

National Interest Analysis [2012] ATNIA 14

with attachment on consultation

**Agreement between the Government of Australia and the Government of Japan on
the Security of Information**

done at Tokyo on 17 May 2012

[2012] ATNIF 10

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring into force the *Agreement between the Government of Australia and the Government of Japan on the Security of Information* ('the proposed Agreement'), signed at Tokyo on 17 May 2012.
2. Pursuant to its Article 19, the proposed Agreement will enter into force on the date on which written notifications have been received by both Parties, through diplomatic channels, that their respective internal legal procedures for entry into force of the proposed Agreement have been completed.
3. Australia will send written notification to the Government of Japan as soon as practicable after the tabling period and subject to a recommendation from the Joint Standing Committee on Treaties (JSCOT) that binding action be taken.

Overview and national interest summary

4. The purpose of the proposed Agreement is to strengthen the legal framework for the exchange of classified information between the Government of Australia and the Government of Japan, ensuring the mutual protection of classified information exchanged under the proposed Agreement. The proposed Agreement will cover all Australian government agencies and five key Japanese government agencies (Cabinet Secretariat, Defence, Foreign Affairs, National Policy Agency, and the Public Security Intelligence Agency).
5. The framework for exchange of classified information established by the proposed Agreement will facilitate cooperation on political and security related issues of relevance to both countries.
6. The proposed Agreement provides for access to and protection of transmitted classified material, as well as procedures for facilitating visits by information security experts to ensure exchanged information is being adequately protected.

Reasons for Australia to take the proposed treaty action

7. Developing closer security cooperation with Japan is a strategic priority for the Government. As that cooperation continues to develop, the potential and, in some cases, the need for greater information sharing with Japan will increase. The proposed Agreement affirms: both countries' commitment to the promotion of bilateral security cooperation through the implementation of the Joint Declaration on Security Cooperation, signed at Tokyo on 13 March 2007; their mutual interest in the protection of classified information; and their wish to ensure the reciprocal protection of classified information exchanged between the Parties.

Obligations

8. The proposed Agreement is substantially similar to other legally binding agreements Australia has entered into with a wide range of countries with which Australia exchanges classified information, including the United States, the European Union and NATO. It does not oblige the Parties to exchange classified information, but provides a framework for protecting any classified information they choose to exchange. Classified information that the Government of Australia passes to the Government of Japan will, under the proposed Agreement, be afforded a degree of protection equivalent in effect to that afforded to it in Australia (and vice versa).

9. Article 1 provides relevant definitions under the proposed Agreement, including a definition of 'Transmitted Classified Information' which means Classified Information¹ which is transmitted directly or indirectly between the Parties.

10. The underlying obligation placed on the Parties, described in Article 2, is to protect Transmitted Classified Information according to the terms of the proposed Agreement and subject to applicable national laws and regulations.

11. The Attorney-General's Department is designated under Article 3 of the proposed Agreement as Australia's National Security Authority responsible for coordination and liaison with regard to the implementation and interpretation of the proposed Agreement.

12. Article 4 lists the security classifications which the Parties will use to mark Transmitted Classified Information, and obliges the receiving Party to mark Transmitted Classified Information at the equivalent level.

13. Under Article 5 of the proposed Agreement, the Parties will:

¹ "Classified Information" means all information which requires protection against unauthorised disclosure in the interest of the national security of the providing Party and which is subject to a Security Classification and generated by, or for the use of, or under the jurisdiction of, the Competent Authorities of the Government of Japan or the Government of Australia. The information may be in any form, including oral, visual, electronic, magnetic, or documentary forms, or equipment or technology, and may also include any reproductions or translations (Article 1(a)).

- a) take appropriate measures to provide all Transmitted Classified Information a degree of protection equivalent in effect to that afforded to it by the Providing Party;
- b) not disclose such information to any third party unless agreed in writing between the Parties;
- c) take appropriate measures to prevent unauthorised disclosure of Transmitted Classified Information;
- d) ensure that necessary inspections are carried out and relevant security policies are complied with in order to protect Transmitted Classified Information;
- e) establish procedures for the identification, location, inventory and control of Transmitted Classified Information outlined in the Procedural Arrangement (paragraph 23 of the *Implementation* section below refers);
- f) not use or permit the use of Transmitted Classified Information for any purpose other than that for which it is provided without the prior approval of the Providing Party;
- g) observe intellectual property rights such as patents, copyrights, or trade secrets applicable to Transmitted Classified Information;
- h) specify in writing additional limitations on the use, disclosure, and release of, and access to Transmitted Classified Information and comply with any such limitations;
- i) release Transmitted Classified Information to a Third Partner² only if the Providing Party specifies that the information is releasable to the Third Partner.

14. Under Article 6, the Parties will prevent unauthorised access to Transmitted Classified Information and limit access to those individuals who require access for the performance of their official duties and hold a current Personnel Security Clearance to the necessary level.

15. Under Article 7, the Receiving Party may release Transmitted Classified Information to a contractor, if mutually determined in writing, and take appropriate measures to ensure the contractor's facilities have the capability to protect the Transmitted Classified Information, including carrying out periodic security inspections.

16. Under Article 8, the Parties will ensure the security of all facilities where Transmitted Classified Information is handled.

17. Under Article 9, the Parties will ensure that Transmitted Classified Information is stored in a manner that prevents unauthorised access in accordance with Article 6. This obligation includes Transmitted Classified Information held in electronic form.

18. Security requirements during transmission are covered by Articles 10 and 11. Information must be transmitted between the Parties through Government-to-Government channels. While in transit, the Providing Party remains responsible for the security of Classified Information until it is received by the Receiving Party.

² "Third Partner" means the government of a third State or an intergovernmental organisation with which the Receiving Party has concluded an agreement or arrangement concerning the protection of classified information (Article 1(i)).

19. Under Article 12, the Parties will notify each other if there are changes to relevant security policies that would adversely affect the protection of Transmitted Classified Information under the proposed Agreement and will consult on possible amendments to the proposed Agreement or modifications to the Procedural Arrangement.

20. Visit procedures involving access by individuals of one Party to Classified Information held by the other Party and visits by security personnel are covered by Articles 13 and 14. Article 14 provides that security personnel of one Party may visit the other Party to discuss the other Party's security procedures and observe their implementation to determine whether Transmitted Classified Information is being adequately protected.

21. Under Article 15, the Parties are required to destroy Transmitted Classified Information by means which prevent its reconstruction in whole or part. Under Article 16, the Parties will notify each other immediately of any loss or compromise of Transmitted Classified Information and take measures to prevent recurrence.

22. Under Article 18, disputes shall be resolved through consultation between the Parties.

Implementation

23. Pursuant to Article 17(1), at the time of signing the proposed Agreement, the Parties signed a Procedural Arrangement, subordinate to the proposed Agreement, which specifies supplementary provisions to implement the proposed Agreement. The Procedural Arrangement does not create legally binding rights or obligations.

24. Article 17(2) of the proposed Agreement allows the Parties to separately negotiate supplementary implementing arrangements to cover particular departmental or agency requirements, should that be required.

25. No change to domestic law is required to implement the proposed Agreement. The proposed Agreement is implemented by Australian laws and policies already in place relating to protective security. The Australian Government Protective Security Policy Framework (PSPF) requires agencies to adhere to the provisions of any international security of information agreements. The proposed Agreement will not require any change to the existing roles of the Commonwealth Government or the State and Territory Governments.

Implementation of the proposed Agreement under the new Protective Security Policy Framework

26. The Australian Government has introduced a new PSPF, including a revision of the Government's security classification system. The revised system reduces the number of classifications from seven to four: PROTECTED, CONFIDENTIAL, SECRET and TOP SECRET. The classifications X-IN-CONFIDENCE, HIGHLY PROTECTED and RESTRICTED will no longer be used for new material. (The RESTRICTED classification will continue to be used by the Department of Defence until August 2013.) The classification system was introduced across government

from 1 August 2012, and will be implemented by 31 July 2013. Further information about the new Protective Security Policy Framework can be found at www.protectivesecurity.gov.au.

27. The PSPF reforms were approved as the negotiation of the proposed Agreement with Japan drew to a close. At the time, the proposed reforms were discussed in general terms with Japan during the negotiations, and the Parties agreed to proceed with the existing treaty text. It is Australia's view that these changes will not affect the Parties' ability to fulfil their obligations under the proposed Agreement.

28. Importantly, the proposed Agreement provides that Japanese information marked 'Gokuhi 極秘Bouei Himitsu 防衛秘密' will be protected by Australia at the 'Secret/Highly Protected' level. Notwithstanding the removal of the 'HIGHLY PROTECTED' classification under the PSPF, Australia will be able to meet its obligations by ensuring that all Japanese material marked 'Gokuhi 極秘Bouei Himitsu 防衛秘密' will be protected at the 'Secret' level in Australia.

29. Also, the proposed Agreement provides that any Australian information marked 'RESTRICTED' or 'X-IN-CONFIDENCE' will be protected as 'Hi 秘 in Japan. 'RESTRICTED' and 'X-IN-CONFIDENCE' have been removed under the PSPF and replaced by the Dissemination Limiting Marker 'For Official Use Only'. While there is no provision in the proposed Agreement for material marked 'For Official Use Only', if Australian agencies wish information marked in this way to be transmitted to Japan, two options exist consistent with the proposed Agreement. First, Australia could re-classify this material as 'PROTECTED', so it would be protected in the same way as 'RESTRICTED' and "X-IN-CONFIDENCE" material is required to be in Japan. Alternatively, Australia and Japan could enter into a Procedural Arrangement to deal specifically with the exchange of 'For Official Use Only' material.

30. Given that the proposed Agreement refers to most new classifications as well as those classifications that will be phased out, it will facilitate the sharing of past and future classified material. It should also be noted that implementation of new classification levels in Australia will be staggered with all agencies except the Department of Defence implementing by 31 July 2013. The Department of Defence has been given an additional 12 months to implement (to 31 July 2014). The current formatting of Article 4 enables Australia to meet its obligations both during and beyond this transition period.

Costs

31. There are no anticipated costs to the Australian Government in the implementation of the proposed Agreement.

Regulation Impact Statement

32. 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

33. In accordance with Article 19(2), the proposed Agreement may be amended by written agreement between the Parties. Any amendment to the proposed Agreement will enter into force once the Parties notify each other through the diplomatic channel that they have completed their respective internal procedures for entry into force.

34. As outlined above, the Australian Government adopted the revised PSPF as the negotiation of the proposed Agreement drew to a close. The proposed reforms to the PSPF were raised with Japan during the negotiations and the Parties agreed to proceed with the current treaty text. Looking forward, it is proposed that Australia will notify Japan at the time of entry into force regarding the implementation arrangements that Australia will put in place (paragraph 26-30 of the Implementation Section above refers). Should Japan raise concerns regarding the new PSPF, the Parties would engage in consultations with a view to possible future amendment of the proposed Agreement, in accordance with the Australia's treaty making process.

Withdrawal or denunciation

35. Under Article 19(3), the proposed Agreement shall remain in force for a period of one year and shall be automatically extended annually thereafter unless the Parties otherwise agree or a Party gives the other notice in writing of its desire to terminate the proposed Agreement, in which event the proposed Agreement shall be terminated one hundred and eighty days after the date on which the notice is given.

36. If the proposed Agreement is terminated, the obligations of the Parties in relation to the protection, disclosure and use of classified information already exchanged shall continue to apply. This will ensure that Transmitted Classified Information provided under the proposed Agreement will continue to receive appropriate protection after the proposed Agreement is terminated.

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

State and Territory Governments

37. States and Territories have been kept informed of progress with negotiations through the biannual meeting of the Commonwealth-State-Territory Standing Committee on Treaties (SCOT) and through the biannual Schedule of Treaties under Negotiation, Consideration or Review by the Australian Government. The proposed Agreement was included in the bilateral list of treaties under negotiation, consideration or review provided to the 15 May 2012 SCOT meeting. No comments were received from the States or Territories. No action will be required from States or Territories to implement the proposed Agreement.

Commonwealth Departments

38. The Department of Foreign Affairs and Trade consulted with the Department of Prime Minister and Cabinet, the Department of Defence, the Office of National Assessments and the Attorney-General's Department throughout the negotiation process and they have confirmed that the Agreement meets the requirements of all Australian Government departments and agencies that deal with national security classified information.

Public Consultation

39. Consistent with the processes followed for other Security of Information Agreements to which Australia is a Party, no public consultation was undertaken. The proposed Agreement simply establishes procedures for the secure exchange of classified information between the Government of Australia and the Government of Japan in accordance with agreed standards.