

Amended Chapeau Defense Agreement

Background

- 6.1 The full title of the amended Chapeau Defense Agreement is the *Agreement to amend the Agreement between the Government of Australia and the Government of the United States of America concerning Certain Mutual Defense Commitments (Chapeau Defense Agreement)*.¹ As its name implies, the amended Chapeau Defense Agreement amends the Chapeau Defense Agreement, which came into effect on 1 December 1995.²

The original Chapeau Agreement

- 6.2 The original Chapeau Agreement came into effect before the JSCOT was formed, and consequently has not been subject to parliamentary scrutiny. The original Agreement clarified the legal status of liability claims between the Australian Department of Defence and the United States Department of Defence as a result of:

...death, injury or damage to property that occurred as a consequence of the provision and receipt of reciprocal military assistance defined within the Chapeau Defense Agreement as cooperative research, development, test evaluation or production programs and the provision of logistic support.³

1 The Agreement uses the American English spelling of the word 'defence'. This chapter uses the Australian spelling when not directly naming the Agreement.
2 National Interest Analysis (NIA), Para 2.
3 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 19.

- 6.3 The original Chapeau Agreement provides for particular processes to deal with administrative issues that might arise during mutual defence commitments. Specifically, the original agreement deals with the following issues:
- Liability for death, injury, or damage to property. Where any of these occur during the performance of official duties, the offended country waives liability. If any of these happen to a third party, any costs born by the countries will be shared in accordance with the proportions stated in the relevant agreement. If any of these happen as a result of recklessness, wilful misconduct or gross negligence, any costs will be born by the culpable person's country. In claims for breach of contract by a third party, any costs will be born as required in that contract.⁴
 - Rights to own and use information provided or developed under a written arrangement. In general, information provided or developed under a written arrangement can only be used for the purposes of the arrangement. Title to the information generated by the arrangement will be allocated in accordance with the written arrangement and any contracts with third parties entered into as part of the arrangement.⁵
 - The lease or loan of materiel or equipment. Where materiel or equipment are leased or loaned as part of a written agreement, the receiving country shall only use the material for the purposes set out in the agreement; maintain the materiel and equipment in as good a condition as they were received; and pay for any loss or damage.⁶
 - Logistic support. Each country shall provide: food; water; billeting; transportation; fuels and lubricants; clothing; communication services; medical services; ammunition; storage services; repair and maintenance; and access to bases as required in the written agreement.⁷
- 6.4 Disputes arising from matters covered by the original Chapeau Agreement are to be resolved by consultation, and are specifically prohibited from being referred to a national or international tribunal.⁸
- 6.5 The original Agreement provided an administrative framework for the implementation of two long standing defence cooperation treaties between Australia and the United States of America. These treaties were:

4 *Chapeau Defence Agreement*, 1995, p. 2.

5 *Chapeau Defence Agreement*, 1995, p. 3.

6 *Chapeau Defence Agreement*, 1995, p. 3.

7 *Chapeau Defence Agreement*, 1995, p. 3.

8 *Chapeau Defence Agreement*, 1995, p. 4.

- the *Agreement concerning the Status of United States Forces in Australia*, signed in 1963; and
 - the *Agreement to Facilitate Interchange of Patent Rights and Technical Information for Defence Purposes*, signed in 1958.⁹
- 6.6 The original Chapeau Agreement also applied to all future written arrangements to cooperate on mutual defence commitments, where those written arrangements explicitly invoked the original Agreement.¹⁰

The amended Chapeau Agreement

- 6.7 The amended Agreement's origins are in advice from the United States Department of Defense that, contrary to a previous understanding, United States law requires the United States Department of Defense to have agreements binding in international law covering all personnel programs.¹¹ In other words, a treaty would be required for each personnel program involving an Australian citizen placed with a United States defence organisation or a United States citizen placed with an Australian defence organisation.
- 6.8 Australian and United States defence forces work closely together, and as a consequence, there are numerous arrangements between the United States Department of Defense and the Australian Department of Defence which relate to personnel programs.¹² There are currently 28 bilateral arrangements, relating to 400 Australian personnel placed with the United States defence organisation and 102 United States defence personnel placed with the Australian defence organisation.¹³
- 6.9 None of these 28 documents are legally binding under international law, rather, they are in the form of non-legally binding arrangements. As a consequence, they do not meet the requirements for cooperation under United States law.¹⁴
- 6.10 The Australian Department of Defence determined that the most efficient way to accommodate the United States' requirement was to amend the

9 *Chapeau Defence Agreement*, 1995, pp. 1-2.

10 *Chapeau Defence Agreement*, 1995, p. 2.

11 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 19.

12 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 19.

13 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 20.

14 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 20.

existing Chapeau Defense Agreement to incorporate terms and conditions covering the exchange, secondment and liaison of personnel between the two nations' defence organisations. In November 2003 the US Department of Defense advised the Australian Department of Defence that such a proposal was acceptable to them.

6.11 The amended Chapeau Agreement will:

...extend the application of the Chapeau Defense Agreement's terms and conditions from cooperative research, development, test evaluation or production programs, logistics and materiel based military assistance to include personnel matters such as claims and liabilities issues arising out of personnel loans, secondments, exchanges and liaison officer activities, security assurances for personnel undertaking the abovementioned personnel activities, personnel access to controlled and classified information, criminal jurisdiction and limits upon the exercise of service disciplinary action for personnel undertaking the previously mentioned personnel activities, and caveats placed upon the duties that personnel may undertake while undertaking their previously mentioned personnel activities.¹⁵

6.12 Specifically, the amended Chapeau Agreement adds the following personnel and exchange related provisions additional to the provisions described above:

- Access to classified and controlled unclassified information.¹⁶ Personnel from one country being hosted by the other must comply with the security and disclosure laws, regulations and policies relating to classified information and controlled unclassified information. Access to controlled unclassified information will occur on a need to know basis and can only be used for the purpose of the written arrangement.¹⁷
- Criminal and disciplinary jurisdiction. While personnel from one country being hosted by the other must comply with the laws of the hosting country, those personnel and their dependents will be granted privileges and immunities as provided for by the written arrangement covering their placement. If administrative or disciplinary action must be taken against a person, that action can only be taken by the country

15 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 19.

16 Controlled unclassified information is information to which access or distribution limitations have been applied. See *Amended Chapeau Agreement*, NIA, Paragraph 16.

17 NIA, Para 17.

the person came from. The host country is prohibited from taking any disciplinary action against host personnel.¹⁸

- Termination of assignments. The amended Chapeau Agreement provides that a hosting arrangement can be terminated where the assigned personnel are unable to perform their duties.¹⁹
- The carrying of weapons. The amended agreement prohibits the carrying or transporting of personal weapons while in the territory of the host country.²⁰

6.13 The amended Agreement will consequently underpin all cooperative Australian – United States defence activities.²¹

6.14 The amended Chapeau Agreement retains the termination procedure of the original Agreement; that is, that the Agreement will remain in force until a decision to terminate the Agreement is taken by one of the countries. However, the amended Agreement adds a new clause. The obligations of the Parties to the Chapeau Agreement will continue notwithstanding termination of the Agreement.²²

Capital punishment

6.15 The Committee has in the past expressed some concern about treaties for defence cooperation exposing Australian defence personnel to the laws and regulations of the host country when those laws and regulations do not meet the Australian community's expectations for the treatment of sentenced prisoners. In Report 95 the Committee discussed this issue in relation to the *Treaty between Australia and the State of the United Arab Emirates on Defence Cooperation*. In that Report, the Committee noted:

...it is possible that Australian personnel will be subject to the death penalty or judicial flogging under United Arab Emirates law. This could be seen as incompatible with human rights law.²³

6.16 The Committee concluded that:

18 NIA, Para 20.

19 NIA, Para 21.

20 NIA, Para 22.

21 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 19.

22 NIA, Para 36.

23 Joint Standing Committee on Treaties, *Report 95*, 16 October 2008, p. 41.

...every effort should be made by the Australian Government to ensure that Australian personnel are protected from the death penalty.²⁴

- 6.17 The Committee recommended that the Australian Government seeks to ensure that Australian personnel are protected from corporal and capital punishment under United Arab Emirates law.²⁵
- 6.18 During the public hearing into the amended Agreement, Committee members expressed their concern that Australian personnel may be subject to the death penalty if convicted of certain offences in the United States.²⁶
- 6.19 In its response, the Department of Defence advised that:
- The agreement does not provide for immunity from United States criminal law for ADF members who are serving in the United States and participating in defence commitments under the agreement. An ADF member could be subject to the death penalty if sentenced to that penalty by a United States court following conviction for an offence committed in the United States.²⁷
- 6.20 The Committee remains of the view that the Australian Government should be doing its best to ensure that defence personnel convicted of a crime while serving in another country should not be subject to penalties harsher than those applied to similar crimes in Australia.

Recommendation 8

The Committee recommends that the Australian Government explore mechanisms to ensure that Australian personnel convicted of crimes for which the penalty is death while serving in the United States are not subject to the death penalty.

Conclusion

- 6.21 The Committee concurs with the Department's view that:
-

24 Joint Standing Committee on Treaties, *Report 95*, 16 October 2008, p. 42.

25 Joint Standing Committee on Treaties, *Report 95*, 16 October 2008, p. 42.

26 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 23.

27 Department of Defence, *Submission 3*.

This treaty action will benefit the Australian Defence Force by ensuring that the exchange of defence information and ideas with the United States will continue now and into the future, will contribute to the continued development of ADF military capability and training and will support Australia's defence partnership with the United States. As noted earlier in this statement, this partnership is central to Australia's broader strategic and security objectives.²⁸

Recommendation 9

The Committee supports the *Agreement to amend the Agreement between the Government of Australia and the Government of the United States of America concerning Certain Mutual Defense Commitments* and recommends that binding treaty action be taken.

28 Mr Mark Cunliffe, *Transcript of Evidence*, 7 September 2009, p. 20.

