

Article Information

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AUKUS, ITAR, Export Control Reform and the Australian Defence Industry

The AUKUS security alliance presents an opportunity to address export control reform and the issues the Australian defence industry may face with ITAR and other US export controls.

Introduction

The AUKUS trilateral security pact is a significant development in both the international and national defence industry landscape. The AUKUS alliance will, amongst other things, see the Royal Australian Navy purchase at least three US Virginia-class nuclear submarines, and later, build approximately eight conventionally armed, nuclear-powered "SSN-AUKUS" class submarines, based on a UK design.

The practical application and future of AUKUS by the combined governments of Australia, the United States and the United Kingdom highlights the issues the Australian Defence industry may face with US export controls, such as the International Traffic in Arms Regulations (**ITAR**), as AUKUS continues.

For an in-depth discussion of the ITAR and its core principles and applications, read our Insight [here](#).

Both iterations of Australia's future nuclear submarines, whether Virginia or AUKUS class, will be comprised of at minimum, US, UK and Australian defence articles and technology.^[1] As such, legislative and regulatory export control reform, in all three countries, will be necessary to allow this vast project to proceed at pace and without undue delay.

ITAR Issues and Drawbacks

The scope of ITAR encompasses almost all advanced defence or security-related technology in 'defense articles', 'technical data' and 'defense services' coming out of the USA. This complex regime was borne out of necessity of the Cold War, and is still relevant to this day in protecting US foreign interests and defence secrets.

However, ITAR is often seen as an obstacle to international collaboration between allies, rather than a protection mechanism against adversaries. The consensus amongst the Australian defence industry is that ITAR is "*the biggest impediment to realising a truly integrated defence industrial and technology enterprise*."^[2] Its restrictions "*excessively disincentivises cross-border research and development*"^[3] between the US and its allies – for example, where any intellectual property or products classified under ITAR and used at any stage in R&D, the technology becomes subject to ITAR controls permanently.^[4]

Logistically, receiving, accessing and storing ITAR controlled defense articles and technical data requires extensive approvals from the US Department of State (**DOS**). This is often a lengthy process which can take upwards of six months for some authorisations, requiring various levels of approval from within the DOS, "wet" signatures from international organisations and significant organisation wide compliance programs and reviews.

At present, only Canada has effective preferential treatment under ITAR, allowing permanent and temporary exports of unclassified ITAR defense article and in country re-transfers of ITAR articles.^[5] While Australia does have defence trade treaties with the US which form certain exemptions within ITAR, these are typically seen as too restrictive to be effective

and broader reform is needed.

Expeditious reviews and approvals of temporary transfers of ITAR defense articles and technical data have occurred in recent times where necessary. For example, the Biden administration provided various military aid packages to Ukraine in 2022, all of which included ITAR-controlled defense articles and technical data.^[6] To facilitate this, US Congress passed the *Ukraine Democracy Defense Lend-Lease Act of 2022*, providing authority for the President to enter into agreements with Government of Ukraine to lend or lease defense articles to that Government.^[7] This Bill garnered bipartisan support, and indicates that there is an appetite for reform, where warranted.

The Vice-Chair of the AUKUS Caucus in the US House of Congress, Rep. Joe Courtney, recently called for significant changes to the ITAR regime, to ensure the Australian defence industry and government do not face lengthy delays in receiving ITAR controlled technology, as significant delays to a project of this size and significance can be costly, and an issue for national security.^[8]

US Bill to Review ITAR's Effect on Australia in AUKUS

On 22 March 2023, a Bill was passed by the US House of Representatives for the purposes of conducting a review on ITAR.^[9] If enacted into law, within 90 days the Secretary of State, in conjunction with the Secretary of Defense, must submit a report on the efforts of the Department of State to implement the AUKUS pact (**Report**). The Report is to include the following data:

1. For the calendar years 2021 and 2022:
 - I. the average and median times for the US Government's review of licenses to export defense articles or defense services to persons, corporations and the governments of Australia or the UK;
 - II. the average and median times for the US Government to review applications from Australia and the UK for foreign military sales; and
 - III. the number of licence applications from Australia and the United Kingdom to export "*defense articles*" and "*defense services*" that were denied or approved with provisos.
1. For each of the fiscal years 2017 to 2022, the number of voluntary disclosures resulting in a violation of ITAR under section 40 of the US's *Arms Export Control Act (AECA)* or involving proscribed countries, by persons, corporations and the governments of Australia and the UK, with respect to various issues.
2. The value of any civil penalties assessed from 2017 to 2022 for disclosures or violations involving foreign persons, foreign corporations and foreign governments in Australia or the UK.
3. A list of relevant US laws, regulations and treaties to which the US is a party that govern authorisations to export defense articles or defense services that are required to implement the AUKUS pact.
4. An assessment of key recommendations the US Government has provided to the Australian and UK governments to revise laws, regulations and policies to implement the AUKUS pact.
5. An assessment of recommended improvements to export control laws and regulations of Australia, the United Kingdom and the US that the countries should make to implement the AUKUS pact and the challenges that Australia and the UK have conveyed in meeting the requirements of section 38(j)(2) of the AECA.

Clearly, there is an intention to assess how best to reduce the barriers that ITAR may impose on the successful transfer of US military technology to its AUKUS allies.

What does this mean for AUKUS?

The successful execution of AUKUS, including the delivery and later construction of Australia's nuclear powered submarines, requires efficient and effective international collaboration and exchanging of information with minimal delays. ITAR does not necessarily prevent this; once an authorisation, such as a Technical Assistance Agreement, a Manufacturing License Agreement, or a Permanent Export License for unclassified articles or hardware, is approved, international parties can begin sharing technical data or hardware. However, it is often the delays imposed by ITAR before the approval of an authorisation that impact a defence industry member or project the most.

If the Bill becomes US law, it is the first step of many in reviewing inefficiencies in ITAR, and how these impact Australia and the UK's involvement in AUKUS. Hopefully, the Report provides key recommendations to the Congress and in turn, Australian and UK governments for the necessary changes to the ITAR regime.

Piper Alderman has nationally recognised lawyers with specialist expertise in legal matters affecting the Defence industry, including ITAR. Please do not hesitate to contact us should you require legal advice.

- [1] Ben Packham, "Defence Strategic Review: 'Decisive action' urged with US", *The Australian*, 24 April 2023.
- [2] United States Studies Centre, *Defence Industry Roundtable Series | Report on Series 1: Export Controls*, 21 April 2023.
- [3] PWC, AMCHAM & ABCC, "Maximising Australia's AUKUS Opportunity", <https://www.pwc.com.au/defence/pwc-amcham-abcc-maximising-australias-aukus-opportunity.pdf>.
- [4] Greenwalt, "Leveraging the National Technology Industrial Base to Address Great-Power Competition", Atlantic Council, April 2019, https://atlanticcouncil.org/wp-content/uploads/2019/04/Leveraging_the_National_Technology_Industrial_Base_to_Addres_Great_Power_Competition.pdf.
- [5] ITAR, § 126.5.
- [6] Tony Bertuca, 'DOD to send Ukraine 580 'Phoenix Ghost' drones' *Inside Defense*, (Web Page, 4 May 2022), <https://insidedefense.com/insider/dod-send-ukraine-580-phoenix-ghost-drones#:~:text=The%20United%20States%20is%20sending,to%20Switchblade%20unmanned%20aerial%20systems>.
- [7] *Ukraine Democracy Defense Lend-Lease Act of 2022*, 136 Stat. 1184, USC, (2022).
- [8] Colin Clark, 'Eye on AUKUS, Aussie defense minister pushes US on ITAR - gently', *Breaking Defense*, (Web Page, 3 March 2023), <https://breakingdefense.com/2023/03/eye-on-aukus-aussie-defense-minister-pushes-us-on-itar-gently/>.
- [9] A Bill to direct the Secretary of State to submit to Congress a report on implementation of the advanced capabilities pillar of the trilateral security partnership between Australia, the United Kingdom, and the United States, HR, 1093, (2023).