

Treaty between Australia and the United States of America Concerning Defense Trade Cooperation

Introduction

- 3.1 The proposed action is to bring into force through an exchange of notes the Treaty between the Government of Australia and the Government of the United States of America Concerning Cooperation in Defense Trade (the Treaty).¹
- 3.2 The Treaty was signed by the former Prime Minister of Australia, and the President of the United States on 5 September 2007 at the time of the 19th APEC Ministerial Meeting in Sydney. The purpose of the Treaty is to enable greater access and sharing of defence equipment, technology, information and services between Australia and the USA. It is a significant step forward in our long-standing defence cooperation relationship with the United States. The only other country that the United States has a similar agreement with is the United Kingdom.²
- 3.3 Article 20 of the Treaty provides that it shall enter into force upon an exchange of notes confirming that each Party has completed the necessary domestic requirements to bring the Treaty into force.

1 National Interest Analysis (NIA), para 1.

2 NIA, para 3.

Before Australia can exchange notes, the Commonwealth must enact legislation to incorporate Australia's rights and obligations under the Treaty into the domestic legal system. The United States Senate must pass the Treaty with a two-thirds majority before the United States can exchange notes.³

- 3.4 When the Treaty enters into force, a non-binding 'Implementing Arrangement' agreed by the parties to facilitate the implementation of the Treaty, will also come into effect.⁴

Background

- 3.5 The Treaty establishes a bilateral framework to reduce barriers (including requirements for licences or other written authorisations) to the exchange and trade of classified and unclassified but 'controlled' defence goods, services and technology between certain pre-approved US and Australian government facilities and private companies. Those 'controlled' items are regulated in the USA under its International Traffic in Arms Regulations and in Australia under Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958* (Cth).⁵
- 3.6 The Treaty will apply to "Defence Articles" required for combined military or counter-terrorism operations; cooperative security and defence research, development, production and support programs; mutually determined specific security programs where the Australian Government is the end-user; and US Government end-use.⁶ Article 1(c) of the Treaty defines "Defence Articles" to mean "articles, services and related technical data, including software, in an intangible form, listed on the United States Munitions List" (as further defined in Article (n)).⁷

3 NIA, paras 1 - 3.

4 NIA, para 1.

5 NIA, para 14.

6 NIA, para 4.

7 NIA, Article 1.

Obligations

- 3.7 The NIA states that the purpose of the Treaty, set out in Article 2, is to provide a framework which will allow the export and transfer of Defence Articles pursuant to the Treaty without a licence or other written authorisation.⁸

Approved Community

- 3.8 Under articles 4 and 5 respectively, Australia and the USA agree to establish, maintain and monitor an Approved Community of government facilities and non-government companies. Only members of the Approved Community will be able to operate within the transfer and export system established by the Treaty.⁹

Security Procedures

- 3.9 Articles 6, 8 and 11 require each Party to establish procedures to ensure that all Defence Articles are clearly marked or identified as being traded pursuant to the Treaty at various points of their movement. These procedures are intended to ensure that security measures for handling such sensitive items are followed during their movement. Article 11 provides that each Party must respect its obligations under the *Security Agreement between the Government of Australia and the Government of the United States of America concerning Security Measures for the Protection of Classified Information (2002)* in marking, identifying, transmitting, storing and handling the Defence Articles.

Recordkeeping and Notification

- 3.10 Article 12 provides that each Party must require that entities within its Community maintain detailed records of their movement of Defence Articles. Further, each Party agrees to make such records available to the other Party upon request.

Approved Community Exports and Transfers, Re-transfers and Re-exports

- 3.11 Under article 8, Australia agrees to ensure that members of the Approved Community shall be permitted to export Defence Articles within the Approved Community without seeking a licence or authorisation for each export. Under article 6, the US Approved

8 NIA, Article 2.

9 NIA, para 13.

Community may export and transfer Defence Articles to Australia pursuant to the Treaty, without prior licenses or authorisations by the US Government.

- 3.12 Under article 9, Australia agrees that all 're-transfers' and 're-exports' of Defence Articles shall require the approval of both the Australian and United States Governments. The Treaty allows for certain mutually determined exceptions, such as where the Defence Article is destined for operational use in direct support of Australian Defence Force (ADF) personnel. This provision will streamline the provision of US-origin articles to ADF units on operations outside Australia and the maintenance of such articles.
- 3.13 Article 1 defines 'Re-transfer' to mean the movement of Defence Articles, that have been exported from the US to Australia, to a location within the territory of Australia. Article 1 also defines 'Re-export' to mean the movement of Defence Articles, that had been exported from the US to Australia, to a location outside the territory of Australia.

Compliance and Enforcement

- 3.14 Under article 13, each Party agrees to investigate promptly all suspected violations and reports of alleged violations of the Treaty. Additionally, each Party agrees to cooperate with the other Party on investigations of suspected violations of the Treaty, and to keep each other informed of the progress of prosecutions and any civil or administrative actions taken in relation to the Treaty. The Parties may also conduct post-shipment verifications and end-use or end-user monitoring of exports and transfers of the Defence Articles.¹⁰

Implementing Arrangement

- 3.15 Pursuant to article 14 of the Treaty, Australia and the USA have concluded an Implementing Arrangement that details the way in which the Treaty will be implemented in both countries. The Implementing Arrangement was signed on 14 March 2008 and will come into effect on the date of entry into force of the Treaty. The Implementing Arrangement supplements the provisions of the Treaty by prescribing detailed procedures and standards to be adopted by the Parties. It is not, however, an instrument of treaty status. The

10 NIA, para 20.

Implementing Agreement is a public document and has been provided to the Committee for information.¹¹

- 3.16 Amongst other things, the Implementing Arrangement provides that both parties may exempt certain Defence Articles from the scope of the Treaty. The national lists of such items will constitute a combined list of items exempt from the treaty that will be published periodically.
- 3.17 The Arrangement sets out the arrangements for the inclusion of non-governmental Australian Approved Community entities including the requirement that each entity or facility be assessed with regard to approval for handling classified information; foreign ownership, control or influence; violations of United States or Australian export controls; United States export licensing history; and national security risks (see Section 4 of the Arrangement).
- 3.18 Where an Australian entity applies for inclusion in the Australian Approved Community, the Australian Department of Defence will conduct an initial eligibility review and the Department and the US Department of State will then *mutually determine* the inclusion of that entity in the Australian community (Section 5 of the Arrangement). There are arrangements for consultation in relation to the removal of entities or facilities from the Australian community, however, it is not clear whether these administrative decisions will be subject to any review process (i.e. Administrative Appeals Tribunal or Federal Court).

Consultations

- 3.19 Under article 17, Australia and the United States agree that consultations at a senior level to review the operation of the Treaty will be carried out at least annually.

Legislation

- 3.20 It is proposed that the Commonwealth implement legislation to give the Treaty effect in domestic law. New legislation is required to create a framework for licence-free trade in Defence Articles with the United States and to ensure compliance and enforcement with the terms of the Treaty. It is proposed to introduce legislation in Parliament in late 2008 or early 2009.¹²
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11 NIA, para 21.

12 NIA, para 23.

- 3.21 The Australian agency authorised to implement the Treaty, under article 15, is the Department of Defence.

Reasons for Australia to take treaty action

- 3.22 The Treaty will improve the interoperability of the Australian and United States armed forces by facilitating the movement and maintenance of Defence Articles in support of mutually agreed activities and operations, while maintaining and ensuring proper safeguards against the unauthorised release of defence technology and equipment.¹³
- 3.23 According to the Department of Defence the benefits of the Treaty will extend to the Australian Defence industry by opening new avenues for industrial cooperation and allowing for effective partnering and technology sharing. The Treaty will permit the transfer of equipment to members of the 'Approved Community.' This will facilitate the involvement of Australian companies in support work for the ADF and for United States defence programs. A particular benefit will be timely access to American technology and the ability to share technical data without the need for a licence, which will reduce lead times in discussing potential business opportunities and improve the prospects for Australian companies seeking to participate in US defence programs.
- 3.24 Australian members of the Approved Community that support ADF equipment will save time through licence-free movement of Defence Articles and related intangible data within the Approved Community. The US Department of State has advised that it approved 2,361 licences and 312 technical data agreements for Australia in 2006. The Treaty will eliminate the requirement for a number of these approvals, each of which can take three months or more. Transfers and exports of Defence Articles outside the Approved Community will still require normal US and Australian export licences.¹⁴
- 3.25 Without implementation of this Treaty, the ADF and Australian defence industry would have to continue to abide by the time consuming licensing requirements of both Australia and the United States for trade in defence technology, equipment and services. It

13 NIA, para 6.

14 NIA, para 8.

could potentially mean that the ADF could experience delay in obtaining support of and maintenance for its US-sourced equipment.

- 3.26 Australia has a long-standing alliance with the USA, which is the foundation for our extensive cooperation in defence and security matters. Australia's close relationship with the USA enhances our ability to protect our interests by providing access to leading-edge defence hardware and technologies, access to training courses and combined exercises, and to significant intelligence capabilities.¹⁵

Entry into force and withdrawal

- 3.27 Under article 21(1), the Treaty is of unlimited duration, unless either party withdraws in accordance with article 21(2). Article 21(2) provides that each Party has the right to withdraw from the Treaty if it decides that extraordinary events related to the Treaty have jeopardised its national interests. In such event, the Party must give notice of its intention to withdraw to the other Party. Such notice of intention to withdraw must include a statement of the extraordinary events the notifying Party regards as having jeopardised its national interests. The Parties must then consult with the aim of allowing the continuation of the Treaty. If, after such consultation, the notifying Party still wishes to withdraw, such withdrawal will take effect upon the expiry of six months from the provision of the notice of intention to withdraw. In the event of withdrawal, the procedures for protection of Defence Articles will continue until such time as appropriate defence export licences or other authorisations are in place.

- 3.28 Withdrawal from the Treaty by Australia would be subject to Australia's treaty process, including tabling in Parliament and consideration by this Committee.¹⁶

15 NIA, para 10.

16 NIA, para 31.

Costs

- 3.29 Entry into force of the Treaty will result in costs to the Australian Government. These costs would be associated with the establishment and maintenance of the Approved Community, including security assessments for applicants, and providing resources for the administration and enforcement of the Treaty. Costs have been estimated at \$26.8m for the first year, and \$26.7m for each year after that. These costs will be met from within the Department of Defence's budget:
- We have a cost of around \$84 million over the forward estimates being invested in this area in defence, both in the Defence Security Authority and in the Strategic Policy Division that currently manages the policy oversight and licensing arrangements in the department. Those costs have been received through the budget, and those processes will be set up over that period of time.¹⁷
- 3.30 The Committee notes concerns that have been expressed about the number of security assessments that will be required, and the associated time and costs that will be involved in the process.¹⁸ The Committee emphasises that security assessment processes need to be adequately resourced to minimise delays and costs for industry.
- 3.31 Entry into force of the Treaty will not result in mandatory costs for industry, since operating within the framework of the Treaty is voluntary. Companies that are involved in defence projects for Australian or US Government end-use are eligible to apply for membership of the approved community should they wish.
- 3.32 Companies are under no obligation to apply for approved community membership. If a company applies for membership, it will have to undergo an eligibility assessment, which will involve Australian Government checks to ensure satisfactory standards of physical, information and personnel security are in place and can be maintained. Therefore, costs for companies of developing and maintaining security standards will differ depending on what already is in place.¹⁹

17 Ms R. Skinner, *Transcript of Evidence*, 16 June 2008, p. 12.

18 Dr Simon Rice, Supplementary Submission No. 11.1, p. 4.

19 NIA, paras 25-26.

Other matters

- 3.33 The Committee received a number of submissions which expressed concerns in relation to certain aspects of Australia's participation in this treaty.

Membership of the Approved Community

- 3.34 CEA Technologies Pty Limited (CEA) raised concerns as to the extent to which it will be optional for a company to choose to be a member of the approved community and whether or not there is 'a real choice for Australian companies in a commercial sense.'²⁰
- 3.35 The Department of Defence confirmed that membership of the approved community is voluntary. However, it is clear from the evidence that those companies who are not a part of the approved community will be at a competitive disadvantage. Nonetheless, membership will provide significant advantages to Australian companies, particularly in reducing the burden of multiple licensing requirements.²¹
- 3.36 The Victorian Government also raised concerns relating to the approved community concept. While recognising the advantages of the Treaty, membership of the approved community will place additional administrative costs on business. The Victorian Government expressed concerns that:
- the cost of these additional security arrangements and the vetting process may act as a barrier for [small to medium enterprises] to enter the US export market and place them at a disadvantage to the primes and the US companies.²²
- 3.37 The Committee shares concerns about the administrative cost burden placed on small to medium sized enterprises to join the approved community. The Department of Defence assured the Committee that they are continuing to look at this issue through the consultation process.²³

20 CEA Technologies Pty Ltd, Submission No. 12, p. 1-2.

21 Mr K. Clarke, Department of Defence, *Transcript of Evidence*, 16 June 2008, p. 12.

22 Victorian Government, Submission No. 19, p. 1.

23 Mr K. Clarke, Department of Defence, *Transcript of Evidence*, 16 June 2008, p. 16.

- 3.38 The Committee also notes that the Treaty is expected to reduce ongoing costs through the reduction of licence fees and delays due to licensing requirements.

Race discrimination

- 3.39 Associate Professor Simon Rice from the Australian National University College of Law raised concerns that the Treaty would require employers to breach local race discrimination laws by selecting applicants based on nationality. He stated:

The thinking behind the ITAR is that the country you are born is the country you are allied to, and that if that country is not Australia or the USA then you pose a security threat to the USA. Clearly there are ways of addressing security concerns other than this crude approach.²⁴

- 3.40 In response, the Department of Defence informed the Committee that there is no requirement for exemption from any anti-discrimination laws for industries operation pursuant to the Treaty. Rather, employees are required to obtain security clearance which assesses 'significant ties' to countries other than Australia or the USA:

The individual employee applies for a security clearance not the employer, and, therefore, there is no need for the employer to ask for nationality details, only that the employee have the ability to obtain the RESTRICTED clearance (or higher as required)...

Under the Defence Cooperation Treaty, all employees with access to licence-free US defence technology will be required to have a minimum RESTRICTED security clearance. In addition to the standard checks conducted as part of a RESTRICTED security clearance, the individual will undergo a check for indicators of 'significant ties.' Where indicators of significant ties to countries proscribed under ITAR Section 126.1 are revealed, the Australian Government will conduct a dedicated assessment as for a SECRET clearance.²⁵

- 3.41 The Committee is satisfied that the security clearance process for projects under the Treaty is adequate given the nature of employment and this process does not inherently require employers to act in a discriminatory manner.
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24 Mr Simon Rice, Submission No. 11, p.1.

25 Department of Defence, Submission No. 23, p. 2.

3.42 However, the Committee notes that there will still be instances where industry must comply with existing requirements under the International Traffic in Arms Regulations (ITAR) for Defence technology that is not within the scope of the Treaty. It also appears that there is some ambiguity around whether there will only be a two tier system, with employees assessed for clearance entirely by government for treaty related projects and assessment by employer under ITAR for others, or whether there may be circumstances where government assessment under the treaties provisions could also cover some or all requirements for non-treaty projects.

3.43 It is clear that this treaty does not remove all of the burdens faced by industry under existing ITAR arrangements, especially as it relates to anti-discriminatory provisions. As noted by Associate Professor Simon Rice:

Whether industry is better off depends on the amount of defence technology that is not within the scope of the Treaty, for which parallel ITAR compliance systems must continue to operate ... and whether industry will in fact carry any of the burden and cost of the security clearance process.²⁶

Conclusion and recommendations

3.44 The Committee notes the concerns of submissions and in particular that the Treaty may increase both costs and the administrative burden on small and medium sized business through the necessity to gain security clearances for staff. However, the Committee also notes that the Treaty will significantly lessen the costs and administrative burden on all businesses in the long term by lessening the need for individual licences for defence articles.

3.45 As such, the Committee considers that the Treaty with the United States on defence trade cooperation will be in Australia's national interest and recommends that binding treaty action be taken.

26 Dr Simon Rice, Supplementary Submission No. 11.1, p. 2.

Recommendation 4

The Committee supports the *Treaty between the Government of Australia and the Government of the United States Concerning Defense Trade Cooperation* and recommends that binding treaty action be taken.

Kelvin Thomson MP
Chair