
Facilitating Defence Trade Between Australia and the United States: A Vital Work In Progress

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The Australia-United States Treaty on Defense Trade Cooperation is a timely innovation. But the Australian Government and its advisers need to do much more work to balance the divergent Australian interests involved appropriately and to maximize the Treaty's net benefits to Australia. The Federal Parliament's Joint Standing Committee on Treaties has a key role to play in ensuring the Executive arm of government does this work.

On 5 September 2007, the Prime Minister of Australia, John Howard, and the President of the United States, George W. Bush, took advantage of the latter's visit to Australia to sign the *Australia-United States Treaty on Defense Trade Cooperation*. President Bush and the British Prime Minister, Tony Blair, signed a very similar treaty in June 2007. This article analyses the significance of the *Australia-United States Treaty on Defense Trade Cooperation*. In doing so the article draws on the comprehensive debate in the United Kingdom (UK) about the merits of the UK-US Treaty.

In both cases, the United States initiated the treaties in response to long standing frustrations by two close allies about the protracted and opaque process of obtaining US-origin military technology. In the UK this frustration was reportedly sufficient to prompt the UK Defence Secretary to warn his American counterpart that the UK would wind back its procurement of US technology unless the United States reduced its restrictions on UK access to US technology.¹

At issue is the administration by the Department of State of the US International Traffic in Arms Regulations (ITAR) pursuant to the US Arms Export Control Act. In 2006, for example, the State Department's Directorate of Defense Trade Controls approved 2361 export licenses and 312 technical data agreements for Australia. Obtaining these licenses and agreements can take three months or more. In addition to delay, the process generated considerable uncertainty for Australian defence planners and commercial decision makers.

¹ 'War over Weapons: The US must drop its intransigence on sharing technology', *Financial Times*, 2 August 2004, p. 16.

Both UK and Australian Treaties seek to facilitate bilateral access to, and sharing of, equipment, technology, equipment-related information and materiel-related services subject to certain security and regulatory requirements. To this end, the Treaties establish the political authority for officials to negotiate more detailed implementing arrangements. Both treaties require ratification by the US Senate and by, respectively, the UK and Australian Parliaments.

The implementing arrangements for both UK and Australian treaties were published in 2008 and would come into effect upon ratification of the treaties. Congressional and Parliamentary enquiries into the balance of national interest served by ratifying the Treaties are now well advanced. Taken together, these processes have generated enough publicly available information to permit reasonably well informed assessment of the potential significance of the Australian-United States Treaty. Accordingly, this article:

- Explores the scope and intent of the Treaty;
- Explains how the Treaty is intended to work;
- Analyses the obligations Australia incurs, the significance of the technologies excluded from Treaty coverage and the costs of compliance; and
- Suggests issues the Australian Parliament might consider before ratifying the Treaty.

The Scope and Intent of the Treaty

According to the preamble of the Treaty, the intent is to provide a framework for managing the export and transfer of defence goods and services (both classified and unclassified) between Australia and the United States that provides sufficient protection of their respective defence and security interests to obviate the need for a license or other written authorization.² The stated scope of the Treaty says much about why the United States has taken this initiative.³ The Treaty applies to defence goods and services required for an agreed list of:

- joint military or counter-terrorist operations, exercises and training conducted by Australian and United States forces;

² *Treaty between The Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*, Sydney, 5 September 2007, p. 3, <http://www.defence.gov.au/publications/defencetradeoperation_treaty.pdf> [Accessed 12 September 2008].

³ *Ibid.*

- cooperative security and defence research, development, production and support programs that are covered by a valid international agreement between the two countries;
- Specific defence and security projects where the government of Australia is the end-user (projects intended for export to third countries are explicitly excluded), including those acquired by the Australian Government under US Foreign Military Sales Arrangements;
- Defence goods and services intended for US Government end-use.⁴

The US developed the UK and Australian treaties as a single initiative, so that the preamble and scope are identical in each. In its case to Congress for ratifying the Treaties the US Administration emphasized how they will advance the US national interest by facilitating joint military operations and cooperative materiel programs with two historically close allies.⁵ Critical here is the political importance to the US Congress and Administration of militarily significant contributions by allies in operations in third countries like Iraq and Afghanistan. For example, in its report for Congress on the US-Australian Treaty, the Congressional Research Service noted that

The treaty is proposed at a time when the United States has found few friends that have been willing to work as closely with the United States in its efforts to contain militant anti-Western Islamists as Australia has proven to be.⁶

The Australian Government's interests are more tactical and focused on the Treaty's potential for:

- Significantly reducing delays in acquiring in-service support of US-origin equipment operated by the Australian Defence Force (ADF) by eliminating lengthy licensing processes;
- Reducing lead-times before Australian and US companies can discuss potential business opportunities; and

⁴ *Implementing Arrangements pursuant to the Treaty between the Government of the United States of America and Government of Australia concerning Defense Trade Cooperation*, pp. 3-4, <http://www.pmdtc.state.gov/docs/US_Australia_Implementing_Arrangement.doc> [Accessed 12 September 2008].

⁵ See, for example, John C. Rood, Acting Under Secretary of State for Arms Control and International Security, 'Improvements in the Defense Trade Export Control System', Statement to the Centre for Strategic and International Studies, Washington D.C., 26 February 2008, <<http://www.state.gov/t/us/rm/107505.htm>> [Accessed 30 July 2008].

⁶ Bruce Vaughn, *The U.S.-Australia Treaty on Defense Trade Cooperation*, CRS Report for Congress RS22772 (Washington DC: Congressional Research Service, 2007), p. 1.

- Expediting Australian Government access to US technical data and technology for consideration in the Australian defence capability development process.⁷

In explaining what Australian Government *projects* are within the ambit of the Treaty, the Treaty Implementing Arrangements shed more light on Australian Government objectives. Subject to agreement by both parties, such projects include

Specific acquisition efforts by the Australian Government ... to research, develop, test, evaluate, produce or sustain Defence Articles for worldwide use by Australian defence and security organizations ...⁸

The above reference in the Implementing Arrangements to ‘worldwide use’ is an important refinement of the scope of the Treaty. In principle, and subject to US agreement on a case by case basis, it permits the re-export from Australia of the goods and services an ADF maintenance unit—or an approved Australian company—would need to support US-origin materiel used by the ADF in operations which, like those in East Timor, may not directly involve the United States.

How the Treaty Works

The Treaty works by Australia’s agreeing to introduce an ITAR-compatible regulatory regime that effectively accords US-origin technology in Australian jurisdiction US-standards of protection.⁹ The regime will comprise a series of inter-linked and mutually reinforcing ‘building blocks’. One such building block, already discussed, is the mutually agreed lists of combined military/counter-terrorist operations, cooperative materiel projects and specific procurements destined for Australian or US Government end-use.

Another building block is the establishment of a trusted “Approved Community” of US and Australian Government and non-government institutions (including US and Australian companies and associated facilities). In principle, and subject to some important exceptions discussed below, classified and unclassified defence goods, technology and services exported in support of listed operations, programs and projects will be permitted to enter and move freely within this trusted community without the need for transfer approvals or export licenses.

⁷ John Howard, ‘Australia-United States Treaty on Defense Trade Cooperation, Fact Sheet’, *Media Release*, 5 September 2007, <http://pm.gov.au/media/Release/2007/Media_Release24535.cfm> [Accessed 10 September 2007].

⁸ *Implementing Arrangements pursuant to the Treaty between the Government of the United States of America and Government of Australia concerning Defense Trade Cooperation*, p. 2.

⁹ For a fuller discussion of regulatory issues, see Roland L. Trope and Monique Witt, ‘Allies at sixes and sevens: Sticky Issues in Australian-US Defense Trade Controls’, *Security Challenges*, vol. 3, no. 2 (June 2007), p. 92.

A third building block of the regime is the criteria by which non-government institutions are selected for inclusion in this trusted community. The Australian Department of Defence and the US State Department will collaborate in establishing and maintaining a list of non-government institutions that will be included in the Australian community. In considering non-government institutions for inclusion in the Australian Approved Community, these two agencies will have regard to:

- The institution's inclusion on the list of entities/facilities approved by Australian Government under its Defence Industrial Security Regulations for handling classified information and material;
- Foreign ownership, control or influence;
- Previous convictions or current indictments for violations of US or Australian export control laws and regulations;
- The US export licensing history of the entity or facility; and
- National security risks, including interactions with countries identified or proscribed by Australian or US laws or regulations.¹⁰

The Australian-US Treaty reflects the entirely asymmetric distribution of bargaining power between the two parties. This asymmetry is reflected in the way Australian and US companies qualify for inclusion in their respective Approved Communities.

In order to join the Australian Approved Community an Australian company first applies to Defence who undertakes an initial eligibility review of the company. Defence then consults with the State Department to determine the company's acceptability to both parties. In doing so Defence is obliged to provide "as much information as possible".¹¹ Defence then advises the company of the outcome of the Defence-State consultation process and, if the company's application is accepted, includes the company in an updated Approved Community list.

To be included in the US Approved Community, by contrast, a US company merely has to be registered with the US State Department.

There are also significant asymmetries in the Treaty's provisions for dealing with, respectively, US concerns about an Australian company and Australian concerns about a US company. If the US Government wants to remove an

¹⁰ *Implementing Arrangements pursuant to the Treaty between the Government of the United States of America and Government of Australia concerning Defense Trade Cooperation*, pp. 8-10.

¹¹ *Ibid.*, p. 9, Section 6, Clause (6).

Australian company from the Approved Community, then under the Implementing Arrangements the State Department will advise Defence of its concerns, and explain the basis of these concerns. The Australian Government then has 24 hours to provide mitigating information. The State Department can then notify Defence that the Australian company must be suspended from the Approved Community list and Defence will suspend the company immediately.

The Implementing Arrangements then allow both parties thirty days for investigation and consultation, after which the company's removal will be confirmed or its suspension rescinded. Rescinding of the suspension may be conditional upon the company's compliance with remedial measures stipulated by the State Department.¹²

Conversely, if the Australian Government has concerns about a US company's willingness or ability to protect Australian defence goods and services exported to the US, then the Implementing Arrangements provide for the Australian Government to consult the US Government about those concerns. Following such consultations, the Australian Government "may issue directions" to the Australian community concerning future dealings with the US company. As necessary, and following further consultation with the US Government, the Australian Government "may issue further directions to the Australian community".¹³

A fourth building block relates to the conditions governing access by Australian community personnel to defence goods and services. The working principle is that no nationals who are not also Australian citizens will be permitted access to Defence goods and services pursuant to the treaty without prior authorisation by both governments. In addition, the treaty requires the Australian Government to ensure that all personnel within the Australian community requiring access to treaty-related goods and services will be:

- Security cleared to at least Australian RESTRICTED level, which includes checking of identity, nationality and police record; and
- Checked for indicators of significant ties to countries of security concern; and
- When checking an individual's background reveals such ties, initiating the much more stringent investigation required to clear that individual to Australian SECRET level.¹⁴

¹² Ibid., Section 6 Clause (9).

¹³ Ibid., p. 18, Section 11 Clauses (3)-(5).

¹⁴ Ibid, p. 10.

In a separate initiative after the treaty was signed, the US State Department amended the relevant provision of the ITAR to relax the provisions governing access to US technology by dual and third country nationals from NATO countries, EU countries, Japan and New Zealand and Australia. The dual nationality issue is analysed in greater detail below.

The fifth building block comprises the list of US-origin military goods, services and technologies that the US has *excluded* from treaty coverage. The US State Department has promulgated the US exclusion list which comprises the following categories:

- **List A** includes, among other items, (i) goods, services and technology (Including those modified or improved) which the State Department has not previously licensed for export but which a US company may want to use for marketing and (ii) all classified US-origin goods, services and technology not being released pursuant to a written request, directive or contract by the US Department of Defense that provides for the export of that materiel;
- **List B** includes specific technologies considered critical to US military advantage including, for example, stealth and counter-stealth technologies, and satellite technologies; (see below); and
- **List C** includes a range of enabling technologies export of which is excluded without written sponsorship by the Department of Defense and which includes, for example, experimental systems still under development; night vision technology beyond that required for basic operations, maintenance and training; manufacturing technology for precision guided munitions, for rockets and associated launching systems, for electronic warfare systems and for submarines; software source code for a broad range of platforms and systems beyond that required for basic operations, maintenance and training.¹⁵

Before analyzing the impact of this list of exclusions on the utility of the Treaty, it is useful to see how this system might work in practice. Assume that the United States and Australia have a common interest in developing, say, soldier portable power sources. Assume also that this common interest is identified in the course of any one of the dense web of bilateral defence/military consultations. Finally assume that the Australian and US policy communities decide to collaborate in the development of this power source with a view to reducing duplication and fostering tactical interoperability in the field.

¹⁵ See Directorate of Defense Trade Controls, Department of State, *List of Defense Articles Exempted from Treaty Coverage*; <http://pmdtc.state.gov/docs/treaties/Australia_Definitions.pdf> [Accessed 12 September 2008].

As a first step, the US and Australian Defence Departments conclude a materiel cooperation Memorandum of Understanding to develop the power source. The two Defence Departments would then add the power source to the list of Treaty-approved projects and each Department then selects its contractor team.

Before conclusion of the Defense Trade Cooperation Treaty, the US company would have been required to prepare and seek State Department approval of a Technical Assistance Agreement (TAA) for the power source project—a process that would normally take 45-60 days but could take much longer if the State Department's Directorate of Defense Trade Controls considers power source technology complex or particularly sensitive. Under the Treaty, however, the US contractor checks three lists on a US Government website to ascertain:

- Whether the Australian industry partner is on the list of approved Australian companies/facilities;
- Whether the portable power source program is on the list of Treaty-approved projects;
- That the technology is *not* on the list of excluded technologies.

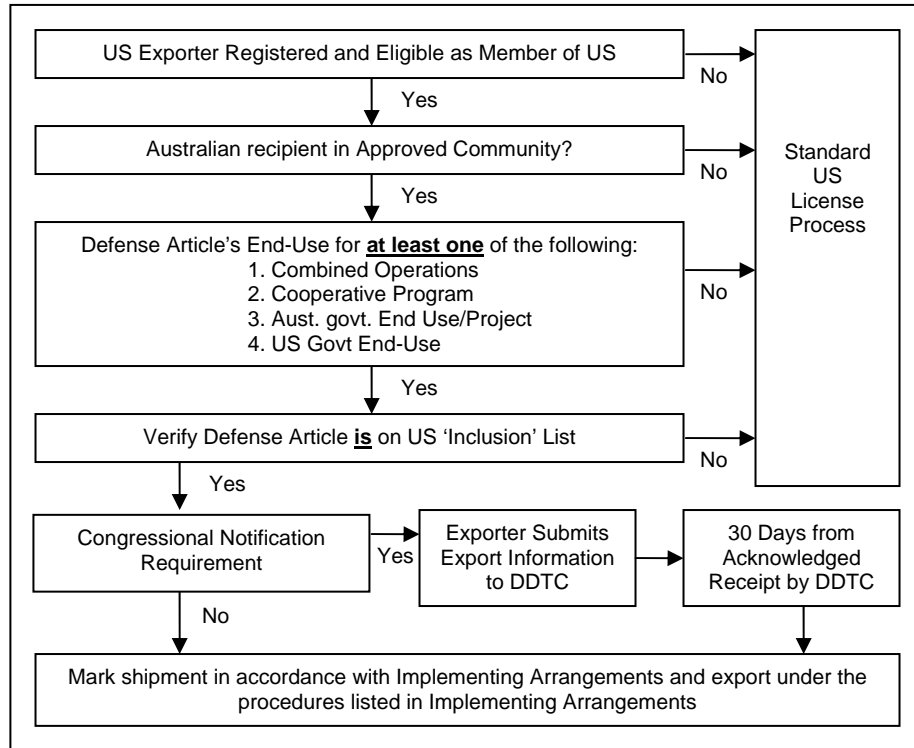
If checking the above lists results in a positive answer in each case, then the US contractor and the Australian companies can cooperate freely without export licences. Hence, for example, the US company can send its technical data to the Australian company to begin work, using the system established under the Treaty implementing arrangements. Either company can add sub-contractors later without the need for additional licenses or an amendment of the TAA *provided* that the sub-contractors are also members of the Treaty-approved Australian or US communities. Under the Treaty, the Australian company can visit the US contractor to examine and discuss initial power source prototypes and will not require a license. While the US and Australian companies will need to keep records, they will not need prior authorization from either government in conducting the above activity.¹⁶

Figure 1 below provides a fuller explanation of the process, again seen from a US exporter's perspective.

Treaty advocates claim, correctly, that the Treaty provides for a potentially significant simplification of current ITAR licensing practice. At issue is the balance of benefits Australia expects to obtain from the Treaty and the costs it must incur in doing so.

¹⁶ See Rood, 'Improvements in the Defense Trade Export Control System'.

Figure 1: Exporting US Defence Technology to the Australian Community under the Defense Trade Cooperation Treaty



Treaty Benefits and Costs

Logical places to look for specific benefits that Australia stands to gain from the Treaty include:

- the Fact Sheet published by the Australian Department of Defence in conjunction with the signature of the Treaty on 5 September 2007;
- The Australian Treaty National Interest Analysis that accompanied the Treaty when it was tabled in Parliament on 14 May 2008.

In both cases the benefits of the Treaty are canvassed in general, qualitative terms only. According to these documents, the Australian Government expects the Treaty to yield, for example:

- Operational benefits for the ADF from faster and easier acquisition of and support for US-defence technology over the life cycle of that equipment;

- Easier movement and maintenance of defence equipment in support of mutually agreed activities and operations, thereby improving interoperability of US and Australian forces;
- Improvements in ADF capability development due to earlier access to US data and technology;
- Cost and time savings from significant reductions in the number of licences required by US contractors exporting defence equipment to Australia;
- More timely access by Australian companies to US technology and enhanced ability to share technical data without the need for a license, thereby reducing lead times in discussing potential business opportunities and improving the prospects for Australian companies involved in bidding on US defence requirements, or in supporting US equipment in the ADF inventory.

Such bland advocacy is, arguably, understandable given that—as Congressional and Parliamentary Committees responsible for reviewing the UK and Australian Treaties have pointed out—analysis of specific benefits was not practicable pending promulgation of the associated implementing arrangements. Since then, and as already indicated, the State Department has promulgated lists of those US defence goods and services that are explicitly *excluded* from the ambit of both UK and Australian Treaties. The following analysis of the above lists is intended to help gauge the Treaty's practical significance.

It seems likely that the **List A** exclusion from the Treaty of the goods and services US companies need to market their products will reinforce the appeal of the US Defense Department's Foreign Military Sales program to the Australian Defence customer, already predisposed to buy proven equipment already in-service. It is also likely to encourage US companies to market military-off-the-shelf solutions to Australian capability requirements. While this may well appeal to a risk-averse Australian defence customer, it is also likely to inhibit Australian industry involvement in supply and support of the platforms and systems involved. Perhaps more importantly, however, the List A exclusions reduce the utility of the Treaty to US companies. For Australia, as a technology importer, to benefit from the Treaty the latter must be embraced by the US companies who own, or who are custodians of, that technology. We return to this issue below.

The **List B** technologies exempt from the Treaty include, for example:

- Stealth-related goods, services and technologies, including those for reduction of electro-magnetic and acoustic signatures and those for

countering low observable technologies, (for example electronic scanned arrays, radar processing algorithms);

- Sensor fusion technology, involving the automatic combination of information from two or more sensors for the purpose of target identification, tracking, designation and engagement;
- A broad spectrum of naval technologies, of which those related to Australian capability development plans include underwater acoustic sensors, maritime target detection and classification systems, autonomous underwater systems and related algorithms;
- Electronic warfare equipment and related counter-measures, including electronic systems and equipment for intelligence and security applications;
- Satellites and satellite payload technology.

The fact that the United States is excluding these technologies from the Treaty is not to say that it will deny them to Australia. As indicated in Figure 1, US export of these technologies will continue to be subject to the existing ITAR licensing processes. But these technologies are all critical to the ADF's capabilities for network enabled operations. As explained in the Australian Defence Organisation's *NCW Roadmap*, the latter capability is the focus of future ADF development.¹⁷ For present purposes, the key point is that, in deciding what costs Australia should accept in securing the benefits of the Treaty, Australian stakeholders should bear in mind that it seems unlikely to contribute materially to realization of Australia's key capability development objective.

The **List C** technologies excluded from the treaty include those required for the precision engagement which characterizes network enabled operations, including night vision technology beyond the data required for basic operation, maintenance and training. Perhaps more significantly, however, List C excludes from the Treaty manufacturing know-how for a huge range of platforms and systems ranging from precision guided weapons to submarines. This significantly reduces the utility of the Treaty in terms of facilitating Australian industry involvement in the supply of platforms and systems.

Finally, **List C** excludes from the Treaty licenses for software source codes specific to virtually all militarily-significant platforms and systems.¹⁸ Denial of access to the source code required to configure US-origin platforms and

¹⁷ Department of Defence, *NCW Roadmap* (Canberra: Commonwealth of Australia, 2007).

¹⁸ See Directorate of Defense Trade Controls, Department of State, *List of Defense Articles Exempted from Treaty Coverage*.

systems for operation by the ADF in Australia's region of primary strategic concern has long vexed defence business relations between the United States and Australia at both government-to-government and commercial levels. More specifically, for example, the Treaty will do nothing to ameliorate the kind of problems identified by the Australian National Audit Office (ANAO) in its audit of Defence acquisition of early warning and control aircraft. In this case, according to the ANAO, a lack of US Government export licenses for some of the project's advanced technology precluded local industry from involvement in some \$44 million worth of contracts in such areas as system design and development, system integration, software and systems engineering.¹⁹

As already indicated, the Treaty's practical significance depends crucially on how willing US companies are to use it to reduce the ITAR licensing burden in both Australia and overseas. Critical here is the ITAR enforcement environment.

US Government agencies impose substantial penalties on those US companies caught violating US defence trade controls.²⁰ On 8 August 2008, for example, Lockheed Martin agreed to pay a civil penalty of \$US4,000,000 in settlement of unauthorized sale of Hellfire missiles to the United Arab Emirates.²¹ As Table 1 indicates, this continues an established pattern of enforcement by the State Department's Office of Defense Trade Controls.

Table 1: Selected Administrative settlements of US export control violations

Company	\$US Fines	Year	Number of Charges
DirectTV/HNS/Hughes	5,000,000	2005	56
ITT	8,000,000	2004	95
GM/General Dynamics	20,000,000	2004	248
EDO Corporation	2,500,000	2003	47
Hughes/Boeing	32,000,000	2003	123
Multigen-Paradigm	2,000,000	2003	24
Raytheon	25,000,000	2003	26

Source: Daniel Buzby, 'U.S. Export Controls on Defense Trade', Presentation to the Society for International Affairs, London, 20 October 2005, <http://www.egad.org.uk/files/documents/EGAD/US_Export_Controls_on_Defence_Trade.pdf> [Accessed 31 July 2008].

¹⁹ Raymond McNally, *Wedgetail Airborne Early Warning and Control Aircraft: Project Management*, Audit Report No. 32 2003-04 (Canberra: Australian National Audit Office, 2004), pp. 45-46.

²⁰ For a full analysis of this issue, see Trope and Witt, 'Allies at sixes and sevens: Sticky Issues in Australian-US Defense Trade Controls', esp. pp. 85-92.

²¹ Office of the Spokesman, US Department of State, 'Lockheed Martin Corporation Settles Charges Involving the Arms Export Control Act and International Traffic in Arms Regulations', 8 August 2008, <<http://www.state.gov/r/pa/prs/ps/2008/aug/1-8050.htm>> [Accessed 14 August 2008].

These financially significant penalties, the associated damage to company reputations, the sunk cost of training staff in existing ITAR licensing procedures and the relatively modest commercial significance of the Australian defence market mean that US defence contractors have little incentive to exploit Treaty-related licensing concessions aggressively. Hence, as things stand, the Treaty seems unlikely to do much to encourage smaller US companies to export to Australia.²² On the contrary, the main commercial beneficiaries of the Treaty seem likely to be Australian subsidiaries of US companies. Again, in judging the balance of cost and benefit in pursuing the Treaty, Australian stakeholders might bear in mind that the Treaty is likely to reinforce the competitiveness of US subsidiaries in Australian defence industry.

A further issue to be taken into account in judging the balance of merit in the Treaty is the cost Australian companies—whether local subsidiaries of overseas prime contractors or Australian owned and controlled—must incur in order to become a member of the Australian Approved Community for the purposes of ITAR license concessions. There are two categories of cost:

- The direct financial cost companies incur in meeting the physical and administrative requirements of Treaty compliance;
- The cost to Australian companies and their employees resulting from Commonwealth legislation required to give effect to the Treaty.

As already indicated, both Australian and US defence suppliers can choose whether or not to operate within the framework of the Treaty. Hence entry into force of the Treaty will not impose mandatory costs on industry. In these circumstances, the main costs to companies wishing to take advantage of the Treaty will relate to those associated with membership of the Approved Community. If a company applies for membership of this community, officials of the Defence Security Authority will assess its eligibility. This will entail ensuring that the applicant has instituted and can maintain satisfactory standards of physical, information and personnel security. Established defence suppliers will have already incurred such costs in the course of, for example:

- Maintaining security clearances and security training for company personnel;
- Ensuring that their facilities meet defence protective security standards for the secure storage of information and materiel; and

²² Howard, 'Australia-United States Treaty on Defense Trade Cooperation, Fact Sheet'.

- Ensuring that information technology systems comply with defence security standards.

Clearly this is an extension of existing Defence Industrial Security arrangements. The extra cost to Australian defence industry will depend on the number of new entrants to the Approved Community. Defence has estimated that, overall, Australian defence industry will need to spend some \$A50 million to establish the requisite security arrangements²³ while administering and enforcing the Treaty will cost Defence itself some \$A26.8 million for the first year and \$26.7 million per annum thereafter.²⁴

The government insists that this is a cost of doing defence business that companies will factor into overall contract bids and that this will be offset by the reduced transaction costs.²⁵ But in assessing the Treaty's balance of merit, it is important to note that such costs do not impact evenly across defence industry. For example, according to the Economist, in 2006 the cost of complying with ITAR was 1% of US prime contractor's foreign sales but 8% of foreign sales by the much smaller third tier US component suppliers.²⁶

These direct costs are not trivial. But of greater political and commercial significance are the indirect costs companies will incur.

To give effect to the Treaty the US and Australian Governments are required to exchange notes confirming that each has completed the prerequisite domestic requirements. Before Australia can exchange notes, the Commonwealth must enact legislation to incorporate Australia's rights and obligations under the Treaty into our domestic system. As this legislation will affect business the Treaty would normally have been tabled with a Regulation Impact Statement (RIS).²⁷ But the National Interest Analysis tabled in Parliament with the Treaty states that:

Due to the process by which the Treaty was negotiated and signed, a Regulation Impact Statement was not prepared in accordance with the best practice regulation requirements. Accordingly, the Office of Best Practice Regulation has advised that the Treaty and its implementation will be subject to a Post Implementation Review by the Office of Best Practice Regulation within one or two years of the Treaty being put into effect.²⁸

²³ Kerry Clarke, Testimony to Joint Standing Committee on Treaties, Hansard, 16 June 2008, <<http://www.aph.gov.au/hansard/joint/commtee/J10940.pdf>> [Accessed 12 September 2008].

²⁴ Defence Export Control Office, Strategy Division, Department of Defence, *Australian Treaty National Interest Analysis (2008)* ATNIA 15, p. 4, <<http://www.austlii.edu.au/au/other/dfat/nia/2008/15.html>> [Accessed 31 July 2008].

²⁵ Howard, 'Australia-United States Treaty on Defense Trade Cooperation, Fact Sheet', Questions and Answers.

²⁶ 'Space Technology: Earthbound', *The Economist*, 23 August 2008.

²⁷ Department of Foreign Affairs and Trade Website, 'Treaties and Treaty Making', p. 2, <<http://www.dfat.gov.au/treaties/making/making2.html>> [Accessed 30 July 2008].

²⁸ Defence Export Control Office, *Australian Treaty National Interest Analysis*, p. 5, para 28.

As Associate Professor Simon Rice (Director of Law Reform and Social Justice, Australian National University) has pointed out, the omission of an RIS is regrettable.²⁹ The resulting deficiencies will not be remedied by the proposed post-implementation review. There are at least three reasons for this.

Firstly, sound policy entails due process: The members of the Commonwealth Parliament's Joint Standing Committee on Treaties are entrusted by Australian citizens to review the Treaty (and the legislation required to bring it into force) to ensure both work so as to protect and advance the interests of the Australian community as a whole. The omission of a rigorous RIS denies the Committee, and the Parliament as a whole, the information they need to discharge their review function effectively.

Secondly, reducing the ITAR licensing burden is not cost free. Conclusion of the Treaty would protect and advance the interests of our defence officials, of our war-fighters and of the companies that supply and support them at the expense of other community interests. The latter interests need to be acknowledged in any balanced assessment of the Treaty's net benefit to the community as whole.

In 2004, for example, the Victorian Civil and Administrative Appeals Tribunal (VCAT) granted Boeing Australia an exemption to that State's Equal Opportunity Act enabling the company to require foreign nationals it employs to wear different identification and restrict their computer and technology access. According to the Age newspaper:

Boeing told VCAT the exemption was necessary because the US State Department required that it not "transfer technical advice, defence articles, or furnish defence services" to any person who is not an 'Australian national' or US person. The company could lose its American export market for up to three years if it refused to meet these conditions.³⁰

Boeing's case is not unique. On 28 September 2005 the State Administrative Tribunal of Western Australia granted ADI and the Thales group of companies in Australia and associated companies a five year exemption from the WA Equal Opportunities Act 1984 to enable it "to undertake defence projects in compliance with the laws of the United States of America".³¹ However, not all such applications for exemption are so successful: In 2008, for example, the Canberra Times reported that the Human Right Commissioner of the Australian Capital Territory (ACT) was

²⁹ Simon Rice, Letter concerning the US-Australia Treaty of Defence Trade Cooperation to the Secretary, Joint Standing Committee on Treaties, 12 June 2008, <<http://www.aph.gov.au/house/committee/jsct/14may2008/subs/sub11.pdf>> [Accessed 12 September 2008]

³⁰ *The Age*, 5 March 2004, p. 1.

³¹ Judge Eckert, et al, Decision by State Administrative Tribunal, Western Australia, Matter No. EOT 31 2004, heard 1 August 2007, Document WASCA/CACV/2007WASCA0261, delivered 28 November 2007.

considering appealing a decision by the ACT Administrative Appeals Tribunal granting Raytheon Australia a three year exemption to the ACT Discrimination Act in order to allow it to comply with ITAR regulations restricting access by third country nationals to US-origin technology released to Australia.³²

Thirdly, it is the companies that must bear the cost of obtaining such exemptions. Such costs, which include the charges of legal representation, can be considerable: For example, obtaining the above WA ruling reportedly cost Thales some \$A2 million in staff time and legal costs. Subsequent ITAR developments and related management requirements cost Thales at least \$A200,000 per annum.³³ For present purposes the key point is that, while larger companies might accept costs of this magnitude as the price of doing Australian defence business, such costs are likely to discourage small and medium enterprises from entry into the business.

Underlying the above administrative processes are important divergences between the US and Australian concepts of race, citizenship and nationality. In determining nationality, and hence eligibility for access to US-origin technology, the State Department considers a person's country of origin or birth *in addition* to citizenship. Under US practice, a person considered to have significant ties by virtue of birth or parentage to an ITAR-proscribed country—for example China or Vietnam—would be denied access to US-origin technology irrespective of citizenship. And the State Department would consider a company allowing such access in violation of ITAR and, hence, subject to the penalties already described. Under Australian practice, however, it is citizenship that matters and an employer discriminating among employees on the basis of country of birth would be considered in breach of State anti-discrimination legislation.

In December 2007 the US approved a modest relaxation of the above third party rule. Pursuant to ITAR 124.16, authorized access to unclassified defence articles and/or retransfer of technical data/defence services to individuals who are dual/third country nationals of NATO countries, members of the European Union, Australia, Japan, New Zealand and Switzerland provided that all access/re-transfers occurred completely within the physical territory of these countries or the United States. For Australia, as an Asia-Pacific country of immigrants, these concessions will do little to eliminate a potentially vexatious problem for bona fide employers in the Australian defence industry.

During the hearing on 16 June 2008 by the Joint Standing Committee on Treaties, Senator Simon Birmingham (Liberal, South Australia) placed the following questions on notice:

³² 'Defence firm faces human rights appeal', *Canberra Times*, 25 July 2008.

³³ Personal correspondence between Thales personnel and author, 3 September 2008.

1. Implementing arrangements for the Defence Trade Cooperation Treaty were agreed to in March this year. For listed projects under the arrangements will Australian defence industry acquire legislative authority to inquire as to the nationality of their employees?
2. Defence industry is currently faced with the requirement to obtain exemptions to State and Territory anti-discrimination laws to allow it to obtain certain information from employees and potential employees and to act upon that information to comply with the requirements of the International Traffic in Arms Regulations (ITAR). Will the Treaty and any associated legislation remove the requirement of industry to obtain such exemptions?
3. Under the Treaty what obligations will reside with industry (as opposed to government) to inquire about and to act upon employees' nationality?
4. In practical terms, will there be greater access to ITAR controlled material for dual nationals previously intended to be dealt with by what is known as the "Hillen letter"?
5. Australian defence industry currently faces burdensome requirements to limit the access of certain employees to ITAR-controlled material. This includes the heavy onus upon industry to deny access to such material to those termed "dual nationals". Could you explain how the Treaty will change these existing requirements?
6. To what extent will this change the existing administrative burden on industry?
7. Under section 6 of the implementing arrangements there is a subsection dealing with "Access". Could you describe what practical steps will be undertaken by the Australian Government to carry out the scheme described under this subsection?
8. What is understood by the term "nationality" within subsection 11(a) of the implementing arrangements? Does this include an inquiry into a person's place of birth, as seems to be the case from guidance provided by the US Department of State in a notice in the Federal Register of 19 December 2007?³⁴

At the time of writing, the Defence Minister had not answered these important questions. But in finalizing its report on the Treaty, it does seem important for the Committee to put these questions into a wider context.

The UK Treaty attracted cautious support from UK companies and, importantly, from the British House of Commons Defence Committee.³⁵ In contrast, the US Senate (which must ratify the Treaty by a two thirds majority before the US and Australian Governments can exchange notes putting it into force) is much more sceptical about the benefits to the United States from ratifying the two Treaties: US Senator Joe Biden, Chairman of the

³⁴ Correspondence between author and Senator Birmingham staff, 4 August 2008.

³⁵ See House of Commons Defence Committee, *UK/US Defence Trade Committee Cooperation Treaty: Third Report of Session 2007-08* (London: The Stationary Office 2007), pp. 20-22.

Senate Foreign Relations Committee (and now the Democratic Party's candidate for Vice President) has insisted on the Administration clarifying much significant detail before the Senate would consider ratifying the Treaties.³⁶ Congressional concerns about the efficacy of UK and Australian arrangements to protect US-origin technology³⁷ reinforce wider concerns about preserving Congressional treaty prerogatives. Congress is therefore unlikely to progress the UK and Australian Treaties until after the US elections in November 2008.

Conclusion

At the time of writing, the Australian Parliament's Joint Standing Committee on Treaties had yet to report on the Treaty. This delay and the likely attenuation of Congressional consideration of both UK and Australian Treaties suggest that it will be many months before the US and Australian Governments are in a position to exchange notes giving effect to the Treaty.

From an Australian perspective, this delay may not be a bad thing. Firstly, and in the interests of good policy making, the Joint Standing Committee on Treaties might encourage the Commonwealth to take the lead in resolving the tension between State and Territory anti-discrimination legislation and Australia's ITAR obligations. A charitable interpretation of the Commonwealth's omission of the RIS is that it views the task of finding an equitable balance between the divergent interests involved here as a minor commercial matter between individual companies and the respective Australian States and Territories. The Treaties Committee should resist this expedient logic, take its cue from the US Senate Foreign Relations Committee, build on Senator Birmingham's lead and require the Defence portfolio to explain how it proposes to reconcile these interests before ratifying the Treaty.

Secondly, Australian States and Territories compete vigorously in attracting Australian defence business. Hence the interest of State and Territory jurisdictions in resolving this issue is at least as strong as that of the Commonwealth and companies involved. But in assessing the merits of company application for exemption from anti-discrimination legislation, State/Territory human rights commissioners and administrative tribunals are responsible for balancing individual human rights, commercial interests and national security imperatives on a case-by-case basis. In judging the appropriate balance, however, the Commissioners have been hampered by

³⁶ Joe Biden, 'UK and Australian Defense Treaties: We Must Proceed with Care and Precision', *Press Release*, 21 May 2008, <http://biden.senate.gov/press/press_releases> [Accessed 30 July 2008].

³⁷ See, for example, Ann Calvaresi Barr, *Export Controls: State and Commerce Have Not Taken Basic Steps to Better Ensure U.S. Interests are Protected*, GAO-08-710T (Washington, DC: Government Accountability Office, 2008).

the lack of specific information about the commercial and national security interests involved.

As a first step in rectifying this lack of information, the Treaties Committee might ask the Minister for Defence to set out:

- The extra benefits accruing from the Treaty over and above those already inherent in previous defence trade initiatives (including those by the Clinton Administration); and
- An estimate of the marginal cost (in dollar terms) to both the Australian Government and Australian companies of obtaining those extra benefits.

To further help State/Territory jurisdictions make balanced judgements, the Joint Standing Committee on Treaties might encourage the Defence portfolio to explain in greater detail what companies and the ADF stand to lose if well intentioned anti-discrimination legislation is upheld without regard to unintended commercial and national security consequences. In doing so the Committee might encourage the Defence portfolio to have regard to the following Canadian experience:

- 1954-1999 Canada, as part of the North American Industrial Base, was “exempt” from ITAR licensing requirements;
- In April 1999 the United States significantly reduced that exemption as a result of alleged diversions of ITAR controlled technology via Canada to proscribed destinations;
- In October 1999 the United States and Canada agreed to harmonise the US Munitions list and the Canadian Export Control list and the Canadians agreed to introduce a Controlled Goods Program pursuant to the Canadian Defence Production Act aimed at reinforcing Canada’s defence trade controls through registration, prevention, deterrence and detection;
- In May 2001 Canada regained a modified exemption from ITAR licensing requirements.³⁸

Full discussion of the events prompting the United States to suspend Canadian ITAR exemptions is beyond the scope of this article. But recent reports of repeated breaches of Australian export control regulations by

³⁸ Controlled Goods Directorate of Public Works and Government Services Canada Website, <http://www.cgd.gc.ca/cgdweb/text/pubs/presentation_procurement_e.htm> [Accessed 14 August 2008].

Australian companies suggests that Australia has no room for complacency in this regard.³⁹

Thirdly, for at least the last thirty years it has been an article of faith of successive Australian Governments that “The kind of ADF we need is not achievable without the technology access provided by the US alliance.”⁴⁰. The new Rudd Government’s forthcoming defence white paper is likely to reaffirm this proposition. But at the same time, successive Australian Governments have also reaffirmed the importance to Australian defence self-reliance of selective Australian industry involvement in supply and support of defence materiel. In this sense an appropriately managed Defence Trade Cooperation Treaty is one element of a portfolio of assets managed by the Defence portfolio so as to broaden the military options available to the Australian Government of the day. Against this background, the Committee might encourage the Defence portfolio to explain how the Treaty fits in with the new government’s strategic guidance.

The UK and Australian Treaties constitute important innovations in the way allies go about creating trusted institutions enabling them to share advanced technology pursuant to common political and strategic interests. But these intricate institutions should be regarded as works in progress, involving much learning by using and learning by doing. The Australian Parliament has a crucial role to play in this vital national endeavour.

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³⁹ Philip Darling, ‘Firms in defence export breaches’, *Canberra Times*, 16 August 2008, p. 1.

⁴⁰ Department of Defence, *Defence 2000: Our Future Defence Force* (Canberra: Commonwealth of Australia, 2000), p. 35.