

Article Information

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The US AUKUS Undersea Act, ITAR & Transfer of US Nuclear Submarines to Australia

The US Congress has officially introduced legislation to authorise the transfer of Virginia-class nuclear submarines, including related “defense services” under ITAR, to Australia under the AUKUS partnership. Piper Alderman explains the effect of this legislation and what it means for the AUKUS alliance should it become law.

Introduction

The implementation of AUKUS heavily depends on all three countries ensuring their legislative frameworks permit the smooth transfer of technology between each other. One of the obvious impediments to this is the United States' International Traffic In Arms Regulations (**ITAR**).

The ITAR, as part of the *Arms Export Control Act of 1976 (AECA)*, prohibits the export of “*defense services*”, “*defense articles*” and/or “*technical data*” to foreign persons without authorisation.

As covered in our previous insights, we have identified that ITAR, as currently enacted, could cause significant delays in the operation of AUKUS and the development of Australia's SSN-AUKUS nuclear-powered submarines.

AUKUS Undersea Defense Act

Recently, US Congress Representatives Joe Courtney, Gregory Meeks, and Ami Bera introduced into Congress a Bill for the “*AUKUS Undersea Defense Act*”. The Act is designed to authorise and facilitate the transfer of Virginia-Class nuclear submarines to Australia, as well as authorise the training of Australian private sector personnel in their maintenance and operation.

Section 3 of the Bill permits the transfer of two Virginia-Class submarines from the US Navy's inventory, with Australia being required to reimburse the United States for any costs incurred in doing so. This is to be read in conjunction with section 21 of the AECA, which requires (in part):

“The President may sell defense articles and defense services from the stocks of the Department of Defense and the Coast Guard to any eligible country or international organization if such country or international organization agrees to pay in United States dollars—

(A) in the case of a defense article not intended to be replaced at the time such agreement is entered into, not less than the actual value thereof;

(B) in the case of a defense article intended to be replaced at the time such agreement is entered into, the estimated cost of replacement of such article, including the contract or production costs less any depreciation in the value of such article; or

(C) in the case of the sale of a defense service, the full cost to the United States Government of furnishing such service...

Provisions are also made to permit the President to authorise the transfer of nuclear material and facilities for use in the transferred Virginia-class submarines, in compliance with existing provisions under the *Atomic Energy Act of 1954*.

Importantly for Australian defence contractors, section 5 of the Bill would permit the transfer or export to the Australian Government of “*defense services*”, which may also be directly exported to Australian private-sector personnel, to support the development of the Australian submarines and associated industrial base.

A “*defense service*” is broadly defined under section 120.9 of ITAR as:

- the furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
- the furnishing to foreign persons of any “*technical data*” controlled under ITAR whether in the United States or abroad;
- Military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise and military advice.

The wide scope of “*defense service*” means that the Bill, if passed, would help provide an avenue for Australian Defence staff and/or defence contractors to begin coming to grips with nuclear submarine technology once the AUKUS nuclear submarine project proceeds in earnest.

It is worth noting that any further transfer of the relevant defense services would still be subject to the AECA’s restrictions; this necessarily means that ITAR would still apply for the re-transfer of defense services between the Australian Government and persons not directly exported to from the United States.

Lastly, given Australia will be footing the bill for the Virginia-class submarines, both those transferred from the United States’ existing inventory and those built for Australia, section 4 permits the United States to take monetary contributions from Australia. Prior to this legislation, if enacted, according to Rep Joe Courtney, there would not actually be a proper legislative mechanism for the United States to receive this money.

A link to Representative Courtney’s proposed Bill is found here: [AUKUS Undersea Defense Act](#)

Growing US Recognition of Need for Reform?

This Bill shows a growing recognition within the United States’ legislature that significant reform of the US’ existing defence export control laws is needed if the AUKUS alliance is to be successful.

The Bill closely follows the introduction by two Republican Senator of a Bill for the TORPEDO Act (Truncating Onerous Regulations For Partners And Enhancing Deterrence Operations Act of 2023). The TORPEDO Act would, if passed, facilitate various actions to enable AUKUS, such as:

- Appointing an “AUKUS Senior Advisor” to coordinate the AUKUS project on behalf of the United States;
- Open a general export licence for the export, reexport, retransfer of certain defense articles under ITAR to or between Australia, the United Kingdom, Canada and the United States;
- Add Australia as a “domestic source” in the Defense Production Act of 1950, which would allow, through executive authority, the expedited sharing of defence technology under AUKUS.

The full text for the TORPEDO Act is found here: [TORPEDO Act](#)

We will continue to monitor the legislative and regulatory developments around AUKUS and report on their impact.

Piper Alderman has a nationally recognised [team of defence industry legal specialists](#) who can assist your company with advice. Please contact us if you need any assistance.