

**National Interest Analysis [2010] ATNIA 19**

**with attachment on consultation**

**Agreement between Australia and the European Union  
on the  
Security of Classified Information,  
done at Brussels, 13 January 2010**

**[2010] ATNIF 2**



# NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

## SUMMARY PAGE

### **Agreement between Australia and the European Union on the Security of Classified Information, done at Brussels, 13 January 2010 [2010] ATNIF 2**

#### **Nature and timing of proposed treaty action**

1. The *Agreement between Australia and the European Union on the Security of Classified Information* (the proposed Agreement) was signed on 13 January 2010.
2. Article 18(1) of the proposed Agreement provides that it will enter into force one month after Australia and the European Union (EU) have notified each other of the completion of the internal procedures necessary for the entry into force of the proposed Agreement.
3. It is proposed that the above mentioned notification by Australia will occur as soon as practicable after the expiration of the tabling period for the treaty action and subject to recommendation from the Joint Standing Committee on Treaties (JSCOT) that binding treaty action be taken. Australia anticipates some delay in receiving notification from the EU that its internal procedures have been completed, as new requirements for ratification of treaties by the European Parliament came into effect on 1 January 2010.

#### **Overview and national interest summary**

4. The purpose of the proposed Agreement is to establish procedures for the exchange of classified information between Australia and the EU (the Parties). The proposed Agreement will strengthen bilateral and multilateral dialogue and cooperation between Australia and the EU in support of foreign security policy and security interests by facilitating increased information sharing between Australia and the EU. This will be achieved by requiring the Parties to protect classified information received from the other Party in accordance with agreed standards and procedures.
5. Classified information that Australia passes to the EU will, under the proposed Agreement, be protected to an agreed standard. It will not be used for any purpose other than that for which it is provided and will not be passed to any third party without the written consent of Australia. The same conditions apply to classified information supplied by the EU to Australia.

## **Reasons for Australia to take the proposed treaty action**

6. The proposed Agreement sets out security procedures and practices for the exchange and protection of classified information between Australia and the EU and for visits by the security authorities of Australia and the EU to assess the effectiveness of measures taken under the proposed Agreement. The proposed Agreement will facilitate future cooperation and assist in strengthening the relationship between Australia and the EU. The proposed Agreement is not controversial in nature and is substantially similar to other legally binding information sharing agreements that Australia has entered into with a wide range of countries with which Australia exchanges classified information. Concluding the proposed Agreement is an Immediate Action Item in the *Australia-EU Partnership Framework* which underpins the bilateral relationship between Australia and the EU.

## **Obligations**

7. Classified Information is defined in Article 2 to include information that is subject to a security classification assigned by either Party and the unauthorised disclosure of which could cause damage or harm to the interests of either Party. Under the proposed Agreement, each Party is obliged to protect Classified Information received from the other Party, in particular against unauthorised disclosure, by affording it an equivalent level of protection as would be applied in the providing Party (Article 3). Article 4 sets out the security markings of each Party and their equivalent markings in the other Party.

8. Under Article 6, Classified Information may be disclosed or released by the Providing Party to the Receiving Party in accordance with the principle of ‘originator control’. This means that the originator of Classified Information must consent to the release or disclosure.

9. Under the proposed Agreement Australia and the EU are required to:

a) ensure the security of facilities where Classified Information released by the other Party is kept, including that all necessary measures are taken to control, protect and safeguard Classified Information provided by the other Party (Article 5(a));

b) ensure that Classified Information exchanged under the proposed Agreement keeps the Security Classification marking given to it by the Providing Party and is not downgraded or declassified without the prior written consent of the Providing Party (Article 5(b)); and

c) afford Classified Information received from the Providing Party a degree of protection at least equivalent to that afforded to its own Classified Information of a corresponding Security Classification as specified in Article 4(2) (Article 5(c)).

10. In addition, the proposed Agreement imposes obligations regarding the use of Classified Information exchanged under the proposed Agreement. Parties are not to use Classified Information for purposes other than those established by the Providing Party or those for which the Classified Information is provided (Article 5(d)). Parties are not permitted to disclose Classified Information to third parties without the prior written consent of the Providing Party

(Article 5(e)). Any EU institution or entity not included in the definition of ‘the EU’ in Article 2 is considered a third party for the purposes of this provision.

11. Under the proposed Agreement, individuals who access Classified Information must have:

- a) a need to know the information in order to perform their official duties (Article 5(f), Article 7);
- b) where required, a security clearance at the appropriate level for access to such Classified Information (Article 5(f), Article 7); and
- c) been informed by the relevant Party of their responsibilities to protect the information in accordance with that Party’s internal laws, rules and regulations (Article 5(g)).

12. Australia and the EU are required to ensure that the rights of the originator of Classified Information exchanged under the proposed Agreement, as well as intellectual property rights such as patents, copyrights or trade secrets, are adequately protected (Article 5(h)).

13. Parties are able to assess the effectiveness of security measures and arrangements through reciprocal security consultations and assessment visits. Article 8 sets out the procedures for such visits and requires the Parties to provide mutual assistance and share information regarding the security of Classified Information exchanged under the proposed Agreement.

14. Classified Information passed to the Receiving Party may only be provided to a Contractor or prospective Contractor with the prior written consent of the Providing Party (Article 9). The term ‘Contractor’ includes sub-contractors (Article 2(h)). In order to be provided with Classified Information, such Contractors or prospective Contractors, as well as any of their personnel who require access to Classified Information, must have a personnel security clearance (Article 9(a)). The Party who wishes to disclose the information to the Contractor must ensure that the Contractor’s facilities are able to protect the Classified Information appropriately (Article 9(b)).

15. The proposed Agreement requires the security authorities of the Parties to conclude security arrangements which lay down the standards for the reciprocal protection of Classified Information (Article 12) and situations where there is suspected loss or compromise of material (Article 13). For Australia, the Attorney-General’s Department is responsible for developing security arrangements for the protection and safeguarding of Classified Information provided under the proposed Agreement.

16. The proposed Agreement also sets out procedures for:

- a) exchanging Classified Information (Article 10);
- b) oversight of the implementation of the proposed Agreement (Article 11); and
- c) dispute resolution (Article 17).

## **Implementation**

17. No changes to Australia's domestic laws or policy are required to implement the proposed Agreement. The proposed Agreement can be implemented through the Commonwealth's protective security policy, which sets out the procedures necessary for implementing the proposed Agreement. The proposed Agreement will not effect any change to the existing roles of the Commonwealth Government, or the State and Territory Governments.

18. For Australia, the Minister for Foreign Affairs, the Minister for Defence and the Attorney-General shall oversee the implementation of the proposed Agreement. For the EU, the Secretary-General of the European Council and the Member of the European Commission responsible for security matters shall oversee the implementation of the proposed Agreement.

## **Costs**

19. Under Article 14 of the proposed Agreement, each Party is required to bear its own costs in implementing the proposed Agreement. However, there are no foreseeable financial costs to Australia for compliance with the proposed treaty action.

## **Regulation Impact Statement**

20. The Office of Best Practice Regulation, Department of Finance and Deregulation has been consulted and has confirmed that a Regulation Impact Statement is not required.

## **Future treaty action**

21. The proposed Agreement does not provide for the negotiation of future related legally binding instruments.

22. Article 16 provides that the Parties are not prevented from concluding other agreements or arrangements relating to the provision of Classified Information. However, such agreements or arrangements must not conflict with the provisions of this proposed Agreement.

23. Article 18(4) of the proposed Agreement provides that the proposed Agreement may be amended by written agreement between the Parties. Article 18(2) specifically provides that the Parties shall consult with a view to amending the proposed Agreement as necessary where changes are made to the laws, rules or regulations of either Party that could affect the protection of Classified Information. Amendments to the proposed Agreement will enter into force in the same manner as the proposed Agreement. Amendments to the proposed Agreement would be subject to Australia's domestic treaty approval process, including tabling in Parliament and consideration by JSCOT.

## **Withdrawal or denunciation**

24. Article 19(1) provides that either Party may terminate the proposed Agreement at any time by notification in writing. Termination would take effect 90 days from the date of notification of the Party's intention to terminate. Termination would be subject to Australia's domestic treaty process, including tabling in Parliament and consideration by JSCOT.

25. Under Article 19(2), if the proposed Agreement is terminated, all Classified Information received by the Parties under the Proposed Agreement shall continue to be protected in accordance with the terms of the proposed Agreement. If the proposed Agreement is terminated, the Parties are required to consult immediately on the handling or disposal of such information.

**Contact details**

European Union Section

Europe Division

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## **ATTACHMENT ON CONSULTATION**

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#### **CONSULTATION**

26. The Minister for Foreign Affairs provided approval for the Department of Foreign Affairs and Trade to be the lead negotiating agency for the proposed Agreement. The Department of Foreign Affairs and Trade consulted with the Attorney-General's Department, the Department of Defence and the Office of National Assessments - as an umbrella agency for the views of the Australian Intelligence Community - throughout the negotiation process. Consultations took the form of inter-departmental committee meetings. These agencies have confirmed that the proposed Agreement meets all the requirements for agencies which deal with national security classified information.

27. This proposed action will have no impact on the States and Territories and will not effect any change to the existing roles of the Commonwealth Government, or the State and Territory Governments. The proposed Agreement also does not require State or Territory action for its domestic implementation and none of the information exchanged concerns States or Territories. A pre-brief has been prepared for the States and Territories' Standing Committee on Treaties Meeting, in the event that this Committee wish to seek information about the proposed agreement.

28. No public consultation on the proposed Agreement has taken place, as there are no aspects to the proposed Agreement which impact on issues of public interest. The proposed Agreement simply establishes procedures for the secure exchange of classified information in accordance with agreed standards.