Inquiry into planned acquisition of the F-35 Lightning II (Joint Strike Fighter)

Submission
on
Terms of Reference (ToR) Item f.
Other Related Matters:
Regulatory Considerations and Impacts
26 January 2016

EVIDENCE TO THE PARLIAMENT AND THE DEFENCE TRADE CONTROLS ACT

"The ITAR (*International Traffic in Arms Regulations*) has gone a long way to markedly reducing the international competitiveness of America's Defense Industry. European defence contractors proudly market their wares as '*ITAR free products*'. Another effect has the US Defense Industry even more stove piped and inwards looking than has been induced by the '*cold war peace dividend*'. This situation is made worse by the way major defense contractors, with their legions of ITAR administrators, managers and lawyers, interpret the regulations; leading to the costs to manage/administer/certify the ITAR ending up more than the direct cost for producing the part. The adage about '*making money for old rope*' doesn't come close to describing this game."

"While as bad as this is, the senior defence officials inspired DTCA is something else, again."

"Put simply, the DTCA is the equivalent of ITAR on steroids, EPO and blood-doping that is then administered under a regime driven by '*self before service*' and, like all defence abuse matters, is just as pernicious to Australian citizens and the Nation, alike."

APA Assessment of the DTCA, circa 2012

In late October, 2012, *Air Power Australia* started closing down all research projects, all collaborations, and all new publishing activity in all areas of military science, military capabilities and technological strategy, to accommodate the introduction of the Defence Trade Controls Act 2012. The bulk of the source research material in APA submissions to this Inquiry was published between 1998 and October 2012.

The language in the DTCA legislation is very specific and not open to interpretation.

Publishing or disclosing to the publicly any of the type of forensic analytical research that APA has performed, using public open source materials, could be arbitrarily and unilaterally deemed by defence officials to be a criminal offence under 14A (1) and (2)[1 2].

The requirement, under the 14A (3), for Ministerial Approval to disseminate any such material makes any effort to continue such research and publishing non-viable.

The monetary/time costs of defending against an allegation by a defence official that the Act has been breached, even if the publication only disclosed that what was previously published overseas, are too prohibitive for a non-profit volunteer organisation like APA to carry.

Given the current Defence culture, the expectation that some if any senior defence official could act as impartial and objective censors under 14A (3) is at best optimistic.

The track record of senior defence officials since 2003 displays a consistent pattern of muddling public discourse on Defence Matters with vendor propaganda, ideologically motivated beliefs, errors of fact, misleading distractions, and simple nonsense, the intent of which invariably appears to be distraction of Parliament, media and public, to draw attention away from prior mistakes or erroneous advice to Governments by senior defence officials.

The observed track record in public statements by senior defence officials reflects the policy within the ADO of misconduct being defined as that what *"brings the reputation of an individual, a group or organisation [in the ADO] into disrepute"*. Therefore hiding any adverse realities that might bring the ADO into disrepute is considered *"Appropriate Conduct*", no matter that doing so might be unethical, dishonest or unlawful[3].

Put bluntly, Defence are confronted with implicit conflicts of interest if they are to act under the DTCA as a censor of all public discourse in DSGL matters, as defined by 14A (3) of the DTCA. Defence personnel tasked with censoring third party publications that might by their analytical content expose shortcomings in Australian capabilities will be compelled to censor out or disallow such content, or be subject to internal allegations of misconduct.

This problem is further compounded by the obvious deskilling within the Canberra based agencies of Defence; especially in performing critical, independent forensic technical assessments of military technologies, foreign and domestic, then determining its importance.

The DTCA regime is closest in its operation and design to the censorship regime employed in the Soviet Union, and as of late 2015 employed in Russia. No such censorship regime exists in other Western democracies.

Defence officials have never explained why Australia must be subject to any such censorship of public discourse on defence capability topics that are unregulated in other Western democracies, such as the United States or United Kingdom.

The DTCA strikes at the heart of open public and professional discourse on the management, governance and implementation of Defence Matters, and especially renders any robust, critical discourse on procurement of military equipment infeasible. It will result in further opacity in the Defence Debate, as anything published must first be approved by Canberra, if the author is not to become exposed to the draconian search and seizure investigative powers, let alone prosecution under the DTCA.

The provision of informed professional quality evidence to Parliamentary bodies, and submissions to inquiries, such as this one, presents significant problems under the DTCA.

Any analytical interpretation or conclusions drawn from public source materials could be, and likely would be, interpreted by some defence officials as breaches of the Act, as the Act explicitly exempts only that what has been previously disclosed as lawful.

Performing the necessary research to provide evidence to an inquiry is expensive and time consuming, and APA has in previous years produced the research, in part, as part of academic publishing activities, consultancies, and commercial publishing in the media.

None of the latter is feasible any more under the DTCA.

Specific publications APA terminated in late 2012, due to the DTCA, include:

A. A largely completed peer reviewed monograph on the future of Electronic Attack (EA), surveying extant and future capabilities, and comparing survivability of super-cruising and subsonic EA platforms in an A2/AD threat environment;

B. A draft peer reviewed paper on the kinematic performance modelling of long range Russian and Chinese Surface to Air Missiles, developed for A2/AD applications;

Specific research projects APA planned for and did not pursue, due to the DTCA, include:

A. Performance and observables modelling of the Shenyang J-31 fighter;

B. Further costing analysis and modelling of the JSF Program with a principal focus on the working thesis that the JSF Pricing Strategy/Model has '*a never ending price*' baked into the JSF designs;

C. Kinematic performance modelling of long range Russian and Chinese Surface to Air Missiles in the 250 km – 400 km performance envelope;

D. Modelling of deep fading effects in long range microwave propagation, and their impacts on Electronic Attack operations;

E. Further collaboration with colleagues overseas on a range of performance, system capability and tactical employment matters of 5th Generation air combat aircraft and related developments with a focus on the further evolution of this class of weapon and the associated weaponry.

F. Updates of extant Technical Reports on the T-50 PAK-FA, J-20, S-400 Triumf, S-300VM/V4, 96K6M-Pantsir SM, Su-34 FULLBACK, Su-35S FLANKER, and various Russian and Chinese guided munitions, including new cruise missiles;

G. New Technical Reports on the J-31 fighter, the S-350 Vityaz Surface to Air Missile system, and new guided munitions such as the Kh-59MK and Grom E1/E2.

H. Production of a seminal dissertation on what ails and is broken in Defence, today, with the evidentiary proofs from PARCA and Risk Based Assessments of the increasingly moribund and dysfunctional environment Australian Scientists, Engineers and fellow Technologists must contend with on an increasing basis.

Such research could have usefully contributed to this inquiry, and other Parliamentary inquiries as well as to the all important contestability and governance of Defence itself.

The principal beneficiaries of the DTCA are Russia and China, as the capabilities and shortcomings of their military systems that could and should be examined via independent expert forensic analyses and assessments, will not be subjected to such.

Endnotes

[1] Defence Trade Controls Act 2012, No. 153, 2012: (*as amended*)

14A Publishing etc. DSGL technology

(1) A person commits an offence if:

(a) either:

(i) the person publishes DSGL technology to the public, or to a section of the public, by electronic or other means; or

(ii) the person otherwise disseminates DSGL technology to the public, or to a section of the public, by electronic or other means; and

(b) the person does not hold an approval under this section authorising the publication or dissemination of the DSGL technology.

Penalty: Imprisonment for 10 years or 2,500 penalty units, or both.

Exception

(2) Subsection (1) does not apply if the DSGL technology has already been lawfully made available to the public or to the section of the public.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the *Criminal Code*.

Approvals

(3) The Minister may, in writing, approve a person publishing or otherwise disseminating specified DSGL technology to the public or to a specified section of the public. The Minister may give an approval only if the Minister is satisfied that it is in the public interest to do so.

(4) If the Minister gives an approval under subsection (3), the Minister must give the person the approval.

Note: Section 67 deals with giving approvals under this Act.

[2] DTCA Definition of "DSGL technology": *"technology relating to goods means: (a) information relating to the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of the goods (including information in the form of blueprints, drawings, photographs, plans, instructions, specifications, algorithms or documentation); or (b) software relating to the goods"*; This definition, intended to control "intangible technology transfers" effectively covers anything of any substance relating to any item in the DSGL – whether the controlled item itself, or any software/technology in a "catch all" clause, thus effectively prohibiting any discourse other than "dual use" publications exemptions in DTCA2012/2015;

[3] Refer Annex A, Orme C.W., MajGen, *BEYOND COMPLIANCE: PROFESSIONALISM, TRUST AND CAPABILITY IN THE AUSTRALIAN PROFESSION OF ARMS*; Report of the ADF Personal Conduct Review, Department of Defence, Canberra, 2011.