ACSG
AUSTRALIAN CENTRE FOR SPACE GOVERNANCE

19 March 2024

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Re: Agreement between the Government of Australia and the Government of the United States of America on Technology Safeguards Associated with United States Participation in Space Launches from Australia

We thank the Joint Standing Committee on Treaties (JSCOT) for the opportunity to make a submission regarding the *Agreement between the Government of Australia and the Government of the United States of America on Technology Safeguards Associated with United States Participation in Space Launches from Australia* (TSA).

The Australian Centre for Space Governance (ACSG) brings together academic experts in fields such as space law, governance, policy, science and technology studies, security, property, history, ethics, political, and social sciences from across six different universities in Australia. Our aim is to advance the agenda for responsible space governance and to advocate for Australia's interests in space in the 21st century.

Members of the ACSG with an expertise in law have had the opportunity to review the TSA and have formed the view that it is in the national interest, and should be adopted. However, the ACSG makes several observations, not all of which are directly the concern of JSCOT, but all of which are for consideration of the Government of Australia. Since the current consultation is the main, or perhaps only, opportunity for public expert engagement in the adoption of the TSA, we would like to take the opportunity to express our views. In summary, our key points are:

- The need for greater clarity, especially in communications from the Australian Space Agency, DFAT and PM&C to the general public, and to Australian space industry. This will aid in alleviating concerns that have been aired regarding ceding sovereignty, the role Australian industry will play in any technology transfer activities that fall under the TSA, and assisting the Australian public to understand what the TSA does and what it does not do.
- The need for further consideration of various side agreements
- The need for more precision and updateable guidelines as to the application of the *Space (Launch and Returns) Act 2018* (Cth).

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The ACSG makes the following submissions:

1. National interest

The ACSG is of the view that the TSA is in the national interest, being an instrument that is intended to allow US businesses to bring their launch vehicles and satellites to Australia to be launched into space. The conditions in the TSA reflect the provisions of many other technology safeguards agreements the US has entered into with other countries and is no more onerous than these equivalent agreements. The TSA will provide opportunities for Australian businesses, particularly those that have developed launch site facilities, to attract US-based businesses, or US government launches, to their facilities. This has the benefit of potentially allowing Australian businesses building spacecraft to host their satellites on flight-proven launch vehicles without the need to export those spacecraft overseas.

However, as noted in the points that follow, there is a need for more clarity within the adoption of the TSA and moreover for clear public communications regarding scope and purpose, implementation, and the extent of certain restrictions.

2. Purpose and Scope

The TSA serves a specific purpose. This purpose may not be immediately apparent to all participants in the Australian space industry, many of whom may expect the TSA to have permitted them to access controlled technology. JSCOT should only consider the intended purpose of the TSA, the ability for US-based entities to bring their launch vehicles and spacecraft to Australia to be launched into space. The TSA should not be viewed as an instrument intended to have a wider scope or purpose.

The TSA will only impact the launch from Australian territory of launch vehicles and spacecraft imported from the US . It will not impact on the operation of launch vehicles developed in Australia or imported from other countries.

It should be clearly communicated by the Australian Space Agency to the public that the primary purpose of the TSA is to protect US technologies from being shared with parties where there might be a risk of them being appropriated or nefariously adopted as missile technology. The risk is not with Australian partners, but the TSA is in place to protect against the risk of other foreign parties coming into contact with US technologies. While it will allow US launch vehicles and US satellites to launch from Australian launch sites, and will allow Australian owned or developed satellites to be launched on US launch vehicles from Australian launch sites, it is not an instrument designed to support companies developing Australian space

launch sites. Nor does it provide Australian access to US launch technologies. It is a US technology export control mechanism and should be clearly communicated as such.

In this respect, the National Interest Analysis, at paragraph 34, makes a slightly misleading statement regarding the scope of the TSA that:

> Article V(1) does not permit the United States to provide Australia with assistance relating to the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, processing or use *of US space technology*, unless specifically authorised by the United States. (emphasis added)

It should be noted that the TSA does not prohibit – because it does not cover - sharing of US space technology where such sharing is unrelated to the export of US launch vehicles, US spacecraft and US related equipment. It is open to US entities to share space-related technology with Australian entities where it doesn't involve the export of US launch vehicles, spacecraft and/or related equipment. Such sharing, though, would still be subject to US export control laws.

3. Implementation

We note that the Australian Government, in its National Interest Analysis, has stated that it intends to implement the content of the TSA through existing legislation, and will not introduce new legislation. The National Interest Analysis sets out a range of legislative instruments, but specifically notes the *Space (Launches and Returns) Act 2018* (Cth) is an instrument that facilitates implementation of the TSA. The National Interest Analysis specifically suggests that the Australian Government will apply the same conditions imposed on launch facility licences and Australian launch permits.

While we acknowledge that this approach will allow for flexibility in how the TSA is implemented on a case-by-case basis, reliance on discretionary licensing conditions does not put the regulated population on sufficient notice of potential operating conditions. The *Space (Launches and Returns) Act 2018* (Cth) itself leaves much open to Ministerial discretion, and conditions are not always known in advance, which can result in authorisation holders being 'surprised' by conditions that are imposed on them. This could cause already scoped and planned operations to be severely compromised or delayed. This is especially the case if members of the regulated population adopt a 'just in time' approach to licence applications.

The use of a discretionary power to impose conditions on operations also makes it impossible to gauge the potential impact or operation of any licensing conditions that may be imposed on operators within Australia. Taken all together, this lack of certainty may in itself lead to a disincentive for US operators to seek to launch their technologies from Australian soil.

The Australian Government should consider whether it can remedy this lack of notice with extensive and regularly updated guidance material, or the introduction of a schedule of common conditions that can be added to the statutory rules under the *Space (Launches and Returns) Act 2018* (Cth).

We also note that there are other legislative instruments that will be used to implement aspects of the TSA. Greater clarity on the planned approach to implementation is needed from the Australian Space Agency on behalf of the Australian Government, to ensure clarity for all parties affected.

4. Side Arrangements

In this same line, the National Interest Analysis should emphasise the content of the TSA Side Arrangements, and the Australian Government should maximise the opportunity that side agreements provide to create greater clarity and confidence in the implementation and effects of the TSA.

The TSA itself makes broad statements that, without the TSA Side Arrangements, might leave parliament and the public feeling less confident about the appropriateness of ceding sovereignty through the TSA. The TSA Side Arrangements respect the obligations of Australian authorities in carrying out and enforcing Australia's laws.

For example:

- Article III, para 4 introduces a role that could be called a 'Technology Safeguards Officer' to oversee the exchange of US Technical Data. There is no more detail on the eligibility criteria or powers associated with such a role, which causes concern as to the extent of powers of this individual. A further Side Arrangement could resolve this.
- Article III, para 7 determines that it is for Australia to assess the 'sufficiency' of information provided by the US for an activity covered by the TSA, in order for the Australian Space Agency to determine whether to issue a licence, permit or authorisation. To expediate such a decision, a side arrangement should be considered which provides that the US Government will consider favourably any requests for further information and facilitate the provision of such further information.

5. Restrictions on Activities

We recognise the Australian Government's efforts to ensure that the TSA does not impose excessive restrictions on Australian activities or capabilities, as well ensuring Australia can continue to host activities from other countries which do not fall under the TSA.

Despite this, we note that there will be concerns on the part of some Australian stakeholders regarding the restriction on the use of funds raised in connection with TSA-covered launch activities in Article III(2). There may be a perception that the Australian space sector will be denied benefits from these funds, since the Australian government cannot directly invest in space activities with these funds. The exception to allow for funds to be transferred to consolidated federal revenue with no subsequent restrictions on usage of those funds may overcome any material concerns. This will need to be consistently reiterated to avoid perceptions on Australian ceding sovereignty in this regard.

The establishment of controlled and segregated areas also raise preliminary concerns. This may be exacerbated by the fact that existing spaceports in Australia are all on Indigenous lands, and some projects, in particular in the Northern Territory and South Australia, have required concerted engagement with Indigenous communities and corporations. The potential - whether real or perceived - that US personnel will have special, protected and unrestricted access to areas of cultural importance, will need to be carefully managed through genuine, full and proper engagement with all Indigenous partners.

Overall, the underlying rationale for the establishment of these US-personnel only areas are reasonable and the exceptions to allow for Australian authorities to have access when carrying out statutory functions is appropriate. Again, clear communication is needed regarding the reasons for these restrictions, and the fact that all US space activities will still be subject to Australian law, to alleviate concerns for ceding sovereignty.

6. Restrictions on Governmental Functions

We acknowledge that several provisions of the TSA will impact on how Australian Governmental activities are to occur. This includes potential changes to customs clearance procedures for technology falling within the scope of the TSA, access to and inspection of equipment in segregated areas, and variations to how accidents or incidents (within the meaning of the *Space (Launches and Returns) Act 2018*) are investigated.

The materials released by the Australian Space Agency, in conjunction with the side arrangement dated 15 February 2024 and the drafting of the TSA itself suggests that the Australian Government is confident that all relevant national security, sovereignty and other statutory requirements have been considered. We see no reason to depart from this view. The consistent exceptions throughout the TSA that confirm the overriding application of Australian law provide comfort that US businesses importing and using captured technology in Australia will at all times remain subject to Australian law.

We hope this submission is of assistance. The ACSG would be delighted to assist the Committee's work further, including by making ourselves available to answer any questions, and by giving expert evidence to any hearings.

Sincerely,

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