

Agreement between the Government of Australia and the Government of Japan on the Security of Information (Tokyo, 17 May 2012)

Introduction

- 4.1 On 30 October 2012, the *Agreement between the Government of Australia and the Government of Japan on the Security of Information (Tokyo, 17 May 2012)* was tabled in the Commonwealth Parliament.

Background

- 4.2 Australia's security relationship with Japan has grown significantly during the past decade. The Lowy Institute observed that:

In the last decade, Australia has quietly and quickly become a close security partner to Japan, second only to the United States. For Australia, no security relationship outside the foundational alliance with the United States has deepened more in this same period. Despite changes of government and political transformations in Australia and Japan towards the end of the decade, the bilateral security relationship has quietly prospered and looks set to continue into the foreseeable future.¹

¹ See 'The Quiet Achiever: Australia-Japan Security Relations', <<http://www.lowyinstitute.org/publications/quiet-achiever-australia-japan-security-relations>>, accessed 7 November 2012.

- 4.3 Japan is, according to the Department of Foreign Affairs and Trade (DFAT), one of Australia's closest and most trusted security partners. The growing security and defence relationship with Japan reflects the confidence that both countries have in working with one another. This includes the establishment of a 'two-plus-two' Foreign and Defence Ministers consultation process – Australia is the only country apart from the United States to have such a process with Japan. It also includes cooperation in Iraq and on peacekeeping operations in East Timor and Southern Sudan along with a growing number of bilateral and trilateral (with the United States) defence exercises.² The fourth two-plus-two talks were held in September this year in Sydney, and at that talk ministers agreed to enhance security and defence cooperation, including strengthening information-sharing cooperation.³
- 4.4 The Department also noted the broader Australia-Japan relationship:
- The Australia-Japan security relationship has matured particularly over the past five years. In 2007 the then Prime Ministers signed a Joint Declaration on security cooperation. It provided a foundation for wide-ranging cooperation and included a specific reference to exchanges of strategic assessments and related information. Since then we have built security and strategic cooperation, and a key part of this has been putting in place the legal framework required to be able to cooperate with each other. In 2008 the Department of Defence signed a memorandum of understanding with Japan. In 2010 Australia and Japan agreed the treaty-level acquisition and cross-servicing agreement, which is essentially a defence logistics agreement. It is expected to come into force later this year or early 2013, and one of the key applications of that will make it easier to cooperate in such areas as disaster relief and peacekeeping.⁴

Overview and national interest summary

- 4.5 The Agreement's purpose is to strengthen the legal framework for the exchange of classified information between the Governments of Australia and Japan, ensuring the mutual protection of exchanged classified
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2 Department of Foreign Affairs and Trade, *Submission 1*, p. 1.

3 Mr Peter Roberts, Director, Japan Section, North East Asia Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, 26 November 2012, p. 7.

4 Mr Peter Roberts, Director, Japan Section, North East Asia Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, 26 November 2012, p. 7.

information. The Agreement will cover all Australian government agencies and five key Japanese agencies.⁵ It will be up to individual agencies to determine what information to share, though there are no obligations on either party to share information.⁶

- Counter-terrorism and intelligence are areas of possible cooperation under the proposed Agreement. Once the proposed Agreement comes into force, agencies responsible for intelligence and counter-terrorism could enter into a discussion with Japan about the sharing of such information.⁷

4.6 The Agreement's framework will facilitate cooperation on political and security related issues of relevance to both countries. The 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.⁸

4.7 At this stage, this is a bilateral Agreement and facilitates the sharing of information between Australia and Japan. There are, however, provisions in the Agreement that do allow sharing with third parties. Given the close security relationship both Australia and Japan share with the United States, the Agreement has the potential to help facilitate the tri-partite relationship.⁹

Reasons for Australia to take the proposed treaty action

4.8 The following summary of the proposed treaty action and its claimed benefits is taken from the National Interest Analysis (NIA).

4.9 Developing closer security cooperation with Japan is a strategic priority for the Government. As that cooperation continues to develop, 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;

5 NIA, para 4. These Japanese agencies are: Cabinet Secretariat, Defence, Foreign Affairs, National Policy Agency, and the Public Security Intelligence Agency.

6 Department of Foreign Affairs and Trade, *Submission 1*, p. 1.

7 Department of Foreign Affairs and Trade, *Submission 1*, p. 1.

8 NIA, paras 5-6.

9 Mr Peter Roberts, Director, Japan Section, North East Asia Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, 26 November 2012, p. 9.

- their mutual interest in the protection of classified information; and
- their wish to ensure the reciprocal protection of classified information exchanged between the Parties.¹⁰

Obligations

- 4.10 Australia has 12 treaties relating to mutual protection of classified information in force, including with the United States, France, New Zealand and the EU, and there have been no problems or issues with regard to these agreements in the past.¹¹ This Agreement 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 Australian Government passes to Japan will be afforded a degree of protection equivalent in effect to that afforded to it in Australia (and vice versa).¹²
- 4.11 Article 1 provides relevant definitions under the proposed Agreement, including a definition of ‘Transmitted Classified Information’ (TCI) which means Classified Information¹³ which is transmitted directly or indirectly between the Parties.¹⁴
- 4.12 While the proposed Agreement covers the possible electronic transmission of classified material, Australia and Japan currently have no electronic connectivity of classified systems with which to transmit such information. If connectivity was ever established, then the proposed Agreement would need to be updated to reflect such a development and specifically cover the issue of the destruction of electronically transmitted classified material. The present understanding is that classified information will be transmitted in hard copy only.¹⁵

10 NIA, para 7.

11 Mr Peter Roberts, Director, Japan Section, North East Asia Branch, Department of Foreign Affairs and Trade, *Committee Hansard*, 26 November 2012, p. 7.

12 NIA, para 8.

13 ‘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)).

14 NIA, para 9.

15 Department of Foreign Affairs and Trade, *Submission 1*, p. 2

- 4.13 The underlying obligation, described in Article 2, is to protect TCI according to the Agreement's terms and subject to applicable national laws and regulations.¹⁶
- 4.14 The Attorney-General's Department is designated under Article 3 as Australia's National Security Authority responsible for coordination and liaison with regard to the implementation and interpretation of the proposed Agreement.¹⁷
- 4.15 Article 4 lists the security classifications which the Parties will use to mark TCI, and obliges the receiving Party to mark TCI at the equivalent level.¹⁸
- 4.16 Under Article 5 of the proposed Agreement, the Parties will:
- take appropriate measures to provide all TCI a degree of protection equivalent in effect to that afforded to it by the Providing Party;
 - not disclose such information to any third party unless agreed in writing between the Parties;
 - take appropriate measures to prevent unauthorised disclosure of TCI;
 - ensure that necessary inspections are carried out and relevant security policies are complied with in order to protect TCI;
 - establish procedures for the identification, location, inventory and control of TCI outlined in the Procedural Arrangement;
 - not use or permit the use of TCI for any purpose other than that for which it is provided without the prior approval of the Providing Party;
 - observe intellectual property rights such as patents, copyrights, or trade secrets applicable to TCI;
 - specify in writing additional limitations on the use, disclosure, and release of, and access to TCI and comply with any such limitations;
 - release TCI to a Third Partner¹⁹ only if the Providing Party specifies that the information is releasable to the Third Partner.²⁰
- 4.17 Article 6 provides that the Parties will prevent unauthorised access to TCI and limit access to those individuals who require access for the

16 NIA, para 10.

17 NIA, para 11.

18 NIA, para 12.

19 "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)).

20 NIA, para 13.

performance of their official duties and hold a current Personnel Security Clearance to the necessary level.²¹

- 4.18 Article 7 provides that the Receiving Party may release TCI to a contractor, if mutually determined in writing, and take appropriate measures to ensure the contractor's facilities have the capability to protect the TCI, including carrying out periodic security inspections.²²
- 4.19 Article 8 provides that the Parties will ensure the security of all facilities where TCI is handled.²³
- 4.20 Article 9 provides that the Parties will ensure that TCI is stored in a manner that prevents unauthorised access in accordance with Article 6. This includes electronic TCI.²⁴
- 4.21 Articles 10 and 11 provide that 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.²⁵
- 4.22 Article 12 provides that the Parties will notify each other if there are changes to relevant security policies that would adversely affect the protection of TCI and will consult on possible amendments to the Agreement or to the Procedural Arrangement.²⁶
- 4.23 Articles 13 and 14 cover visit procedures, and visits by security personnel. Security personnel of one Party may visit the other Party to discuss security procedures to determine whether TCI is being adequately protected.²⁷
- 4.24 Articles 15 and 16 require the Parties to destroy TCI by means which prevent its reconstruction, and Parties to notify each other immediately of any loss or compromise of TCI and take measures to prevent recurrence.²⁸

Implementation

- 4.25 Article 17(1) provides that the Parties shall make signed a Procedural Arrangement, subordinate to the Agreement, which specifies
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21 NIA, para 14.

22 NIA, para 15.

23 NIA, para 16.

24 NIA, para 17.

25 NIA, para 18.

26 NIA, para 19.

27 NIA, para 20.

28 NIA, para 21.

supplementary provisions for implementation. This Arrangement does not create legally binding rights or obligations. Article 17(2) allows the Parties to separately negotiate supplementary implementing arrangements to cover particular departmental or agency requirements.²⁹

- 4.26 No change to domestic law is required to implement the Agreement – it will be implemented by 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 Agreement will not require any change to the existing roles of the Commonwealth Government or the State and Territory Governments.³⁰

Implementation under the new Protective Security Policy Framework (PSPF)

- 4.27 The PSPF³¹ reforms were approved as the negotiation of the 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.³²
- 4.28 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.³³
- 4.29 Given that the Agreement refers to most new classifications as well as those to be phased out, it will facilitate the sharing of past and future classified material. Implementation of new classification levels in

29 NIA, paras 23-24.

30 NIA, para 25.

31 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>.

32 NIA, para 27.

33 NIA, para 28 -29.

Australia will be staggered with all agencies except the Department of Defence implementing by 31 July 2013 – Defence has been given an additional 12 months. Article 4 enables Australia to meet its obligations both during and beyond this transition period.³⁴

Inspections

4.30 As discussed above, Articles 7, 13 and 14 cover inspections and other measures to ensure that classified material is being handled appropriately. The Attorney-General's Department provided further detail on how inspections would be carried out by both countries:

The issue of inspections is on a case-by-case basis. If it is government-to-government, then typically it would be someone from my area – protective security policy – who would go along with particular Australian government agencies, such as the Department of Defence, and they would jointly inspect the government facility if that was appropriate. Likewise, in respect of a private sector company, it would typically be the person from the agency sharing information with the other government agency to which the other government agency had the contract for procurement or whatever the contract was. It would typically be someone from the Australian government specific department, someone from the foreign government and possibly someone from my area – protective security policy – who would go along to look at the protective security arrangements for the actual contractor. It is a relatively common type of process, but we do make sure that to ensure the inspection hits the mark and is fit for purpose that we do not take a cookie cutter approach. We tailor each one...³⁵

Costs

4.31 There are no anticipated costs to the Australian Government.³⁶

34 NIA, para 30.

35 Mr Michael Jerks, Assistant Secretary, Critical Infrastructure and Protective Security Policy Branch, National Security Resilience Policy Division, Attorney-General's Department, *Committee Hansard*, 26 November 2012, p. 8.

36 NIA, para 31.

Conclusion

- 4.32 The Committee is encouraged that Australia has 12 treaties relating to mutual protection of classified information in force, including with the United States, France, New Zealand and the EU, and there have been no problems or issues with regard to these agreements in the past. The Committee also notes that in the past there have not been any serious security breaches committed by Japan with regard to any information supplied by Australia.³⁷
- 4.33 The growing security relationship between Australia and Japan is of importance to Australia. Moreover, this Agreement has the potential to strengthen the tri-partite relationship between Australia, Japan and the United States with regard to information sharing.
- 4.34 Given this, the Committee is positive about the growing Australia-Japan security relationship, and about this information sharing agreement in particular. The Committee supports the Agreement and recommends that binding treaty action be taken.

Recommendation 4

The Committee supports the *Agreement between the Government of Australia and the Government of Japan on the Security of Information (Tokyo, 17 May 2012)* and recommends that binding treaty action be taken.

³⁷ Department of Foreign Affairs and Trade, *Submission 1*, p. 1.

