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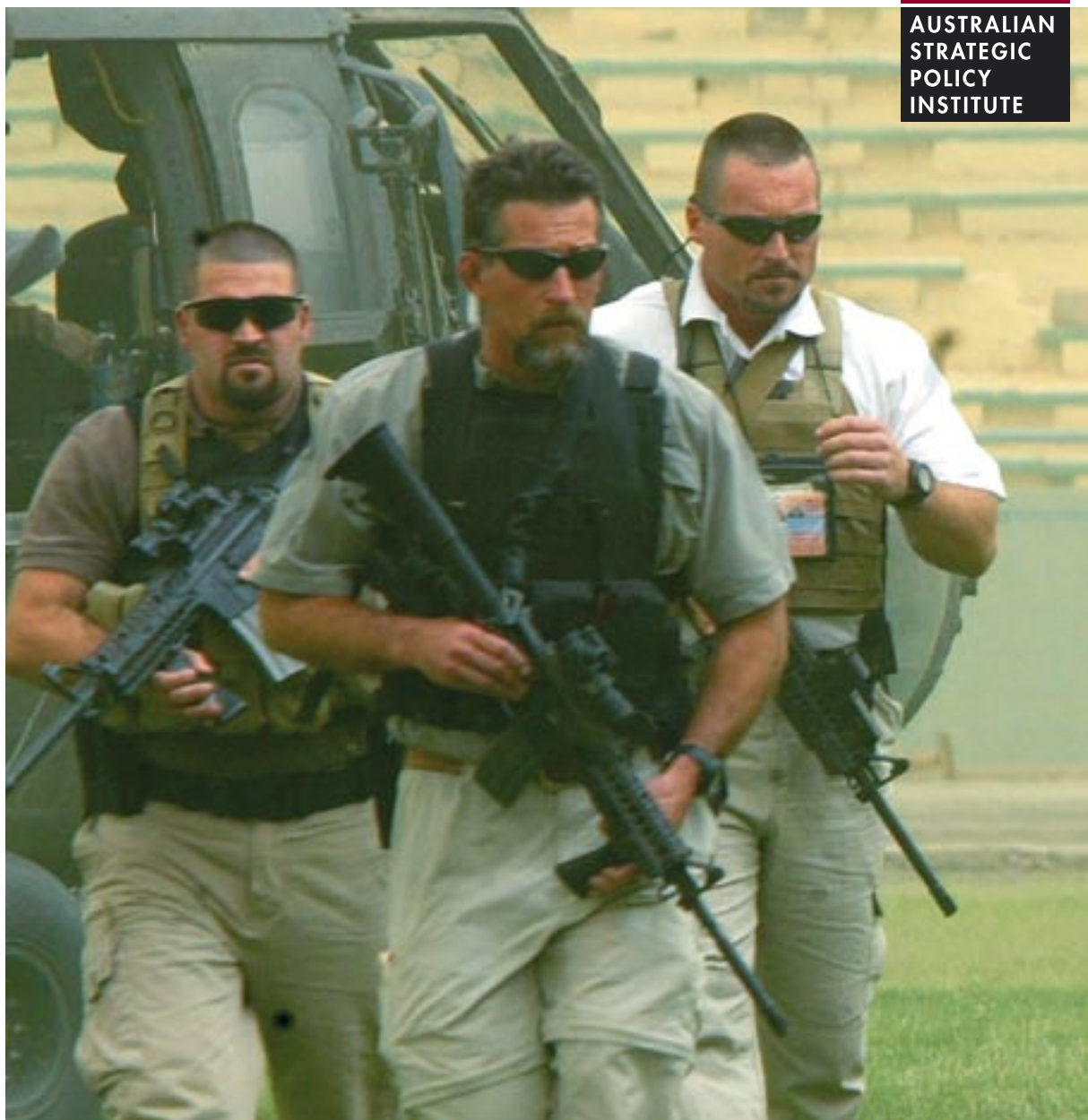
A S P I

War and Profit:

Doing business on the battlefield

A S P I

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Prior to joining ASPI, Mark Thomson held a number of positions in Defence working in the areas of capability development and resource management. In 1999 he was Political Military Adviser to Major General Peter Cosgrove during the INTERFET operation. Prior to his time with Defence, Mark held a series of academic research and teaching positions in theoretical physics.

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War and Profit:

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Director's introduction

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. This was no administrative troop transfer. The convoy had to run a gauntlet past SMS *Emden*, a German raider operating in the Indian Ocean that had already dispatched twenty-five ships, including a Russian cruiser and a French destroyer. Eight days later, while the convoy was passing Keeling Island, the escorting light cruiser HMAS *Sydney* broke away and brought an end to the *Emden's* intrepid career.

The point of this historical snippet is that every 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.

In the 21st century, the military and private sectors are developing an even closer partnership. Consider Iraq, where we're both fighting an enemy and rebuilding a country. Here we have a military task, and a largely civil and therefore commercial task—each tightly dependent on the other for success. But it's not just reconstruction that sees the private sector prominent on the modern battlefield. The economics and politics of the post-Cold War era have seen the US employ contractors on a larger scale and greater range of tasks than ever before.

This ASPI report looks at the emerging role of the private sector in support of military operations and examines the opportunities and challenges this creates for the Australian Defence Force (ADF). The result is a set of recommendations to optimise the private sector's role in supporting Australia's national security in or near conflict zones.

Photo opposite: Troops boarding a transport in Fremantle in World War I.
Australian War Memorial Neg Number H16166

A great many people contributed to this report. In particular, Professor Donald R Rothwell from the Faculty of Law at the University of Sydney provided invaluable advice on the many legal issues involved, and Ms Alison Drury made available her strong academic expertise in this field to assist with key elements of the report. Thanks also to Mr Lyndon McCauley, who undertook valuable research for us while on loan from the staff of the Parliamentary Joint Standing Committee on Treaties.

Because this report deals with the role of the private sector in supporting the ADF, it couldn't have been written without the cooperation of many within Australian defence industry. To them I extend my sincere thanks for being so generous with their time and expertise.

ASPI has also been fortunate to receive advice and comment from officials in a number of government agencies. In particular, we're grateful to Defence for providing comments on a draft version of this report. Of course, this doesn't in any way imply that Defence, or any other government agency, endorses this report or agrees with its recommendations.

Finally, thanks go to Dr Mark Thomson, who prepared this report.

As always, the views expressed here aren't to be taken as expressing the views of ASPI as an institution: responsibility for them rests with Dr Thomson, and with me.

Peter Jennings
Acting Director

Executive summary

Over the past 15 years, the permanent Australian Defence Force (ADF) has fallen in strength from over 70,000 to around 52,000 personnel. This is due, in large part, to the contracting out of support activities to the private sector. While most rear-echelon support tasks have been permanently outsourced, direct support on or near the battlefield largely remains an ADF role, with only ad hoc private sector involvement.

In contrast, the US, and to a lesser extent the UK, now rely extensively on private firms to provide logistics support in operational areas. Moreover, the private sector increasingly maintains high-tech military equipment, including command and control systems, for our allies in the field. This reliance has been tested in the recent Iraq War and, while there have been challenges, it has proven effective throughout the turmoil of that endeavour. Where there have been problems, they can usually be traced back to inadequate oversight rather than to any intrinsic problem with contract support. Importantly, any fear that contractors would 'cut and run' when the security situation deteriorated has been dispelled.

Iraq has also seen a much expanded role for the private sector in providing armed security on the ground, including to the Australian Government. While this, too, has proved effective, the rapid rise in largely unregulated paramilitary security firms is a concern.

More recently, the ADF has employed the private sector to varying degrees in East Timor, Bougainville, Afghanistan and Iraq. By and large, this has worked well, freeing precious ADF logistics capacity for other tasks. But in each case the ADF used contractors to replace its own support elements only some time after the initial deployment.

The benefits of using contractors are greatest when their support is on call and ready to go as an integrated part of overall military preparedness. This allows contractor support to be employed from the first day of operations, thereby keeping sparse military logistics capacity in reserve for higher intensity operations where contractor support would be impractical. Both the US and UK now

have long-term contracts with logistics contractors for this reason. In the case of the US, the contractor stands ready to provide an extensive package of logistics support for up to 25,000 troops anywhere around the globe at 15 days notice.

So far, Defence has resisted taking the step of prearranging logistics support on a contingent basis. We think that the time is ripe to do so. Our proposal is contained in the following four recommendations.

Move now to prearrange contract support for operations

The ADF should follow the lead of both the UK and US and contract a logistics support partner to be ready to support deployments at short notice. Given recent experience, such a contract would naturally cover both military operations and humanitarian crises. This would give the ADF the opportunity to fully integrate the private sector partner into planning and exercising. More importantly, it would provide options in the event of a contingency—real options that the ADF could either use or set aside in favour of its own organic capabilities depending on the risks. At the same time, the ADF would do well to further explore how the private sector can be made ready to maintain specialist equipment in the field, especially in those areas where the ADF is having trouble recruiting and retaining suitably skilled personnel.

Sharpen the capability to manage contractors

If the ADF makes more extensive use of contractor support to operations, it will need the doctrine, skills and capacity to do so effectively. Fortunately, good progress has been made in developing appropriate doctrine and policies for the use of contractors, and skills have accumulated through successive recent operations. Nonetheless, the recent need to initiate widespread reforms to Defence Materiel Organisation contracting shows that there's still substantial room for improvement. The aim should be to employ the highest standards of commercial acumen, supported by quality legal advice, when writing and agreeing contracts. Then, once an operation commences, it's essential to have an adequate number of trained personnel available to manage the delivery of services under contract.

Tighten the legal framework and related policies

There is an increasing number of unregulated firms providing both paramilitary security services and military training or advice for profit. Without regulation, there's no guarantee that such firms will act in Australia's national interest. Consequently, the government should introduce a regulatory regime to control the provision of military, paramilitary and policing services, training and support akin to the export control regime for arms and military technology. The UK is exploring options to regulate firms operating from its jurisdiction, and the US—arguably the world's most *laissez faire* economy—already requires export licences for firms providing such services. Additionally, as a matter of policy, Australia should not employ security contractors in roles and circumstances that would risk their non-combatant status under international law.

Where possible, transfer resources into combat capability

Nothing proposed here would make any difference to the size or shape of the ADF, but it would be surprising if opportunities didn't consequently arise to refocus ADF personnel away from support tasks and into more direct combat roles. Of course, it would still be necessary to retain a core ADF organic support capability for high-intensity operations where contractor support is impractical. Care would be required. Any changes to the force structure should only be considered once confidence in contractor support is fully established. Nonetheless, if contractors more fully shouldered the burden in operations, there should be ways of adjusting the current split of resources between support and direct combat capabilities, to the benefit of the latter.



IN DEFENCE OF PROFIT

Aside from the central planners who run the workers' paradise of North Korea, almost everyone agrees that the private sector can deliver goods and services more efficiently than government. This belief has led many developed nations to privatise a host of previously public services. In the past thirty years, everything from banks, airports and public transportation through to utilities like telecommunications, water, sewerage and power have been transferred from public to private hands. At the same time, many activities within other government agencies have been contracted out, including information technology, recruitment, accounting, cleaning, catering and training.

Over the past fourteen years, almost 16,000 civilian and military positions have been systematically market tested against commercial alternatives ...

Armed forces have not been immune to this trend. The US, the UK and Australia have all transferred a large number of day-to-day defence activities to the private sector, including tasks previously shared by uniformed and civilian personnel. In Australia, the move began in the late 1980s when the government sold off its naval shipyards and munitions and aircraft factories, divesting itself of a 20,000-strong defence production workforce in the process. In the 1990s, it was the turn of those staff deemed 'non-core' in the Department of Defence itself to lose their jobs to the private sector. Over the past fourteen years, almost 16,000 civilian and military positions have been

systematically market tested against commercial alternatives by the Commercial Support Program. As a result, 66% of activities tested have been moved to commercial contracts.

These changes account, in large measure, for the dramatic reduction in the size of the Defence workforce. Since the mid-1980s the number of civilians has fallen by 55% from around 40,000 to just over 18,000, while the number of uniformed personnel has dropped by 25% from around 70,000 to just over 52,000. This reduction has been accompanied by a corresponding increase in Defence's dependence on the private sector. Defence's Corporate Services Group alone manages contracts worth more than \$1,600 million a year on information technology, garrison support, housing, facilities operations, travel and property services, while the Defence Materiel Organisation manages contracts of around \$2,700 million annually for the repair and maintenance of Defence's vast array of equipment.

These changes have not been without controversy. The aim of outsourcing is to make financial savings through more efficient service delivery, and there's little doubt that savings have accrued, thereby allowing Defence to meet the demands of rising personnel and equipment costs. But some argue that a degree of effectiveness has been lost, especially in flexibility and responsiveness. Such concerns aren't unique to the defence sector, but reflect the dichotomy between efficiency and effectiveness that pervades all privatisation and outsourcing. Yet, such misgivings are unlikely to reverse the changes that have occurred. At all levels of government, the aim is now to ensure that contracted services work properly, while looking for further opportunities to engage the private sector.

The private sector under fire

In many ways, Australia has gone further than our allies in harnessing private sector support for defence, but with one exception: the use of contractors on or near the battlefield. Here the Australian Defence Force has been relatively cautious in exploring the opportunities.

In contrast, the US military now depends heavily on private contractors for a wide range of services during operations. During the Gulf War in 1991 they deployed one contractor for every hundred uniformed personnel; in Operation Iraqi Freedom, the ratio had risen to one in ten.

Despite the inherent risks, many firms are ready to compete for operational support contracts on or near the battlefield. These range from logistics behemoths able to feed, water and resupply tens of thousands of troops at short notice, to smaller firms providing highly specialised capabilities such as interrogators and intelligence analysts. Also, as recent developments in Iraq have highlighted, there's been a rapid increase in the number of paramilitary and 'security' firms willing to work in conflict zones.

The expansion of the private sector's role in military operations began soon after the end of the Cold War. As the need for large, ponderous, pre-positioned armed forces evaporated with the demise of the Soviet threat, governments eagerly harvested the promised peace dividends. But as the 1990s played out, it became clear that armed force was far from obsolete. Indeed, the lifting of Cold War constraints let slip a wave of conflict, from the first Iraq war to the atrocities of the ethnically riven Balkans and sub-Saharan Africa.

The US, in particular, found itself with a much smaller military than at almost any time during the previous fifty years—less than half the strength reached in the late 1960s—yet with greater need to deploy and sustain combat forces around the globe at short notice.

With budgets and strategy pulling in opposite directions, the Pentagon began to use private firms for operational support to release its own personnel for combat roles.

Arguably, Australia now faces a similar situation. The government wants the ADF to be more prepared to deploy offshore than at any time since the Vietnam War, but the permanent ADF is now smaller than its average size in any of the past four decades.

The government wants the ADF to be more prepared to deploy offshore than at any time since the Vietnam War ...

In this report, we examine the challenges and opportunities presented to Australia by the increasing number of private sector firms willing to do business on or near the battlefield. Our main focus will be on private sector support to the ADF, but we also look at the implications for other government agencies given Australia's emerging whole-of-government approach to national security. Where necessary, we also look at the vexed question of mercenaries who actually take part in hostilities, although for our purposes this is secondary to the more routine tasks of logistics and other non-combat support.

In the remainder of this chapter, we examine the market for private sector support to military operations. In Chapter 2, we look closely at the role of contractors in the recent Afghanistan and Iraq conflicts to see what can be learned from those demanding, real-world testbeds. Chapter 3 explores ADF experience with contractor support to operations and asks what opportunities remain. Chapter 4 examines the complex legal and regulatory issues arising from having private firms on the battlefield. Finally, in Chapter 5 we look at what needs to be done to ensure that Australia's use of the private sector in future conflicts is lawful, cost effective and militarily judicious.

What the market has to offer

One of the difficulties in discussing the private sector's role in military operations is the wide range of services on offer. While no breakdown is perfect, it's convenient to divide these into four categories:

- strategic sea and air transport
- basic in-theatre logistics, including ammunition, water, rations, fuel, shelter, hygiene, communications, information technology and construction
- repair and maintenance of military equipment, including weapons systems
- specialist military services such as training, security and, in extremis, the direct delivery of combat capability.

Each of these four areas has its own characteristics and problems.

Heavy lifting: sea and air transport

Throughout both world wars, Australia and our allies relied heavily on privately owned and civilian-crewed merchant vessels for strategic sealift. This was inevitable while every national asset was directed to the war effort. The result was that the civilian crews of very lightly armed (and totally unarmoured) merchant vessels shared all the privations and danger of their naval colleagues.

Even in 1982, when the British sailed to the Falklands, twenty-six of their ships came from the Royal Navy, twenty-two came from the civilian-crewed Royal Fleet Auxiliary and forty were merchant vessels contracted or requisitioned for the operation. The merchant fleet included the liners *Canberra* and *QE II*, which were used as troopships, and three freighters converted into aircraft and helicopter support ships. The captain and eleven civilian crew of one of the freighters, the *Atlantic Conveyor*, were killed when she was sunk by an Exocet missile.

... few nations can afford to maintain enough naval support and transport vessels for the largest military operations.

The situation is little changed today. Even though the scale of warfare is slight compared with the massive efforts of the last century, few nations can afford to maintain enough naval support and transport vessels for the largest military operations. For this reason, it's inevitable that commercial shipping will continue to transport military personnel, equipment, munitions and supplies during war. The same is often also true when it comes to airlift, especially for small and middle powers like Australia that have only a limited capability to lift heavy and oversize loads.

Whether it's strategic sealift or airlift, the economic argument is the same: Why invest hundreds of millions, if not billions, of dollars on surge capabilities that are seldom required if they're available in the marketplace?

The basics: construction, food, water and resupply

While merchant transports have been a mainstay of military logistics for more than a thousand years, the commercialisation of support on the ground has been more recent. Nevertheless, the modern practice of using the private sector on deployed operations dates back at least to the Vietnam War, when the US used contractors extensively to build airfields, harbours, military bases and other infrastructure. This was a marked change from World War II, when there were 325,000 men in US Navy construction battalions.

For our purposes, the story begins in 1992 when the US Army tendered its first Logistics Civil Augmentation Program (LOGCAP) contract. The contract sought a strategic partner to work with the military to plan, exercise and be prepared to deliver logistics support—including rations, shelter, water and welfare services—around the globe. What separated this from previous ad hoc support contracting was that a firm was being put on a definite preparedness notice, well ahead of any contingency. The contract has been retendered twice since, most recently in 2001, and is currently held by the Halliburton subsidiary, Kellogg Brown & Root (KBR).

The current LOGCAP contract calls for KBR to be prepared to support up to 25,000 troops (with an absolute maximum of 50,000) in seven base camps of 3,000 troops each and with a rear support area housing another 4,000—all within fifteen days notice and anywhere around the globe. Analogous contracts are in place with the US Air Force (the Air Force Contract Augmentation, AFCAP) and Navy (the Construction Capabilities Contract, CONCAP). A separate long-term Balkans Support Contract (BSC) has provided logistics support to US forces in that region since 1999.

In peacetime, the first three contracts involve a relatively modest retainer but in a contingency they provide support at short notice on a cost-plus basis. Importantly, the contracts do not preclude contracting work separately when urgency is not required. However, the high operational tempo over the past few years has seen the US military use the contracts extensively (see Table 1). The contracts share two key features: a modest base fee balanced by incentive awards, and a long term contract that is renewed annually to encourage performance.

	LOGCAP	AFCAP	CONCAP	BSC
Contractor	KBR	Readiness Management Support	KBR	KBR
Award date	December 2001	January 2002	June 2000	May 1999
Base fee	1%	1%	0%	1%
Award fee	2%	6%	2%–5.75%	8%
Under contract	\$9.1 billion	\$653 million	\$242 million	\$2.021 billion
Duration	1 year plus 9 option years	1 year plus 7 option years	1 year plus 4 option years	1 year plus 4 option years
Current operations	Afghanistan Djibouti Kuwait Uzbekistan	Afghanistan Kuwait Kyrgyzstan Oman Qatar United Arab Emirates Uzbekistan	Guam Guantanamo Bay	Balkans

Source: Adapted from US General Accounting Office Report, GAO-04-854, July 2004.

The UK has recently followed suit with Contracts for Logistics Support (CONLOG), the British equivalent of LOGCAP. Announced in February 2004, CONLOG comprises a central planning capability to allow the UK military ‘to secure a wide range of support services as and when required’. The seven-year contract is valued at around £12 million, but based on recent experience the value of follow-on work could be around £50 million per year. The contract was awarded to KBR and, coincidentally, is due to expire when the US LOGCAP contract is retendered in six years.

War machines: repair and maintenance

One area in which Western militaries have tended to retain a higher proportion of uniformed support is the repair and maintenance of weapons platforms such as planes, vehicles and ships deployed to forward areas. This is despite the fact that much of the intermediate and deeper level maintenance is now done by civilian contractors back home.

... it appears to be routine for technical contractors to work side by side with US military maintenance personnel on operations.

There are exceptions, especially when highly specialised equipment is involved. For example, the UK deployed around 1,500 contractors to the Gulf during the recent Iraq campaign to provide equipment and technical support to British forces. And the US employs contractors

on board its naval vessels during operations, as well as having contractors support equipment in the field. For example, Raytheon and its subsidiary Vertex Aerospace secured contracts for aircraft equipment maintenance and repair in Afghanistan and engineering technical services in Iraq. It's difficult to find an estimate of the numbers involved overall, but it appears to be routine for technical contractors to work side by side with US military maintenance personnel on operations.

Some non-Western nations are even more willing to rely on forward-deployed contractor maintenance for their weapons platforms. Saudi Arabia, for example, employs a large number of private firms to repair and maintain its modern air force, so much so, that in the first Gulf War, firms had to scramble to find enough personnel to support the maintenance surge when the Saudi air force commenced wartime operation.

The specialists: training, security and combat

A wide range of specialised military services is available in today's international market. While there are benign post-conflict tasks such as land mine clearance, munitions disposal and the demobilisation of troops, services that either develop or deliver military capability are of more interest. These include the training of military personnel, planning of military operations, armed and paramilitary security and—if you know where to look—actual combat operations.

Training, planning and consultancy

The private sector plays a big role in training armed forces around the globe. Here are a few examples:

- In the US, Military Professional Resources Incorporated (MPRI) provides instructors at just about every level of US Army officer training. MPRI even helps write doctrine: the firm wrote the Pentagon's official policy on using contractors in support of operations.
- In Canada, the NATO flying training program run by Bombardier Incorporated provides a wide range of flight training up to and including lead-in fighter qualification.
- In Saudi Arabia, the US firm Vinnel Corporation has been training the Saudi military since 1975. Vinnel currently employs more than 1,300 workers under a five-year, US\$800 million contract for that purpose.
- In Australia, KBR trains the Tiger armed reconnaissance helicopters' pilots, battle captains, ground crew and maintainers, while BAE Systems Australia runs flight screening and basic flying training for the ADF at its Tamworth facility. Other private firms provide a range of specialist military advice to the ADF, including assistance with the development of military doctrine and operational concepts.

Private firms are ready and able to deliver an extensive range of training in the military arts anywhere in the world.

These examples are typical of what the market has to offer. Private firms are ready and able to deliver an extensive range of training in the military arts anywhere in the world. One indirect consequence of this is that military consultancy services are now also available

for a fee—any firm that can train a military can also provide some level of advice on its deployment.

All this has important implications. In the absence of a commercial alternative, a developing nation has to either grow its own military doctrine and skills from scratch or convince another nation to provide training. But with military know-how being exported for profit, a nation can rapidly and independently develop its armed forces. This can have a significant impact on international affairs. MPRI, for example, is credited with changing the balance of power in the Balkans through its rapid and effective training of the Croatian and Bosnian militaries in the mid-1990s. In Bosnia, MPRI provided a comprehensive top-to-bottom service—everything from establishing the ministry of defence to training individual soldiers.

This shows that the commercial delivery of military training can be much more than just an efficient alternative for established armed forces: it can allow a nation to develop its military capabilities quickly, and even change the balance of power within a region. Viewed this way, the sale of military training and advice is no less significant than the proliferation of military hardware.

Private security

In Australia there are more than two licensed security providers for every police officer and more than 2,000 firms providing security services. Private security services range from static guarding of private premises to the maintenance of sophisticated remote surveillance systems. As in most countries, the bulk of the private security sector is focused on the domestic market, but there are some important exceptions in the area of business security.

Businesses have always had to deal with the threat of crime, but more recently they have also had to worry about terrorism. And for those operating offshore, there's the danger of civil unrest or international conflict disrupting operations and endangering staff. To help business manage these risks, specialised security firms provide an extraordinary range of services. One of the largest is the UK-based Control Risks Group (CRG). A partial list of CRG's services includes business and financial intelligence; country and political risk analysis; crisis pre-planning, response and recovery; computer and financial forensics; close personal protection; and kidnap prevention and response.

Although business security firms like CRG operate internationally, the vast bulk of their work is usually unrelated to armed conflict. However, when governments and businesses persist in operating in conflict zones, opportunities inevitably arise. As we'll see in the next chapter, private security firms are now playing a major role in Iraq protecting people, assets and even other contractors.

Mercenaries

In what sounds like a B-grade reworking of the 1972 novel *The Dogs of War*, mercenaries plot to overthrow the corrupt dictatorship of an oil-rich African state so that they can install a more compliant regime for commercial gain. Embroiled in the scheme are an Eton-educated ex-SAS officer and a selection of British establishment figures, including the son of a former prime minister. Of course—in a case of life imitating art—this is the widely reported story of the abortive coup in Equatorial Guinea cut short by Zimbabwean authorities in March 2004.

However, because the customer wasn't a nation state, this most recent use of mercenaries wasn't typical of the past decade. Throughout the mid-1990s, a number of African governments employed mercenaries to bolster, or to replace outright, their own militaries.

Most prominent in the field was the South African firm Executive Outcomes (EO), which even had its own air force equipped with transport and bomber aircraft and attack helicopters. And unlike the ragtag mercenary outfits of the 1960s and 1970s, EO had a corporate structure like any commercial firm.

In 1993, EO turned the tide against rebel forces in Angola for US\$40 million. Then in 1995 it helped the Sierra Leone Government defeat rebel forces, thereby allowing free elections to be held and more than a million displaced persons to return home—all for a mere US\$35 million. (The contract was subsequently terminated under international pressure, but chaos returned in 1997 after the international community balked and promised UN peacekeepers failed to materialise.) EO also worked for the governments of Uganda, Kenya, South Africa, Congo and even Indonesia at various times in the 1990s.

Although mercenaries played a positive role in stabilising Angola and Sierra Leone, there are undoubted problems with having private armies on the loose. Consider Sandline's abortive role in Bougainville. In 1997, the Papua New Guinea (PNG) Government contracted UK firm Sandline International (which had corporate links to EO) to end the long-running rebellion in Bougainville for US\$36 million.

Not only was the proposed solution unnecessarily aggressive compared with the negotiated accommodation that has since been worked out, but the presence of mercenaries in PNG destabilised the government and almost resulted in a coup by the disgruntled PNG defence force. Sandline also violated a United Nations arms embargo by providing arms to combatants in Sierra Leone in 1998.

In recent years, both Executive Outcomes and Sandline have ceased operation. Perhaps the surge in highly visible, private military operations in the 1990s was an aberration—or perhaps firms and their clients are now being more discreet.



Boss of Sandline International, Tim Spicer, on his way to court in Port Moresby, March 24, 1997. AP via AAP/Rick Rycroft © 1997 AP

The US currently employs a number of private firms to assist Colombia with counter-narcotics operations. This entails direct assistance to the Colombian military and, according to some reports, direct involvement in fighting against rebels (something the US military is prohibited from doing under US law). Be that as it may, it could just be a matter of time before a role, positive or otherwise, emerges for mercenaries if Western governments continue to resist sending their own troops to help developing countries in crisis.

The mercenary captains are either capable men or they are not; if they are, you cannot trust them, because they always aspire to their own greatness, either by oppressing you, who are their master, or others contrary to your intentions; but if the captain is not skilful, you are ruined in the usual way.

— from *The Prince*, by Niccolò Machiavelli (1469–1527)



THE COALITION OF THE BILLING

No discussion of the private sector's role on the battlefield would be complete without a close look at recent operations in Afghanistan and Iraq. In Iraq, especially, the private sector has been involved on a scale not seen before in modern warfare. This chapter examines the role of contractors in these ongoing operations and draws out the many lessons learned.

The private sector's role in Afghanistan and Iraq has extended well beyond military support. Indeed, foreign private companies are also doing the vast bulk of reconstruction work in these countries. From a legal perspective, there are significant differences between the two roles, so we'll draw a distinction when necessary. However, the challenges—and the firms—are usually the same irrespective of the work being undertaken. In some ways, it's an error to see reconstruction as separate from operations when the battle is as much for the hearts and minds of the population as it is for physical military objectives.

Finally, a caution. To piece together a picture of contractors in Iraq we've had to rely on snippets from various sources, including media reports, commentary by non-government organisations and a limited number of official documents on specific issues. This has been difficult, given the controversy surrounding the war in general and the employment of contractors in particular. To extract an objective picture from the tangle of sensationalism, secrecy and polemic has taken a lot of effort.

The hired help

No official figures are available on the number of foreign private firms or individuals operating under contract in Iraq and Afghanistan.

However, the independent Center for Public Integrity (CPI) in the US has used freedom of information requests to assemble a list of contracts awarded by the US Government for work in those countries since late 2001. In Iraq, CPI reports that 125 firms had been awarded more than US\$51.4 billion in contracts by late 2004. This represents about a third of the US\$153 billion that the US Congress had approved so far for the Iraq War and reconstruction. The Pentagon holds the bulk of the contracts (US\$46.2 billion), with the remainder split between the US Agency for International Development (USAID) with US\$4.2 billion and the US Department of the Interior with US\$66 million. The breakdown is similar for Afghanistan, where forty-five firms are together earning US\$2.4 billion, again mostly through the Pentagon but with US\$563 million in contracts held by USAID and US\$54 million by the State Department. Note that these figures represent contract ceilings that might not be expended in practice.

All up, KBR is supporting more than 210,000 US and Coalition troops and civilians in more than sixty camps ...

KBR is the largest contractor in Iraq and Afghanistan, holding contracts valued at US\$11.4 billion—much of it under the LOGCAP contract. In Iraq alone, KBR has more than 47,000 employees and subcontractors. The range of support tasks undertaken by KBR in Iraq and Afghanistan is impressive. It includes the provision of air traffic control support; the production of 74 million gallons of water a month for consumption, hygiene and laundry; the deployment of as many as 700 trucks a day to deliver services to troops; the provision



At this dining facility in Kuwait, KBR served more than 22,000 soldiers for one meal. Photo courtesy of KBR

of firefighter and crash-rescue services; and the running of some seventy dining facilities in Iraq, Afghanistan, Kuwait and Djibouti. All up, KBR is supporting more than 210,000 US and Coalition troops and civilians in more than sixty camps—amounting to more than four times the scale of support envisaged under the LOGCAP contract. The British, too, are using the private sector for logistics support in Iraq, with KBR once again the principal contractor.

Aside from traditional logistic support, contractors are undertaking a host of specialist tasks in Iraq. These include sealift and stevedoring, administrative support, language translation, munitions disposal, mine clearance, management and governance consultancy, and the provision of specialist equipment from flashlights to boot lockers. Even the sensitive area of command and control has seen the private sector involved, with Raytheon providing information technology support to the US headquarters in Qatar and Baghdad.

Some of these contracts are small, like the US\$124,000 contract with Native American Industrial Distributors Inc for 'protocol support services'. Others are massive, like Zapata Engineering's five-year contract valued at up to US\$1.5 billion for explosives removal in Afghanistan, Iraq and elsewhere. In between, there are significant contracts like the US\$402 million contract with Titan Corporation, which among other things delivers 4,400 linguists.

All the King's horses and all the King's men ...

US contractors have also been central to the rehabilitation of civil and economic infrastructure in Iraq. Bechtel Group Inc, for example, was awarded a contract valued at up to US\$1.03 billion by USAID in 2003 to rebuild Iraqi infrastructure, including schools, water delivery and sewage disposal. Meanwhile, KBR and other firms (including the Australian company WorleyParsons) are undertaking the mammoth task of rebuilding Iraqi oil infrastructure.

According to USAID, key Iraq rehabilitation accomplishments include restoring important airports, railways, bridges, ports and roads; developing power generation to beyond pre-war levels; conducting water and sanitation projects affecting 14.5 million people; restoring telecommunication services to 140,000 subscribers in Baghdad; vaccinating 3 million children; renovating 2,356 schools; and providing training for 13,772 teachers. These are significant achievements, given the poor security situation in many parts of the country. Little of this would have been achieved without contractor involvement.

These are significant achievements, given the poor security situation in many parts of the country.

Yet, despite the progress made in rebuilding Iraq, most of the contractor effort has been in support of the military. This is reflected in the allocation of contracts—most of which are with the Pentagon—and the US Congress's approval of only US\$18.4 billion for reconstruction compared with US\$135 billion for the military side of the operation.

Protection money

In addition to providing logistics and supporting reconstruction, private firms are heavily involved in providing security in Afghanistan and especially in Iraq. With the multinational force stretched to the limit, and Iraqi security forces both slow to develop and initially ineffective, it's been left to the private sector to fill the widening gap. An estimated 10,000 to 20,000 non-Iraqis are protecting people and assets against insurgent attack. This involves at least sixty, and perhaps as many as two hundred, firms with staff drawn from some thirty nations; some work for the US-led coalition and its member states, while others are employed by private firms (including other contractors in need of protection).

It starts at the top. Blackwater USA was awarded a US\$21 million contract to provide two helicopters and security guards to protect Coalition Provisional Authority head Paul Bremer, and after him US Ambassador John Negroponte. In Afghanistan, DynCorp protects Afghan president Hamid Karzai. The UK has contracted Armor Group and Control Risks Group to protect British officials and reconstruction agencies in Iraq, at a cost of more than £20 million. And while Australian troops are still responsible for the security of our embassy and embassy staff in Baghdad, the Control Risks Group has a 14-month \$15.9 million contract to protect AusAID personnel in Iraq.

But the largest security contracts are for the protection of assets. A largely unknown South African firm, Erinyes, is contracted by the Iraqi Ministry of Oil at a cost of US\$80 million to recruit, train, equip and manage 14,000 Iraqi security guards to protect 140 oil wells, 7,000 kilometres of pipeline and numerous refineries across the country. Services include access control, theft prevention, loss control and emergency response, all supported by 450 patrol vehicles and air surveillance of the pipelines.

Private firms are also closely involved in police and military training. DynCorp was awarded a contract valued at up to US\$50 million a year to provide 1,000 personnel to help organise and train the Iraqi police force, judicial and correctional agencies. Vinnel Corporation, a subsidiary of Northrop Grumman, won a US\$48 million, one-year contract to train the Iraqi Army (a task that the ADF has been involved in).

Not even the shadowy world of intelligence is immune to outsourcing.

Not even the shadowy world of intelligence is immune to outsourcing. The US Army Intelligence and Security Command contracted for interrogators in Iraq. Their existence came to light following the revelations of prisoner abuse at Abu Ghraib. The same firm has reportedly provided deployed signals intelligence capabilities for the US in Afghanistan. And although the details are unclear, the CIA has used contractors in both Afghanistan and Iraq to provide something more than logistics support.

Getting it right in the fog of war

Iraq has proved to be a very demanding testbed for the use of contractors. After the initial success of the invasion, Operation Iraqi Freedom has been a fraught endeavour made more difficult by inadequate troop numbers and the failure to anticipate and suppress the ensuing insurgency. At the same time, the size of the operation has sorely tested the capacity of the private sector. Established firms have had to expand their operations well beyond previously planned levels, while relatively inexperienced firms have received hundreds of millions of dollars in contracts. It's not surprising that there have been problems and a degree of controversy surrounding the extensive use of contractors in Iraq.

In the remainder of this chapter, we look at the lessons to be learned from this recent, mainly US, experience with contractor support. This includes the questions of value for money, contract oversight, competition for personnel, legal accountability and reliability. We won't explore the widely reported allegations of impropriety and political patronage in the awarding of contracts. To the extent that any of these accusations have a basis, they reflect systemic problems with what Eisenhower called the 'military-industrial complex', rather than any intrinsic shortcoming in the use of contractor support.

Sticker shock

The seemingly exorbitant salaries paid to contractors in Iraq—such as US\$90,000 per year to drive a truck—have led some to question the cost-effectiveness of using contractors instead of military personnel. Such questions ignore the true cost of military personnel who receive a myriad of costly benefits like health, housing, education and generous retirement pensions (and in the case of Australian personnel, tax-free allowances of around \$50,000 a year during operations). Moreover, while contractors are hired and paid only if and when they're needed, military personnel are usually employed on a permanent basis and spend most of their time training to keep their skills current. Even if contractors cost twice as much per head as military personnel, in the long term you'd have to be at war more than 50% of the time for military personnel to be more cost effective.

... it would only be in the exceptional circumstance of near permanent large-scale deployment that contractor support could not be cheaper in the long term than the military alternative.

The financial argument for contractors gets even stronger when we remember that deployed military personnel have to be relieved every six to twelve months by other military personnel, who nonetheless have to be paid in the meantime. In contrast, contractors use largely casual workforces that are only paid when deployed. Even though this last argument can be countered by the use of part-time reserve forces, it would only be in the exceptional circumstance of near permanent large-scale deployment that contractor support could not be cheaper in the long term than the military alternative.

Do you get what you pay for?

Just because something *can* be cheaper doesn't mean that it is. And even if it's cheaper, it's not necessarily better value for money unless the service is delivered to contract. Unfortunately, many alarming cases of alleged overbilling and underdelivery have emerged in Iraq, although in dollar terms they represent a small proportion of contract activity. Rather than regurgitate the sensational headlines, let's look at the more sober analysis by the US General Accounting Office (GAO), which has produced three major reports on contractor support since mid-2003.

The GAO assessment of the US military's use of contractors globally is generally positive, although the office did find that the effectiveness of contract planning and oversight was variable. In particular, the GAO judged that contractor employment in Iraq had suffered from a lack of early planning and contractor involvement, poor oversight of service delivery and a failure to review contracts to ensure value for money. In large measure, these problems can be sheeted home to the grossly inadequate number of trained contracting personnel available. Indeed, according to one report, the US contract management office in Baghdad employed a mere fourteen people to manage more than US\$18 billion in support and reconstruction projects. This goes a long way towards explaining publicised disagreements between customer and vendor in Iraq.

Aside from the largely financial matters looked at by the GAO, anecdotal evidence suggests that contract oversight has been poor in other respects, including the vetting of personnel. In an extraordinary turn of events, British firm Aegis Defence Services—headed by ex-Sandline chief Tim Spicer—was awarded a US\$293 million contract in 2004 to coordinate private security activities in Iraq. Not surprisingly, the decision to have someone with Spicer's background overseeing a private security force of more than 20,000 people has raised concerns in the media.

Poor contract management appears to have also contributed to the abuses at the Abu Ghraib military prison, where four contractors were implicated by official US Army reports. One of the reports highlighted inadequate contractor training as a particular concern. It estimated that 35% of the contract interrogators lacked formal training, with one of those implicated deemed to have had 'little or no' experience as an interrogator. Just as worrying are the reports that military guards at Abu Ghraib were confused about whether they worked for the contractors, or vice versa.

Without proper oversight, service delivery can't be assured and costs can't be confirmed, let alone contained.

The US Congress has already responded to the problems with contractor employment in Iraq. The 2005 Defense Authorisation Bill requires the Pentagon to address a raft of matters concerning the relationship between contractors and the forces, and particularly the roles and responsibilities of commanders in the management and oversight of contractors.

The lesson here is a simple one: adequate numbers of trained staff must be available to plan contracts and monitor contract delivery. Without proper oversight, service delivery can't be assured and costs can't be confirmed, let alone contained.

Accountability

At the time of writing, the legal accountability—that is, liability under law for criminal acts—of deployed contractors in Iraq is complex. In broad terms, foreign contractors are usually beyond the embrace of military law and enjoy immunity from Iraqi law under the arrangements in place. As a result, legal accountability depends on the willingness and capacity of the state of which the contractor is a citizen (not the employing state) to take action. The problem is that, even if they want to, some nations lack effective extraterritorial jurisdiction to take action.

For example, while a number of military personnel at Abu Ghraib have been court-martialed, none of the four private contractors implicated has yet been brought to trial. It may be that the evidence isn't sufficient to warrant their prosecution but, even if it were, prosecution would be difficult because the contractors appear to fall outside of US legal jurisdiction (for the technical reason that they were contracted to the Department of the Interior rather than the Pentagon). Massachusetts Democratic Congressman Meehan moved to fill this gap by proposing the 2004 Contractor Accountability Act. More generally, the US has held contractors to account, including by indicting a CIA contractor for assault in Afghanistan.

Security firms range from highly reputable paramilitary operations staffed by Western ex-special forces personnel, through to small, hastily formed firms offering little better than suburban hotel bouncers with guns.

Aside from individual contractor accountability, there's also the issue of corporate responsibility, especially when it comes to firms providing security services. Although a licensing regime and clear rules of engagement for private security guards have been in operation since mid-2004, the situation is far from reassuring. Just as there's a wide range of security tasks in Iraq—from routine civil security to VIP protection—there's also a wide range of skills and expertise in the market. Security firms range from highly reputable paramilitary operations staffed by Western ex-special forces personnel, through to small, hastily formed firms offering little better than suburban hotel bouncers with guns.

We explore the legal accountability of deployed contractors more fully from an Australian perspective in Chapter 4.

Market forces and the market for forces

The expansion of contract work in Iraq and Afghanistan has affected the retention of personnel in some conventional militaries. The lure of large pay cheques has seen many soldiers—especially elite troops—leave their national forces to work for private contractors. A Western soldier can earn more in a week in Iraq as a contractor than in a month back home. In order to counter the flood of troops leaving to take up private security jobs, the British Army is now keeping jobs open for a year, in the hope that troops will return once their private contracts expire. The US Special Operations Command has formulated new pay,

educational and other benefits in the hope of retaining staff, including a one-off US\$150,000 payment to special forces personnel to re-enlist for six years.

Although there has been a small increase in the number of ADF Special Air Service personnel who have discharged in the past eighteen months, the worrying drain of personnel experienced by the US and the UK has not happened here.

In late 2004, Defence prohibited ADF personnel from travelling to Iraq or taking up employment there while on leave, but this was more to avoid potential embarrassment than anything else. Although there has been a small increase in the number of ADF Special Air Service personnel who have discharged in the past eighteen months, the worrying drain of personnel experienced by the US and the UK has not happened here. Moreover, it's anticipated that former members will seek to re-enlist once the current surge in demand subsides.

While the short-term retention of special forces personnel hasn't emerged as a problem for the ADF, the long-term impact on the Defence workforce of contracting out services can't be ignored. We return to this question in the next chapter.

When the going gets tough ...

Given that contractors aren't subject to military discipline, concerns are often raised about their reliability under fire. However, in Iraq and Afghanistan it appears that, for the most part, contractors have stayed the course in the face of kidnappings and deaths. In December 2003, sixty Korean contractors working for Washington Group International Inc withdrew following the ambush killing of two of their colleagues. Since then, several US firms working in Iraq have decided that the country is too dangerous a place to do business, and the UK reported two instances of contractors refusing to deploy or remain in-theatre, but most contractors have nonetheless remained. This needs to be seen in context: a number of Coalition partners long ago packed their kitbags and went home, and in at least one instance US Army personnel refused to follow orders, citing the poor condition of their equipment and inadequate security.

... for the most part, contractors have stayed the course in the face of kidnappings and deaths.

Not only have most contractors stayed the course in Iraq, but Blackwater USA personnel were praised for successfully defending the Coalition Provisional Authority (CPA) headquarters in Najaf when attacked by militia in April 2004. According to the *Washington Post*, 'After hours of calling the US military and CPA for backup, Blackwater sent in its own helicopters—twice—to ferry ammunition in and carry a wounded Marine to safety'.

Similarly in Kut, the security firm Triple Canopy held off enemy attacks against a CPA facility until KBR eventually evacuated the site.

Such tenacity has come at a cost. No official list of contractor casualties in Iraq exists, but monitoring of media reports by the website www.icasualties.org lists at least 197 foreign contractors killed, some in gruesome circumstances following widely publicised kidnappings. Even if we assume that there are 40,000 foreign contractors in Iraq in all roles, this still implies a death rate (for the duration of the operation so far) of around 0.5% compared with less than 1% for the military coalition as a whole. KBR alone has lost sixty staff and subcontractors killed and over 250 wounded.

The lesson here is a sobering one. Contractors face risks in Iraq commensurate with those shouldered by military personnel, despite the fact that under international law armed forces employing contractors are responsible for their protection.



SUPPORTING AUSTRALIA'S DEPLOYMENTS

A logistics tale

Throughout most of the last century, Australia depended heavily on other nations for our military logistics. During World War I, the 1st AIF effectively operated as part of the British Army in this regard. To varying degrees, this dependency continued into World War II, at least until the initial stages of the New Guinea campaign when we tried to support our own troops and failed at great cost. In the postwar period, in Korea, Malaya, Borneo and Vietnam, we again found ourselves relying on our allies for overall support and were still poorly organised to support our own limited specific needs.

... Australia is too small to develop an entirely independent supply chain for all of our military capabilities.

This reliance continued after Vietnam, and it was not only foreign deployments arising at short notice catching us unawares. Even when it came to the self-reliant defence of the Australian continent—the pre-eminent goal of our defence policy since the mid-1970s—successive white papers assumed that we would rely on others for our resupply and logistics. This approach (which remains government policy) reflects the practical reality that Australia is too small to develop an entirely independent supply chain for all of our military capabilities.

Photo opposite: ADF light armoured vehicle being removed from commercial vessel.
Photo courtesy of Patrick Defence Logistics.

In theory, at least, the plan was for the ADF to have well-developed operational and tactical-level logistics backed up by allied support at the strategic level, with the level of allied support greatest for discretionary operations further afield and least for operations closer to home.

In practice, determining the correct level of organic logistics capability to maintain within the ADF is difficult because future contingencies can't be foreseen in detail. It's even harder to win resources for seemingly mundane logistics capabilities against the alternative of sexy, high-tech combat equipment—a task made harder by the rise to senior ADF ranks of so few logistics officers.

By the 1990s, the ADF's logistics capabilities, especially those in the Army, were in poor repair. In that decade, ADF logistics were tested and found wanting in a series of operations both large and small. Somalia, Bougainville and, finally, East Timor all highlighted serious shortcomings in our ability to deploy and sustain ground operations and the ground component of air operations. In each case, while the ADF acquitted itself as an effective and professional force, this was only because of heroic efforts to make up for inadequate logistics. Had the intensity of operations been higher, our logistics chain might not have been able to cope—especially in East Timor, where escalation into open conflict could easily have snapped an already overstretched logistics chain.

In part at least, this reflected the reduction in ADF logistics capability due to the outsourcing programs of the 1990s. In under a decade, the ADF lost almost 5,500 logistics personnel. Although many of these wouldn't have been involved in deployable support, these cuts undoubtedly undermined our ability to sustain operations. While, from a peacetime perspective, expensive military personnel had been replaced by efficient contractor support, no adequate arrangements had been developed for logistics support in a contingency.

The fact is that for years, the ADF had not taken logistics seriously in planning, training or military exercises ...

Yet the problems went deeper still: logistics doctrine was poorly developed and information systems were an ineffective mess. The fact is that for years, the ADF had not taken logistics seriously in planning, training or military exercises, notwithstanding internal clamour from the professional logisticians. Despite the public rhetoric to the contrary, the result was an unbalanced force in which the combat elements were stronger than the capability to support them.

Of course, Australia's deployment to East Timor was a wake-up call to remind us that the ADF needed to be a balanced force ready to deploy at short notice. This message was reinforced two years later with the attacks of September 11 and the deployment to Afghanistan that followed. Over the past four years, the government has substantially boosted logistics funding, and the supporting elements in the Army and Air Force have grown by more than 1,000 personnel. (The Navy, by its very nature, has always been largely self-supporting afloat, although the industry underpinning it at home has limitations and war stocks are another question.) Concurrently, the ADF has strengthened its doctrine and command arrangements to embrace logistics more fully. Recent operations in Afghanistan,

Iraq and Solomon Islands have benefited from these initiatives to make the ADF more deployable and sustainable, although in the first two instances we once again enjoyed a measure of support from the US.

Yet problems remain. The ADF's logistics information systems remain in a poor state and it will be some years before they're up to the task, especially given the plethora of subsystems that make up the system. This is complicated by the transition to the Defence Integrated Distribution System contract, which will see ADF warehousing, domestic distribution and some maintenance handled by the private sector. While this should ultimately deliver better efficiency and perhaps even improved effectiveness, the transition has contributed to the recent trials and tribulations over Defence's financial accounts.

More serious than any of this, however, is the remaining imbalance between ADF combat elements and the capacity to support them on operations.

The rule of three

The government has a stated goal of being able to deploy and sustain a brigade on operations for extended periods and, at the same time, maintain at least a battalion group available for deployment elsewhere. Implicit in this is the ability to deploy and sustain adequate naval and air assets as part of a joint force alongside the brigade and/or the battalion group. In these deployments, it's envisaged that individuals won't serve on operations for longer than six to twelve months.

So can we do this? It all depends. As far as combat elements go, the answer is probably 'yes'—provided that the government is happy to make extensive use of ADF Reserves for the first time since New Guinea in 1942, and service personnel prove willing to endure deployments closer to twelve months than six. None of this is unthinkable; it's exactly what the US has been forced to do to sustain operations in Iraq.

Such severe measures would be needed because of the practical reality of what the military calls the 'rule of three'. To sustain one unit on operations requires three such units: at any given time, one is deployed, a second is recovering from being deployed, and a third is preparing to deploy. (Actually, if the rule of three applies to six-month force rotations, a 'rule of two' will apply to twelve-month rotations, although the pace would be gruelling for the individuals involved and might only be sustainable for a limited time.) As far as ground combat elements go, and with the caveats already mentioned, the ADF can largely achieve this. But when it comes to logistics and other supporting elements the prospects are less encouraging. Some support capabilities are simply not maintained in triplets, and those that are have a much higher reliance on reserve personnel.

The result is that support capabilities represent the critical path, if not the Achilles heel, when it comes to sustaining ADF deployments over extended periods.

The result is that support capabilities represent the critical path, if not the Achilles heel, when it comes to sustaining ADF deployments over extended periods. Add to this the fact that the ADF is sometimes also asked to provide support both to other government

agencies and to other nations—like the Australian Federal Police (AFP) in Solomon Islands and a host of national contingents in East Timor during INTERFET—and we can see why the ADF has been using more private sector support for deployments.

Testing the water

Defence began its first comprehensive study on the use of contractors to support ADF operations in 1998. The result was an extensive discussion paper, released in early 1999, that was broadly optimistic about the long-term prospects but pessimistic about how long it would take to remove the constraints it had identified. In fact, the paper suggested that it could take years before the full potential of contractor support would be realised. History proved not to be so accommodating, and the ADF was in East Timor before the end of the year—its largest deployment since World War II. Worse still, the ADF not only had to support its own 6,000 or so personnel but also had to provide varying degrees of support to another 4,000 coalition troops from thirty countries.

To help carry off this mammoth task, the ADF chartered civil shipping, and later civil aircraft, to maintain the supply line from Darwin to East Timor. This was easy enough, given the benign air and maritime environment. Initially, the security situation on the ground was less certain and for that reason very few contractors were employed. Even when the situation stabilised, Defence made only limited use of contractors in the first, Australian-led phase of the operation because of a lack of policy guidance. Notable exceptions were the relatively early and successful contracting for communications infrastructure, followed by the contracting of cleaning of ADF vehicles for quarantine clearance before their return to Australia. In the subsequent UN-led phase of the operation, the ADF used contractors in a variety of roles, including vehicle, equipment and facilities maintenance and cleaning.

Defence finally issued formal guidance on the matter in October 2001. Following an update in early 2004, the key elements of ADF policy are as follows.

- Commercial support to operations should be considered a standard option rather than an exceptional case.
- The ADF has a responsibility to protect contractors from environmental and hostile threats on operations.
- Contractors may not carry weapons or directly take part in hostilities.
- Any decision to use contractors must take into account the ADF's ability to protect them, the criticality of the capability they may provide and the cost-effectiveness of the contract.
- Where necessary, contractors should be integrated into ADF planning, exercising and preparedness regimes (this last element of the policy is yet to be realised in practice).

To support this policy, Defence has developed a range of administrative procedures and instruments, which need not concern us here beyond noting that every attempt is made to ensure that contractors are treated ethically and in accord with international law.

With a policy framework in place, the way was clear for the ADF to use contractors more widely. In 2001, the commercial firm Hevilift was contracted to replace ADF helicopters in Bougainville in support of the Peace Monitoring Group. Then followed even more extensive use of contractors in both Afghanistan and Iraq. Aside from the usual use of strategic air and sea transportation, contractors have constructed base infrastructure, provided ongoing

domestic support within the infrastructure and provided miscellaneous logistic support services to the ADF throughout Central Asia.

Much of this has been done through a standing offer in place since 2002 with Inchcape Shipping Services. As of late 2004, Defence was recontesting the standing offer, which covers a range of miscellaneous and ad hoc tasks including vehicle hire, transportation, language services, telecommunications, building hire, catering, laundry, welfare and recreation. Five firms have been shortlisted—three Australian subsidiaries of multinational companies, one indigenous Australian corporation, and one international company.



Contracted Super Puma helicopter transports PNG members of the Regional Assistance Mission to Solomon Islands. Photo courtesy of Patrick Defence Logistics.

The ADF adopted a more comprehensive approach to contractor support in the 2003 Regional Assistance Mission to Solomon Islands. In July of that year, the Australian Government responded to a request for assistance from the Solomon Islands Government to help restore peace and stability in that troubled nation. Initially, the mission involved 2,500 personnel, including 1,400 ADF personnel along with AFP officers, public servants and personnel from a number of other Pacific Island states. Apart from a couple of hundred troops designated as a security reserve, most of the ADF contingent provided logistics support of one sort or another, including communications, air and sea transport, catering, engineering and health services. The composition of the force showed yet again that operating in an isolated place with limited infrastructure demands a sizeable logistics tail (more like a ponderous rump). Indeed, in this case, more people were needed to support the mission than were directly involved in delivering frontline functions.

Finding itself with a number of scarce logistics and support units deployed on a non-ADF led operation, Defence moved quickly to transition to commercial support.

Finding itself with a number of scarce logistics and support units deployed on a non-ADF led operation, Defence moved quickly to transition to commercial support. This is understandable; the deployment further exacerbated the imbalance between the ADF's combat and support capabilities at a time when deployments were continuing in East Timor and Iraq.

In August 2003, an invitation was issued to register interest for the provision of a package of logistic support services, including garrison support, repair and maintenance, fixed- and rotary-wing aviation, sea transport, medical and dental services, catering, supply chain and security. Competition for the contract was surprisingly active. A total of fourteen companies responded, of which four were shortlisted. In the event, Patrick Defence Logistics won the contract and began delivering services in October 2003.

The scale of the support operations is substantial. The prime contractor has fourteen personnel on the ground managing sixty-three subcontractor personnel, seventy local contractor personnel and 150 locally-engaged staff. Assets include forty-three vehicles, three motor boats, one fixed wing aircraft and three rotary wing aircraft. The three helicopters are particularly important in providing aero medical evacuation, mobility for the quick response force, search and rescue and logistics support. The health services facility has twenty-eight health professionals including five doctors and ten nurses. The catering subcontractor supplies meals for 450 people daily.

Performance has reportedly been very satisfactory. As the transition from military to commercial support progressed, the ADF contingent drew down from 1,400 to 600 personnel in early December 2003 finally leveling out to around fifty at the end of 2004. The contract is valued at around \$49 million per annum. In comparison, the net additional cost of ADF support during 2004-05 was more than \$100 million not counting the base cost of personnel or the use of capital assets (although the ADF phase of the operation was in many ways more demanding than that following the transition to contract support).

The Solomon Islands experience proved that contractor support could be employed in remote, poorly developed locations. So far, the contract is working to the satisfaction of the customer. It must be noted, though, that the area of operations is largely benign.

Help wanted

In September 2004, Defence released an invitation to register interest in helping to plan contractor support to ADF operations. The ADF seeks a planning partner for a three-year period, extendable to five years. To guard against perceptions of conflicts of interest, the successful bidder for the planning contract will be excluded from tendering for the work identified in the planning process.

The aim of the planning contract is to reduce the time taken to plan for and engage contractor support to operations. More broadly, it will also help integrate contractors into ADF exercising and preparedness regimes. Yet this is only a modest step in that direction. To begin with, the scale of the work is slight; the indicative budget implies the equivalent of only a couple of junior staff officers. More critically, it does little to ensure that industry can respond at short notice to contingencies. To date, this is the best indication we have of Defence's long-term approach to contractor support. It means that support to operations will continue to be contracted case by case and probably after the event, as in Solomon Islands in 2003.

A bolder approach?

As we have seen, the US and UK armies have a much bolder approach to contractor support through their respective LOGCAP and CONLOG contracts. The essential difference is that the company holding the contract is integrated into the military preparedness regime and can therefore respond very much more quickly—in a matter of days rather than months. This allows contractor support to be employed from the start of an operation, thereby avoiding the need to deploy fully the military's own organic support capability. Essentially, LOGCAP and CONLOG augment the military's capability and capacity.

Contractor support won't work in all circumstances. There will be times when the security situation either precludes or makes impractical the use of civilian contractors. As the level of operational risk increases, so will the number of troops needed to protect contractors in the area of operations. But there will also be situations like Bougainville in 1997 and Solomon Islands in 2003, where contractor support could arguably have been used from start to finish, thereby allowing the ADF to retain its organic support capabilities ready for higher intensity operations elsewhere.

There will be times when the security situation either precludes or makes impractical the use of civilian contractors.

Another advantage of the comprehensive approach is that, with a single contract in place, the ADF can use contractors in exercises and training rather than waiting for a real deployment to see if things work.

The increasing trend for agencies like the AFP to be involved in, or even to lead, offshore operations expands the circumstances in which complex logistics support in remote places might be needed. These are relatively low-threat operations almost by definition, and could employ contractor support from the start if a rapid response contract were in place.

Of course, there's a price to be paid. It costs money for a firm to maintain a latent capability available at short notice, although as argued in Chapter 2 this will usually be less than the cost of maintaining a uniformed capability. Moreover, the cost of contractor support is kept lower by the sheer scale of the global market servicing other militaries, aid agencies, construction projects and the mining and energy sectors. In practice, a firm holding a prime contract would probably subcontract a lot of work to other firms with available assets and personnel.

One shortcoming compared with the current ad hoc approach would be the loss of regular competition in what has proven to be a very healthy marketplace. Following a competitive process to pick its long-term logistics support partner, Defence would have to rely on a cost-plus incentive contract for the delivery of support in a contingency. This is probably not as bad as it seems. The possibility of contractors extracting monopoly rents can be mitigated through open-book accounting and, where practical, competitive subcontracting. Properly managed, this would deliver greater transparency of operational costs and perhaps even a higher level of price surety than when Defence uses its organic capabilities. And once

the initial surge abates, Defence could still use competitive means to award contracts for less urgent types of support. (This is currently happening with the US Army's contracts in Iraq, as 'contingency' operations give way to 'sustainment' operations.) In any case, Defence's commercial position would be no more precarious than under the alliance contracts already adopted for billions of dollars of capital equipment projects.

Rethinking the force structure

The question must be asked: if the private sector can provide support to an operation from start to finish, can the ADF reduce its own organic support capabilities? Some care is required here. Looking at how heavily the US Army relies on commercial support through the LOGCAP contract, it's tempting to think that we could do the same. However, the US can afford to have its army largely reliant on private sector support because it also has the Marine Corps, which retains a higher capacity for self-support, at least in the initial phase of a rapid deployment.

The question must be asked: if the private sector can provide support to an operation from start to finish, can the ADF reduce its own organic support capabilities?

Just as the US retains the capability for independent support of quick deployments in a sizeable part of its force structure, it's essential that the ADF retain a similar core capacity when commercial support is unavailable or inappropriate. In particular, the ADF must be able to support at least an initial deployment into a high-threat environment at the upper end of the scale of prospective operations. Even so, this leaves the way open to look closely at the range and depth of support capabilities currently contained in the ADF.

If a rapid response arrangement like LOGCAP or CONLOG were in place, the ADF could rely on contractor support in all but the most dangerous of environments. Even then, the working assumption could be that six to twelve months into an initially dangerous operation the situation would be secure enough to allow commercial support to take over from the ADF. This couldn't be assured—a large, sustained, high-intensity conflict could arise. But, as with all defence planning, it's a matter of managing risk rather than covering every remote possibility. If this proposition is accepted, the ADF could focus its limited logistic support capabilities much more than at present. Rather than trying to maintain multiple support elements for rotating forces, it could concentrate on building a smaller but more robust support capability for demanding operations. This would boost the capability of high-readiness support elements at the expense of undermanned and underequipped elements, including those in the Reserve force. At the same time, any support capability not required in a high-threat environment could be deleted from the ADF order of battle.

Given the ADF's uneven experience with contracting out in the 1990s, some care would be needed. There are practical limits to what can be achieved. For example, some tactical-level combat support elements are so closely integrated into the units they support that it's unavoidable that they train, exercise and deploy together—greatly complicating, if not

precluding, the use of contractor support. Nonetheless, it's worth close examination. But rather than searching for peacetime financial savings, the goal should be to make the best use of all available resources—public and private—to ensure that the ADF can deploy and sustain the combat capabilities that the government wants.

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Contracting repair and maintenance

So far we've focused mainly on general logistics support to deployments. The other important category is the maintenance of specialist military equipment in operational areas. Here, too, there appear to be opportunities to consider.

As a matter of course, Defence pursues long-term support contracts when it acquires new military equipment. This allows industry to make a long-term investment in the skilled personnel required. Even for current ADF platforms, Defence has progressively been moving to longer term contracts for the repair and maintenance of equipment. In most cases, contractor personnel do most of the major, depot-level work while military maintenance personnel undertake direct operational-level maintenance tasks. The demarcation is designed so that only military maintainers need deploy with the asset. Arrangements like this exist for most ADF platforms, including vehicles, fixed- and rotary-wing aircraft, and ships.

The arrangement makes sense. It means that ADF assets can be maintained in any threat environment because all the operational maintenance personnel are in uniform. But this isn't always going to be necessary. A lot of repair and maintenance work tends to be done in rear areas—especially for aircraft that operate from well-defended airfields often outside of the conflict zone. For example, it's hard to see why contractors couldn't have maintained our AP-3C maritime patrol aircraft and F/A-18 fighters, which all flew from safe bases outside Iraq. Certainly the US made use of contractors to augment its uniformed maintenance crews, for example in maintaining Patriot air-defence missile systems in the field.

Having contractors ready to augment ADF uniformed maintenance crews on operation would improve sustainability from a workforce perspective—especially given that the ADF is having trouble recruiting and retaining personnel in many of these specialist areas. There would be much to be gained by ensuring that equipment maintenance contracts allow for in-theatre support by the private sector. Defence is making some progress in this direction with the replacement patrol boat project, where provision exists for the contractor to send people to meet the vessel in regional ports if support is required. And the Airborne Early Warning and Control aircraft project plans to augment deployed uniformed maintenance personnel with fly-in fly-out civilian contractors.

Complications

A more explicit reliance on commercial support would need to be considered carefully. Contractors can't be brought into the military chain of command; aside from financial redress under the terms of their contract, they can pack up and leave at a moment's notice should the security situation deteriorate. However, experience in Iraq has shown that contractors can be highly resolute and reliable even in the face of kidnappings and terror attacks—much more so than some nation states.

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Another complication with contractor support is the burden it imposes on the ADF to provide protection. Uniformed ADF support units are able to provide some level of self-protection, whereas contractors may need to be protected by the ADF. Indeed, this is an obligation of the ADF under international law (see Chapter 4). One option would be to use some of the 17,000 soldiers in our Army Reserve for the relatively less demanding task of protecting contractors, the advantage being that we have a bounty of basic soldiers and a dearth of logistics specialists.

In US practice, contractor security is solved, at least in part, by allowing contractors to either be armed or be protected by specialist security contractors. ADF policy prohibits this, thereby forcing the ADF to divert troops to protect contractors when necessary. But, as we'll see in the next chapter, our advice is that there's no legal impediment to contractors being armed for self-protection even though Defence remains concerned that the practice could reduce protection under treaties and international law. As a practical matter, it remains to be seen if contractors can be denied the ability for self-protection if and when casualties arise on an operation.

The final complication of expanding contract support is the availability of trained personnel and the flow-on effect on the defence workforce. Anecdotal experience from the 1990s is that firms winning contracts readily took up former Defence personnel when activities were outsourced, especially in technical areas like the maintenance of military equipment. In this way, firms avoided the training overhead that they would otherwise have incurred. The fear is that more extensive use of contract support in operations could siphon off logistic and technical expertise from the ADF. Given the acknowledged shortages in many technical trades—both in the ADF and the broader economy—this possibility can't be ignored. To the extent that more extensive use of contractors would create competition for personnel between the Defence and private sector, rather than transfers from one to the other, this would need to be taken into account.

There is, however, a more optimistic way to view the likely interaction between the Defence and contractor workforces. Around 10% of permanent ADF members re-enter civilian life each year. That is, roughly 5,000 individuals with an average of ten years in uniform separate from the ADF—an annual loss of around 50,000 years of military experience of one sort

or another. Many of the personnel working for Australian logistics firms are former ADF members, so using contractor support to operations would bring some of this substantial pool of expertise back into play. While these people have decided to leave behind the rigours of military service, they're nonetheless happy to support the ADF through their subsequent civilian careers. In this way, the ADF continues to benefit from its investment in training these personnel while they were in uniform.

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Sponsored reserves

The UK has found a way to overcome concerns about the protection and reliability of contractors through the use of what they call 'Sponsored Reserves'. Put simply, the scheme requires contractor personnel providing peacetime support to the UK military to become reservists who can be called up for full-time service in the event of war.

In the UK, the system was first put into practice in December 2001, as part of the private financing of the heavy equipment transport capability used to move tanks and other armoured vehicles. In peacetime, the vehicles operate from military bases in the UK and Germany. Not only does the private sector own the ninety-two transporters and other related assets, approximately one-third of the drivers and maintenance personnel are civilians employed by a subsidiary of KBR. As a condition of their employment, these people



UK heavy equipment transport. Photo courtesy of KBR

are Sponsored Reservists: in wartime, they would don their uniforms, deploy with their vehicles and, significantly, defend themselves like any other soldiers. Currently, twenty-one of the vehicles are successfully operating in southern Iraq, with eleven of the detachment being Sponsored Reservists.

By explicitly linking civilian employment with reserve service, the Sponsored Reserves system overcomes the practical problem of training general reserve personnel in specialist roles in the limited four to six weeks available each year. Moreover, the amount of military training required of specialist reserves can be truncated to only those skills needed for the delivery of their service in an operational environment (which should not be too different from peacetime delivery) and for self-protection. Finally, by making civilian employment contingent on Sponsored Reserve service, the scheme gets around the problem of the ‘busman’s holiday’, where specialists tend to be unwilling to mirror their civilian expertise in reserve service.

Sponsored reserves won’t work in all circumstances, and are best thought of as an option with niche application. In fact, many types of private sector support rely on exploiting the highly dynamic global market for such services, which hinders the development of sponsored reserves. Moreover, legislative changes may be needed to compel reserve service as a condition of employment, and it remains to be seen what sort of wages this would entail. Nonetheless, sponsored reserves deserve close attention. Not only is the ADF looking to replace a large number of vehicles—some with potential third-party use—but the maintenance component of the new Defence Integrated Distribution System contract could provide a valuable testbed for the concept.

... securing commercial assets at short notice can’t be guaranteed, especially in a crisis ...

Sealift and airlift

While the focus so far has been on support to ground operations, it’s important not to ignore strategic lift. Almost every major ADF deployment in the past ten years relied on some combination of commercial sea and air transport to move stores and equipment. However, securing commercial assets at short notice can’t be guaranteed, especially in a crisis when other governments and non-government organisations are scrambling for lift capacity, as in the December 2004 tsunami. Of course, this will often be the case in wartime.

Rather than hope that ships and planes will be available when the time comes, consideration should be given to prearranging access ahead of time. The UK is doing this with its strategic sealift capability through a private financing deal. The result will be six roll-on/roll-off vessels (with Sponsored Reserve crews) available on call to the UK Ministry of Defence. At other times, the vessels will be used for commercial tasks. Similar approaches are feasible for any infrequently employed transport asset that has commercial application, including ships, utility helicopters and strategic transport aircraft.

Mission delivery

The final possible area for private sector support to operations is in actual mission delivery: that is, having the private sector perform the core task on an operation rather than simply support it.

In the case of military combat operations this is probably easy to dismiss. For a nation like Australia whose self-identity involves notions of Anzac and Kokoda, it would be discomfoting to have our fighting done by others. But there are non-combat areas where the private sector could find itself at the front line, so to speak. For example, the US routinely uses private firms to conduct both military and police training for other nations, and it has even employed contractors as peace monitors in the Balkans.

There are real advantages to using ADF or AFP personnel to train regional military and police personnel.

There are real advantages to using ADF or AFP personnel to train regional military and police personnel. Not only does it ensure that appropriate standards are maintained, but it allows us to develop close personal relationships with our neighbours. But why do we have personnel in Iraq training the Iraqi military when the US itself has employed a private firm for the same task?

There may be opportunities even closer to home for the private sector to play a bigger role in delivering the mission. The AFP is at full stretch at the moment, with officers in Solomon Islands and PNG and added responsibilities at home due to the threat of terrorism. Could there be an opportunity for the private sector to help with some of the training and support in the region? At least one firm, DynCorp Australia, thinks so and is actively seeking applications from ex-police officers and SAS members 'to participate in a joint effort to restore law and order and address issues of serious crime in the Oceania region'.



LAWYERS, GUNS AND MONEY

Armed conflict entails the deliberate killing and wounding of humans. Despite this brutal fact, or perhaps because of it, the international community has developed rules for the conduct of war. Australia is no exception, having ratified essentially all of the relevant treaties, including the four Geneva Conventions of 1949 (Geneva I–IV) and the two Additional Protocols of 1977 (Protocols I and II). Geneva I–IV and Protocol I apply to international armed conflicts, while Protocol II deals with non-international armed conflicts. There are some important differences between the provisions for international and non-international conflicts, and we will highlight these as necessary.

International humanitarian law provides the framework within which the private sector’s role on the world’s battlefields must be tested and, where possible, accommodated. However, this far from exhausts the legal issues that have arisen because of the burgeoning private military sector. Other important and to some extent unresolved questions concern how to hold contractors working in conflict regions accountable and whether regulatory arrangements, akin to arms export regulations, need to be imposed.

This chapter explores these issues—legality, accountability and regulation—from an Australian context. While the discussion does get technical, this is warranted: Australia’s obligations under international law are too important to gloss over. The discussion that follows draws heavily on a legal opinion provided by Professor Donald R Rothwell, Challis Professor of International Law at the University of Sydney.¹

1 ‘Legal opinion on the status of non-combatants and contractors under international humanitarian law and Australian law’, by Professor D R Rothwell, available on the ASPI website (www.aspi.org.au).

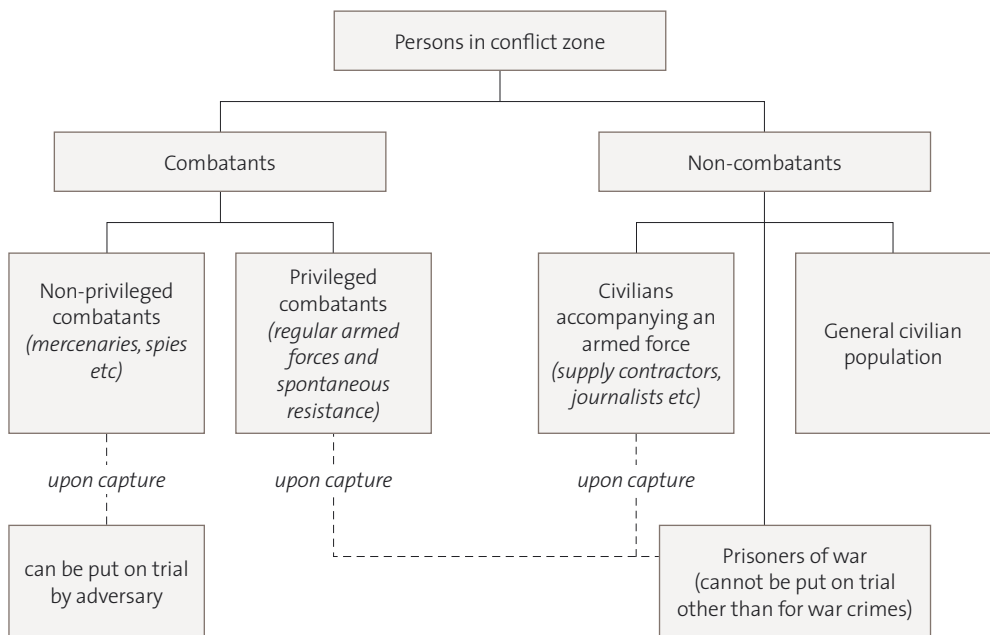
Legality: combatants, non-combatants and contractors

Under Geneva III and Protocol I, persons in a conflict zone are either combatants or non-combatants. Each of these categories can then be broken down further, as shown in Figure 1.

Combatants, as the term implies, take part directly in hostilities. Combatants who are members of an armed force are ‘privileged combatants’, as are civilians who take up arms spontaneously to resist invading forces and who respect the laws and customs of war. Upon capture, privileged combatants are treated as prisoners of war and thereby enjoy immunity from prosecution for acts undertaken before their capture, except for war crimes.

Any combatants who do not qualify as privileged combatants, such as mercenaries and spies as defined in Protocol I, are ‘non-privileged combatants’. Non-privileged combatants aren’t entitled to be treated as prisoners of war; nor are they immune from prosecution for their actions while combatants. Nonetheless, they remain entitled to humane treatment, especially if sick or wounded. This doesn’t mean that non-privileged combatants (including mercenaries) violate international law by their very existence. Rather, they’re simply not protected by it in the same way as privileged combatants or civilians.

Figure 1: Combatants and non-combatants under international humanitarian law



Non-combatants include everyone in a conflict zone who isn’t a combatant. Under the Geneva Conventions and Protocols, non-combatants are granted extensive protections. The non-combatants category can be divided into three: first, there’s the general civilian population; second, there are prisoners of war, who have surrendered or been captured; third, and of particular interest, are civilians accompanying an armed force, who are referred to in Geneva III as:

Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of armed forces...

In this way, Geneva III explicitly acknowledges that civilians, including contractors, may accompany an armed force in a conflict. Importantly, Geneva III also confers prisoner of war status on accompanying civilians upon their capture. This provides a firm legal regime under humanitarian law for civilian contractors employed on operations.

Where do armed civilians fit in?

Armed civilians create challenges for the operation of the Geneva Conventions and Protocols. In an international armed conflict, they could be categorised as:

- non-combatants accompanying the armed forces, provided they're armed only for their self-defence
- privileged combatants who have taken up arms spontaneously to resist invasion
- non-privileged combatants who meet neither of the exceptions noted above
- mercenaries, who are also non-privileged combatants.

In most circumstances, civilians accompanying an armed force will fall into the first category of non-combatant. Difficulties arise when civilians are armed for other than self-defence, as in the case of security contractors.

... security contractors replacing soldiers around a legitimate military objective in a conflict zone could find it hard to argue that they aren't combatants.

Whether an armed security contractor is termed a combatant or non-combatant is a matter of the detailed circumstances and, to an extent, of legal interpretation. The distinction is very important. If classified as a combatant, the security contractor will almost certainly be non-privileged and therefore lose the protection afforded to either civilians or privileged combatants under international law. If captured, the contractor would not become a prisoner of war and could face legal action according to the laws of the imprisoning power—not unlike those designated as 'unlawful combatants' by the US, who are being held at Guantanamo Bay.

In some circumstances, a security contractor could be classed as a mercenary under Protocol I, although the criteria for such a classification are many and hard to satisfy. Here the distinction could turn on the nationality of the individual, whether they were in 'pursuit of monetary gain' and whether they were recruited 'to fight in an armed conflict' as opposed to providing security of a defensive nature. Even if they avoid being classed as mercenaries, security contractors could still be classed as non-privileged combatants in some circumstances.

This is best appreciated by way of examples. Security contractors protecting assets of no military significance, like a diplomat or purely civil infrastructure, would under most interpretations be non-combatants. On the other hand, security contractors replacing soldiers around a legitimate military objective in a conflict zone could find it hard to argue that they aren't combatants. In between, there's a myriad of uncertain situations. Consider a private security detachment travelling with a logistics supply convoy in a conflict

zone. If they're there to protect the civilian drivers they are arguably non-combatants, but if they're there to protect the military supplies being carried they could be seen as combatants.

Under Protocol II, civilians who take part in hostilities in a non-international armed conflict lose the protections afforded to the civilian population. Moreover, they could find themselves open to legal action akin to that which non-privileged combatants are liable to in an international armed conflict.

Thus, while there's some room for interpretation, argument and taking account of circumstances (including in the case of organised resistance movements), civilians armed for other than self-defence could find themselves treated as non-privileged combatants upon capture. This is true in both international and non-international armed conflicts.

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Can an adversary legally target contractors?

In general, contractors will enjoy the protection afforded to civilians in an international armed conflict. This doesn't mean that they will always be immune from attack. Almost by definition, contractors accompanying an armed force perform tasks that make an effective contribution to military action, which in turn makes their activities legitimate military objectives in an international armed conflict under Protocol I. Similarly, under Protocol II, civilians lose their right to protection for such time as they take a direct part in hostilities. Under some interpretations, this would extend to contractors if, for example, they're repairing aircraft and thereby preparing the means for hostilities. Conversely, contractors undertaking purely civil reconstruction work in a conflict zone retain non-combatant status and are immune from attack under international law.

... as the insurgency in Iraq demonstrates, there's no way to guarantee that an adversary will respect international humanitarian law.

It follows that, in both international and non-international armed conflicts, contractors would be immune from attack in many circumstances, but their immunity would become less certain the more closely they support combat operations. Of course, as the insurgency in Iraq demonstrates, there's no way to guarantee that an adversary will respect international humanitarian law.

Responsibility to protect contractors

The obligations of defence forces to civilians attached to them in conflict zones aren't entirely clear under international law.

Protocol I says that state parties to an international armed conflict shall *to the maximum extent feasible* remove civilians under their control from the vicinity of military objectives, and protect civilians under their control against the dangers resulting from military operations. These obligations were intended to cover the responsibilities of a state party on its own territory towards its own civilians, or in the case of a territory under its own control towards the civilian population. But the language is arguably broad enough to cover civilians accompanying a military force in a conflict.

The term 'to the maximum extent feasible' in Protocol I is significant. It suggests that elements of military necessity can be taken into account when decisions are taken on employing contractors in an international armed conflict. And Protocol I does not displace the clear recognition in Geneva II that persons such as civilian members of military aircraft crews, war correspondents, supply contractors and members of labour units will accompany the forces and receive prisoner of war protection if captured. Consequently, there's no complete prohibition on their use; nor must the employing military meet absolute standards of protection. Instead, it's accepted that civilian contractors should only be deployed after carefully balancing the level of risk and the military need for contract personnel in the conflict zone.

In a non-international armed conflict, the responsibility to protect civilians under Protocol II isn't as extensive as in an international armed conflict. Nevertheless, and quite properly, ADF doctrine shoulders the responsibility conferred in Protocol I—to protect and avoid using contractors when the risks are high—without distinction between international and non-international conflict.

Accountability: ensuring the rule of law

Without the rule of law there can be no accountability. Domestic criminal and civil law applies only within a defined jurisdiction—usually the actual territory of the state administering the law. Military law, on the other hand, routinely extends beyond borders to impose legal accountability on armed forces operating overseas. For the ADF, this is done through the *Defence Force Discipline Act 1982* (DFDA) which provides the legal framework for military discipline and justice both in Australia and overseas. This includes the extraterritorial extension of Commonwealth criminal law as it is applied in the Jervis Bay Territory.

The extraterritorial reach of the DFDA is important. Not only does it enable ADF command and discipline to be maintained overseas, but it also ensures that ADF personnel can be held to account under law for criminal acts while deployed. This last factor is particularly important: ADF personnel often enjoy immunity from local laws through a Status of Forces Agreement (SOFA) between Australia and the host government, and in other instances no effective legal system may be in operation in a conflict region. When either of these circumstances arise, it's essential that the Australian Government has the legal power to hold ADF personnel to account for their actions. The DFDA ensures that this is always the case.

The jurisdiction of the DFDA can be extended to civilians accompanying the ADF overseas or on operations against the enemy, provided that they formally agree to the extension. This allows the application of extraterritorial criminal law but excludes the imposition of several military-specific provisions, including the requirements to obey lawful orders, remain at post and not be insubordinate.

ADF doctrine recognises the merit of placing contractors and other civilians accompanying a force under the DFDA, and procedures are well established for this to occur. This isn't always necessary, especially if the local laws are similar to those in Australia, so an assessment is made in each specific circumstance. But even if operational planners assess that deployed civilians should come under the DFDA, the operational commander has the discretion to waive the requirement if an 'indispensable' individual refuses to sign on to DFDA coverage. Provided that an effective local legal system is in operation, and the individual isn't afforded the protection of a SOFA, then this is an acceptable situation. Otherwise, a situation could arise where a contractor employed by the ADF falls outside any legal jurisdiction.

For those circumstances in which the DFDA can't be applied, such as when contractors are employed by an agency other than Defence, the government amended the *Crimes (Overseas) Act 1964* in late 2003. The amendments cover a wide range of circumstances, including those of Australians undertaking tasks under international agreements with the UN or foreign countries, and those of Australians given diplomatic and consular immunity. Importantly, the Act also establishes extraterritorial jurisdiction for Australians working in declared countries on behalf of, or under contract to, the Commonwealth. Currently, Iraq and Solomon Islands have been declared in this way, and more limited declarations have been made for designated persons in Jordan and PNG.

In many ways, Australia's regime of extraterritorial law compares well with what other nations are doing. The US, for example, is moving only now to strengthen its laws to cover contractors employed by agencies other than the military. However, while the US legislation covers anyone except nationals of the host country, and the DFDA makes no distinction on the basis of nationality, the *Crimes (Overseas) Act 1964* applies only to Australian citizens and permanent residents.

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It may be possible through legislation to extend the *Crimes (Overseas) Act 1964* to non-Australian contractors in certain circumstances. To be effective, this would probably require both an appropriate SOFA with the host nation, extending to non-Australian nationals operating in the host country, and consent from the contractor's employees (which could be a condition of contract award). This would then align the jurisdictional reach of the *Crimes (Overseas) Act 1964* with that of the DFDA as far as foreign citizens are concerned.

Even given the undoubted practical difficulty in securing a prosecution, extending the *Crimes (Overseas) Act 1964* to cover foreign nationals in this way is worth considering. 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 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.

Regulation: putting the dogs of war on a leash

So far, we've examined several legal problems surrounding the use of contractors by the Australian Government, and in particular by the ADF, in conflict zones. We now turn to the related issue of regulating the activities of Australians and Australian firms that ply their trade on the world's battlefields.

Compared with the UK and the US, Australia currently has a relatively small number of firms that deliver logistic, military and security services overseas. But with the sector growing globally, now is the time to consider regulation—especially given that the arguments for regulation depend more on the intrinsic nature of the activities than on their scale.

The foremost reason to regulate the sector is to prevent individuals and firms acting contrary to Australia's national interests and foreign policy objectives. The most straightforward example would be assisting a foreign nation to take military action not supported by the Australian Government. In the worst case, this might include military action against an ally. Irrespective of whether the support entailed direct or indirect support to hostilities, or only went so far as assistance with planning and intelligence, the involvement of Australians or an Australian firm would be entirely inappropriate.

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Even providing foreign armies and police forces with training could be a matter of real concern. This isn't simply a matter of keeping sensitive intellectual property out of the wrong hands, although that can be very important. Rather, in many cases, Australia has a strong interest in ensuring that training is of a sufficiently high standard. This is especially true for some of our smaller neighbours, where good policing and a disciplined military can be critical to the state's stability and prosperity. Similarly, there are good reasons to want any military and police training to promote the laws of armed conflict, respect for human rights and the rule of law. None of this can be ensured if the training is delivered by an unregulated private sector firm.

Finally, there are some pragmatic issues. The involvement of inadequately skilled and experienced firms in risky ventures has the potential to embarrass Australia and—if worse comes to worst—force the government to take military action to recover Australian nationals. This is a real-world issue: in mid-2004, Australia deployed hostage negotiators and a 'logistic support detachment' by RAAF C-130 transport aircraft to Iraq following the

claim that two Australian contractors had been taken hostage. On that occasion, two things quickly became clear. First, the government had no definitive picture of which Australian firms and individuals were working in Iraq. Second, while there were many highly reputable and professional firms providing security services, there were also a good number of hastily formed firms employing poorly qualified staff—each an accident waiting to happen.

International law is surprisingly permissive towards the activities of private military firms, even when it comes to the question of mercenaries. There exists an International Convention against the Recruitment, Use, Financing and Training of Mercenaries, but neither Australia nor our major allies have signed it, probably because it adopts a definition of mercenary that would make the convention of little practical use. In practice, if private military/security firms are to be regulated effectively, it will be on the basis of domestic law.

As things stand, the government can exert a degree of control over private military and security firms through the *Crimes (Foreign Incursions and Recruitment) Act 1978*. The Act was originally designed to prevent Australians becoming mercenaries in southern Africa in the late 1970s. Subsequently, in 2004, it was amended to prohibit Australians fighting with or assisting terrorist organisations in the wake of the government's inability to prosecute Australians held by the US as unlawful combatants following the conflict in Afghanistan.

Broadly speaking, the Act prohibits Australians from engaging in hostile activities in a foreign state, planning and preparing to do so in Australia or elsewhere, or recruiting persons to serve with a body or association that has the objective of doing so. This prohibition isn't absolute; exceptions exist for persons in or with an armed force of a foreign government or in any other armed force formally declared by the Minister. However, these exceptions do not apply if the person is a member of a prescribed terrorist organisation, or an organisation prescribed by the Minister because it's directly or indirectly engaged in preparing, planning, assisting in or fostering a serious violation of human rights; or armed hostilities against Australia or its allies; or a terrorist act; or an act prejudicial to the security, defence or international relations of the Commonwealth.

The Act also prohibits recruiting people in Australia to serve 'in any capacity in or with an armed force in a foreign country, whether the armed force forms part of the armed forces of the government of that foreign country or otherwise', unless the Minister declares that it's in Australia interests to allow recruitment into that specified armed force. Despite the broad sweep implied by the phrase 'in any capacity in or with', the legislation is open to interpretation in several respects, including on what constitutes an armed force. In any case, it only prohibits recruiting, not actual service in or with an armed force in another country. Thus, to the extent that this part of the legislation applies to Australian military/security firms, it's at best a complication and not an effective avenue for regulation.

Overall, then, the *Crimes (Foreign Incursions and Recruitment) Act 1978* could be used to place limits on the activities of private military/security firms, but only in so far as they engage in hostile activity in a foreign state and aren't in or with a foreign armed force—and then only in a blunt manner.

What's needed is a precision tool—a regulatory regime that controls *what* services can be provided and *when* those services may be provided.

What's 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*. Moreover, clear 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 of mass destruction. Thus, there appears to be no legal impediment to legislation controlling the export of military services in general.

Since the US already has an export-licensing regime over some types of services, and the UK is actively considering licensing private military firms, the time is ripe for the Australian Government to look at this issue.



MAKING IT WORK

It's tempting to conclude that a 100% military force is always going to be more effective and less risky than a mixed force of soldiers and contractors. Given unlimited money and an endless supply of willing recruits, the goal would be simple—an ADF that is totally self-sufficient from barracks to battlefield.

If only it were that easy. Since the current government entered office in 1996, Defence spending has increased in real terms by more than 20% after taking account of supplementation for operations. This is due to a number of factors, the most enduring of which is the simple fact that the cost of maintaining a defence force continues to rise faster than inflation. In the 2000 Defence White Paper, the government committed itself to a decade of 3% real growth in defence spending. Yet in just about every budget since then, Defence has asked for and received still more money for either personnel or operating costs.

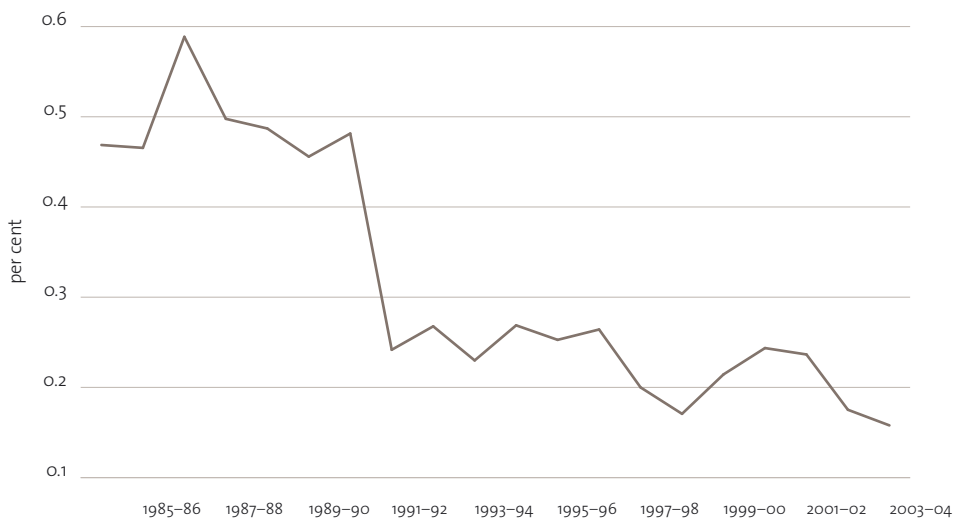
In recent years, the taxpayer has been willing to foot the bill ...

In recent years, the taxpayer has been willing to foot the bill, but this was under very favourable economic conditions and in a worryingly insecure world. This willingness will get harder to sustain as we adapt psychologically to our initial alarm at the events of the past few years and an aging Australian populace puts the squeeze on Treasury coffers. And even if rising costs were not a problem, Defence should strive as a matter of course to deliver as much combat capability as it can with the money it gets. Here lies the real impetus for using contractors. For

any given size of force, contractor support enables both larger and more sustained operations than would otherwise be the case.

Then there’s the challenge of finding recruits. As Figure 2 shows, over the past twenty years the proportion of the Australian workforce applying to join the ADF has more than halved (without any correlation with unemployment in the economy as a whole). The fall is just as stark in absolute terms. Last year, fewer people applied to join the ADF than at any time in the past two decades—only around 16,000 applicants compared with a peak of over 45,000 in the mid-1980s.

Figure 2: Percentage of the Australian workforce applying to join the ADF



Source: *Defence Annual Reports*

Over the past nine years, ADF recruitment has, on average, fallen short of target by more than 12%.

Some of this dramatic fall may be an artefact of Defence seeking fewer recruits as its workforce contracted during the 1990s, as well the more recent use of more focused recruitment strategies. Nonetheless, there’s a problem. Over the past nine years, ADF recruitment has, on average, fallen short of target by more than 12%. Recent data on ADF personnel numbers highlights all too clearly where the shortfall is being felt. There are large deficits in occupations such as mechanics, electricians and other technical trades—in many cases precisely the non-combat areas that contractor support is able to fill. And a 2005 Audit Office report ‘identified that significant challenges remain for Army in maintaining required logistics capabilities, particularly in regard to personnel required and critical trade deficiencies’. Importantly, the ADF’s recruiting problems predate the recently emerged skill shortage in the economy as a whole. Thus, even if the government is willing to pay the cost, these personnel trends may render a fully self-sufficient ADF unsustainable.

Like it or not, the battlefield-contractor genie is well and truly out of the bottle. In Iraq, the US has demonstrated what can be done with contractors. While there have been some

problems, nobody has suggested going back to more uniformed support units. If the size of the US military grows as a result of the lessons of Iraq, it will be to provide more combat troops rather than to put more cooks, cleaners, truck drivers, equipment maintainers and construction workers back into uniform. In any case, with contractor support firmly entrenched in the doctrine—indeed in the force structure—of our principal ally, it's likely that we'll be making use of contractor support on coalition operations. Similarly for the UK, who assessed that 'the services provided by contractors [in Iraq] were often excellent, especially given the demanding conditions and short timescales.'

Like it or not, the battlefield-contractor genie is well and truly out of the bottle.

Over recent years, the ADF has made good use of contractor support in a variety of operations, but always on an ad hoc basis and usually well after the commencement of the operation. We think that the time is ripe to go further, but we propose a measured approach that, in the first instance at least, would allow the ADF to fall back on its current practice if necessary. Our proposal is contained in the following four recommendations.

Move now to prearrange contract support for operations

The benefits of using contractors are greatest when their support is on call and ready to go as an integrated part of overall military preparedness. So far, Defence has resisted taking this next step, but such an approach costs little and sacrifices no flexibility if it's properly managed. This is true in the two key areas of general logistics and specialist equipment maintenance.

The US's LOGCAP and UK's CONLOG arrangements provide the template for general logistics support. The ADF should move quickly to tender for a logistics partner along these lines. Based on the UK's £12 million, seven-year CONLOG contract, the cost would probably amount to no more \$5 million per year—small change by Defence standards. This would provide two things. First, it would allow the ADF to work closely with the successful contractor to understand the costs, risks and capabilities of the private sector; importantly, it would allow the contractor concept to be tested in exercises both here and abroad. Second, it would provide options in the event of a contingency—real options that the ADF could either use or set aside in favour of its own organic capabilities.

Such a contract should envisage the contractor being prepared to support the upper scale of ADF deployment under current preparedness goals and across the spectrum of possible circumstances; that is, a brigade group with supporting air and naval elements. At the same time, the contract should make provision for supporting non-ADF operations such as the AFP-led Solomon Islands intervention. And it would be worth looking at the ways contractors could support humanitarian and other civil emergency responses. The challenge of Aceh after the Indian Ocean earthquake and tsunami is a case in point.

A different approach is needed for specialist equipment maintenance and support, since no single company can be expected to hold the skills needed. Accordingly, it's a matter of looking case by case to see which maintenance jobs are needed in forward areas and

asking the firms that support the equipment back in Australia what they're willing and able to do in those areas. Where an opportunity arises to boost the sustainability of deployed capability, standing contracts for deployed support should be established. With the increasing trend to establish long-term support contracts at the time of acquisition, this should become a routine part of Defence equipment procurement. Where appropriate, sponsored reserves (as in the UK system) should also be given close consideration. Of course, as with general logistics support, the aim would be to have the private sector ready while reserving the right to employ organic capabilities when necessary.

Where an opportunity arises to boost the sustainability of deployed capability, standing contracts for deployed support should be established.

If implemented, this recommendation would increase the flexibility and sustainability of ADF operations at small cost and with no commitment.

Sharpen the capability to manage contractors

If the ADF is to make more extensive use of contractor support to operations, it will have to ensure that it has the doctrine, skills and capacity to do so effectively. Fortunately, good progress has been made in developing appropriate doctrine and policies for the use of contractors, and skills have accrued through successive operations.

Yet, with contracts easily amounting to tens if not hundreds of millions of dollars, the imperative for effective contract management can't be overstated. This is especially so, when we consider that the scope of work will often have to be agreed quickly and managed in the rapidly changing and uncertain environment of war. While Defence does have a lot of experience in managing contracts, the recent need to initiate widespread reforms to Defence Materiel Organisation contracting shows that there's still substantial room for improvement. The aim should be to employ the highest standards of commercial acumen, supported by quality legal advice, when writing and agreeing contracts. In doing so, it's important to set clear service standards that ensure, among other things, that contractor personnel are properly skilled and physically prepared for the rigours of deployment. Then, once an operation begins, it's essential to have an adequate number of trained personnel available to manage the delivery of services under contract.

The aim should be to employ the highest standards of commercial acumen, supported by quality legal advice, when writing and agreeing contracts.

The increased use of contractors in support of operations will also entail a much closer relationship between Defence and the private sector than has previously been the case. Asking a private sector firm to send its people into a conflict zone is qualitatively different

from buying an asset or service in peacetime. Defence must be able to inform individual contractors, and even brief the boards of firms, on the risks likely to be encountered. And when private security firms are contracted to provide protection, they need access to intelligence so that they can do their jobs properly. In some circumstances this will involve sensitive or classified material. None of this should be difficult: private sector arms manufacturers routinely deal with (and sometimes produce) some of the most highly compartmentalised information and intelligence there is. It just means that arrangements and clearances need to be put in place ahead of time.

Under international law and Defence policy, the ADF is responsible for providing protection to its contractors from the hazards of war. The ADF has well-developed policies and risk-management methodologies for this purpose. In general, these must be adhered to rigorously (although it remains to be seen how long contractors can be denied the means for self-defence). Furthermore, the ADF should be transparent about the extent of contractor support in an operation and routinely disclose any casualties that occur.

... the ADF should be transparent about the extent of contractor support in an operation and routinely disclose any casualties that occur.

Tighten the legal framework and related policies

As we saw in Chapter 4, the government legislated in late 2003 to improve the legal accountability of Australian contractors employed by it in conflict zones. This was a timely and appropriate move. The imperative to ensure accountability under the law isn't mere legal pedantry. In 1997, private contractors supporting US forces in Bosnia were alleged to have committed serious crimes, including rape and arms trafficking, but no legal action was taken—reportedly because neither local nor US law applied at that time.

With this in mind, the government should be cautious of employing contractors in a conflict zone unless the individuals are accountable under an effective and acceptable legal regime. This could be local law, the *Defence Force Discipline Act 1982* or the *Crimes (Overseas) Act 1964*, as appropriate. Moreover, consideration should be given to amending the *Crimes (Overseas) Act 1964* to include foreign nationals (excluding those from the host nation) working for the Commonwealth in a declared country through the same mechanism used in the DFDA—individual consent to come under jurisdiction.

A separate legal issue is the potential loss of immunity, under the Geneva Conventions and Additional Protocols, of security contractors operating in armed conflicts. Australia should adopt the explicit policy of not employing security contractors in armed conflicts whenever that could mean they lose the protection afforded to non-combatants under international law. The ignominy of an Australian, or Australian-employed, civilian security contractor being put on trial by an adversary is well worth avoiding.

Finally, the government should introduce a regulatory regime to control the provision of military, paramilitary and policing services, training and support akin to the export control regime for arms and military technology. If firms move offshore as a result, it's better that

they do. Working with our allies, it should be possible to keep the sector in check. The UK is exploring options to regulate firms operating from its jurisdiction and the US—arguably the world’s most *laissez faire* economy—already requires export licences for firms providing such services.

Where possible, transfer resources into combat capability

Nothing that we have proposed so far would make any difference to the size or shape of the ADF, but it would be surprising if opportunities didn’t arise as a consequence to redeploy ADF personnel from support tasks into more direct combat roles. Of course, it would still be necessary to retain a core ADF organic support capability for high-intensity operations where contractor support is impractical.

... it would still be necessary to retain a core ADF organic support capability for high-intensity operations where contractor support is impractical.

Care would be required. Any changes to the force structure should only be considered once confidence in contractor support is fully established. Nonetheless, if contractors shouldered the burden of supporting low-risk operations, and also provided the second rotation of support for others, there should be ways to adjust the current split between support and direct combat capabilities within the ADF. In practice, this isn’t likely to amount to changes on anywhere near the scale that occurred in the 1990s. It would be more a matter of adjusting resources to maximise the available combat capability.

In some areas, the *prima facie* case looks strong. Why does the ADF need to maintain what is, in effect, a civil engineering capability? And why are any uniformed personnel required for essentially commercial functions like imagery, map making and surveying? For that matter—even though it’s not a deployable capability—why are several hundred uniformed personnel required to operate the JORN radar from the comfort and safety of South Australia? Even some major projects look iffy. Why does the ADF plan to spend \$175 million on a roll-on/roll-off vessel while the UK is pursuing a private financing deal for similar vessels that will see the ships used for commercial work when not required by the defence forces?

None of this will be music to the ears of an ADF that’s had its numbers cut significantly by outsourcing over the past decade and a half. And, as discussed earlier, care is required to ensure that competition between Defence and the private sector for specialist personnel doesn’t erode the sustainability of the Defence workforce. But the stakes are high: financial pressures and recruiting trends are making the traditional military model less tenable every year that passes. There are hard choices ahead. Shifting from organic to contractor support would free up resources to devote to combat capability. At the same time, too great a reliance on contractors risks undermining flexibility and the capacity to undertake high intensity operations. Ultimately, the key is striking the right balance.

Contributors

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Born in Johannesburg, South Africa, Alison has a Bachelor of Economics (Social Science) from the University of Sydney and in 2003 was awarded a Hedley Bull Scholarship to undertake a Master of International Relations at the Australian National University. Alison's Masters thesis examined the use of mercenaries and private military corporations by states. Alison worked for several years at Royal and Sun Alliance Insurance Australia in the International Broker Division prior to taking up her current position as an officer with the Australian Department of Foreign Affairs and Trade. Alison contributed to this report in a personal capacity.

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Acronyms and abbreviations

ADF	Australian Defence Force
AFCAP	Air Force Contract Augmentation (US)
AFP	Australian Federal Police
AIF	Australian Imperial Force
AusAID	Australian Agency for International Development
BSC	Balkans Support Contract (US)
CONCAP	Construction Capabilities Contract (US)
CONLOG	Contracts for Logistics Support (UK)
CPA	Coalition Provisional Authority
CPI	Center for Public Integrity (US)
CRG	Control Risks Group (UK)
DFDA	<i>Defence Force Discipline Act 1982</i>
EO	Executive Outcomes (South Africa)
GAO	General Accounting Office (US)
Geneva I–IV	Geneva Conventions I to IV of 1949
HMAS	Her Majesty's Australian Ship
KBR	Kellogg Brown & Root (US)
LOGCAP	Logistics Civil Augmentation Program (US)
MPRI	Military Professional Resources Incorporated (US)
NATO	North Atlantic Treaty Organisation
PNG	Papua New Guinea
Protocol I, II	Geneva Additional Protocols I, II of 1977
<i>QEII</i>	<i>Queen Elizabeth II</i> (passenger liner)
SMS	His Majesty's Ship (German)
SOFA	Status of Forces Agreement
UK	United Kingdom
US	United States
USAID	US Agency for International Development

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The past fifteen years have seen a rapid growth in private sector firms supporting military operations. From logistics to paramilitary security, the private sector is increasingly playing a critical role on the battlefield.

More recently, the ADF has employed the private sector to varying degrees in East Timor, Bougainville, Afghanistan and Iraq. By and large, this has worked well, freeing precious ADF logistics capacity for other tasks. But in each case the ADF used contractors to replace its own support elements only some time after the initial deployment. We think that the time is ripe to go further. Our proposal is contained in the following four recommendations.

Move now to prearrange contract support for operations. The ADF should follow the lead of both the UK and US and contract a logistics support partner to be ready to support deployments at short notice. Given recent experience, such a contract would naturally cover both military operations and humanitarian crises.

Sharpen the capability to manage contractors. If the ADF makes more extensive use of contractor support to operations, it will need the doctrine, skills and capacity to do so effectively. The aim should be to employ the highest standards of commercial acumen, supported by quality legal advice.

Tighten the legal framework and related policies. The government should introduce a regulatory regime to control the provision of military, paramilitary and policing services, training and support akin to the export control regime for arms and military technology.

Where possible, transfer resources into combat capability. If contractors more fully shouldered the burden in operations, there should be ways of adjusting the current split of resources between support and direct combat capabilities within the ADF, to the benefit of the latter. Of course, it would still be necessary to retain a core ADF organic support capability for high-intensity operations where contractor support is impractical.