence Force
ADOD	Australian Department of Defence
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
FCC	Five Country Conference
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organisation for Migration
MoU	Memorandum of Understanding between the Australian Department of Immigration and Citizenship and the United States Department of Homeland Security and the United States Department of State for the purposes of Implementation of the High Value Data Sharing Protocol between the Nations of the Five Country Conference
NIA	National Interest Analysis
RIS	Regulation Impact Statement
SOFA	Agreement Between the Government of Australia and the Government of the United States of America concerning the Status of United States Forces in Australia
USAF	United States Air Force
USMC	United States Marine Corps

List of recommendations

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

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3 Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology

Recommendation 2

The Committee supports the *Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology* and recommends that binding treaty action be taken.

4 Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information

Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information* and recommends that binding treaty action be taken.

1

Introduction

Purpose of the report

1.1 This report contains the Joint Standing Committee on Treaties' review of the following treaty actions tabled on 26 August and 2 September 2014:

- *The Force Posture Agreement between the Government of Australia and the Government of the United States of America* (Sydney, 12 August 2014);
- *Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology* (Canberra, 8 July 2014);
- *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information* (Canberra, 27 August 2014).

1.2 The Committee's resolution of appointment empowers it to inquire into any treaty to which Australia has become signatory, on the treaty being tabled in Parliament.

1.3 The treaties, and matters arising from them, are evaluated to ensure that ratification is in the national interest, and that unintended or negative effects on Australians will not arise.

1.4 Prior to tabling, major treaty actions are subject to a National Interest Analysis (NIA), prepared by Government. This document considers arguments for and against the treaty, outlines the treaty obligations and any regulatory or financial implications, and reports the results of consultations undertaken with State and Territory Governments, Federal and State and Territory agencies, and with industry or non-government organisations.

1.5 A Regulation Impact Statement (RIS) may accompany the NIA. The RIS provides an account of the regulatory impact of the treaty action where adoption of the treaty will involve a change in the regulatory environment for Australian business. The treaties considered in this report do not require Regulation Impact Statements.

1.6 The Committee takes account of these documents in its examination of the treaty text, in addition to other evidence taken during the inquiry program.

1.7 Copies of each treaty and its associated documentation may be obtained from the Committee Secretariat or accessed through the Committee's website at:

- http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/26_August_2014/Terms_of_Reference
- http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/2_September_2014/Terms_of_Reference

Conduct of the Committee's review

1.8 The treaty actions reviewed in this report were advertised on the Committee's website from the date of tabling. Submissions for the treaties were requested by 12 September 2014 and 19 September 2014.

1.9 Invitations were made to all State Premiers, Territory Chief Ministers and to the Presiding Officers of each Parliament to lodge submissions. The Committee also invited submissions from individuals and organisations with an interest in the particular treaty under review.

1.10 The Committee held a public hearing into these treaties in Canberra on Monday 22 September 2014.

1.11 The transcripts of evidence from the public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website under the treaties' tabling dates, being:

- 26 August 2014; and
- 2 September 2014.

1.12 A list of submissions received and their authors is at Appendix A.

1.13 A list of exhibits received is at Appendix B.

1.14 A list of witnesses who appeared at the public hearings is at Appendix C.

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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]

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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

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

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:

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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 tenders[35], 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 States[51], 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.**

3

Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology

Introduction

3.1 According to the Department of Defence, the current global economic environment and emerging security challenges require the close cooperation of likeminded states.[1]

3.2 Japan is, according to the Department of Defence, world renowned for its defence science and technology capabilities,[2] and:

> The decision to proceed with negotiations on this agreement took place within the broader context of deepening Australia – Japan defence cooperation, including efforts to enhance training and exercises, increase personnel exchanges and deepen cooperation on humanitarian assistance and disaster relief, maritime security, peacekeeping, capacity building and trilateral security cooperation with the United States.[3]

3.3 Australia has a close defence relationship with Japan, but the Department of Defence noted that Japanese domestic legislation prevents it from exporting defence technology and engaging in joint development without a binding bilateral agreement.[4]

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1 Mr Peter Baxter, Deputy Secretary, Strategy, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

2 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

3 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

4 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

3.4 Negotiations for the *Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology* (the Agreement) commenced in April 2014, and negotiations were concluded in June.[5]

3.5 The National Interest Analysis (NIA) states that:

> The Agreement will facilitate Australian access to Japanese defence technology for practical defence science, technology and materiel cooperation with Japan.[6]

Background

3.6 Australia's practical defence relationship with Japan is based on a 2007 joint statement on cooperation.[7]

3.7 There are also two legally binding treaties covering engagement between the two countries:

- the *Agreement between the Government of Australia and the Government of Japan concerning Reciprocal Provision of Supplies and Services between the Australian Defence Force and the Self-Defense Forces of Japan of 2010*, which enables logistical support between Australian and Japanese forces cooperating in international operations such as peacekeeping and humanitarian assistance and disaster relief.[8] This agreement was examined by the committee in *Report 115*;[9] and
- the *Agreement between the Government of Australia and the Government of Japan on the Security of Information*, which ensures the mutual protection of classified information between the countries.[10] This agreement was examined by the committee in *Report 132*.[11]

3.8 The Department of Defence characterises the Agreement as:

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5 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

6 National Interest Analysis [2014] ATNIA 17, *Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology* [2014] ATNIF 20 (hereafter referred to as the NIA) para. 6.

7 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

8 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

9 Joint Standing Committee on Treaties (JSCOT), *Report 115*, March 2011, Chapter 2.

10 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

11 JSCOT, *Report 115*, March 2013, Chapter 4.

> …a natural development in Australia's defence relationship with Japan and consistent with our efforts to strengthen cooperation more broadly.[12]

3.9 Japan already has similar agreements with the United States and the United Kingdom.[13]

The Agreement

3.10 The Agreement is intended to enable defence cooperation between Australia and Japan with the intention of improving security and defence cooperation.[14] Article 1.1 of the agreement states:

> Each Party shall, subject to the relevant laws and regulations of its country and in accordance with the provisions of this agreement, make available to the other Party, defence equipment and technology necessary to implement joint research, development and production projects or projects for enhancing security and defence cooperation…[15]

3.11 The Department of Defence advised that:

> The agreement will allow Australia's Defence Science and Technology Organisation and Japan's Technical Research and Development Institute to work together more closely on areas of common interests and mutual benefit.[16]

3.12 The Agreement will also facilitate the reciprocal transfer of defence science, technology and materiel between Australia and Japan.[17]

Obligations

3.13 The Agreement establishes a joint committee comprising Australian representatives from the Department of Defence; the Defence Science and Technology Organisation; the Defence Materiel Organisation and the Department of Foreign Affairs and Trade, and Japanese representatives

12 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

13 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

14 NIA, para. 3.

15 *Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology*, [2014] ATNIF 20, (hereafter referred to as the Agreement) Article I.1.

16 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

17 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 8.

from the Ministry for Defence; the Ministry for Foreign Affairs and the Ministry for the Economy, Trade and Industry.[18] The joint committee will determine the defence equipment and technology to be transferred.[19]

3.14 Specific projects for joint cooperation will be mutually determined, taking into account factors such as commercial viability or the security of the respective countries, and confirmed by the parties through diplomatic channels.[20]

3.15 Detailed arrangements for the technology transfer will be agreed between the Australian Department of Defence and the Japanese ministries of Defence and Economy, Trade and Industry.[21]

3.16 Detail includes the specific equipment and technology to be transferred, the persons who will be party to the transfer, and the terms and conditions of the transfer.[22]

3.17 The use of the transferred technology is limited to the uses allowable under the charter of the United Nations and the purposes determined under the detailed arrangements. The transferred technology cannot be used for any other purpose.[23]

3.18 Prior consent from the originating government is required for the technology transferred under this Agreement to be given to a person or Government other than those agreed in the detailed arrangements.[24]

3.19 Each party must commit to protect the classified information transferred from the other party under this Agreement.[25]

3.20 Matters of interpretation or dispute can only be resolved through consultation between the parties.[26]

Potential benefits

3.21 The Department of Defence believes that the Agreement could result in the sale of Australian defence capabilities to Japan, and gave as an

18 NIA, para. 4.
19 The Agreement, Article II.
20 The Agreement, Article I.2.
21 The Agreement, Article II.
22 The Agreement, Article II.
23 The Agreement, Article III.
24 The Agreement, Article III.
25 The Agreement, Article IV.
26 The Agreement, Article VI.

example the only recent defence related export from Australia to Japan, the recent sale of Australian Bushmaster vehicles.[27]

3.22 Other areas of potential cooperation identified by the Department of Defence included the Joint Strike Fighter program, and a joint research project on hydrodynamics.[28]

3.23 The joint research program on hydrodynamics involves looking at water flows around vessels, which may influence future vessel design. The hydrodynamics research program was identified as:

> … the one project that has progressed significantly in the last year or so, albeit that this is not directly connected to the treaty…[29]

3.24 When questioned about the relationship between the Agreement and the recent speculation that Australia would be purchasing Japanese submarines to replace the Collins Class boats, the Department responded:

> That is not the purpose of the treaty…Any arrangement that the government might enter into with Japan on submarines would be governed by its own agreement.[30]

3.25 However, the Department did qualify that:

> The hydro-dynamics program is obviously a research program which would have applicability to both countries' submarine programs.[31]

Implementation

3.26 According to the NIA, no changes to laws, regulations or policies will be required to implement the Agreement.[32]

3.27 The Agreement contains no specific financial commitments. The costs associated with cooperative research, development and production activities under the Agreement will be determined using the detailed arrangements process discussed above.[33]

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27 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 9. As the Agreement is not in force, this sale occurred outside the agreement's framework.

28 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 9.

29 Mr Clive Dunchue, Executive Director, Science International Engagement, Department of Defence, *Committee Hansard*, 22 September 2014, p. 9.

30 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 10.

31 Mr Baxter, Department of Defence, *Committee Hansard*, 22 September 2014, p. 10.

32 NIA, para. 14.

33 NIA, para. 15.

Conclusion

3.28 The Committee supports the ratification of this Agreement.

Recommendation 2

3.29 **The Committee supports the *Agreement between the Government of Australia and the Government of Japan concerning the Transfer of Defence Equipment and Technology* and recommends that binding treaty action be taken.**

4

Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information

Introduction

4.1 The proposed treaty action is to bring into force the *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information* signed at Canberra on 27 August 2014.[1]

4.2 The Agreement is required for automation of the existing immigration information sharing process. According to the NIA, such automation is expected to enable increased speed, efficiency and volumes of exchanges. Australia and the United States currently share visa and immigration information under the *Memorandum of Understanding between the Australian Department of Immigration and Citizenship and the United States Department of Homeland Security and the United States Department of State for the purposes of Implementation of the High Value Data Sharing Protocol between the Nations of the Five Country Conference* (the MoU).[2]

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1 National Interest Analysis [2014] ATNIA 18 with attachment on consultation, *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information,* done at Canberra, 27 August 2014 [2014] ATNIF 23 (hereinafter referred to as 'NIA'), para 1.

2 NIA, para 4. Apart from Australia, the Five Country Conference members are: Canada, New Zealand, the United Kingdom and the United States of America.

Reasons for Australia to take the proposed treaty action

4.3 Bilateral Memoranda of Understanding governing immigration information exchange under the Five Country Conference (FCC) High Value Data Sharing Protocol were signed in 2009 and 2010 between Australia and each of the other FCC member countries. Under these original arrangements, up to 3 000 anonymised fingerprints per year may be sent to each of the other countries for checking against their respective biometric data holdings.[3]

4.4 Subsequent arrangements with the United States have enabled up to 20 000 fingerprints per year to be sent for checking. In the event there is a fingerprint match, agreed biographic information, immigration history and travel information is exchanged with the country that had the match. Such matches have uncovered identity and immigration fraud.[4]

4.5 The NIA explains that currently these checks are largely manual and the process typically takes one to two days. The Agreement will allow automation of the process, delivering increased speed, efficiency and volumes. When fully implemented, this system is expected to allow the Parties to send in excess of one million fingerprints per year for checking.[5]

4.6 United States law requires an Executive Agreement to allow automation of this process which corresponds to a treaty in Australia.[6]

4.7 Asked if there were plans to expand the arrangements to other countries besides the five currently involved, the Department of Immigration and Border Protection said that Australia is actively pursuing expansion of the program, particularly in the immediate region. A biometric hub is being constructed in Thailand under the Bali process and will be managed, on Australia's behalf, by the International Organisation for Migration (IOM).

> That will become a hub for other countries to voluntarily join in such exercises. We regard this as a really big success because of the number of countries involved under the Bali process. It is in a neutral country. It is going to be managed by a very well-regarded organisation. We have great hopes that a number of countries in the region will start to join in to protect the security of not just Australia but also their own borders.[7]

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3 NIA, para 8.

4 NIA, para 9.

5 NIA, para 10.

6 NIA, para 11.

7 Mr Gavin McCairns, First Assistant Secretary, Risk, Fraud and Integrity Division, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 12.

Obligations

4.8 The scope of the Agreement is to specify the terms, relationships, responsibilities, and conditions for the regular sharing of Information between the Parties for the purposes set out in **Article 2B**. 'Information' is defined in **Article 1B** as data collected, maintained or generated on Nationals of a Third Country, and Nationals, including citizens, of the Parties seeking authorisation to travel to, work in, or live in Australia or the United States. 'Information' also includes other data relevant to the immigration laws of the respective Parties, such as compliance with visa conditions.[8]

4.9 The purpose of the Agreement outlined in **Article 2B** is to assist in the administration and enforcement of the respective immigration laws of the Parties by:

- using Information in order to enforce or administer the respective immigration laws of the Parties;
- furthering the prevention, detection, or investigation of acts that would constitute a crime rendering an individual inadmissible or removable under the laws of the Party providing the Information; and
- facilitating a Party's determination of eligibility for a visa, admission, or other immigration benefit, or of whether there are grounds for removal.[9]

4.10 **Article 2(C)** provides that a Party shall only provide Information about its own nationals in response to a specific request, where such Information is relevant and necessary to support an identified immigration decision in the other Party. **Article 2(D)** provides that a Party shall only provide Information about a national of the other Party in response to a specific immigration matter to which the individual is directly tied. In both cases, Information shall only be provided if the sharing of such Information is compatible with domestic law and policy.[10]

4.11 Under **Article 2E**, no provision in the Agreement shall be interpreted in a manner that would restrict practices relating to the sharing of information that are already in place between the two Parties. **Article 2F** provides that the Agreement does not affect rights, privileges or benefits that exist independently of the Agreement.[11]

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8 NIA, para 12.
9 NIA, para 13.
10 NIA, para 14.
11 NIA, para 15.

4.12 **Article 5A** provides that the Parties may use and disclose Information to assist in the effective administration and enforcement of each Party's respective immigration laws; to prevent immigration fraud; to identify threats to national or public security related to immigration or travel systems; and in immigration enforcement actions. Information may only be used for any other purpose with the prior consent of the Party transmitting that Information. **Article 5B** provides that the Parties are obliged to ensure that domestic authorities which are provided with Information obtained under the Agreement, only use or disclose that Information in a manner consistent with the Agreement. Under **Article 5C**, Information can only be disclosed for other purposes with the prior written consent of the Party supplying the Information.[12]

4.13 **Article 5C(i)(b)(1)** requires that the Party disclosing the Information make best efforts to ensure that the disclosure: could not cause the Information to become known to any government, authority or person from which the subject of the Information is seeking or has been granted protection:

- in Australia under domestic laws implementing Australia's obligations under the Convention relating to the Status of Refugees (the '1951 Refugee Convention')[13]; the Protocol relating to the Status of Refugees 1967 (the '1967 Protocol)[14]; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[15]; or the International Covenant on Civil and Political Rights (ICCPR)[16]; or
- in the United States under domestic laws implementing US obligations under the 1967 Protocol or the CAT.[17]

4.14 **Article 5C(i)(b)** also provides that disclosure not occur where it is reasonably foreseeable that the subject of the Information may become eligible for protection, or if the disclosure may place the subject of the Information, or their family members at risk of refoulement or any other type of harm under the 1951 Refugee Convention, 1967 Protocol or the CAT.[18]

4.15 **Article 5D** clarifies that **Article 5** shall not be interpreted to preclude the use or disclosure of Information as required under domestic law.[19]

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12 NIA, para 16.
13 [1954] ATS 5.
14 [1973] ATS 37.
15 [1989] ATS 21.
16 [1980] ATS 23.
17 NIA, para 17.
18 NIA, para 18.
19 NIA, para 19.

4.16 **Article 6A** provides that a Party may decline to provide all or part of the Information requested where that Party determines that to do so would be inconsistent with its domestic law or detrimental to its national sovereignty, national security, public order, or other important national interest. **Article 6B** affirms that the Agreement shall be implemented consistent with the Parties' obligations under human rights treaties, including the ICCPR and the CAT; and any domestic legislation implementing those treaties.[20]

4.17 **Article 7** deals with access, correction and notation of data. It provides that nothing in the Agreement interferes with a Party's domestic law obligations with respect to requirements to provide data subjects with information about and access to the data or their right to request rectification of data. This is intended to guarantee fair processing with respect to data subjects.[21]

4.18 **Article 8** requires the Parties to have appropriate technical and organisational measures in place to protect shared Information from accidental or unlawful destruction, accidental loss, or unauthorised disclosure, alteration, access or any unauthorised form of processing. The Parties shall use and disclose personal Information fairly and in accordance with their respective laws. These matters will be further dealt with under Implementing Arrangements developed by the Parties in accordance with **Article 4** of the Agreement. Any material accidental or unauthorised access, use, disclosure, modification or disposal of Information must be notified to the other Party within 48 hours after the receiving Party becomes aware of that event.[22]

4.19 **Article 9** provides for the retention, archiving and disposal of Information in accordance with applicable domestic law. Data is to be retained only for as long as is necessary for the specific purpose for which it was provided and as required under domestic law.[23]

4.20 **Article 11** requires the Parties to consult regularly on the implementation of the provisions of the Agreement. This includes the requirement to notify the other Party of any substantive or material change to its laws that would fundamentally alter its ability to comply with the Agreement. This notification is to occur within fourteen (14) days. **Article 11** also provides that in the event of a dispute regarding the interpretation of application of

20 NIA, para 20.
21 NIA, para 21.
22 NIA, para 22.
23 NIA, para 23.

the Agreement, the Parties shall consult each other to seek to resolve the dispute.[24]

4.21 **Article 12** provides that if the Parties cannot come to a mutually satisfactory resolution of a dispute through consultation, they should address the dispute through diplomatic channels.[25]

4.22 Under **Article 13**, the Parties may amend the Agreement by mutual agreement, in writing. Any amendment to the Agreement would be subject to Australia's domestic treaty process.

4.23 **Article 13** also provides for a Party to terminate the Agreement at any time by giving notice in writing to the other Party. The termination shall be effective 90 days after the date of the notice. Termination of the Agreement shall not release the Parties from their obligations under **Articles 5, 7, 8** and **9** in relation to Information exchanged pursuant to the Agreement. Therefore, termination would not release either Party from its obligations concerning the protection, use, disclosure, access to, correction, notation, retention, archiving and disposal of Information already exchanged.[26]

Implementation

4.24 According to the NIA, the Agreement will not require changes to national laws or regulations. Current biographic and biometric information exchange under the FCC Protocol is authorised under the *Migration Act 1958* and the *Privacy Act 1988*. This authorisation is unaffected by increasing the volume of data exchanged through automated, point-to-point checking between biometric systems.[27]

4.25 The NIA states that the Agreement will not change existing roles of the Australian Government or the state and territory governments.[28]

4.26 The NIA advises that it is intended that detailed Implementing Arrangements will be negotiated at the agency level to establish operational procedures and safeguards in relation to the exchange, storage and retention of Information, consistent with the obligations set out in **Articles 3** and **4** of the Agreement. It is envisaged that these arrangements will be signed by agency heads and will not be legally binding, but will

24 NIA, para 24.
25 NIA, para 25.
26 NIA, paras 35 and 36.
27 NIA, para 26.
28 NIA, para 27.

simply describe the operational implementation of the binding obligations of the Agreement itself.[29]

4.27 The Agreement as a whole is made within the context of the Parties' obligations under the ICCPR and the CAT. **Article 6B** relevantly provides that the Agreement shall be implemented consistently with the Parties' obligations under those treaties and any domestic legislation implementing those treaties, as applicable. In addition, under **Article 3**, the Parties agree that where Information is provided through processes set out in Implementing Arrangements, it is to be provided consistently with the respective domestic laws of the Parties. This would include laws relating to the protection of privacy.[30]

4.28 Protocols have been put in place to ensure that privacy laws for both countries will be complied with. The Department of Immigration and Border Protection stressed that the process is anonymised and is 'data matching' not 'data sharing':

> It is just a number. The reason for this is … that the privacy laws of both countries would come into effect. You are not allowed to go fishing for data … So [the match] in and of itself … allows us then to ask the other country—and them to ask us—for the biographic information attached to that.[31]

4.29 A privacy impact statement is in place and will be regularly reviewed and updated to accommodate any new developments as the new process is implemented.[32] Additionally, the Department is confident that the safeguards that have been put in place to protect against accidental or unlawful disclosure or use of the information are secure:

> We are required to have certain protections in place under the protective security manual and the ISP, the technical security manual on a whole-of-government basis. Our gateways are required to be accredited to a certain level. For this particular solution we have two levels of encryption—at a transport layer and at a higher messaging layer. So we have got strong encryption in two places and we also have some of our own procedures. For

29 NIA, para 28.

30 NIA, para 29.

31 Mr McCairns, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 13.

32 Mr McCairns, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, pp. 13–14.

> example, we have our own assurance checklist that we complete on a regular basis and we exchange these with our partners …[33]

Costs

4.30 The NIA states that the Agreement does not contain any specific financial commitments. Under **Article 10**, each Party shall bear the expenses incurred by its authorities in implementing the Agreement.[34]

4.31 The NIA advises that capital funding has been allocated for 2014–15 to continue system design and development of interoperability between Australia's biometric system and the biometric systems of other FCC countries, and to share data under the Agreement. This capability is occurring under the broader biometrics programme being implemented by the Department of Immigration and Border Protection. Maintenance of the capability will also occur under the Department's broader biometrics programme.[35]

4.32 Ongoing operation of the capability will be largely automated and those parts which require manual intervention will be handled under existing resourcing of the Department's identity resolution area for its wider biometrics programme.[36]

4.33 The Department assured the Committee that, at this stage, current resources are sufficient to implement the new system. However, the Department did not rule out the need for further resources in the future:

> If we need more resources, the department and indeed our ministers have said, 'We're happy to have that conversation.' It has not been blocked. But for this purpose we absolutely do not need them. We may need them 'tomorrow'; it might be that at some point in time we are getting lots of matches.[37]

4.34 According to the NIA the regulatory impact of the proposed treaty action has been assessed and no additional regulatory costs have been identified.[38]

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33 Mr Paul Anthony Cross, Assistant Secretary, Identity Branch, Risk, Fraud and Integrity Division, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 15.

34 NIA, para 30.

35 NIA, para 31.

36 NIA, para 32.

37 Mr McCairns, Department of Immigration and Border Protection, *Committee Hansard*, 22 September 2014, p. 13.

38 NIA, para 33.

Conclusion

4.35 The Committee is satisfied that the automation of the fingerprint matching process with the United States will provide substantial benefits in the way of increased speed, efficiency and volume for immigration information sharing.

4.36 The Committee notes that further expansion of the program is being pursued in the immediate region.

4.37 The Committee suggests that the Department's resource levels be closely monitored to ensure that adequate resources remain available to support the program.

4.38 The Committee supports Australia's ratification of the Agreement and recommends that binding treaty action be taken.

Recommendation 3

4.39 **The Committee supports the *Agreement between the Government of Australia and the Government of the United States of America for the Sharing of Visa and Immigration Information* and recommends that binding treaty action be taken.**

Mr Wyatt Roy MP
Chair

A

Appendix A – Submissions

Treaty tabled on 26 August 2014

1 Australian Government Department of Defence

2 BaseWatch NT

B

Appendix B – Exhibit

1 Provided by: BaseWatch NT *(Related to Submission 2)*

P Toohey, 'Oversexed and over here', *The Weekend Australian*, 27 October 2001, p. 23; and

A Hardie, 'Darwin girl raped by sailors: claim', *Northern Territory News*, 30 October 2001, p. 3.

C

Appendix C – Witnesses

Monday, 22 September 2014 – Canberra

Attorney-General's Department

Ms Anne Sheehan, Acting Assistant Secretary, International Law, Trade and Security Branch, Office of International Law

Department of Defence

Mr Peter Baxter, Deputy Secretary Strategy

Mr Michael Carey, Special Counsel, Defence Legal

Air Commodore Paul Cronan, Director General Australian Defence Force Legal Service

Mr Adam Culley, Chief Finance Officer, Chief Operating Officer Division

Mr Clive Dunchue, Executive Director Science International Engagement

Ms Felicity Stewart, Director of Intergovernmental Agreements and Arrangements

Department of Foreign Affairs and Trade

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

Department of Immigration and Border Protection

Mr Gavin McCairns, First Assistant Secretary, Risk, Fraud and Integrity Division

Mr Paul Anthony Cross, Assistant Secretary, Identity Branch, Risk, Fraud and Integrity Division