

**National Interest Analysis [2011] ATNIA 11
with attachment on consultation**

**Agreement between the Government of Australia and the
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,
done at Washington on 16 July 2008**

[2008] ATNIF 10

**NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY
SUMMARY PAGE**

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the *Agreement between the Government of Australia and the 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* ("the proposed Agreement") into force. The proposed Agreement was signed by the Minister for Defence and the United States Secretary of Defense in Washington on 16 July 2008.
2. Pursuant to Article 12, the proposed Agreement will enter into force on the date Australia notifies the United States in writing that it has fulfilled its domestic processes necessary for the proposed Agreement to enter into force. It is proposed that Australia will send this written notification to the United States as soon as practicable after the tabling period and following consideration of the proposed Agreement by the Joint Standing Committee on Treaties.

Overview and national interest summary

3. The purpose of the proposed Agreement is to replace the *Agreement between the Government of the Commonwealth of Australia and the Government of the United States of America relating to the Establishment of the United States Naval Communications Station in Australia*, done at Canberra on 9 May 1963, as amended ("the 1963 Agreement", [1963] ATS 16). The 1963 Agreement, which was terminated on 8 May 1999, provided for the establishment, maintenance and operation by the United States of a naval communication station in Australia. The Harold E Holt Naval Communication Station at Exmouth in Western Australia ("the Station") was commissioned in 1967 and became a joint facility in 1974. The Station provides Very Low Frequency communications for United States and Australian submarines. Since 1999, Australia has operated the Station, but the United States has retained full access. Under an interim arrangement the terms of the 1963 Agreement continue to apply until a new treaty is concluded.
4. The proposed Agreement sets out the terms and conditions for the maintenance and operation of the Station by Australia, and grants the United States access to and use of the Station, in accordance with the provisions of the proposed Agreement and technical arrangements agreed between Australia and the United States.
5. The proposed Agreement will remain in force for an initial period of 25 years, and unless terminated, shall continue for subsequent periods of five years (Article 12). Article 4 of the proposed Agreement provides that the Station is managed in accordance with Australia's policy of full knowledge and concurrence.

Reasons for Australia to take the proposed treaty action

6. The proposed Agreement will ensure the continuation of access and use by the United States of the Station and, consequently, the means through which the facility for Very Low Frequency communication for United States and Australian submarines may be maintained. Continuing United States access to the Station will help support the maintenance of a strong and adaptable United States presence in the Asia-Pacific region and is an important indication of the continuing commitment of the United States Government to regional cooperation.
7. The Station's capacity for communicating with submerged submarines throughout and beyond our area of strategic interest is unique in our region. The facility is an important element in the support of Australian submarine activities.

Obligations

8. The proposed Agreement, like the 1963 Agreement, is designed to facilitate the combined use of the Station. Article 1 of the proposed Agreement provides that Australia will maintain and operate the Station. Article 2 provides that Australia will grant to the United States all necessary rights of access to and use of the Station throughout the duration of the proposed Agreement, subject to the remainder of the provisions in the proposed Agreement. Access and use by the United States would also be subject to technical arrangements made between the cooperating agencies of Australia and the United States (the Department of Defence and the Department of the Navy respectively).
9. Articles 3 and 4 set out certain conditions relating to access to and use of the Station. Paragraph 1 of Article 3 of the proposed Agreement provides that the two Governments will consult from time to time on matters connected with the Station and its use. Paragraph 2 of Article 3 provides that, unless Australia's express consent is obtained, the Station will not be used for purposes other than defence communication.
10. Article 4 of the proposed Agreement sets out three conditions on the access to and use of the Station. These are: first, that the communication services of the Station must be available to both Australian and United States armed forces; second, that the cooperating agencies of the two Governments must mutually determine technical arrangements for the use of the Station; and third, that the United States' use of the Station must accord with Australia's policy of full knowledge and concurrence. Full knowledge and concurrence refers to Australia's right to know what activities foreign governments conduct in, through or from Australian territory or national assets. "Full knowledge" equates to Australia having a full and detailed understanding of any capability or activity with a presence on Australian territory or making use of Australian assets. "Concurrence" does not mean Australia approves every activity or tasking; rather, Australia will approve the presence of a capability or function in Australia in support of its mutually agreed goals, based on our full understanding of that capability and the uses to which it can be put.
11. Articles 5, 6 and 7 set out obligations on the two Governments relating to personnel, property and taxation. Article 5 of the proposed Agreement prohibits the disposal of tax free equipment, materials, supplies and other property imported into or acquired in Australia by the United States under the *Agreement Concerning the Status of United States Forces in Australia*, done at Canberra on 9 May 1963 ([1963] ATS 10), except under certain conditions agreed by the two Governments.

12. Article 6 of the proposed Agreement sets out provisions relating to the taxation of income and property of contractors, personnel and dependants of the United States in connection with the Station. Paragraph 1 of Article 6 establishes an exemption for contractors, subcontractors and personnel of the United States (other than companies incorporated in Australia), and their dependants, from being subject to Australian tax in respect of income derived from their performance of a contract with the United States in connection with the maintenance or operation of the Station provided that they are not exempt under the taxation laws of the United States.
13. Paragraph 2 of Article 6 provides that the period of time in which such contractors, sub-contractors, personnel and dependants are in Australia for the sole purpose of maintenance or operation of the Station shall not be considered as a period of residence in Australia for the purpose of taxation.
14. Paragraph 3 of Article 6 further provides that personal property held by, or transferred to or by, such contractors, sub-contractors, personnel or dependants is not subject to taxation under Australian laws relating to estate and gift duty. Paragraph 4 of Article 6 requires the said property to be taxed under the laws of the United States and further excludes certain types of property from the exemption set out in paragraph 3.
15. Paragraph 5 of Article 6 provides that contractors, sub-contractors or their personnel will not be excluded from the scope of this Article by reason only of having performed a contract in Australia for the United States in connection with other activities agreed upon by the two Governments.
16. Article 7 sets out certain provisions relating to the import of equipment, materials, supplies and other property by the United States into Australia in connection with activities under the proposed Agreement. Paragraph 1 of Article 7 requires Australia to take the necessary steps to facilitate the admission of all equipment, materials, supplies and other property provided by or on behalf of the United States in connection with the Agreement, and exempts such property from Australian duties, taxes or like charges. Paragraph 2 of Article 7 states that any indirect Australian taxes in respect of equipment, materials, supplies and other property and services purchased in Australia for use in connection with this Agreement shall be paid by the Australian Department of Defence on behalf of the United States. This paragraph is intended to apply to, among other things, Australian goods and services tax legislation, which has no provision for exemption in such circumstances.
17. Article 8 relates to the leasing by the United States from Australia of communication services within Australia and to overseas destinations and allows the United States to establish and operate radio circuits as required for the passage of defence communications. Article 8 also obliges the United States to take all practicable measures to minimise the electronic interference from its radio transmitters with a view to avoiding any harmful interference to established radio services.
18. Article 9 provides that the cost of operation, maintenance, modernization, alteration and repair of the Station will be shared between the two Governments in accordance with technical arrangements made between the cooperating agencies.
19. Article 10 requires the cooperating agencies of the two Governments to make technical arrangements with respect to responsibilities of the appropriate authorities of the two Governments for the participation in the maintenance, operation and access to the Station, its facilities and services. Article 10 specifically cites command and control, financial and security responsibilities as matters that must be covered by technical arrangements. Article 10 must be read together with Articles 4, 8, 9 and 11, which set out additional matters to be included in technical arrangements.

20. Article 11 requires Australia to compensate the United States for any residual value of the buildings and equipment constructed or improved by the United States at the Station since 1963 and not removed at the termination of this proposed Agreement. The amount and manner of compensation is to be determined by the cooperating agencies of the two Governments in technical arrangements.
21. Article 12 details the requirements for the entry into force, duration and termination of the proposed Agreement. Article 12 also provides that the proposed Agreement supersedes the 1963 Agreement.

Implementation

22. In consultation with relevant agencies, legislation implementing the 1963 Agreement ([1963] ATS 10) will be repealed. The *United States Naval Communication Station Agreement Act 1963* and the *United States Naval Communication Station Agreement Act 1975* “approved” the 1963 Agreement and the 1974 amendments. These Acts no longer have any effect since the 1963 Agreement is no longer in force.
23. Other legislation partly implements the 1963 Agreement. In consultation with relevant agencies, these pieces will either be repealed (if considered no longer necessary) or amended (if considered necessary) by updating the reference to the proposed Agreement from the 1963 Agreement.
24. No other changes to national laws, regulations or policies are required to implement the proposed Agreement. The proposed Agreement will not effect any change to the existing roles of the Australian Government or the state and territory governments.

Costs

25. Article 9 of the proposed Agreement provides that the cost of operation, maintenance, alteration and repair of the Station will be shared by the two Governments. Technical arrangements for cost sharing will be negotiated between the cooperating agencies as required.
26. Article 11 requires Australia to compensate the United States for any residual value of the buildings and equipment constructed or improved by the United States at the Station since 1963 and not removed at the termination of the proposed Agreement. A proposed Deed of Transfer for Property was initiated during the transition period associated with the departure of United States navy personnel. However, this remains unresolved due to differences between United States and Australian positions regarding residual value, site environment risks and hazards, and associated remediation costs, the pros and cons to concluding the deed, as well as other initiatives that may impact on the attractiveness of the proposed Deed to both countries. Discussions are continuing sporadically with regard to both the different positions and the possible implications of the proposed initiatives.

Regulation Impact Statement

27. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

28. The proposed Agreement does not provide for the negotiation of any future legally binding instruments. Articles 2, 4, 8, 9, 10 and 11 provide that less-than-treaty status technical arrangements must be concluded between the cooperating agencies of Australia and the United States (the Department of Defence and Department of the Navy respectively).

Withdrawal or denunciation

29. Pursuant to Article 12 of the proposed Agreement, the proposed Agreement will remain in force for an initial period of 25 years and, unless terminated, will remain in force for successive periods of five years. The proposed Agreement may be terminated upon either Government giving one year's written notice to the other Government.

Contact Details

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ATTACHMENT ON CONSULTATION

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Consultation

30. The state and territory governments have been consulted through the Commonwealth-State-Territory Standing Committee on Treaties (SCOT). Information on the negotiation of the proposed Agreement was provided to state and territory representatives through the biannual SCOT meetings throughout the course of the negotiations concerning the proposed Agreement. No requests for further information or comments on the proposed Agreement have been received to date from the state and territory governments.