



PRIV-WAR Report – Australia

National Reports Series 10/09

**Australian Report
on National Legislation and Judicial Practice**

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PRIV-WAR

Regulating privatisation of “war”: the role of the EU in assuring the compliance
with international humanitarian law and human rights

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1. Scope of the Report

This Australian National Report has been prepared in the context of the Project ‘Regulating Privatisation of War: The Role of the EU in Assuring Compliance with International Humanitarian Law and Human Rights’ (PRIV-WAR) conducted under the auspices of the European University Institute’s Academy of European Law. The Report considers the Australian approach to the national legal regulation of Private Military Companies (PMCs) and Private Security Companies (PSCs). Despite the increasing tendency of Western Governments to respond to the increasing prevalence of PMCs and PSCs on military operations by reviewing regulatory frameworks applicable to the activities of such entities, Australian Government policy in relation to the regulation of PMCs and PSCs has been in something of a ‘holding pattern’ pending the outcome of the Montreux Process. Now that the Montreux Document has been adopted, the Australian Government will need to consider its policy position and eventually to undertake legislative reform.

2. The Australian Private Military and Security Industry

The Australian private military and security industry is a relatively small player in the global marketplace. The Australian military with 52,000 uniformed members is a relatively small force and, as a consequence, the scale of military support services available for contract is limited. In addition, there has been governmental resistance in this country to contract out direct military services – in contrast to the readiness of some of Australia’s major military allies to do so.

The scale of contracts on offer for military support services is dwarfed by the amounts of money expended on procurement of military hardware. The Australian Government has not privatised military production entirely and has, instead, maintained a government-owned manufacturing capability. However, for many years government-owned entities have been forced to compete on a ‘level-playing field’ basis with the corporate military production industry for Australian Defence Force (ADF) military equipment. The policy of competitive tendering for the supply and technical upgrading of military equipment has spawned a significant presence of Australian companies, Australian subsidiaries of multinational corporations and international companies in the marketplace of the Australian military industry. While billions of dollars are committed to hardware procurement contracts (eg – the manufacture in Australia of four new naval destroyer-class warships or even more recently the announcement of a program to secure the manufacture in Australia of a new class of non-nuclear-powered submarines), the amounts are significantly less for the contracting of services to the private military and security industry.

Australian companies and subsidiaries of international corporations offering military and security services are, understandably, fewer in number than those in the market for the supply of military hardware. However, a surprising number of international corporations do have subsidiaries with representative offices in Australia.

These include Unity Risk (Sydney), DynCorp (Aust) Pty Ltd (Canberra), Agility Logistics Pty Ltd (Brisbane, Canberra and Perth), Kellogg Brown and Root Pty Ltd (Adelaide, Brisbane, Canberra, Melbourne, Perth and Sydney), BAE Systems (Australia) Ltd (many locations around Australia) and Hart Aviation (Canberra, Melbourne and Perth). Other international corporations have established partnerships with Australian companies. A leading example is the US corporation Insitu Inc. in partnership with Boeing Australia. It has been suggested anecdotally that at least some of these corporations maintain Australian offices in order to identify and recruit highly-trained current and former ADF military members – particularly members of special forces. No known data exists on the precise number of Australian civilians currently working for international corporations in direct military roles around the world but the popular view is that there are more than the ADF would care to admit. The reality of large numbers of Australian civilians working for PMCs and PSCs is perhaps a more challenging issue for legal regulation than the activities of PMCs and PSCs providing services to Australian Government Agencies.

The notion of private contractors providing logistic support services to the ADF is far from novel. Consider the following example almost 100 years ago:

On 1 November 1914, less than ninety days after the start of World War I, the initial Australian and New Zealand contingent of 21,529 men and 7,882 horses departed Fremantle aboard thirty-eight merchantmen that had hastily been converted into transports. ... [E]very one of those transports was a civilian-crewed merchant vessel, as were the ships that six months later took the same troops from Palestine to Gallipoli, where many were landed in lifeboats manned by merchant sailors. Australia has always relied on private assets and civilians to directly support its military endeavours, especially in the mass mobilisations of the 20th century.¹

The ADF, consistently with most other national militaries from economically developed countries, has increasingly contracted a broader range of services to the private sector beyond troop carriage by merchant vessel or civilian aircraft.² The Australian experience of greater private sector efficiency at reduced economic cost across a range of services is all too familiar to many other Western militaries. However, unlike some of its major military allies – the US, the UK and Canada in particular – the ADF has taken a more cautious approach to the range of activities it has been prepared to devolve. Most importantly, the ADF has maintained the practice of refusing to contract out to private corporations any direct military functions on ADF deployments outside of Australia. So, for example, the provision of armed security to Australian diplomatic personnel in Baghdad has consistently been the responsibility of an ADF contingent and not a private security company. The policy has not only required the allocation of ADF resources to security tasks but has also required the ADF to take responsibility for the protection of its private contractor personnel on deployment and,

¹ Peter Jennings, 'Director's Introduction' in Mark Thomson, *War and Profit: Doing Business on the Battlefield*, Australian Strategic Policy Institute Strategy Paper (March 2005), 1.

² See Mark Forbes, 'Privatised Future of the War Zone' *The Age*, 31 March 2005, where the author claims that: 'Nearly two-thirds of non-core defence functions, including catering, base support, maintenance and some pilot training, has been privatised in Australia.'

to date, the ADF has consistently allocated the necessary resources to ensure such protection. The practice of the ADF on overseas deployments is consistent with its approach domestically. Although ‘gate-keeping’ security at most Defence bases and establishments in Australia is provided by private companies, security at the most sensitive establishments is conducted by personnel from the Australian Protective Services – an arm of the Australian Federal Police.

The implementation of the policy of ADF-only resort to lethal force on overseas deployments obviously leads to some strict limitations on the range of services the ADF is able to contract out. The majority of contracts are for logistics support including, for example, air and sea transportation, rotary wing aviation, catering and accommodation, cleaning and laundry, fleet and camp maintenance, vehicle repair and maintenance, fuel procurement, storage and handling, and dental and medical services.³

Other Australian Government agencies appear to operate on the basis of the same practice as the ADF. The Australian Federal Police are increasingly deployed on missions in Timor Leste, Papua New Guinea and the Solomon Islands because the instability in those particular nations requires the application of effective policing functions more than a military response. In the particular case of the multilateral Forum of Pacific Island Nations States Regional Assistance to the Solomon Islands (RAMSI) Mission, the lead nation is Australia through the Australian Federal Police. One of the highest public profile current private contracts is an AUD 49 million per annum arrangement for the delivery of logistics support (garrison support, medical and dental services, land, sea and air transportation, catering, and vehicle and equipment repair and maintenance services) to the RAMSI Mission.⁴ Although gate-keeping security services for the RAMSI base are provided by a local private security company in Honiara, those personnel remain unarmed and the Australian Protective Services maintain a presence at the base for any escalation in security threat. AusAID (the Australian Government Overseas Aid Agency) does not contract out security services. However, to the extent that organisations undertaking AusAID-funded overseas aid and development projects require security for their personnel in the program country, AusAID leaves it to the project deliverer to organise its own security services.

Since the adoption of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (Montreux Document),⁵ Australian Government Agencies have been reviewing their procurement contracting processes to ensure that they are acting consistently with the Montreux Document. Australia’s

³ One of the major Australian companies providing defence logistics support is PDL Toll – a subsidiary of the Australian transport conglomerate Toll Holdings. PDL Toll maintains a website with extensive information about the range of services the company offers as well as case-study specific information about company services in particular situations. See www.pdltoll.com for more details.

⁴ See Mark Forbes, ‘Privatised Future of the War Zone’ *The Age* (31 March 2005). The successful tenderer for the contract was PDL Toll. To view PDL Toll’s case study on its support services to the RAMSI Mission in the Solomon Islands see: www.pdltoll.com/case-studies/the-solomon-islands/

⁵ For the text of the Montreux Document see:

<http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908>

participation in the Montreux Process has certainly galvanised attention on the issue of Australian utilisation of the services of PMCs and PSCs.

There are a number of Australian national companies in the marketplace for Defence and other Australian Government Agency contracts. Toll PDL (formerly Patrick Defence Logistics) and ATACS are 2 leading examples. To date there is no peak industry body in Australia – unlike the peak bodies in the US and the UK – the International Peace Operations Association (IPOA) and the British Association of Private Security Companies (BAPSC) respectively. The US parent companies of the Australian subsidiaries referred to above are all members of IPOA. One Australian-owned company – Unity Resources Group – has chosen to establish its international headquarters in Dubai rather than in Australia. Presumably the corporation believes that it can significantly increase its international market share by establishing itself in the Middle East. Unity Resources is a member of IPOA and, as such, subscribes to the Association’s Code of Conduct.⁶

3. Domestic Security and Investigation Services

The Australian domestic security and investigation services industry is large and heavily regulated. The peak national professional body is the Australian Security Industry Association Limited⁷ and virtually all providers of security services in Australia are members of the Association. All members commit themselves to a Code of Professional Conduct.⁸

In the Australian system of federalism the legal regulation of domestic security is the responsibility of the State and Territory Governments and not of the Australian Federal Government. Consequently, there is no single national legislative framework for the regulation of the industry. Service providers must comply with legislative requirements for registration and licensing in each of the respective Australian States and Territories in which they seek to operate.⁹ Although the existence of eight separate legislative regimes (six States and two Territories) may appear cumbersome, there is sufficient uniformity of approach across the eight jurisdictions to warrant at least some security service providers offering their services across the entire nation. In particular, all Australian jurisdictions require all security personnel to be registered and licensed individually and, in addition, most jurisdictions also require security companies to be registered and licensed.

The reality of eight separate legislative regimes guarantees some disparity in the legal definitions of security services. For example, the definition of a ‘security activity’ subject to legal regulation in the State of New South Wales (NSW) is extremely

⁶ See the IPOA website at: <http://ipoaworld.org/eng/unity.html>

⁷ See www.asial.com.au

⁸ For text of the Code of Conduct see: www.asial.com.au/Codeofconduct

⁹ For a list of the eight separate legislative regimes with links to the relevant legislation see: www.asial.com.au/Legislationandregulations

detailed.¹⁰ In contrast, the definitions of ‘crowd control activities’ and ‘security guard activities’ subject to legal regulation in the State of Tasmania are couched in general terms and are significantly less detailed.¹¹

4. Regulation of Armed Force

There is no general constitutional (or other legal) right to bear arms in Australia and possession, ownership and use of guns and other lethal weapons is strictly regulated. As with legislation governing private security services, the federal system of government in Australia allocates responsibility for the regulation of armed force to the States and Territories and not to the Federal Government. Consequently there is no Australian national register of firearms and there are eight separate legislative enactments for the legal regulation of firearms. However, in contrast with disparate approaches to the legal regulation of the domestic security industry, the Australian States and Territories have established and uniformly implemented a consistent system of firearm regulation – the prohibition of private ownership of automatic and other military-style weapons and strict registration and owner-licensing of other types of weapons. A massacre of 34 individuals by a lone gunman possessing unregistered automatic and semi-automatic weapons at Port Arthur in Tasmania in April 1996 provided the catalyst for unprecedented national co-operation in relation to gun control. Since 1996, all State and Territory Police Departments maintain registries of firearm ownership within their respective jurisdictions.¹²

Australian firearms legislation does not apply extraterritorially. Consequently, PMCs and/or PSCs operating outside of Australia would not automatically be governed by this legislation. As indicated above, the Australian Government does not contract out armed security services. If Government practice were to change, presumably the procurement contract could obligate the successful service provider to comply with Australian firearms legislation. This is certainly an issue which will need to be resolved if Australian Government practice on contracting out armed security services is to change.

5. Government Procurement

Any PMCs and/or PSCs established in, or otherwise operating in, Australia will be subject to Australian domestic corporations law, labour law, occupational health and safety obligations, anti-discrimination legislation etc. However, it is not the case that

¹⁰ See Section 4 of the *Security Industry Act 1997 (NSW)* available at:

http://www.austlii.edu.au/au/legis/nsw/consol_act/sia1997255/s4.html

¹¹ See Section 3A and 3B of the *Security and Investigation Agents Act 2002 (Tasmania)* available at:

http://www.austlii.edu.au/au/legis/tas/consol_act/saiaa2002378/s3a.html and at

http://www.austlii.edu.au/au/legis/tas/consol_act/saiaa2002378/s3b.html respectively.

¹² For a list of all eight legislative regimes for the control of firearms see:

<http://www.asial.com.au/Firearms>

extra-territorial activities by those same corporations will be covered by the same Australian domestic legislative framework.

In the absence of a specific Australian legislative framework to regulate the activities of PMCs and PSCs, the most effective control on their activities is the procurement contract process. The Australian Government is committed to a strict policy of open tendering for its procurement contracts in order to achieve value for money by encouraging competition and to ensure transparency, accountability and effective, efficient and ethical use of public funds. Open tendering in this context extends to include non-discrimination against foreign corporations – provided that applicable national legislation or other relevant foreign government policy is not inconsistent with the Australian Government Procurement Guidelines. The Procurement Guidelines have been promulgated by the Australian Department of Finance and Deregulation. All Australian Government Departments and Agencies must comply with the Guidelines in their tendering for procurement contracts.¹³ *Inter alia*, the Guidelines require tendering Departments and Agencies to include specific contractual clauses insisting upon compliance with relevant Australian legislation.

The approach of AusAID, the Australian Government's Overseas Aid Agency, is illustrative here. AusAID advertises a list of Commonwealth legislation for prospective tenderers to consider even before they expend any effort in the preparation of tender documentation.¹⁴ The possible exclusion from consideration for procurement contracts is undoubtedly the most effective incentive for compliance with various legislative enactments. Those corporations which have secured procurement contracts – particularly for military and police logistics support – certainly will not want to prejudice their prospects for additional future contracts. Their ongoing compliance with relevant legislation will constitute a key performance indicator in establishing a positive track record as they contemplate bids for further contracts. The Department of Defence and the Australian Federal Police follow similar procurement practices to AusAID.

6. Criminal Responsibility

Australia currently lacks a specific regulatory framework for any criminal activities of PMCs and PSCs. This lack of a specific regime has been the subject of calls for rectification.¹⁵ Generally Australia's domestic criminal law applies to offences occurring within the physical territory of Australia unless particular legislation provides for a broader scope of application. There are, of course, multiple examples of Australian criminal legislation applying extra-territorially on the basis of Australian

¹³ The Guidelines are publicly available at:

<http://www.finance.gov.au/publications/fmg-series/docs/CPGs-2008.pdf>

¹⁴ See List of Laws and Guidelines for Contractors Undertaking Activities for AusAID at:

http://www.usaid.gov.au/business/pdf/Lists_of_Laws_and_Guidelines_for_Contractors.pdf

¹⁵ See, for example, Mark Thomson, *War and Profit: Doing Business on the Battlefield*, Australian Strategic Policy Institute Strategy Paper (March 2005), 49.

nationality and, in certain cases, on the basis of universal jurisdiction. Some of those criminal laws are relevant to the legal regulation of the activities of PMCs and PSCs.

A *Defence Force Discipline Act 1982*¹⁶ and ‘Defence Civilians’

The *Defence Force Discipline Act 1982* provides the principal legal framework for Australian military discipline and justice. Sections 9 and 61 of the Act extend the application of Australian criminal law to the acts of ADF members not only in Australia but wherever those members are deployed in the world. These are fundamentally important provisions because Australian Status of Forces Agreements routinely reserve criminal jurisdiction over military personnel to the Australian Government rendering ADF members immune from host-nation criminal jurisdiction. In securing the primacy of national jurisdiction, it is important that the domestic legislative basis exists to hold ADF members accountable for any perpetration of international crimes.

For the purposes of the present project, it is important to also note that this legislation establishes a process for the extension of Australia’s criminal law to civilians, including private contractors, accompanying the ADF on deployments external to Australia. The mechanism allows for the designation ‘defence civilian’ for anyone not a defence force member, who:

- (a) with the authority of an authorized officer, accompanies a part of the Defence Force that is:
 - (i) outside Australia;
 - (ii) on operations against the enemy; and
- (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.

This act prohibits defence civilians from engaging in certain specified military service offences and, pursuant to Sections 9 and 61, also provides for the extraterritorial application of Australian criminal law to the acts of defence civilians. Although defence civilians are not bound by all the details of the military discipline regime of the Act, they are covered by the extra-territorial extension of Australian criminal law and can be prosecuted in Australian courts accordingly. It is significant that there is no requirement that a ‘defence civilian’ be an Australian citizen or permanent resident.

The ADF routinely utilises the ‘defence civilian’ mechanism on its military deployments but the characterisation is not compulsory and individuals can opt not to be so characterised. In practical terms, the choice not to be characterised as an Australian ‘defence civilian’ may not create problems of lack of accountability structures provided any Australian Status of Forces Agreement (SOFA) does not cover such individuals and that they are subject to host nation criminal law.¹⁷

¹⁶ For the text of the legislation see: http://www.austlii.edu.au/au/legis/cth/consol_act/dfda1982188/

¹⁷ Mark Thomson, above note 15, 46.

Section 10 of the *Defence Force Discipline Act 1982* specifies that Chapter 2 of the Australian Federal *Criminal Code Act 1995* on ‘General Principles of Criminal Responsibility’ applies to offences under the legislation. Part 5 of Chapter 2 of the *Code* extends application of all offences to bodies corporate including even those that are punishable by imprisonment. It is difficult to imagine the designation of a corporation as a ‘defence civilian’ but if that were possible the legislation makes it clear that such a corporation could be convicted of criminal offences.

It is important to note that the ‘defence civilian’ characterisation does not apply to the personnel of PMCs and/or PSCs contracted by Australian Government agencies other than the Department of Defence.

B Crimes (Overseas) Act 1964

Aware of the increasing utilisation by various Australian Government agencies other than Defence of services provided by PMCs and PSCs, and conscious of the non-applicability of the *Defence Force Discipline Act 1982* to those involved in delivering such service, the Australian Government amended the *Crimes (Overseas) Act 1964* to ensure broader legal regulation. The *Crimes (Overseas) Act 1964* now extends the application of Australian criminal law extra-territorially to the acts of Australian citizens and permanent residents in certain specified circumstances.¹⁸

Section 3A(10) explicitly excludes the application of the legislation to the acts of ADF members or Australian Secret Intelligence personnel. However, in other relevant provisions of Section 3A, it is clear that the legislation does apply to those Australians who enjoy immunity from host-State criminal law (diplomatic, consular or multilateral organisational immunity or some other agreement which precludes prosecution in the domestic courts of the host-State). The legislation also applies to those Australians who are engaged by one or other Australian government agency to undertake tasks in countries external to Australia. It is this latter scope of application of the legislation that extends the reach of Australian criminal law to the acts of PMC and/or PSC personnel engaged by government agencies other than the Department of Defence.

The *Crimes (Overseas) Act 1964* may also apply to the acts of Australians employed by PMCs and PSCs engaged by foreign governments or by international organisations. However, at present the legislation does not extend to foreign nationals – even where those foreign nationals are employed by Australian PMCs and/or PSCs. It is not difficult to conceive scenarios in which this lacuna in the scope of application of Australian law may well prove to be problematic. The Australian Strategic Policy Institute suggests the following hypothetical scenario:

For example, in Iraq until at least late 2004, contractors working for Australian Government agencies were immune from Iraqi law for acts performed under contract. Suppose a crime were alleged to have been

¹⁸ For the text of the legislation see: http://www.austlii.edu.au/au/legis/cth/consol_act/ca1964178/

committed by a foreign security guard under contract to the Australian Government, perhaps even a guard working for an Australian firm. Unless the guard's home state was willing and able to prosecute them or waive immunity under Iraqi law, the accused wouldn't face trial. This could be very embarrassing if the crime were particularly serious.¹⁹

Again, Section 4 of the *Crimes (Overseas) Act 1964* incorporates Part 2 of the *Criminal Code* such that offences under the legislation apply to bodies corporate as much as they do to individuals. Consequently, an Australian PMC or PSC undertaking proscribed activity in a foreign country or a PMC or PSC registered in Australia or in any other country in the world but engaged in proscribed activities in Australia could be subjected to criminal prosecution pursuant to the *Crimes (Overseas) Act 1964*.

C *Crimes (Foreign Incursions and Recruitment) Act 1978*

The motivation for the enactment of the *Crimes (Foreign Incursions and Recruitment) Act 1978*²⁰ was to criminalise mercenarism by Australian nationals lured by lucrative financial gains particularly in African civil conflicts. The original legislation made it an offence for Australians to engage in unauthorised armed activity against a foreign government.

In November 2001 the Australian, David Hicks, was captured by Northern Alliance fighters in Afghanistan and handed over to US forces. In January 2002 Hicks was transferred to Guantánamo Bay, Cuba and held there for more than 5 years pending trial by US Military Commission. Throughout the years of incarceration, the repeated claims of abuse and mistreatment, and the persistent criticism of the lack of fair trial rights in the Military Commission process, there was sustained debate in Australia about whether or not Hicks could have been tried under Australian law in relation to his involvement in Al Qaeda and his armed support for the Taliban. The Australian Attorney-General indicated his view that the *Crimes (Foreign Incursions and Recruitment) Act 1978* did not provide a legislative basis for the Australian prosecution of Hicks. While David Hicks was in Afghanistan he had armed and prepared himself to fight in support of the Government of that country – the Taliban. The fact that Australia did not recognise the Taliban as the legitimate government of Afghanistan did not remedy the limited scope of application of the legislation. David Hicks had not been in Afghanistan to overthrow the government of that country and Australian prosecution of his alleged crimes could only have been undertaken in violation of the principle *nullem crimen sine lege*.

While David Hicks was incarcerated in Guantánamo Bay, the Australian Government amended the *Crimes (Foreign Incursions and Recruitment) Act 1978* to broaden the scope of application of the legislation and to ensure that any Australians wishing to engage in future activities akin to those of David Hicks could indeed be tried

¹⁹ Mark Thomson, above note 15, 46-47.

²⁰ For the text of the legislation see: http://www.austlii.edu.au/au/legis/cth/consol_act/ciara1978431/

pursuant to Australian domestic criminal law. Since 2004 the legislation criminalises the act of an Australian national entering a foreign State (or preparing to travel to a foreign State) intending to engage in, or actually engaging in, armed hostilities to overthrow a foreign government or to support a terrorist organisation (or other proscribed purpose). The legislation also criminalises the recruitment of people in Australia to engage in any of the proscribed activities and goes as far as to prohibit any attempt to recruit people in Australia for armed hostility in a foreign country, including as part of the armed forces of the government of a foreign country, without the express approval of the Australian Defence Minister.

The *Crimes (Foreign Incursions and Recruitment) Act 1978* only has limited relevance to the activities of PMCs and PSCs. A company that recruited or attempted to recruit Australians to travel overseas to engage in armed hostilities to overthrow a foreign Government would clearly be covered by the legislation. Ironically though, the activities of Australian employees of a company that provided armed assistance to Zimbabwean President Robert Mugabe, or the Fijian coup-leader, Commodore Frank Bainimarama, might not be covered by the amended legislation.

D *The Need for A Specific Legal Regime?*

Mark Thomson of the Australian Strategic Policy Institute has called for a specific Australian legal regime to regulate the activities of PMCs and PSCs. Thomson claims that:

What is needed is a precision tool – a regulatory regime that controls *what* services can be provided and *when* those services may be provided. In practice this won't be easy, given the global nature of the private military/security sector and the hazy distinction between routine commercial services and, for example, military logistics and communications. On a purely legal basis, however, the Commonwealth's powers are more than adequate to legislate in a similar manner to the *Crimes (Foreign Incursions and Recruitment) Act 1978*.²¹

In the author's view, Thomson's call for the need for a specific legal regime is both timely and appropriate. The existing legislative framework – the designation of 'defence civilians' in the *Defence Force Discipline Act 1982*, the *Crimes (Overseas) Act 1964* and the *Crimes (Foreign Incursions and Recruitment) Act 1978* – is neither comprehensive in scope nor specifically directed towards the activities of PMCs and/or PSCs. A specific and comprehensive legal framework is desirable despite the complexities of the range of activities in need of regulation. The Australian Federal Government unquestionably possesses the constitutional authority to enact such legislation. Thomson goes further by explaining that there is an existing precedent in the Australian approach to preventing the proliferation of weapons of mass destruction:

[C]lear precedents exist. Australia already places stringent export controls on general military hardware and militarily applicable technology, and specific measures are in place to control the export of both goods and services that may assist the proliferation of weapons

²¹ Mark Thomson, above note 15, 49 (emphasis added).

of mass destruction. Thus, there appears to be no legal impediment to legislation controlling the export of military services in general.²²

Thomson's chosen example of an existing comprehensive and specific legal regime is an excellent one. The *Crimes (Biological Weapons) Act 1976*, the *Nuclear Non-Proliferation (Safeguards) Act 1987* and the *Chemical Weapons (Prohibition) Act 1994* implement Australia's treaty obligations pursuant to the Biological Weapons Convention (BWC), the Nuclear Non-Proliferation Treaty (NPT) and the Chemical Weapons Convention (CWC) respectively. All three Acts introduce a range of criminal offences for violations of the respective treaties. In the case of both the nuclear and the chemical weapons legislation there are additional elaborate schemes for the issuance of permits to work with certain specified nuclear materials or chemicals enabling the Australian Government to be confident of compliance with its reporting and declaration obligations under the NPT and the CWC treaty regimes. Importantly, all three Acts are complemented by the *Export Control Act 1982* – a separate and general legislative enactment - which imposes strict requirements on corporations and individuals intending to export certain specified substances.

While all of the above-mentioned Acts implement Australia's multilateral treaty obligations, there is an additional legislative enactment that extends Australian law significantly further than existing treaty obligations. The *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* is intended to provide a catch-all legislative framework to maximise the chances of ensuring that no Australian national or corporation engages in any activity that may, even inadvertently, assist the development of a foreign weapons of mass destruction (WMD) capability. The Act achieves this objective by requiring a ministerial permit for the export of any goods or services to another country or organisation which may assist such a capability. The onus in the legislation is very much on the would-be exporter to seek ministerial permission in the case of any doubt about potential end-use of the exported material. Failure to apply for ministerial permission in any relevant case is itself an offence under the legislation. This is a strict legal regime and, from the perspective of successive national Governments, the possibility of embarrassment from inadvertent Australian support for a foreign WMD capability warrants comprehensive and strict legal regulation.

For present purposes it is intriguing to observe the comprehensive nature of the specific legal regime that results from the existence of firm resolve to ensure a particular policy outcome. If a similar level of resolve existed in relation to the particular problem of the legal regulation of the criminal activities of PMCs and PSCs, there is no doubt that an effective legal regime could materialise.

7. Civil Liability

Although the criminal law applicable extra-territorially to the acts of Australian nationals and Australian companies is *ad hoc* and patchy, there is at least some

²² *Ibid.*

legislation potentially relevant to the activities of PMCs and PSCs and their personnel. In contrast, the potential for civil liability for the activities of PMCs and PSCs and/or the actions of their personnel is minimal. Australian contract law may well apply extra-territorially in the sense that parties can enter into a binding contract in Australia for services provided overseas. Any alleged breach of the contract can be litigated in Australian courts. However, tortious liability in Australia does not extend extra-territorially in the absence of specific legislative provision to that effect. The author has been unable to locate any examples of liability in tort in Australian legislation for the acts of Australian companies or individual Australian citizens conducted in foreign countries. There may well be legal causes of action pursuant to host-country law but Australia does not have equivalent legislation to other Common Law countries – particularly the US and the UK. Australia has no legislation approximating the US Alien Tort Statute for example. The UK has legislated to give effect to obligations pursuant to the European Convention on Human Rights. The UK Ministry of Defence conceded that British forces had violated Article 2 of the Convention by causing the death in custody of the young Iraqi national Baha Moussa. In acknowledgement of that violation of rights enshrined in UK legislation the Ministry of Defence agreed to pay monetary compensation to Moussa’s family following their instigation of civil litigation in UK courts.²³ There is no similar legislative basis for tortious action against a PMC or PSC in Australian law.

8. Relevant Case Law

The Australian Government has had no cause to date to prosecute PMCs or PSCs or, indeed, to prosecute any incidence of mercenarism in this country. As far as the author has been able to determine, no prosecutions are currently pending or even contemplated. In relation to mercenarism, the existence of the *Crimes (Foreign Incursions and Recruitment) Act 1978* may well act as an effective deterrent to any overt program of recruitment of Australian nationals for mercenary activity elsewhere in the world. In relation to the activities of PMCs and PSCs, the lack of any need for litigation probably has much to do with the limited range of support services contracted out to the private industry. The high public profile cases such as that involving Blackwater security guards shooting Iraqi civilians, for example, have not occurred in Australia primarily because of the cautious refusal of the ADF to contract out the use of lethal force in military operations overseas.

Intriguingly there has been litigation in Australia related to mercenarism although the use of mercenaries in the case had no direct link to Australia.

²³ For more details of this tragic story see:

<http://www.telegraph.co.uk/news/uknews/1583030/MoD-to-pay-compensation-for-death-of-Iraqi-prisoner-Baha-Moussa.html>

A *The Sandline Affair*

Early in 1997, following more than a decade of unsuccessful attempts to suppress the Bougainville Revolutionary Army (BRA), a secessionist force on the island of Bougainville in Papua New Guinea (PNG), a desperate PNG Government engaged the private military firm Sandline International to equip, train and assist the Papua New Guinea Defence Force (PNGDF) to conduct a special military operation to finally defeat the BRA. Many governments, particularly Australia, New Zealand and other regional governments, protested their opposition to the resort to mercenarism as a military solution to the Bougainville conflict. The introduction of mercenaries into the South Pacific was considered a serious threat to regional stability and a dangerous precedent for other regional governments faced with domestic tensions.²⁴

The Prime Minister of PNG, Sir Julius Chan, attempted to portray the engagement of Sandline as a strategy to develop the capabilities of the PNGDF and to force the BRA to negotiate an end to the Bougainville conflict. He argued that Sandline had only been engaged for training purposes and he strenuously refuted the applicability of the “mercenary” tag to describe the contractual relationship.²⁵

However, the actual terms of the contract between PNG and Sandline²⁶ undermined the Prime Minister’s attempts to re-characterise the nature of Sandline’s proposed involvement in the conflict. The PNG Government agreed to pay Sandline USD 36 million and to negotiate a joint venture involving Sandline and the PNG Government in relation to the Panguna copper mine once the mine, closed because of the hostilities on the island, was back in operation.²⁷ In return, Sandline undertook to provide extensive supplies of sophisticated weaponry and ammunition and to “conduct offensive operations in conjunction with PNG defence forces” in order to quell the BRA and to repossess the Panguna copper mine. Similarly, Port Moresby agreed to “issu[e] instructions to PNG defence forces personnel to cooperate fully with Sandline commanders and their nominated representatives” and undertook “to ensure that full cooperation is provided from within its organisation and that of the PNG defence forces.” Responsibilities for initiating planning cooperation between PNG commanders and Sandline commanders were also undertaken by the government.

Although Sandline professed to be available for hire only to recognised governments and to act in accordance with the Geneva Conventions, such claims failed

²⁴ Background Notes 1988 – 1997: Bougainville, *Department of Foreign Affairs and Trade*, http://www.dfat.gov.au/geo/spacific/png/png_bg.html. For more detail on the Sandline Affair see T. McCormack, ‘The ‘Sandline Affair’: Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict’ (1998) 1 *Yearbook of International Humanitarian Law* 292-300

²⁵ Statement by Sir Julius Chan reported in *The Age*, 19 March 1997. See also statement by Sandline reported in *Sydney Morning Herald*, 27 Feb 1997.

²⁶ The text of the agreement, which has been in the public domain for some years, is available at: <http://coombs.anu.edu.au/SpecialProj/PNG/htmls/Sandline.html>

²⁷ Sir Julius Chan’s vision for Bougainville had included a plan for the PNG Government to purchase CRA’s controlling share in the Panguna mine and to reopen and operate the mine once the military operation had successfully restored PNGDF control of Bougainville.

to obscure the nature of the functions Sandline were willing to perform purely for pecuniary gain.²⁸

The Sandline Agreement was derailed when the Chief of the PNGDF, Brigadier General Jerry Singirok, and other senior military officers refused to cooperate with Sandline staff and publicly condemned the contractual arrangement.²⁹ Soldiers who had not received pay and adequate equipment for months were unwilling to work with Sandline staff following disclosure of the amounts of money to be paid to Sandline. The PNGDF made significant allegations of corruption against the government generally, and against Sir Julius Chan personally. These allegations were subsequently raised in the PNG Parliament during debate on the motion for the Prime Minister to step down temporarily from office pending the outcome of a judicial inquiry. The Sandline contract was prematurely terminated as a consequence of widespread PNGDF opposition. PNGDF members went as far as to detain some Sandline employees in their barracks at the Sepik army training camp.³⁰ General Singirok was dismissed by the government for ‘gross insubordination bordering on treason’,³¹ and his acting replacement was ordered to release all Sandline employees. The head of Sandline International and of the PNG operation, Tim Spicer, was arrested on a firearms charge,³² but charges against him were later dropped.³³

Although the Australian Government supported the right of the democratically elected government of PNG to dismiss Singirok, it continued to make wide-ranging criticisms of the contract entered into with Sandline.³⁴ The sacking of General Singirok provoked a public revolt with thousands of civilians engaged in rioting, looting and protest in the streets of Port Moresby. The PNG government, battered by criticism from outside the country as well as from the PNGDF and citizens within the country, announced that the cancellation of the contract with Sandline would be “considered”.³⁵ On 18 March 1997, Sandline employees began to leave PNG.³⁶

The PNG Parliament voted to institute a formal judicial inquiry into the negotiations and procedures by which Sandline was hired and the way in which the arrangement was to be financed. The inquiry was headed by the Australian-born judge of the Papua New Guinean Supreme Court, Warwick Andrew.³⁷ Sir Julius Chan agreed to stand down temporarily as Prime Minister during the inquiry. Sir Julius announced

²⁸ The Sandline Contract with the PNG government included this claim by Sandline. However, the terms of the contract itself indicated the intention of the parties for Sandline personnel to engage in operational and command activities, not merely in training in the use of particular weaponry.

²⁹ Statement by Sir Julius Chan reported in *The Age*, 18 March 1997.

³⁰ *PNG Post-Courier*, Niuswire, 19 March 1997.

³¹ Statement by Sir Julius Chan reported in *The Age*, 19 March 1997.

³² See *Sydney Morning Herald*, 1 April 1997.

³³ *BBC Online*, 19 January 1998.

³⁴ See statements by the Australian Minister for Foreign Affairs and Trade, Mr Downer, reported in *Sydney Morning Herald*, 6 June 1997.

³⁵ See *Sydney Morning Herald*, 20 March 1997.

³⁶ See *The Age*, 18 March 1997.

³⁷ The transcripts of the inquiry are available at: <http://ww3.datec.com.pg/sandline/default.html>.

his resumption of the position of Prime Minister on 2 June 1997,³⁸ claiming exoneration by the inquiry. However, elections were held later that month and, despite the Prime Minister's best efforts to focus the campaign on local issues, the Sandline affair dominated the election. Sir Julius Chan not only lost government but ultimately lost the Parliamentary seat he had held for 29 years.³⁹

B Sandline and the Australian Courts

Pursuant to the terms of the contract between Sandline and PNG, any unresolved dispute between the parties was to be settled by arbitration applying the laws of England. Sandline initiated an independent arbitration which was conducted in Cairns, in the Australian State of Queensland, in 1998.

Counsel for PNG argued that the contract was illegal and unenforceable because it contravened the PNG Constitution. Counsel sought to rely on English legal authority in *Ralli Bros v. Cia Naviera Sota Y Aznar*⁴⁰ to the effect that, where performance of contractual obligations are illegal in the State in which performance occurs, the contract is unenforceable. The arbitral panel of Rt Hon Sir Edward Summers, Rt Hon Sir Michael Kerr and Sir Daryl Dawson rejected the argument of PNG. Instead, the members of the panel decided that the State of PNG could not seek to rely upon its own domestic illegality to avoid its contractual obligations. By entering into the contract as an independent sovereign nation State PNG had, in view of the panel members, clearly intended the contract to be governed by international law (despite the contrary explicit intention that the law of England was the applicable legal regime for the resolution of any disagreement). On the basis of international law PNG was bound by the contractual obligations it had committed itself to.

As the arbitration had been conducted in the State of Queensland, PNG was granted leave, pursuant to the Queensland *Commercial Arbitration Act 1990*, to appeal the decision to the Supreme Court of Queensland. Justice Ambrose decided that he had no jurisdiction in respect of an alleged error of foreign law. In his view, 'error of law' giving rise to a right of appeal pursuant to the *Commercial Arbitration Act 1990* can only mean an error of Queensland State or Australian national law.

Having exhausted its legal avenues of appeal, the government of PNG under its new Prime Minister Bill Skate negotiated a settlement with Sandline International by agreeing to pay the remaining USD 18 million plus interest.

³⁸ See *Sydney Morning Herald*, 6 June 1997.

³⁹ *Asia-Pacific News Network*, 2 July 1997.

⁴⁰ [1920]2 KB 287; also *R v. International Trustee for the Protection of Bondholders AG* [1937] AC 500 per Lord Wright at 519.

C Ramifications of the Sandline Affair

The Sandline Affair was clearly a damaging national experience for Papua New Guinea. Quite apart from the financial cost of in excess of USD 40 million – a huge impost for a developing economy – the incident caused massive social upheaval in the country and seriously undermined respect for Governmental authority in the PNG military. Ironically, however, the hiring of mercenaries ultimately cost Sir Julius Chan his political career and the government that replaced him was elected with a popular mandate to negotiate a peaceful settlement to the Bougainville crisis. Sandline was engaged to resolve the Bougainville dispute by military force and, instead, became the catalyst for a successful negotiation which has resulted in a lasting peaceful settlement to the long-running conflict.

Around the South Pacific Region the Sandline Affair had profound ramifications. Many smaller Pacific Island States as well the larger and heavily regionally influential New Zealand and Australia were genuinely shocked that Port Moresby was prepared to resort to mercenarism to overthrow the Bougainville Revolutionary Army. Sandline International was popularly perceived to be financially opportunistic and greedy at the expense of the best interests of economically undeveloped States. That popular perception, which evoked such social turmoil in Papua New Guinea, has produced a healthy scepticism in the region for private military companies driven solely by the motive of pecuniary gain. The ADF's policy of never contracting out the use of lethal force on military operations is, in part, explicable as a reaction to the overwhelmingly negative publicity generated by the engagement of Sandline International. In addition, both Australia and New Zealand have been much more willing to commit personnel – military and police – to operations in the South Pacific since the destructive Sandline Affair. The success of the South Pacific Regional Forum's multilateral Regional Assistance Mission to the Solomon Islands has been exemplary and certainly avoided any pressure on Honiara to contemplate the desirability of engaging private military companies to wage war on insurgent Malaitan forces.

9. Australian Government Policy on PMCs and PSCs

The Australian Government claims a commitment to ensuring respect for, and effective implementation of, international humanitarian law and, consistent with that objective, is keen to promote accountability and ethical standards in the activities of PMCs and PSCs. Australia actively participated in the Montreux Process and, in late 2008, supported the adoption of the Montreux Document. Australian Government Agencies are now working on the implementation of those elements of the Montreux Document that are relevant to the (albeit limited) Australian experience in utilizing some of the services of PMCs and PSCs. The existing Australian legislative framework is far from comprehensive. Substantial legislative reform will be required if the Australian Government wants to ensure comprehensive regulation of the activities of PMCs and PSCs.