

National Interest Analysis [2024] ATNIA 4
with attachment on consultation

**Agreement between the Government of Australia and the Government of the Republic
of Fiji on Cooperation in the Field of Defence and the Status of Visiting Forces**

(Suva, 20 October 2022)

[2024] ATNIF 7

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

Agreement between the Government of Australia and the Government of the Republic of Fiji on Cooperation in the Field of Defence and the Status of Visiting Forces

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Nature and timing of proposed treaty action

1. The proposed treaty action is the entry into force of the *Agreement between the Government of Australia and the Government of the Republic of Fiji on Cooperation in the Field of Defence and the Status of Visiting Forces* (the Agreement) through the exchange of diplomatic notes. The Agreement was signed by Australia and Fiji on 20 October 2022 in Suva.
2. For the Agreement to enter into force, each Party must present the other with written notification, through diplomatic channels, confirming that it has completed its domestic requirements for entry into force. The Agreement would enter into force on the date that the last Party presents written notification to the other Party (Article 24(1)). Australia intends to present its written notification as soon as practicable following the completion of its domestic requirements.

Overview and national interest summary

3. The purpose of the Agreement is to facilitate mutually beneficial defence cooperation activities between Australia and Fiji. The Agreement identifies defence cooperation activities that may be engaged in by Australia and Fiji. Where the parties mutually determine to undertake such an activity, the Agreement also establishes a framework governing the legal status of each Party's forces and its military and civilian personnel (and dependants) while present in the other Party's territory. The provisions of the Agreement are reciprocal and apply equally to Australia and Fiji.
4. Australia and Fiji have had a longstanding defence relationship based on mutual benefit that recognises Fiji's status as a regional leader. In 1983, both countries signed the Memorandum of Understanding (MOU) Concerning the Conduct of Projects Under the Australian Defence Co-operation Program that formalised a Defence Cooperation Program (DCP) with the Republic of Fiji Military Forces (RFMF). Under the DCP, Australia contributes to building capability, professionalism and sustainability across the RFMF and Defence enterprise by providing military advice, equipment and training. The DCP remains integral to our bilateral defence relationship and to the development of the RFMF as a capable and professional force.
5. As Australia and Fiji's defence relations mature, both Parties would benefit from a legally binding and comprehensive treaty governing cooperative defence activities between them. The Agreement would also establish and govern the legal status of

each Party's force and accompanying civilian personnel while present in the territory of the other Party for the purpose of these activities.

Reasons for Australia to take the proposed treaty action

6. In 2019, Fiji and Australia signed the Vuvale Partnership, with a key pillar being to enhance security cooperation and establish key deliverables such as progressing bilateral defence agreements. Prime Ministers Albanese and Rabuka signed the enhanced and elevated Vuvale Partnership in October 2023, committing Australia and Fiji to enhanced security cooperation.
7. The Agreement would enable Australia to participate in more frequent and sophisticated bilateral military activities with Fiji, a key strategic defence partner, by providing a reciprocal and legally binding framework to govern the legal status of the visiting force and any civilian component of one Party while present in the territory of the other for the purpose of mutually determined defence cooperation activities.
8. The Agreement also provides a clear pathway to expand and improve the quality of defence engagement with Fiji in areas such as maritime security, humanitarian assistance and disaster relief, peacekeeping operations, co-deployments, joint or unilateral training of military personnel, and land force engagement. Each of these activities reflect the maturity of Australia's bilateral relationship with Fiji, and would contribute to our shared vision of a stable and secure Indo-Pacific region.
9. The Agreement would reinforce Australia's close bilateral defence relationship with Fiji, deepening the bilateral military cooperation between our two countries.

Obligations

10. The Agreement is a treaty-level instrument that comprises twenty-four (24) articles, which set out the Parties' key rights and obligations. This includes provisions with respect to the legal status of visiting military and civilian personnel (and dependants) of the sending State (being the State to which the visiting force belongs) in the receiving State (being the State in whose territory the visiting force is located) while undertaking defence cooperation activities pursuant to the Agreement, the handling of claims and the resolution of disputes arising under the Agreement.

Purpose and Scope

11. Article 2 of the Agreement sets out its objective, to 'facilitate and foster closer defence cooperation between the Parties by establishing a framework for the conduct of such cooperation'. The Agreement fulfils this objective by providing a framework for the conduct of cooperative activities, including provisions governing the status of each Party's forces and accompanying civilians while present in the territory of the other.
12. Article 3 concerns the scope of the Agreement, and other issues relating to its application to cooperative activities. Article 3(1) confirms that the Parties would mutually determine in writing the cooperative defence activities to which the Agreement would apply on a case-by-case basis. Article 3(2) sets out an indicative list

of such cooperative activities, which may include (but are not limited to): visits and military exchanges (Article 3(2)(a)); the provision of humanitarian assistance and disaster relief (Article 3(2)(b)); military education and training (Article 3(2)(c)); logistics support (Article 3(2)(d)); military operations and exercises (Article 3(2)(a)); and information sharing (Article 3(2)(e)).

13. Article 3(5)-(6) concerns the protection of information exchanged under the Agreement. The Parties must protect any classified or sensitive information exchanged under the Agreement in accordance with any security, privacy or other markings it carries and not to pass on such information to a third party without the consent of the originating Party (Article 3(5)). The Parties may mutually determine in writing any additional requirements for security protection as they consider appropriate for the purpose of facilitating the transmission and protection of classified or sensitive information (Article 3(6)).
14. Article 3(7) confirms that the sending State may request facilities and related services for the purposes of activities conducted under the Agreement, and the receiving State must make reasonable efforts to address those requests. The Parties must mutually determine arrangements for the use of such facilities and services.

Status of Forces Provisions

15. Articles 4-20 of the Agreement concern the legal status of visiting military and civilian personnel (and dependants) of the sending State in the receiving State while undertaking cooperative defence activities pursuant to the Agreement. They include provisions setting out joint understandings relating to local law, disciplinary matters and criminal jurisdiction (Articles 4-6), along with further provisions to facilitate effective operation of the sending State's forces when deployed in the territory of the receiving State (Articles 7-20).

Local Law, Disciplinary Matters and Criminal Jurisdiction

16. Article 4 of the Agreement confirms that members of a visiting force and its civilian component (and dependants) present in the territory of the receiving State would be subject to the laws and regulations of the receiving State, subject to Articles 5 and 6.
17. Article 5 of the Agreement confirms that the sending State has exclusive competence regarding administrative and disciplinary matters over members of the visiting force and civilian component when in the receiving State, in accordance with its laws and regulations (Article 5(1)). Accordingly, Australia would have exclusive competence regarding administrative and disciplinary matters over members of the Australian visiting force and its civilian component when they are in Fiji under this Agreement. If the behaviour is liable to administrative or disciplinary action in the receiving State, where practicable the sending State must inform the receiving State of the nature of the possible punishment before carrying it out (Article 5(2)). The receiving State may request that the member of the visiting force or its civilian component be repatriated to the sending State for the punishment to be carried out (Article 5(3)).
18. Article 6 of the Agreement sets out the framework for determining which Party has jurisdiction over criminal matters. Article 6(1) and (2) provides that the receiving State would have criminal jurisdiction over the sending State's visiting force and its

civilian component (and dependants) with respect to offences committed in the receiving State that are punishable by the law of the receiving State but not by the law of the sending State. The sending State would have criminal jurisdiction over its visiting force and its civilian component (and dependants) who are in the receiving State, with respect to offences committed in the receiving State and punishable by the law of the sending State but not by the law of the receiving State.

19. Article 6(3) confirms which Party has the primary right to exercise jurisdiction where conduct is an offence under the laws of both the sending State and receiving State (referred to as concurrent jurisdiction). The sending State has the primary right to exercise its jurisdiction when: the offences are solely against the property or security of the sending State (Article 6(3)(a)(i)); are solely against the person or property of another member of the sending State's visiting force or its civilian component (or dependants) (Article 6(3)(a)(i)); or, arise out of an act or omission done in the performance of official duty (Article 6(3)(a)(ii)). The receiving State has the primary right to exercise jurisdiction over all other offences (Article 6(3)(b)). A Party that has the primary right to exercise jurisdiction must notify the other Party as soon as practicable if it elects not to exercise jurisdiction (Article 6(3)(c)). The Parties must give sympathetic consideration to a request from the other Party to waive the primary right to exercise jurisdiction. Such a decision may be given on conditions, including that proceedings be commenced by the requesting Party (Article 6(3)(e)). The Parties must notify each other as soon as practicable of the disposition of all cases where the right to exercise jurisdiction is concurrent (Article 6(3)(f)).
20. Article 6(4) requires the Parties to cooperate in the arrest of members of the visiting force or its civilian component (or a dependant) and in handing them over to the authorities of the Party entitled to exercise jurisdiction. The sending State must notify the receiving State promptly should it arrest or detain a member of the visiting force or its civilian component (or a dependant) where that person is subject to the primary jurisdiction of the receiving State (Article 6(5)). The receiving State must notify the sending State promptly of the filing of a complaint against, or the arrest or detention of, any member of the visiting force or its civilian component (or a dependent) (Article 6(6)). Where the receiving State is to exercise jurisdiction over a member of the visiting force or its civilian component (or a dependant), the receiving State must give sympathetic consideration to a request from the sending State that the sending State be entrusted with the custody of that person pending the conclusion of all judicial proceedings. The sending State must make that person available for the purposes of investigation or trial upon request (Article 6(7)). The Parties must cooperate in carrying out investigations of offences, including in the collection and production of evidence (Article 6(8)).
21. Article 6(9)-(11) sets out a number of procedural safeguards in respect of criminal proceedings that must be accorded to members of the visiting force or its civilian component (or a dependant). Whenever a member of the visiting force or its civilian component (or a dependant) is taken into custody, detained or prosecuted by the receiving State, the receiving State must accord that person all generally accepted procedural safeguards pursuant to the international law obligations of the receiving State and no less than those provided to its nationals (Article 6(10)). For this purpose, the Agreement includes a list of minimum procedural safeguards that must be accorded (Article 6(10)(a)-(l)). Where the receiving State is to exercise jurisdiction

over members of a visiting force or its civilian component (or dependants), proceedings must only be commenced in the courts of ordinary jurisdiction of the receiving State and must not take place under the military jurisdiction of the receiving State (Article 6(11)). Further, any person convicted or acquitted for an offence by one Party cannot be retried by the other Party for an offence that is substantially the same (Article 6(9)).

Arrangements to facilitate defence cooperation activities

22. Article 7 of the Agreement obliges each Party to take specific steps to facilitate the entry into their territory of the visiting force and any civilian component (and dependants) for the purpose of defence cooperation activities under the Agreement. This includes: providing notice of arrival and departure dates (Article 7(1)); visa exemptions (Article 7(2)); and, permitting entry with specific documents (Article 7(3)). The receiving State must provide reasonable prior notice to the sending State of additional documentary requirements in satisfaction of its national health and biosecurity laws and regulations (Article 7(4)). If a person ceases to be a member of a visiting force or of a civilian component or to be a dependant, the sending State must promptly inform the receiving State and promptly take steps to effect the departure of that person from the receiving State (Article 7(6)). If the receiving State reasonably requests the departure of a member of the visiting force or civilian component or a dependant of the sending State, the sending State must promptly take steps to effect the departure of that person and meet any reasonable costs incurred by the receiving State in removing the person from the receiving State (Article 7(7)).
23. Article 8 of the Agreement concerns diplomatic clearances and movement of personnel and aircraft, vessels and official motor vehicles of the visiting force and any civilian component. The receiving State must submit all appropriate permanent or occasional flight or ship diplomatic clearances for State and military aircraft and vessels to the sending State (Article 8(1)). The authorities of the receiving State must grant access to aircraft, vessels and official motor vehicles of the visiting force and its civilian component within the territory of the receiving State for mutually approved activities, subject to restrictions that may be imposed by the receiving State (Article 8(3)-(5)). Individual members of the visiting force and its civilian component are afforded freedom of movement in the territory of the receiving State for the purpose of lawful activities (Article 8(6)). The visiting force's vessels, aircraft and vehicles are to be subject to the same conditions in respect of harbour, airport and road taxes, fees and charges as those of the receiving State (Article 8(7)-(8)).
24. Article 9 of the Agreement provides for the importation and exportation of goods to and from the receiving State, including items that may be imported and exported free of duty and taxes. The sending State must take appropriate measures to ensure that the visiting force, its civilian component and dependants pay any duty and fines due to the receiving State (Article 9(10)).
25. Article 10 of the Agreement concerns the importation, transportation, storage use, carriage and export of weapons, ammunition and other dangerous or prohibited goods. Members of the visiting force may possess and carry weapons in accordance with the laws, regulations and policies of the receiving State or the sending State, whichever is more restrictive (Article 10(1)). Specified types and quantities of weapons, ammunition and dangerous goods of the visiting force must be imported, transported,

stored and used in accordance with the laws, regulations and policies of the receiving State (Article 10(2)-(3)).

26. Article 11 of the Agreement concerns the taxation of members of the visiting force or its civilian component (and dependants), and confirms that this would be subject to any applicable agreement entered into by Australia and Fiji for the avoidance of double taxation.
27. Article 12 of the Agreement confirms that members of the visiting force may wear the uniforms and military insignia of their force while performing their official duties in the territory of the receiving State.
28. Article 13 of the Agreement requires both Parties to cooperate to ensure the security of installations and areas made available in the receiving State to the visiting force, as well as their property, official records and information (Article 13(1)). The sending State has the right to maintain military police in order to maintain discipline and good order within the visiting force (Article 13(2)). The receiving State retains responsibility for external security (Article 13(3)-(4)).
29. Article 14 of the Agreement provides certain arrangements regarding driving licenses and official vehicles. Article 14(1) confirms that the Parties must mutually determine the applicability of exemptions from registration and licensing laws in respect of official vehicles, aircraft and vessels necessary for cooperative activities. Article 14(2) requires the receiving State to accept the validity of a driving permit issued by the sending State for the purpose of driving official vehicles in the performance of official duties.
30. Article 15 of the Agreement requires the receiving State to allow members of the visiting force and civilian component with professional, technical or trade licences to conduct their official duties as a member of the visiting force or civilian component without requiring those members to obtain any permission from the receiving State.
31. Article 16 of the Agreement provides that the sending State only install communication systems with the permission of the receiving State and only operate these within allocated frequencies. The receiving State would be required to give fair and expeditious consideration to a request to install a communication system (Article 16(1)-(2)). The Parties must take reasonable measures to avoid interference with each other's communications networks by communications or other electrical installations (Article 16(3)).
32. Article 17 of the Agreement concerns arrangements relating to the public health, biosecurity and medical treatment of the receiving State. The sending State must ensure that all members of the visiting force and civilian component (and dependants) comply with the biosecurity laws and regulations of the receiving State (Article 17(3)). All costs in relation to meeting the receiving State's biosecurity laws must be met by the sending State (Article 17(3)). Further, the sending State must ensure that members of the visiting force are medically and dentally fit to conduct cooperative activities upon entry into the receiving State (Article 17(1)). Any medical or dental fees (including with respect to aeromedical evacuation) incurred by the receiving State would be fully recoverable from the sending State (Article 17(2)).

33. Article 18 of the Agreement concerns the protection of the environment. While operating in the territory of the receiving State, both Parties must act in a manner that promotes the protection of the environment and cultural heritage of the receiving State (Article 18(1)-(2)). In cooperation with the receiving State, the sending State must take appropriate measures to address any damage or potential damage made to the environment, cultural heritage, and human health and safety (Article 18(3)).
34. Under Article 19 of the Agreement, in the event of the death of a member of the visiting force or its civilian component (or a dependant) in the receiving State, the sending State must inform the receiving State which must, among other things, issue a death certificate (Article 19(1)-(2)). Subject to the laws and regulations of the receiving State, the sending State would have the right to take, retain charge of, and make arrangements for the disposition of the remains of the deceased person upon notification from the receiving State. If requested and circumstances permit, the receiving State must assist with arrangements to return the deceased's remains to the sending State (Article 19(3)). If a member of the visiting force or its civilian component was believed to be dead but their remains had not been recovered, the receiving State must permit the sending State to be involved in the search and recovery of those remains, subject to the receiving State's laws and regulations (Article 19(4)). If the deceased was to be disposed of in the receiving State, the receiving State must have regard to any requests by the sending State as to the method of disposal and any costs of disposal would be borne by the sending State (Article 19(5)).
35. Article 20 of the Agreement concerns arrangements for investigating accidents involving the aircraft and vessels of the Sending State. In respect of any accident or incident in the receiving State involving only aircraft and vessels of the sending State, the sending State must conduct the investigation in a manner consistent with international law and the laws and regulations of the receiving State (Article 20(1)). Where accidents or incidents in the receiving State involved the aircraft or vessels of the sending State, and any aircraft, vessels, vehicles or personnel of the receiving State or a third party, the Parties must conduct a joint investigation (Article 20(2)). Where consistent with the laws and regulations of the receiving State, members of the visiting force and its civilian component must, if possible, assist the sending State to secure the accident site and take custody of all wreckage (Article 20(3)).

Claims and Disputes

36. Articles 21 and 22 of the Agreement outline the handling of claims between the Parties, and with third parties arising from an act or omission of the Parties' military or civilian personnel, while undertaking cooperative activities pursuant to the Agreement.
37. Article 21 of the Agreement requires both Parties to waive all claims against the other Party arising from: loss or damage to property owned by a Party and used by its force where the loss or damage arose in connection with official duty (Article 21(1)(a)-(b)); maritime salvage for vessels or cargo used by a Party for official purposes (Article 21(1)(c)); and, injury or death suffered by a member of a Party's military or civilian personnel while engaged in the performance of official duty (Article 21(1)(d)). Where both Parties mutually determine that a claim arises from a reckless act or omission, gross negligence or wilful misconduct of a member of a Party's military or civilian

personnel, the Party to whom that member belongs would be solely responsible for the claim (Article 21(2)). All other claims against each other are to be settled through consultation (Article 21(3)).

38. Article 22 of the Agreement outlines the handling of third party claims brought as the result of an act or omission of the Parties' military or civilian personnel in the performance of their official duty, which cause loss or damage to property or injury or death to third parties in the receiving State. Any such claim must be settled or adjudicated in accordance with the receiving State's laws. The receiving State must make any payments arising from such a claim, and notify the sending State of the payment and propose a distribution of the cost incurred based on the provisions in Article 22(1)(f). The sending State forfeits the right to claim immunity from the civil jurisdiction of the courts of the receiving State with respect to any act or omission by a member of its visiting force or civilian component (or dependants) in the receiving State (Article 22(2)). Unless otherwise agreed, Parties must not indemnify contractors against third party liability claims (Article 22(4)). If the receiving State so requests, the sending State must, to the extent permitted by their laws, assist the receiving State to take possession of the property of a member of a visiting force or civilian component or a dependent that is subject to compulsory execution (Article 22(5)). The Parties must cooperate to the extent permitted by their laws and regulations to collect and produce evidence to ensure a fair hearing and the disposal of claims (Article 22(6)).
39. Article 23 of the Agreement requires Parties to resolve any dispute regarding the interpretation or implementation of the Agreement solely by consultation and negotiation between the Parties and not by referral to any third party or tribunal.

Implementation

40. Cooperative activities must be implemented by the Parties' national defence organisations. The details of such cooperative activities may be mutually determined in writing by the Parties if required (Article 3(3)).
41. To the extent that provisions of the Agreement are implemented by the *Defence (Visiting Forces) Act 1963* (the Act), Fiji has been declared in Schedule 2 of the *Defence (Visiting Forces) Regulations 1963* as a country to which the provisions of the Act apply.
42. In the event that any legislative or regulatory action is required to ensure consistency with the Agreement, this would be completed by the time of entry into force of the Agreement for Australia.
43. The Agreement would not change the existing roles of the Commonwealth Government or the State and Territory Governments.

Costs

44. Each Party must bear its own costs of participation in cooperative activities pursuant to the Agreement, unless otherwise mutually determined by the Parties (Article 3(4)).

Future treaty action

45. In accordance with Article 24(2), the Agreement may be amended at any time where both Parties agree in writing. Any amendment would be subject to Australia's domestic treaty-making requirements, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties. Any amendment would enter into force on the date that the last Party presents written notification, through diplomatic channels, confirming that it has completed its domestic requirements for entry into force of the amendment.

Termination

46. In accordance with Article 24(3), the Parties may terminate the Agreement at any time where both Parties agree in writing. Either Party may give written notice of termination to the other Party at any time, in which case the Agreement would terminate 180 days after receipt of written notice by the other Party.
47. Obligations relating to protection of information, jurisdiction, claims, and disputes would continue to apply under the Agreement after termination in accordance with Article 24(4).

Contact details:

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ATTACHMENT ON CONSULTATION

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CONSULTATION

Commonwealth Departments

1. The Department of Defence consulted with the Department of the Prime Minister and Cabinet, Department of Foreign Affairs and Trade, and Attorney-General's Department. No concerns have been identified.

State and Territory Governments

2. State and Territory Governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). No requests for further information or comments on the Agreement have been received to date from the State and Territory Governments. No action would be required from States or Territories to implement the Agreement.