International Aerospace Law & Policy Group

Australia's Air and Space Lawyers

Our ref: Adv

27 May 2024

Secretary of the Joint Standing Committee on Treaties
Parliament House
CANBERRA ACT 2600

BY EMAIL: *jsct@aph.gov.au*

Dear Secretary,

Supplementary Submission on Agreement of Technology Safeguards between United States and Australia:

Comments the International Traffic in Arms Regulations Exemption for Defence Trade and Cooperation Among Australia, the United Kingdom and the United States

1. On 13 May 2024 International Aerospace Law & Policy Group (**IALPG**) gave evidence before the Joint Standing Committee on Treaties (**JSCoT**) regarding the Agreement between the Government of Australia and the Government of the United States of America on Technology Safeguards Associated with United States Participation in Space Launches from Australia (**TSA**).

2. During the hearing of this evidence, Senator Fawcett invited witnesses to submit comments on the public notice issued in the United States Federal Register on 1 May 2024 concerning the International Traffic in Arms Regulations (**ITAR**) exemption for defence trade and cooperation among Australia, the United Kingdom and the United States. In particular, JSCoT seeks information as to how AUKUS-related trades may intersect with the TSA.

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3. Ultimately IALPG suggests there is a potential cross over by the jurisdictions of the two frameworks and, accordingly:

   a. the Commonwealth should make publicly available a guide which outlines all of the applicable frameworks to actors conducting launch or returns activities in Australia (including launch facility operators), both in the context of United States technology and without; and

   b. the Commonwealth define and consult with stakeholders on measures to reduce administrative burdens regarding the concept of integrated technologies, which could fall under both the TSA laws and any amendments to United States export controls.

The Public Notice and the Proposed ITAR Exemption

4. On 1 May 2024 the United States Department of State issued public notice 12377 in Federal Register 89, no. 85 (**Public Notice**).[1]

5. This Public Notice proposes the United States government amend the ITAR so as to "support the goals of the AUKUS partnership". The purpose of the proposal is to:

   a. "foster defense trade and cooperation between and among the United States and two of its closest allies"; and

   b. to implement among the three states "shared security standards on protecting defense technology and sensitive military know-how."

6. The suggested mechanism to give effect to this proposal is to include in the ITAR exemptions from the licensing regime administered by the Directorate of Defense Trade Controls (**DDTC**) in the US Department of State. According to the Public Notice, the amendments would mean "no license or other approval is required for:

   a. the export, reexport, retransfer, or temporary import of defense articles;

   b. the performance of defense services; or

[1] See, < https://www.govinfo.gov/content/pkg/FR-2024-05-01/pdf/2024-09236.pdf >.

c. engagement in brokering activities between or among designated authorized users within Australia, the United Kingdom and the United States provided certain requirements and limitations are met."

7. The proposal also seeks to:

a. add a list of ineligible (excluded) defence items for transfer under a new exemption;

b. expand the exemption scope to allow transfers of classified defence articles to specific dual nationals in the United Kingdom and Australia; and

c. update the licence review procedures for United Kingdom and Australia.

8. Finally, the Public Notice suggests the amendments include a stipulated timeframe for application reviews where licences are needed.

Distinction between the Objectives of the Public Notice and the TSA

9. The Public Notice relates to reforms under the ITAR framework as a means to give effect to AUKUS. It reflects synchronised efforts across all three jurisdictions to remove restrictions on sharing of technology within the scope of AUKUS. Originally the scope of technology in the AUKUS partnership did not specifically include space technology, although it did include hypersonic technology. In December 2023 AUKUS expanded to include the 'Deep Space Advanced Radar Capability'. Still, AUKUS does not comprehensively encompass space technologies. As such, space technologies generally are an incidental beneficiary of the synchronised efforts to remove restrictions on sharing of technology between AUKUS partners.

10. All three jurisdictions have similar legislative and regulatory regimes to prevent the proliferation of sensitive technologies to other nations in circumstances that would undermine their national security. These export control regimes in large part reflect international agreements to which each nation is a party and international arrangements in which each nation is a participant. The most relevant, for present purposes, is the Missile Technology Control Regime (**MTCR**). This involves a politically-binding commitment (it is not a treaty, so the commitment is not legally-binding) to prevent the proliferation of missile technology, which encompasses space launch technology. All three AUKUS nations are participants in the MTCR.

11. The export control regimes of Australia, the UK and the US are broader than the international agreements and arrangements to which they are parties or participants, and encompass technologies of national security concern more generally. The 'Defence and Strategic Goods List' (**DSGL**) in Australia, the 'Strategic Export Control List' (**SECL**) in the UK, and the US Munitions List under their 'International Traffic in Arms Regulations' (**ITAR**) and the US Commerce Control List under their 'Export Administration Regulations' (**EAR**) are all in very similar terms, and each of them covers the MTCR. The transfer of technologies covered by these lists is subject to the issuance of a licence or permit, with associated conditions, by the relevant jurisdictions. The synchronised efforts mentioned above are intended to remove the requirement for a licence or permit for the transfer of AUKUS technologies between AUKUS partners, in order to promote greater efficiency in the pursuit of the objective of the AUKUS partnership. It is not focussed on space launch technology, but rather encompasses such technology incidentally.

12. Under ITAR, the DDTC could not approve an export licence for the launch of a US space launch vehicle from another MTCR participant country (of which Australia is one) unless that country has established the legal and technical safeguards to ensure that the US could maintain its commitments under the MTCR. The TSA between the US and Australia is intended to address this prohibition by providing for close US control of the space launch technology even whilst in Australian territory, consistent with the commitments made in the MTCR. Prior to the TSA, the launch of a US launch vehicle from Australia was still possible, if supported by a government-to-government, *ad hoc*, Technical Assistance Arrangement (**TAA**) (the word 'arrangement' indicating that these were typically politically-binding, not treaty-level documents). Another witness in the JSCoT hearing, Mr Michael Jones, CEO of Equatorial Launch Australia (**ELA**), mentioned that ELA was the beneficiary of a TAA allowing a number of NASA space launches from its facility in Gove. The settling of an *ad hoc*, government-to-government TAA is more realistic when one of the parties involved in a commercial arrangement is itself a governmental organisation, as opposed to where the parties are both non-governmental, commercial entities. Thus the TSA.

13. As such, the proposed change to ITAR and the implementation of the TSA deal with the same subject matter, being export-controlled goods and information, but under separate circumstances. One way to think of this is:

a. the ITAR amendments proposed under the Public Notice deal with ***transfer*** of goods and information; and

b. the TSA deals with the ***handling*** or ***safeguarding*** of goods and information that have been transferred to Australia.

14. Notwithstanding this distinction, the common ground between these frameworks is the export control regime of the US as it applies to the launch of US space launch vehicles in Australia, and the legal and technical safeguards that must be met to allow for this. Many launch-related technologies could fall under both frameworks. Therefore, it is important to consider how goods and information will to be treated in such circumstance, including when technologies from different nations are integrated.

Potential Challenges with Integrated Technologies

15. The Public Notice is open until 31 May 2024 and must be considered by the Department of State before Congress considers changing ITAR to give effect to the proposed changes – that is, to provide an exemption from restrictions for the transfer of AUKUS technologies between AUKUS partners. The proposed rule includes an exclusion from exemption of certain technologies. The exclusion currently encompasses space launch vehicles. That is, space launch vehicles will not benefit from the exemption. This is unlikely to change because under the ITAR space launch vehicles cannot be launched from another MTCR participant country unless that country has established the legal and technical safeguards to ensure that the US could maintain its commitments under the MTCR – which is the reason for the TSA. That is, the export of space launch vehicles and related technologies to Australia will still require an export licence for the US exporter, but the existence of the TSA makes it possible for DDTC to issue a licence, when it was not possible before (unless through an *ad hoc* TAA, such as the one of which ELA was the beneficiary).

16. Nevertheless, there are other technologies that might be involved in space activities that may benefit from the exemptions. The US Munitions List and the Commerce Control List contain technical descriptions of complex and evolving technologies (and the same is true in Australia and the UK) and their application inevitably involves a level of subjectivity and discretion by relevant government officials. For example, innovations in machine learning and its integration into a satellite may or may not be categorised to technology related to missile technology, depending on the technical detail. As such, it is impossible to say in advance how

the space industry in Australia might or might not benefit from the exemption – especially in relation to any individual item of technology. Time, practice and proactive policy-making by government officials in the US and Australia will assist industry in the application of the exemption and the TSA.

17. Depending on how the TSA and the ITAR exemptions are implemented, there are foreseeable problems with the interactions of the two frameworks. One scenario is where Australian and US enterprises collaborate on the development of innovative space technology and arrange for the launch of that technology on a US space launch vehicle from an Australian launch facility. In this scenario, the ITAR exemptions may have facilitated the collaboration between the Australian and US enterprises, but from the point at which the innovative space technology has to be integrated into (or installed in) the space launch vehicle (and therefore taken into a 'Segregated Area' under the TSA), until some time after launch, the Australian space entrepreneur may be excluded from access to their own technology. Part of the practice and proactive policy-making by government officials in the US and Australia that would address such a situation would be standard terms in a TAA, such as the TAA that Mr Michael Jones mentioned in his testimony. This could be one of several subordinate implementing arrangements settled under the TSA. Similarly, other implementing arrangements under the TSA, and standard conditions in launch licences issued by the Australian Space Agency could also minimise the regulatory burden that Australian space enterprises face.

18. Although both the AUKUS-related exemptions proposed in the Public Notice and the TSA implementation would aim to lessen the administrative burden on space enterprises, a substantial level of administrative burden would nevertheless remain, not least for Australian space enterprises to spend resources identifying which approvals, restrictions or exemptions are relevant to it under both, and many other, frameworks.

Potential Challenges with Technologies Governed under both Frameworks

19. Outside of export control regulations, space enterprises endeavouring to conduct space launches or returns in Australia, or to operate launch facilities, are already subject to a multitude of distinct legal frameworks needed to authorise the actual activity (that is, frameworks other than regulations governing standard business operations).

20. Such frameworks include legislative instruments governing environmental matters, air traffic controls, aviation safety, explosives manufacturing and explosives handling, aboriginal affairs

and telecommunications. These are ***in addition*** to the approvals required under the *Space Launches and Returns Act 2018* (Cth).

21. For a small business, young company or an entrepreneur newly entering the market, the wide array of applicable regulation reduces competitiveness with more established, traditional space enterprises. This is not least due to the greater know how (to navigate the regulations) and financial resources held by larger space enterprises. Notably, US space enterprises are typically larger than Australian space enterprises and have established know how in relation to the regulatory regime applicable to their operations in the US. There are two competing scenarios: a small Australian space enterprise is enticed to establish operations in the US to leverage the know how of a US partner, or the US partner is incentivised to establish a base of operations in Australia, to collaborate with innovative Australian space enterprises. Clearly, the latter is preferable. In light of the complexity IALPG respectfully recommends the Commonwealth investigate not only the potential crossover between the proposed ITAR amendments in the Public Notice against any new TSA laws, but that it make publicly available a comprehensive guide identifying all the federal and state and territory laws which are applicable to the space enterprises in circumstances of launches, returns and launch facility operations, with or without US technologies.

Concluding Remarks

22. The comments and recommendations in IALPG's original submission to the Committee dated 19 March 2024 remain after having reviewed the proposed amendments to ITAR in the Public Notice.

23. In particular, IALPG's recommendations i. and iv. of that submission speak to this matter of TSA and US-export controls, those recommendations being:

i. how the implementation of Controlled Area and Segregated Area obligations will be consistent with traditional custodians of Australian territory and not interfere with the voluntary arrangements made between those custodians and Australian space actors; and

iv. how technology transfer will be managed in circumstances where technologies are integrated using technology originating from both the United States and Australia.

24. In response to Senator Fawcett's specific question on how the AUKUS-related exemptions and the TSA might interact, IALPG notes that much will depend on implementation, including the exercise of discretion by regulatory officials in the application of the complex export control regime, and most importantly, proactive policy-making in both countries through standard-term TAAs and launch licence conditions.

25. Further analysis on both frameworks and a comprehensive review of all government discussions and consultations, as well as market trends, may identify opportunities. However, in the interim, IALPG respectfully recommends the government consider the following to mitigate any adverse potential incongruence between the two frameworks:

a. the Commonwealth provide a guide detailing the regulatory frameworks for launch, return, and launch facility activities in Australia, with specific content addressing activities involving United States technologies under export controls and the TSA; and

b. consult with stakeholders on how to streamline processes under all regulations which would apply to 'integrated technologies' under the TSA and United States export controls.

Please do not hesitate to contact us on the details below should you have any questions or require a verbal briefing on our submission.

Yours sincerely

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