The Senate

Foreign Affairs, Defence and Trade Legislation Committee

Defence Trade Controls Bill 2011 [Provisions]

Final report

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Chapter 1

Terms of the Inquiry

Background to the Defence Trade Controls Bill 2011

1.1 The Defence Trade Controls Bill 2011 (the bill) was introduced into the House of Representatives on 2 November 2011, passed on 21 November 2011 and introduced into the Senate on 22 November 2011. The bill, with its companion bill the Customs Amendment (Military End-Use) Bill 2011 (the customs bill), was referred to the Joint Committee on Foreign Affairs, Defence and Trade.[1]

1.2 On 10 November 2011, pursuant to the Senate Selection of Bills Committee Report, the provisions of the Defence Trade Controls Bill 2011 were referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 12 April 2012. The reasons for referring the bill were to 'allow further investigation into issues of concern within the defence industry'.[2] The customs bill was not referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry.

1.3 On 21 November 2011, the Joint Committee made a statement advising that it had agreed not to inquire into the bills in order to avoid duplicating the examination being conducted by the Senate committee.[3]

1.4 Draft regulations accompanying the bill, the Defence Trade Controls Regulations 2012 (the regulations), were circulated by the Department of Defence (Defence) for industry consultation between 22 December 2011 and 17 February 2012.

Purpose of the bill

1.5 The bill gives effect to the *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation* (the treaty). Signed in 2007 by former Prime Minister John Howard and former United States President George W Bush, the treaty was considered by the Australian Joint Standing Committee on Treaties in 2008.[4] The joint standing committee supported the treaty and recommended that binding treaty action be taken.[5]

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1 House of Representatives Selection Committee *Report No.38,* 3 November 2011, p. 3.

2 Selection of Bills Committee *Report No. 16 of 2011*, 10 November 2011, Appendix 2.

3 Statement to the House of Representatives re Customs Amendment (Military End-Use) Bill 2011 and Defence Trade Controls Bill 2011, 21 November 2011.

4 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008.

5 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 44.

1.6 In addition to giving effect to the treaty, the bill also:

- introduces controls on the supply of Defence and Strategic Goods List technology and services related to Defence Strategic Goods List (DSGL) technology and goods;
- creates a registration and permit regime for the brokering of DSGL goods, technology and related services; and
- introduces a number of new criminal offences to enforce the new provisions.

Conduct of the inquiry

1.7 Initially, the committee received 11 submissions, including one confidential submission. All submissions except the confidential submission are listed at Appendix 1 and published on the committee's website. In order to examine concerns raised in the submissions, the committee held public hearings on 2 and 21 March 2012. Witnesses who appeared at the hearings are listed at Appendix 2.

1.8 Based on a number of submissions and evidence received at the public hearings, the committee became aware that consultation undertaken by Defence on the proposed legislation was seriously deficient and that as a result Defence was in the dark about likely unintended consequences.[6] The committee asked Defence to work with Universities Australia and representatives from the University of Sydney to develop a solution to the problems created by the strengthened export control provisions in the bill. To allow adequate time for consultation to occur, and for the committee to consider its progress, the committee sought and was granted an extension to its reporting date to 15 August 2012. The committee asked Defence and Universities Australia to provide feedback about the consultation process by 30 May 2012.

1.9 Concerned about the obvious shortcomings in Defence's consultation process, the committee also approached other academic and research organisations to seek their submissions in regard to the effect of the bill on their work. Nine submissions and eight supplementary submissions have since been received.

1.10 Defence commenced consultation in earnest with the Australian research sector about the proposed legislation during March 2012. The process continued and on 21 June 2012 Defence informed the committee that it had met with Universities Australia and agreed to develop principles and options for further consultation and discussion with the university and research sectors. A submission from the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) dated 2 July 2012 suggested that the consultation process had some way to go before all parties could reach agreement on a solution.

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6 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraphs 4.1–4.4, 4.11–4.15.

1.11 Unfortunately, as detailed in length in the committee's preliminary report, the parties could not reach agreement on a preferred option.[7] Defence's submission to the committee on 8 August 2012 and Universities Australia's submission on 10 August 2012 both advised the committee that the consultation process had failed to produce a workable compromise.

Preliminary report

1.12 After considering the evidence, submissions and reports on the consultation process, the committee reached the conclusion that the bill should not proceed. While the committee was conscious of the importance of the legislation, it felt that it was equally important to be certain that the strengthened export control regime would have no unintended or unnecessary adverse consequences for the university and research sectors.

1.13 Taking into account the uncertainty surrounding the bill as drafted, the committee decided to present a preliminary report. This measure was intended to underscore the problems raised by the university and research sectors, allow Defence more time to give close consideration to the issues and to consult further if necessary, especially with the research sector. The preliminary report detailed the committee's concerns, particularly with regard to the need for further consultation. In its preliminary report, the committee urged Defence to undertake further consultation with the university and research sectors.[8]

1.14 The committee endorsed the roundtable approach proposed by Universities Australia and recommended that Defence participate in roundtable discussions involving key stakeholders convened by Universities Australia and chaired by the Chief Scientist, Professor Ian Chubb. The committee also recommended that:

> …further consultation be conducted by Defence with key stakeholders, until the issues raised can be resolved to the satisfaction of all parties. Further, the committee recommends that consultation be conducted in an open and transparent manner, and sufficient time allowed for key stakeholders to consider the complex issues and respond.
>
> The committee further recommends that, in designing the implementation of the strengthened export controls, Defence create an advisory group of key stakeholders which must have input into each part of the process. Key stakeholders in the group should include, but not be limited to: DIISRTE, the Department of Health and Ageing, NHMRC, Universities Australia, and the Chief Scientist of Australia.[9]

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7 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraphs 4.17–4.26.

8 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraphs 4.27–4.28.

9 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraphs 4.27–4.28.

1.15 At that time, the committee was encouraged by all stakeholders' support for the legislation and optimistic that their willingness to work cooperatively would produce a mutually satisfactory solution.

Final report

1.16 On 17 August 2012, soon after the committee had tabled its preliminary report, the Minister for Defence, the Hon Stephen Smith MP (the minister), announced that Mr Ken Peacock AM[10] and Chief Defence Scientist, Dr Alex Zelinsky, had been appointed to conduct further consultations on the bill. They held talks with key university and research sector stakeholders, the Chief Scientist and the DIISRTE.[11]

1.17 The committee understands that the report prepared by Mr Peacock and Dr Zelinsky formed the basis for two roundtable discussions between Defence and the university and research sectors on 6 and 21 September 2012. The roundtables were convened by the Chief Scientist of Australia, Professor Ian Chubb.

1.18 The outcomes of the roundtable process, including proposed amendments, and the committee's recommendations, are discussed in the following chapters.

ITAR reform

1.19 In its preliminary report, the committee noted that it was aware that the US Government was currently undertaking reforms to its International Traffic in Arms Regulations (ITAR) that could have a direct bearing on the operation of some provisions in the bill.

1.20 Since tabling its preliminary report, the committee has received assurances from the minister and the US Ambassador, His Excellency Mr Jeffrey Bleich,[12] that ITAR reform currently being undertake in the US would not affect the provisions of the treaty. The minister advised the committee:

> Regardless of when the various US export control reform initiatives do occur, the Treaty will continue to mean:

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10 'Mr Peacock chaired the Defence Trade Cooperation Treaty Industry Advisory Panel that supported the development of the Bill. He is a former Member of Council at the Australian War Memorial and former Executive Chairman, Boeing Australia Limited.' The Hon Stephen Smith MP, Minister for Defence; the Hon Jason Clare MP, Minister for Defence Materiel; the Hon Warren Snowdon, Minister for Defence Science and Personnel, 'Joint Media Release – Government to consult on strengthening Australia's defence export controls', Media Release, 17 August 2012.

11 The Hon Stephen Smith MP, Minister for Defence; the Hon Jason Clare MP, Minister for Defence Materiel; the Hon Warren Snowdon, Minister for Defence Science and Personnel, 'Joint Media Release – Government to consult on strengthening Australia's defence export controls', Media Release, 17 August 2012.

12 US Ambassador, Mr Jeffrey Bleich, *Submission 8A*, pp. 1–2.

- Reduced delivery time for new defence projects;
- Improved sustainment, by permitting transfers within the Approved Community without further Australian or US approvals;
- Improved business opportunities, by permitting Australian and US companies to share technical data without licences; and
- Greater opportunities for Australian companies to participate in US contracts.[13]

1.21 The minister noted further that Defence was working closely with the US Department of State Treaty Management Board to ensure the Treaty incorporates the benefits of US export control reform.[14] According to the minister, both Australia and the US were committed to ensuring that by joining the Approved Community members would continue to enjoy benefits. Furthermore, he indicated that the Approved Community operating within the treaty framework would remain attractive over existing control authorisations, including in the context of the reforms underway. He informed the committee that Defence had received a commitment from the US Department of State that the treaty 'will always remain beneficial over the ITAR licence regime'.[15]

Acknowledgements

1.22 The committee thanks all those who assisted with the inquiry. It especially acknowledges the contribution of the Chief Scientist, Chief Defence Scientist and the participants in the roundtables who, in good faith, worked hard to reach agreement. The committee hopes that the cooperation which has led to this solution can continue throughout the implementation of the strengthened export controls.

13 The Hon Stephen Smith MP, Minister for Defence, *Submission 15C*, p. 1.

14 The Hon Stephen Smith MP, Minister for Defence, *Submission 15C*, p. 2.

15 The Hon Stephen Smith MP, Minister for Defence, *Submission 15C*, p. 2.

Chapter 2

Consultations and proposed amendments

2.1 On 17 August 2012, the Minister for Defence, the Hon Stephen Smith MP (the minister), issued a media release thanking the committee for its preliminary report on the bill. The minister announced that he had appointed Mr Ken Peacock AM and the Chief Defence Scientist, Dr Alex Zelinksy, to conduct further consultations on the bill.[1]

2.2 After consulting with key stakeholders, Mr Peacock and Dr Zelinksy prepared a report outlining possible amendments to the bill and implementation options. They also presented issues raised during the consultation and proposed possible solutions in order 'to stimulate discussion and feedback'.[2] In their report, they noted that as a result of consultations commenced in February 2012 several changes had been proposed to the legislation, the most significant involved:

- removing the control of 'defence services', which would have regulated a broader range of teaching and research activities;
- removing controls on transfers inside Australia, which would have regulated all transfers to foreign students and employees in Australia;
- removing controls for Australians located overseas who supply technology; and
- including exemptions for 'in the public domain' and 'basic scientific research' in the Bill if possible.[3]

2.3 The report also noted that Defence proposed to recommend to government additional amendments to the bill such as establishing a 12–24 month transition period for strengthened export controls after passage of the legislation. Other recommendations included establishing an advisory group to advise government on implementation issues during the transition period and conducting a comprehensive pilot program during this period.

2.4 On 13 September 2012, the minister wrote to the committee providing a copy of the report. He indicated that:

> The Government in-principle supports the proposals in the report, with the exception that the Bill not be returned to Parliament until re-drafting of the

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1 The Hon Stephen Smith MP, Minister for Defence; the Hon Jason Clare MP, Minister for Defence Materiel; the Hon Warren Snowdon, Minister for Defence Science and Personnel, 'Joint Media Release—Government to consult on strengthening Australia's defence export controls', Media Release, 17 August 2012.

2 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 11.

3 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 9.

> Regulations is completed...The Government will continue to engage with stakeholders throughout the implementation process, including with regard to Regulations.[4]

2.5 Mr Peacock and Dr Zelinksy's report was to serve as a consultation paper for discussion with the university and research sectors on proposed further amendments to the bill.[5]

Roundtables

2.6 Recommendation 6 of the committee's preliminary report supported Universities Australia's proposal for a roundtable to be conducted to allow all stakeholders to discuss openly amendments to the bill.[6] This recommendation was subsequently taken up. At this stage it should be noted that the main concern, as described by Universities Australia, was that:

> …a Bill designed to support and reduce administrative burden on defence trade has the potential to substantially increase the regulatory burden on a range of civilian innovation activities, with an as yet unknown effect on research in health, agriculture, mining, manufacture and trade.[7]

2.7 The University of Sydney, Universities Australia, and the Chief Scientist informed the committee that two roundtables, convened by the Chief Scientist, Professor Ian Chubb, were conducted with all stakeholders and Defence. They were held on 6 September and 21 September 2012. The roundtable participants included Dr Zelinsky and representatives from Universities Australia, the University of Sydney, the Academy of Technological Sciences, Australian Academy of Science, the Cooperative Research Centres Association, Department of Defence, DIISRTE and a number of other relevant Commonwealth agencies.

2.8 On 28 September, Professor Chubb wrote to the committee about the roundtable process. He described the discussions as fruitful and informed the committee that the parties had reached 'an agreed path forward'.[8] Professor Chubb noted that some representatives from the university sector still held reservations about the timing of the legislation. He was confident, however, that the approach agreed between all stakeholders would be a workable solution:

> It has been noted by some representatives of the university sector that in their view a pilot study should precede the enacting of the legislation, not follow it, to enable results from the pilot to inform the final legislation. In my view, the current proposal involving exemptions, legislation with

4 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 3.

5 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 5.

6 Recommendation 6—Preliminary Report, p. 34.

7 Universities Australia, *Submission 11B*, p. 3.

8 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 1.

> provisions for a transition period, a pilot and a Steering Group with its final advice tabled by Ministers is quite workable. If issues with the Bill are identified through the pilot, the legislation can be amended at a later stage to address these issues. The Steering Group may also recommend to the Ministers that the transition period be extended.[9]

Outcome of the roundtable discussions

2.9 As noted above, Professor Chubb advised the committee that he was satisfied that a workable solution had been reached through the roundtable process.

> In my view, the amended Bill is a significant improvement on the original, addressing key concerns initially identified by the sector. It does give institutions a very substantial role in managing the process. The inclusion of the transition period, pilot study, and the Steering Group should alleviate many of the sector's concerns and act to help minimise any administrative impacts over time.[10]

2.10 In his correspondence to the committee, Professor Chubb provided a copy of the list of agreed outcomes from the roundtable discussions.[11] They were:

- Establish the Strengthened Export Controls Steering Group, reporting to the Minister for Defence and the Minister for Tertiary Education, Skills, Science and Research (the Ministers).
- A transition period of at least 24 months with no offence provisions in effect. The Steering Group may recommend an extension to this non-offence provision transition period.
- A pilot program (not limited to a single pilot) to test the regulatory impact of the regime.
    - The pilot to determine the costs and benefits associated with the regime, the feasibility of its implementation, the processes and interaction required to successfully implement the bill during the transition period, and identify any aspects that require modification prior to the offence provisions coming into full effect.
    - The framework for the pilot to be agreed by the Steering Group and, pending consideration of the Steering Group, will span two grant funding cycles with interim reporting to identify improvements.
    - The pilot will review mechanisms by which organisations can determine thresholds for technologies assessments beyond which an organisation will consult with Defence and, if required, seek a permit.

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9 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 2.

10 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 2.

11 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, pp. 3–4.

- Internal institutional practices and structures (including a supplement to the Australian Code for the Responsible Conduct of Research) to be developed to reduce the need to interact with Government agencies on the legislative regime.
- The Model to be tested as part of the pilot will consist of an export control regime that:
    - Begins with an institutional assessment process for open academically based research in accordance with guidelines incorporated into the supplement to the Australian Code for the Responsible Conduct of Research. This step recognises that not all activities to supply technology to 'develop', 'produce', or in comes cases 'use', an item on the DSGL will involve the level of detail which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions of the DSGL listed item. The institutions involved in activities of this type must have processes for assessing technology and for determining when advice is to be sought from Defence about a possible permit in accordance with established guidelines.
    - Provides exemptions from export controls for research, where:
        - The activity is 'basic scientific research', as defined in the DSGL and Wassenar Arrangements (Experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective).
        - The technology is already 'in the public domain', as defined in the DSGL (technology or software which has been made available without further restrictions upon its further dissemination (copyright restrictions do not remove technology or software from being in the public domain))
    - Provides exemptions for transfers of technologies within Australia's domestic borders.[12]

2.11 Participants in the roundtable discussions agreed that the following be incorporated into the bill:

- Modification, if necessary, once the results of the pilot studies are known.
- A non-offence transition period of no less than 24 months, and with the possibility of an extension on the recommendations of the Steering Group.
- Pilot studies governed by the Steering Group.

12 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, pp. 3–4.

- Pilot studies to test the outcomes from the Model.
- A formal evaluation against agreed criteria to include outcomes of pilot studies.
- A final report from the Steering Group to be submitted to the Ministers to be tabled in Parliament.
- Ordinary scientific communication is permissible, where the institution and individual have complied with established guidelines which include the institutional assessment model outlined above.
- The provisions relating to Defence Services are deleted.
- Controls on foreign employees and students in Australia are removed.
- Controls on Australians overseas are removed.[13]

2.12 The committee notes that in his submission of 13 September 2012, the minister advised that the government in-principle supports the proposals in Mr Peacock and Dr Zelinksy's report[14], which included exemptions for 'in the public domain' and 'basic scientific research'.[15] The Chief Scientist lists amongst the key developments agreed at the roundtable 'exemptions for basic scientific research and for information already in the public domain'.[16]

Response by the university sector

2.13 On 4 October 2012, the committee received a supplementary submission from the University of Sydney regarding their concerns about the amendments and implementation arrangements discussed during the roundtables. Professor Jill Trewhella wrote that:

> Regrettably, notwithstanding the welcome but largely procedural improvements that have been achieved in a very short timeframe through the roundtable discussions facilitated by the Chief Scientist in September, our key concerns remain largely unchanged...The only comfort provided to the sector from the roundtable process is a commitment to address the unintended consequences of the legislation by extraordinary post legislation procedural concessions...[17]

2.14 The University of Sydney noted that during the roundtable discussions a difference of opinion arose between Defence and the university sector regarding the scope of export controls as they apply to US universities. Endeavouring to understand the scope of the export control regimes applying to researchers in the US, the

13 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 4.

14 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 3.

15 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 5.

16 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 1.

17 University of Sydney, *Submission 7B*, p. 1.

university sought independent advice from a law firm in Washington. The university suggested that the committee consider the scope of the proposed exemptions for research in the bill in the context of the exemptions provided for research under US law. It was seeking to bring the Australian legislation into alignment with the US system of export controls which would 'also serve to streamline the currently proposed complex post legislation requirement'.[18] Sydney University recommended that the bill be amended sufficiently:

> ...to ensure that the resulting control regime is no broader in scope or more stringent than the arrangements in place for fundamental research in accredited institutions of higher learning in the US.[19]

2.15 The University of Sydney was of the view that this proposition had broad support.[20]

2.16 The committee considers the request of the University of Sydney to be fair and reasonable: the effect of the bill should not place Australian universities and research organisations at a disadvantage compared to their counterparts in the US.

2.17 Universities Australia also identified the coverage of the legislation as a substantial concern. It was concerned particularly about:

> …the risk that the Australian legislation imposes, or is interpreted so as to impose, greater restrictions on Australian universities and researchers than are applied in the United States.[21]

2.18 In its view, Australian researchers 'should be subject to similar but not more severe regulatory constraints than their US counterparts'. For Universities Australia this matter was one requiring 'priority attention'.[22]

2.19 The committee understands the universities' call for the bill to take account of the legislation governing similar institutions in the US and supports their stand that Australian legislation should not impose heavier burdens. In this regard, the committee suggests that the government be guided by this principle when drafting amendments to the bill.

Outstanding concerns

2.20 Universities Australia noted that the roundtable process had addressed many of the concerns raised by the universities and that they supported amendments to the bill which reflect the agreed outcomes of the roundtable. It advised the committee,

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18 University of Sydney, *Submission 7B*, p. 1.

19 University of Sydney, *Submission 7B*, p. 2.

20 University of Sydney, *Submission 7B*, p. 1.

21 Universities Australia, *Submission 11B*, p. 6.

22 Universities Australia, *Submission 11B*, p. 7.

however, that the sector had some remaining concerns about the impact of the legislation. The outstanding issues include:[23]

- that the scope of the legislation provides greater restrictions on research activity than similar legislation in the US;
- effect of the bill on 'Freedom of inquiry';
- development of self-assessment processes;
- publication of research and criminal penalties in the bill;
- additional risks and costs incurred as the new regime is implemented; and
- effect on Australia's ongoing engagement in international research.

2.21 The committee notes that many of these unresolved issues will be tested in the 24 month pilot program contained in the list of agreed outcomes from the round table. The committee relies upon Defence to commit to and implement expeditiously any amendments which are proposed from the pilot program.

2.22 The committee notes the pilot program will be complex, and will result in proposals to amend the bill. The committee believes it would be premature for any government amendments to the bill in 2012 to be made contrary to any agreements reached during the roundtable.

Importance of transition period

2.23 Clearly, Universities Australia still holds significant concerns about the effect of the legislation as currently framed on Australia's research capacity, and the social and economic benefits that flow from it. Even so, it was of the view that should the bill proceed, it would support the incorporation of amendments that 'fully and accurately reflect the outcomes of the roundtable discussions' as a means of 'mitigating, at least partially, the risks to Australian research posed by the scheme'.[24] It recommended that:

> …should Parliament pass amended legislation, the minimum two year transition period must enable outstanding concerns to be examined and addressed prior to the full impact of the legislation coming into effect.[25]

2.24 It should be noted that Universities Australia stressed that outstanding concerns not addressed during the roundtable process 'must be dealt with substantively in the trial phase and under the auspices of the Steering Group'.[26] Universities Australia highlighted the central importance of the transition period:

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23 Universities Australia, *Submission 11B*, pp. 6–8.

24 Universities Australia, *Submission 11B*, p. 2.

25 Universities Australia, *Submission 11B*, p. 4.

26 Universities Australia, *Submission 11B*, p. 5.

> It is critical, therefore, that the proposed minimum two year transition period is enacted and facilitates a thorough and robust assessment of the impact of the legislation on defence trade, the effectiveness and efficiency of the control regime, and also the conduct and output of Australian research.[27]

2.25 The committee fully endorses this view.

27 Universities Australia, *Submission 11B*, p. 5.

Chapter 3

Recommendations

Proposed amendments

3.1 The committee understands that it is the government's intention to introduce amendments to the bill which incorporate the outcomes from the roundtable discussions. The committee understands the effort that went into the agreements reached during the roundtable process and wants to underline some of the key recommendations. It is essential that the government and Defence honour the agreements with a firm undertaking in the legislation; this will be essential to the future relationship with the university and research sector, and other commonwealth departments which is needed for implementation. The committee therefore recommends that the bill incorporate or allow for:

- modification, if necessary, once the results of the pilot studies are known.
- a non-offence transition period of no less than 24 months, and with the possibility of an extension on the recommendations of the Steering Group.
- pilot studies governed by the Steering Group.
- pilot studies to test outcomes from the Model.
- a formal evaluation against agreed criteria to include outcomes of pilot studies.
- a final report from the Steering Group to be submitted to the Ministers to be tabled in Parliament.
- ordinary scientific communication is permissible, where the institution and individual have complied with established guidelines which include the institutional assessment model outlined above.
- the provisions relating to Defence Services are deleted.
- controls on foreign employees and students in Australia are removed.
- controls on Australians overseas are removed.[1]

3.2 The committee notes in particular the agreements reached during the roundtable discussions to:

- establish the Strengthened Export Control Steering Group;
- have a transition period of at least 24 months with no offence provisions in effect;

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1 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 3.

- have exemptions for basic scientific research and for information already in the public domain; and
- test the given model as part of a pilot program.[2]

3.3 The committee believes that it would devalue the hard work put into the consultation process, and damage the important relationship between Defence and its stakeholders, if the above agreements were not incorporated in government amendments to the bill.

Export Controls Steering Group

3.4 The committee believes that the Export Controls Steering Group (ECSG) has a vital role in the design of the implementation process for the provisions of the bill and wants to ensure that the ECSG will have both the representation and the authority to provide timely and informed advice to the ministers and to Parliament. The committee notes that during the second roundtable, draft terms of reference were circulated and approved and recommends these be incorporated in the bill under amendments establishing the ECSG. The terms of reference are as follows:

> The Steering Group's function is to provide advice to the Department of Defence and Minister for Defence, and the Minister for Tertiary Education, Skills, Science and Research (the Ministers) throughout the transition period of the Defence Trade Controls Act in relation to:
>
> - the adequacy of organisational and government arrangements to identify, assess and manage risks, costs and administrative burden associated with intangible transfers of DSGL technologies;
> - oversight, design and delivery of a pilot program to identify the adequacy of the legislation, regulations, implementation arrangements and resources for regulating intangible transfers;
> - recommendations on amendments to legislation, regulations and implementing arrangements.
>
> In order to fulfil its role, the Steering Group will:
>
> (a) consider quarterly progress reports from participants in the pilot on implementation of the strengthened export controls;
>
> (b) through the Chair, report to the Ministers every six months; and
>
> (c) if required by the Ministers, provide additional reporting.
>
> The Steering Group will advise the Department of Defence on how to obtain appropriate technical expertise regarding Australian Government consideration of the control lists of international regimes and the Australian DSGL.
>
> The Steering Group may establish sub-groups, as required, to support its function. Subgroups will report back to the Steering Group.

2 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 2.

Membership

The Steering Group membership will comprise:

- Australia's Chief Scientist as the Chair; up to four representatives from the industry sector, one of whom is the co-Deputy Chair;
- two representatives from the university/research sectors, one of whom is the co-Deputy Chair;
- the CEO of the National Health and Medical Research Council, or representative nominated by that CEO;
- the CEO of the Australian Research Council, or representative nominated by that CEO;
- a representative from the Department of Industry, Innovation, Science, Research and Tertiary Education; and
- a representative from the Department of Defence.

There will be no substitutions or additional attendees unless agreed with the Chair.

The Steering Group will be established for the period of the transition period but the period may be extended if agreed by the Ministers.

Reporting

The Chair will report six monthly, in writing, to the Ministers and the Department of Defence, including any dissenting membership views.

The Steering Group will provide a final report, in writing, at the conclusion of the two year transition period to the Ministers. The Ministers will jointly table this report in the Parliament.

Meetings

The frequency and timing of meetings of the Steering Group is at the discretion of the Chair, however it is expected to meet at least quarterly, supplemented by out of session consideration of matters as necessary.

A quorum of the Steering Group will be met when there are a minimum of the Chair, two public sector representatives, one industry representative and one university/research representative.

Secretariat

The Steering Group will be supported by a Secretariat provided by the Defence Export Control Office.

The Secretariat will:

(a) prepare and circulate agendas in conjunction with the Chair;

(b) work with the authors of agenda papers to ensure quality and timeliness;

(c) ensure that the agenda approved by the Chair and papers are received by members at least one week before each meeting;

(d) prepare and provide to the Chair, within one week of the meeting, the minutes, outcomes and actions arising;

(e) circulate the meeting outcomes to all members following clearance by the Chair; and

(f) maintain Steering Group records.[3]

3.5 The committee notes that a model is to be used as part of the pilot program to test the regulatory impact of the regime. The committee recommends that the pilot program and the model to be adopted for the test are as set out in the agreed outcomes from the roundtable.[4]

3.6 The committee takes this opportunity to emphasise that amendments to the bill must fully and accurately reflect the outcomes of the roundtable discussions. This principle must also apply to regulations made under this legislation.

3.7 As noted in previous chapters, the committee drew attention to recommendations made in the committee's preliminary report. They are given below in full.

Recommendation 1 (preliminary report): The committee recommends that the government consider including in the bill the criteria provided in the explanatory memorandum in relation to permits issued under clause 11 so that the Parliament can scrutinise them properly and potential applicants can be clear as to the criteria that will be used to assess their applications.[5]

Recommendation 2 (preliminary report): In consultation with all relevant sectors, the committee recommends that Defence provide examples to illustrate the scope of the definition of 'intangibles' and 'intangible transfer' in the explanatory memorandum.[6]

Recommendation 3 (preliminary report): The committee recommends that Defence include the definition of 'arrange' in the bill, and that in defining the term Defence consult with submitters who have raised issues regarding the scope of the term.[7]

Recommendation 5 (preliminary report): The committee recommends that Defence undertake consultation with industry in order to eliminate unnecessary record-keeping.[8]

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3 Universities Australia, *Submission 11B*, Appendix II, pp. 12–14.

4 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, pp. 3–4.

5 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraph 2.13.

6 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraph 2.21.

7 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraph 2.29.

8 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraph 3.32.

Recommendation 7 (preliminary report): The regulations are an important part of the implementation of the strengthened export controls. Defence has proposed that the regulations will be amended in line with any amendments made to the bill. The committee recommends that the regulations form an integral part of the consultation process.[9]

Reporting

3.8 The committee believes that an important part of the ECSG's work will be the vital contribution that the pilot program provides to the development of the implementation of provisions in the bill. While the committee hopes that the good will demonstrated during the roundtable discussions will continue, the committee is mindful of the concerns expressed by the University of Sydney and Universities Australia regarding the outstanding issues to be resolved. The committee sees significant benefits in its oversight continuing after its final report has been tabled.

Recommendation 1

3.9 The committee refers to its previous recommendation 8[10], and asks that the regular reports of the ECSG provided to the minister also be provided to the committee.

Recommendation 2

3.10 In light of the ongoing concerns held by stakeholders, the committee believes that implementation of the bill would benefit from further scrutiny. The committee therefore recommends that during the 24 month transition period, the Senate Foreign Affairs, Defence and Trade Legislation Committee conduct a six-monthly examination of progress of the implementation of the provisions of the bill and report to the Senate.

Conclusion—final recommendations

3.11 Committee recognises the importance of the strengthened export controls regime in the bill. The committee appreciates the cooperation of all parties involved in the consultation processes.

Recommendation 3

3.12 Given the advice detailed in this final report, the committee recommends that the bill, with the proposed amendments outlined in this report, should

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9 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraph 4.29.

10 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report,* paragraph 5.14.

proceed to debate in the Senate. The committee recommends that the bill, amended as outlined in this report, be passed.

Recommendation 4

3.13 The committee further recommends that Defence use the implementation process for the provisions of the Defence Trade Controls Bill to foster closer links with the research and university sectors and with the Department of Industry, Innovation, Science, Research and Tertiary Education and other relevant departments.

Senator the Hon Ursula Stephens
Chair

Dissenting Report

Australian Greens and Liberal Senators

1.1 The Defence Trade Control Bill 2011 is a complex and flawed piece of legislation that should not be rushed through the Parliament.

1.2 The Committee is tabling this report a full 20 days earlier than requested by the Senate. The government has not allowed the Committee time to review the government's amendments, which at the time of submission of this report, had not been sighted by any members of this committee. The Committee has not been given time to consult further with stakeholders and to examine legal advice received from a Washington DC-based law firm that submits Australian academic institutions will be subject to a more stringent control regime with a much broader scope than is the case in the US.

1.3 As this report notes, numerous recommendations made in its Preliminary Report are yet to be implemented. The Committee also notes that consultation efforts undertaken by Defence on this Bill were 'seriously deficient', resulting in unintended consequences for the university sector. Much of the consultation process ensued without participants having access to the proposed amendments to the Bill.

1.4 The Committee's Preliminary Report indicated that, "When the proposed legislation is no longer a work-in-progress, the committee's intention is then to reconsider the provisions of the bill, including any amendments proposed by the government, and present a final report to the Senate."

1.5 Without doubt, the Bill remains a work in progress.

Recommendation 1

1.6 The Committee undertake a further inquiry into the government's amendments to the bill, to ensure that serious concerns raised throughout the inquiry have been addressed, and that until this has occurred, the bill should not be debated.

Alan Eggleston (Deputy Chair)
Liberal Senator for WA

Scott Ludlam
Greens Senator for WA

David Fawcett
Liberal Senator for SA

The Hon David Johnston
Liberal Senator for WA

Appendix 1

List of submissions

1 Defence Teaming Centre

2 Confidential

3 US Trade and Export Control Services

4 Australian Manufacturing Workers' Union (AMWU)

5 Saab Systems Pty Ltd

6 Boeing Australia and South Pacific

7 The University of Sydney
7A Supplementary Submission
7B Supplementary Submission

8 Ambassador of the United States of America
8A Supplementary Submission

9 NewSat Ltd

10 Australian Industry Group

11 Universities Australia
Covering Letter
11A Supplementary Submission
11B Supplementary Submission

12 National Health and Medical Research Council (NHMRC)
12A Supplementary Submission

13 Australian Research Council

14 Minister for Education, Training and Employment, the Hon John-Paul Langbroek MP, Queensland Government

15 Minister for Defence, the Hon. Stephen Smith MP
15A Department of Defence - Supplementary Submission
15B The Hon Stephen Smith MP Supplementary Submission
15C The Hon Stephen Smith MP Supplementary Submission

16 Department of Industry, Innovation, Science, Research and Tertiary Education

17 Cooperative Research Centres Association
17A Supplementary Submission

18 National Tertiary Education Industry Union

19 The University of New South Wales

20 Hunter Hill Branch, ALP

21 Professor Ian Chubb, Chief Scientist of Australia

Appendix 2

Public hearings and witnesses

Friday, 2 March 2012—Canberra

BEECHER, Ms Glenda, Universities Australia (Monash University)

CUNLIFFE, Mr Mark, Head, Defence Legal, Department of Defence

CURTOTTI, Mr Michael, Universities Australia (Australian National University)

GIULINN, Mr Andrew, Contracts Manager, Saab Systems Pty Ltd

KENNEALLY, Mr Michael, Vice President Satellite Strategy, NewSat Limited

KINNEAR, Dr Pamela, Deputy Chief Executive, Universities Australia

KIRKWOOD, Mr Angus, Assistant Secretary Export and Arms Control, Strategic Policy Division, Department of Defence

O'CALLAGHAN, Mr John, Executive Officer, Australian Industry Group Defence Council

SHOEBRIDGE, Mr Michael, First Assistant Secretary Strategic Policy, Strategic Policy Division, Department of Defence

SILSBURY, Ms Elissa, Business Analyst, NewSat Limited

WALKER, Ms Rebecca, Senior Advisor, Australian Industry Group Defence Council

Wednesday, 21 March 2012—Canberra

ASPLUND, Mr Mark, Regional Counsel, Boeing Australia Holdings Pty Ltd

BIERCUK, Dr Michael, University of Sydney

CANNING, Professor John, University of Sydney

KIRKWOOD, Mr Angus, Assistant Secretary Export and Arms Control, Strategic Policy Division, Department of Defence

MANN, Professor Graham, University of Sydney

PAYNE, Mr Timothy, University of Sydney

REUER, Ms Stephanie, Director, Global Trade Controls, The Boeing Company

SHOEBRIDGE, Mr Michael, First Assistant Secretary Strategic Policy, Strategic Policy Division, Department of Defence

THOMAS, Dr Ian, President, Boeing Australia and South Pacific

TREWHELLA, Professor Jill, Deputy Vice-Chancellor, University of Sydney

Appendix 3

Additional information, tabled documents, and answers to questions on notice

1. Universities Australia – Answers to questions on notice (from public hearing, 2 March 2012, Canberra)

2. Saab Systems Pty Ltd – Answers to questions on notice (from public hearing, 2 March 2012, Canberra)

3. NewSat Limited – Answers to questions on notice (from public hearing, 2 March 2012, Canberra)

4. Boeing Australia and South Pacific – Answers to questions on notice (from public hearing, 21 March 2012, Canberra)

5. Department of Defence – Answers to questions on notice (from public hearings, 2 and 21 March 2012, Canberra)

6. Department of Defence – Answers to written questions on notice

Appendix 4

FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

Defence Trade Controls Bill 2011

SUBMISSION

SUBMISSION NUMBER: **15B**

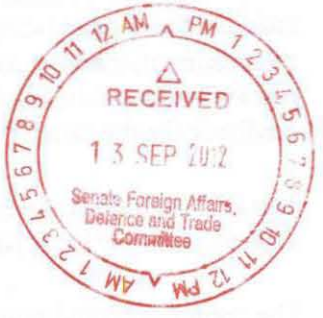
SUBMITTER

The Hon. Stephen Smith MP
15B Supplementary Submission

Stephen Smith MP
Minister for Defence

13 SEP 2012

Senator the Hon Ursula Stephens
Chair
Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600



Dear Senator Ursula

Thank you for your letter of 23 August 2012 concerning the Inquiry into the provisions of the Defence Trade Controls Bill 2011 by the Foreign Affairs, Defence and Trade Legislation Committee.

The Defence Trade Controls Bill 2011 gives effect to the Australia-United States Defense Trade Cooperation Treaty, which was signed on 5 September 2007. The US Senate passed the Resolution of Ratification for the Treaty on 29 September 2010.

Following the release of the Preliminary Report by the Committee, I appointed Mr Ken Peacock and Dr Alex Zelinsky to conduct further consultations on the Bill.

Mr Peacock and Dr Zelinsky have held consultations with key University and research sector stakeholders, the Chief Scientist and the Department of Industry, Innovation, Science, Research and Tertiary Education.

Mr Peacock and Dr Zelinsky have prepared a report on these further consultations, which outlines the following new proposals:

- A transition period of 12 to 24 months for industry (particularly Specialist Military Equipment), Universities and the research sector to adopt the Strengthened Export Controls and to allow Defence to complete its education and training program prior to full implementation of the Bill.

- A pilot program to be conducted during the transition period that would involve a broad range of stakeholders to test and evaluate implementation arrangements (this would complement the 'Pathfinder' program being conducted for the Treaty provisions).

Parliament House, Canberra ACT 2600 Tel: (02) 6277 7800 Fax: (02) 6273 4118

- Defence establish an Advisory Board similar to the Defence Trade Cooperation Treaty Industry Advisory Panel (DIAP) from industry, research, University and Government stakeholders to advise Government on implementation issues during the transition period. Based on the result of pilot studies the Advisory Board may recommend changes to the legislation, regulations or implementing arrangements.

- Use the Advisory Board and engagement with the University and research sectors to inform the annual Wassenaar Arrangement review of the Defence and Strategic Goods List to ensure that this list is up to date. This would take advantage of specialist technical knowledge within the sectors to ensure the Defence and Strategic Goods List keeps up with technical change and advances.

- Defence should allocate additional resources to adequately carry out the necessary stakeholder engagement; including Advisory Board and pilot program set up and management, training, education and assistance required by industry, Universities and research entities during the transition period. This should include stakeholder feedback for the new IT system supporting implementation of the new processes.

- The Bill should reinforce the principle that all researchers, including those operating under Federal or State jurisdictions, are subject to the same export control regulations.

- The compliance and regulatory regime be refocused from individuals and research groups to the organisational level (company, University, research agency or institution). Organisations would be responsible for implementing compliance schemes that will identify researchers, research projects and research programs that are affected by the legislation. Organisations will apply for permits on behalf of the affected groups and will be responsible for reporting compliance.

- Permits should be granted for specific research programs and projects for extended periods (preferably for the life of the program or grant where risk allows) and not be transactional based, where approvals are sought for every interaction with a collaborating foreign partner.

- The proposed obligation to apply for Permits for publications to be replaced with an offence provision that applies to individuals if they wilfully release controlled information into the public domain.

- The Bill not to be returned to Parliament until re-drafting of the Regulations is completed and reviewed by the DIAP and key stakeholders in the University and research sectors.

- The final draft of the Regulations, Approved Community Manual and other documents relating to membership of the Approved Community, be reviewed by the DIAP to ensure there is consistency in definitions, clarity of intent and sufficient details on implementation.

I have attached a copy of the Report for your consideration.

As the report notes, stakeholder consultations conducted by Defence earlier this year had also identified possible changes to the Bill as introduced into the Parliament, including:

- removing the control of "defence services", which would have regulated a broader range of teaching and research activities.

- removing controls on transfers inside Australia, which would have regulated all transfers to foreign students and employees in Australia.

- removing controls for Australians located overseas who supply technology, which would have required Australians employed in overseas research and industry to obtain a permit to transfer DSGL-listed technologies.

The Government in-principle supports the proposals in the report, with the exception that the Bill not be returned to Parliament until re-drafting of the Regulations is completed. Given the United States ratification process for the Treaty was effected two years ago in September 2010, the Government is of the view that the legislative process should be completed as soon as possible this year. The Government will continue to engage with stakeholders throughout the implementation process, including with regard to Regulations.

As well the Government also looks forward to the further contribution by the roundtable chaired by the Chief Scientist for Australia, Professor Ian Chubb AC.

Professor Chubb conducted a roundtable meeting with stakeholders on 6 September to consider the report prepared by Mr Peacock and Dr Zelinsky. Participants included the University and research sectors, the Department of Defence, the Department of Industry, Innovation, Science, Research and Tertiary Education and other government agencies. Further roundtable meetings will be held on 14 and 21 September.

The Government will also take these consultations into account and will continue to engage with industry and the University and research sectors as the Bill progresses through the legislative process and throughout its implementation.

I would be pleased if your Committee would consider the report prepared by Mr Peacock and Dr Zelinsky, the further contribution of the Chief Scientist, and report to Parliament as soon as possible to enable consideration of the Bill by the Senate and the House of Representatives in October.

Yours sincerely

Best Wishes,

Stephen Smith

Intangible transfer of technology controls

Consultation paper for discussion
with the university and research sectors
on proposed further amendments to the Defence Trade Controls Bill 2011

Department of Defence
in consultation with the Department of Industry, Innovation, Science, Research and Tertiary Education

Last updated 3/09/2012 15:00

This paper has been compiled by the Department of Defence in consultation with the Department of Industry, Innovation, Science, Research and Tertiary Education. Issues and proposed resolutions for discussion presented in this paper are not Australian Government policy and should not be represented as such.

Executive Summary

This paper has been developed by the Department of Defence in consultation with the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) for discussion on further amendments to the Defence Trade Controls Bill 2011.

Australia is a strong supporter of international efforts to prevent the proliferation of weapons of mass destruction and is an active member of major international and multilateral arms and export control regimes. To meet its international obligations under the Wassenaar Arrangement – the export control arrangement to which Australia and 40 other countries belong - Australia needs to ensure the responsible transfer of intangible technology that allows people to produce, develop -and in some limited more sensitive cases use- specific military and dual use items on the Defence and Strategic Goods List (DSGL).

The Wassenaar Arrangement:

- Contributes to regional and international security and stability
- Promotes transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies
- Complements and reinforces the existing control regimes for weapons of mass destruction and their delivery systems
- Is not directed against any state or group of states
- Uses export controls as a means to combat terrorism

The Australian Government will remain a participating state in the Wassenaar Arrangement, as has been the case since its formation in 1996.

To ensure consistency in the treatment of tangible items and intangible technology, Australia has decided to adopt the existing legal framework for regulating the export of tangible items, which is also derived from the Wassenaar Arrangement. In implementing these obligations, Government will continue its strong support of research and industry and, recognising the importance of international engagement, assure Australia's national security by protecting items on the DSGL.

As a condition for ratification of the Australia-US Defense Trade Cooperation Treaty, Australia is required to enact legislation to strengthen its export controls, including intangible transfers of controlled technology.

As a result of stakeholder consultation since February, there have been several proposed changes to the original Bill. Significant changes in the legislative proposal include:

- removing the control of "defence services", which would have regulated a broader range of teaching and research activities;
- removing controls on transfers inside Australia, which would have regulated all transfers to foreign students and employees in Australia;
- removing controls for Australians located overseas who supply technology, which would have required Australians employed in overseas research and industry to obtain a permit to transfer DSGL-listed technologies; and
- including exemptions for 'in the public domain' and 'basic scientific research', in the Bill if possible.

While the legislative proposal adapts the existing foundation of laws governing export of tangible goods and technologies, it recognises that this is a new area of regulation for universities, research agencies, the research community and industry. Therefore, in response to further stakeholder consultation, Defence proposes to recommend to Government the following additional amendments to the Bill:

- Establish a 12-24 month transition period for Strengthened Export Controls after the legislation is passed by Parliament to allow for:
    a. a period to provide for education and outreach programs; and undertake a detailed pilot program in conjunction with key stakeholders (selected universities, research agencies and industry (particularly small to medium enterprises)), to assess practical implementation issues and make the necessary changes; and
    b. a further period where offences will not be enforceable but permits can be obtained.
- Defence establish an Advisory Group comprising members from university, research, industry and government agency stakeholders to advise government on implementation issues during the transition period. Based on the results of the pilot program, the Advisory Group may recommend changes to the legislation, regulations or implementing arrangements.
- The proposed Advisory Group could also engage with the university and research sectors to inform review of items listed on the DSGL. This would take advantage of specialist technical knowledge within the sectors to help ensure the DSGL keeps up with technical change and advances.
- Conduct a comprehensive pilot program during the transition period. This will involve a wide variety of stakeholders and activities to test and evaluate the implementation of controls and identify any activities that need special consideration.
- Defence will invest and engage in extensive stakeholder engagement; including Advisory Board and pilot program set up and management, training, education, and assistance required by industry, universities and research entities during the transition period. This should include stakeholder feedback for the new IT system supporting implementation of the new processes.
- Ensure that all researchers, including those operating under Federal or State jurisdictions, be subject to the same export control regulations.
- Refocus the Bill's compliance and regulatory regime from individuals and research groups to the organisational level (company, university, research agency or institution). Organisations would be responsible for implementing compliance schemes that will identify researchers, research projects and research programs that are affected by the legislation. Organisations will apply for permits on behalf of the affected groups and will be responsible for reporting compliance.
- Propose that publication be addressed by organisational or individual responsibility to ensure that controlled information is not published. An offence for publishing controlled information would be included, to apply if the proposed publication wilfully released controlled information - details on how to 'develop', 'produce' or in some cases 'use', the DSGL goods (akin to the practice around publishing classified information). This proposal would eliminate the need for organisations or researchers to obtain permits to publish their research results.

- Permits should be granted for specific research programs and projects for extended periods (preferably for the life of the program or grant where risk allows) and not be transactionally based.
- Develop, in consultation with stakeholders, accessible, searchable "user guides" and DSGL information, targeted specifically at researchers and universities.

In consultation with key stakeholders, there are opportunities for further improvements within the existing framework provided these changes are:

- consistent with Australia's Wassenaar Arrangement obligations for regulating intangible transfers in the Wassenaar Arrangement's publication *Best Practices for Implementing Intangible Transfer of Technology Controls* (the Wassenaar Guidance) that were agreed in 2006,
- consistent with the current laws that regulate the transfer of tangible goods and items, through the Customs and WMD Acts, and
- consistently applicable to universities, research organisations and industry.

The amended legislation should reflect the requirement to regulate the intangible supply of DSGL technology or software in a way that minimises the risk that DSGL technology and software could be supplied to would-be proliferators while not introducing unreasonable administrative burden or stifling innovation and collaboration.

Background

Illicit programs of weapons of mass destruction and proliferation of conventional arms and military equipment pose a significant threat to the safety of all Australians and to regional and global security. Australia, along with the international community of like-minded countries, has decided that we must ensure that we make every effort to deny these people access to the materials and technologies they need to achieve their aims. One way that Australia achieves this aim, is through its export control legislation and regulation.

Export control regulation centres on the legislative instrument called the Defence and Strategic Goods List (DSGL). The DSGL is a list of controlled defence and dual-use goods, software and technology that is compiled from various international proliferation and export control regimes to which Australia belongs – the Wassenaar Arrangement, the Missile Technology Control Regime, the Australia Group, and the Nuclear Suppliers Group. Most like-minded countries have a parallel list of controlled goods, software and technology.

Australia regularly updates the DSGL to reflect the international agreement by the countries which belong to these international regimes. Items are included in the DSGL after the international community members, consisting of specialist scientific and proliferation experts, agree by consensus that, in the wrong hands, the items could assist with the proliferation of weapons of mass destruction, conventional arms and military equipment. Items are removed from the DSGL when the international community agree that the items no longer present a proliferation threat. As the department responsible for administering the DSGL, Defence prepares a position on each technical proposal considered by the international regimes. Technical advice from relevant experts, both inside and outside of Government, is a welcome and valuable part of that process.

Australia has controlled the tangible export of DSGL items for over 15 years. In 2006, recognising advancements in technology, the Wassenaar Arrangement state parties agreed that member states should also introduce domestic measures to control transfer of intangible technology associated with the DSGL items. They reasoned that to minimise proliferation risk, it was necessary to control both the physical export of goods and the transfer of technology[1] that would allow a recipient to reproduce those same goods indigenously.

It is important that the Department of Defence work with the Australian industry, academic, research and government sectors to raise ongoing awareness of the sensitivity of the items they are using, and meet the controls that will ensure Australia meets its international obligations to combat proliferation.

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[1] Wassenaar Arrangement Guideline definition of "Technology" is specific information necessary for the "development," "production" or "use" of a product. The information takes the form of technical data or technical assistance. Controlled "technology" for the Dual-Use List is defined in the General Technology Note and in the Dual-Use List. Controlled "technology" for the Munitions List is specified in ML22.
Technical Notes
1. 'Technical data' may take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.
2. 'Technical assistance' may take forms such as instruction, skills, training, working knowledge, consulting services. 'Technical assistance' may involved transfer of 'technical data.'

Policy objectives

The Australian Government is committed to increasing our international engagement and to take advantage of emerging opportunities. Australia has a world class research capability, but as a relatively small nation, it needs to enable international engagement and tap into the other 97% of research undertaken outside Australia.

The Government also needs to introduce controls on the supply of DSGL technologies and software to close the gap in Australia's export controls and align those controls with the expected best-practices as outlined in the Wassenaar Arrangement's publication *Best Practices for Implementing Intangible Transfer of Technology Controls* (the Wassenaar Guidance) that were agreed in 2006. Legislation that introduces these guidelines will need to regulate the intangible supply of DSGL technology or software in a way that minimises the risk that DSGL technology and software could be supplied to would-be proliferators while not introducing unreasonable administrative burden or stifling innovation and collaboration.

It is important that Australia meets its international obligations, including those of the Wassenaar Arrangement, and finding the right balance will be critical to ensuring we do not impede opportunities to capitalise on global developments.

Also, Australia is seeking to ratify the Australia-US Defense Trade Cooperation Treaty which requires enacting legislation to strengthen its export controls, including intangible transfers of controlled technology. Although the Treaty requires strengthened export controls, Australia's Wassenaar obligation preceded the signing of the Treaty.

The current legislation

As currently drafted, the Bill requires a permit for every supply from an Australian person to a foreign person inside Australia and for every supply from Australian territory to a foreign person outside Australia. The Bill also requires a permit for the provision of services by any Australian person in relation to any DSGL item or DSGL technology.

Defence's consultation to date has identified that these controls are broader than required by the Wassenaar Guidance and that this broad scope had introduced unintended consequences for implementation. It is important that these unintended consequences be considered and the legislation be reviewed to minimise the effects of the regulation.

Legislative proposal

Past consultations with the research and academic sectors have seen a range of possible amendments develop, including to:

- remove controls on supplies of technology inside Australia;
- remove controls for Australians located overseas who supply technology;
- apply controls to all supplies of technology from Australia to anyone outside Australia;
- include definitions for 'in the public domain' and 'basic scientific research', in the Bill if possible;
- remove controls on defence services; and
- include an offence for publishing information where it will transfer controlled technology to the public domain (see below).

The definition of 'technology' could be amended to match the Wassenaar-agreed definitions that are contained in the DSGL. This includes exemptions for technology that is 'in the public domain' and supplied in the course of 'basic scientific research'.

A further possible change is that there be no requirement for a separate control on the provision of services and this could be removed from the legislation.

The Wassenaar Guidance allows member states to decide when an intangible transfer takes place. The Bill could be amended such that there is no need to control technology inside Australia or when technology is supplied by an Australian who is overseas, and that the controls could be applied at the same point that tangible goods are controlled; i.e. when the intangible technology leaves Australia.

Proposals for discussion

While it adapts the existing foundation of laws governing the export of tangible goods and technologies, it is recognised that this is a new area of regulation for universities, the research sector and industry. Further opportunities to amend the Bill to limit the burden of this regulation are:

- Establish a 12-24 month transition period for Strengthened Export controls after the legislation is passed by Parliament to allow for:
    a. a period to provide for education and outreach programs; and undertake a detailed pilot program in conjunction with key stakeholders (selected universities, research agencies and industry (particularly small to medium enterprises)), to assess practical implementation issues and make the necessary changes; and
    b. a further period where offences will not be enforceable but permits can be obtained.
- Defence establish an Advisory Group comprising members from university, research, industry and government agency stakeholders to advise government on implementation issues during the transition period. Based on the results of the pilot program, the Advisory Group may recommend changes to the legislation, regulations or implementing arrangements.
- The proposed Advisory Group could also engage with the university and research sectors to inform review of items listed on the DSGL. This would take advantage of specialist technical knowledge within the sectors to help ensure the DSGL keeps up with technical change and advances.
- Conduct a comprehensive pilot program during the transition period. This will involve a wide variety of stakeholders and activities to test and evaluate the implementation of controls and identify any activities that need special consideration.
- Defence will invest and engage in extensive stakeholder engagement; including Advisory Board and pilot program set up and management, training, education, and assistance required by industry, universities and research entities during the transition period. This should include stakeholder feedback for the new IT system supporting implementation of the new processes.
- Ensure that all researchers, including those operating under Federal or State jurisdictions, be subject to the same export control regulations.
- Refocus the Bill's compliance and regulatory regime from individuals and research groups to the organisational level (company, university, research agency or institution). Organisations would be responsible for implementing

compliance schemes that will identify researchers, research projects and research programs that are affected by the legislation. Organisations will apply for permits on behalf of the affected groups and will be responsible for reporting compliance.

- Propose that publication be addressed by organisational or individual responsibility to ensure that controlled information is not published. An offence for publishing controlled information would be included, to apply if the proposed publication wilfully released controlled information - details on how to 'develop', 'produce' or in some cases 'use', the DSGL goods (akin to the practice around publishing classified information). This proposal would eliminate the need for organisations or researchers to obtain permits to publish their research results.
- Permits should be granted for specific research programs and projects for extended periods (preferably for the life of the program or grant where risk allows) and not be transactionally based.
- Develop, in consultation with stakeholders, accessible, searchable "user guides" and DSGL information, targeted specifically at researchers and universities.

Issues and proposed resolutions for discussion

This section presents the issues that have been raised through stakeholder consultations and proposes possible solutions to stimulate discussion and feedback.

Defence services control

The Bill's provisions capture a high volume of activities.

Proposed resolution for discussion

It is recognised that the controls introduced for 'defence services' are broader than required by the Wassenaar Guidance and this was an unintended consequence. It is proposed to remove controls on 'defence services' from the legislation:

- As the Bill is currently drafted, there is a broad control on anyone providing 'defence services' in relation to DSGL-listed goods. The Bill's current definition defines 'defence services' as including activities such as giving assistance in relation to design, repair, operation, destruction and use of all controlled goods – this control would apply equally to all goods listed on the DSGL. This control is broader than the measures outlined in the Wassenaar Arrangement's Guidelines which propose controls in accordance with the narrower DSGL 'technical assistance' and 'use' controls.

- Australia's Wassenaar Arrangement obligations could be met by implementing the existing technology controls in the DSGL which are specific to individual DSGL goods. The broad 'defence services' controls in the Bill would impose an unnecessary level of regulation and the Bill's 'defence services' controls could be removed.

During the transition period, a pilot program could be established to test a range of different activities. This could be overseen by an Advisory Group to assess the impact of the legislation and recommend changes prior to the end of the transition period.

Foreign employees and students in Australia

The Bill's provisions would require universities and research institutions to identify foreign students and researchers inside Australia.

Proposed resolution for discussion

The legislation as currently drafted would impose significant regulation as it requires a permit for every supply from an Australian person to a foreign person inside Australia. This domestic permit requirement could be removed as the risk posed by these domestic supplies is lower due to the following existing domestic security arrangements:

- all foreign people in Australia have undergone border control and visa screening processes and been found to be of sufficiently low risk to be allowed entry into Australia; and
- other Australian legislation serves to reduce security risks posed by domestic transfers of sensitive technology.

If adopted, this would allow foreign students to study in Australia or foreign employees to work in the industry, university and research sectors in Australia without a permit.

Australians working overseas

The legislation as drafted would apply to Australians working overseas who are working with DSGL-listed technologies, regardless of whether those technologies have any connection to Australia.

Proposed resolution for discussion

As currently drafted, the Bill has an extra-territorial application that requires any Australian located overseas to apply for a permit to supply DSGL-listed technology to a foreign person located overseas. Industry consultation has emphasised that this will have the effect that Australians employed overseas will need to apply for a permit if their work involves supplying DSGL-listed technology, regardless of whether the technology has any connection to Australia. If the supply is from a foreign country, it is therefore possible that the Australian person would be required to obtain permits from both Defence and the local export authority.

The Bill could be amended to remove the control on Australians located overseas supplying technology to a foreign person overseas. If adopted, this would enable Australians to work in overseas industry and research organisations without needing to obtain technology supply permits.

Transition period

The Bill does not provide a transition period for university and research sectors, or industry to introduce necessary compliance structures.

Proposed resolution for discussion

A phased transition period of 12-24 months could be considered; for example:

- A12 month period for the Defence Export Control Office (DECO) to focus on assisting research and industry institutions with a comprehensive education and awareness-raising and building their internal compliance arrangements. This period will include a pilot program to test a range of different activities.
- A subsequent 12 month period in which institutions start to submit permits, but are exempt from the offence provisions.
- Then followed by the Act coming into full force (including offence provisions).

The transition period will include a comprehensive pilot program. This will involve a wide variety of stakeholders and activities to test and evaluate the implementation of controls and identify any activities that need special consideration.

The entire transition period could be overseen by an Advisory Group to assess the impact of the legislation and to recommend changes to legislation, regulations and implementing arrangements prior to the end of the transition period. Existing DECO outreach activities would continue to operate throughout and beyond the transition period.

Defence will establish an Advisory Group comprising members from university, research, industry and government agency stakeholders to advise government on implementation issues during the transition period. Based on the results of the pilot program, the Advisory Group may recommend changes to the legislation, regulations or implementing arrangements.

Defence will invest in extensive stakeholder engagement; including Advisory Board and pilot program set up and management, training, education, and assistance required by industry, universities and research entities during the transition period. This should also include stakeholder feedback for the new IT system supporting implementation of the new processes.

Conduct a comprehensive pilot program

The need to ensure that implementation of legislation meets the policy objectives and does not cause unintended consequences across the variety of environments in different sectors

Proposed resolution for discussion

Consultation has highlighted the variety of possible implementation scenarios across different organisations and sectors. In implementing new legislation equally across all sectors, it is important to ensure that the arrangements, both regulatory and

administrative, are appropriate for meeting the policy objectives while not introducing unintended consequences.

A key part of the proposed transition period and implementation of the legislation could be the conduct of a comprehensive pilot program. This could involve a wide variety of stakeholders and activities necessary to test and evaluate implementation arrangements.

The involvement of the Advisory Group would be valuable in contributing to the design and operation of the program; to ensure that scenarios are comprehensive and to identify appropriate participants and encourage their involvement. The outcomes of the program would be reviewed by the Advisory Group and would form the basis for identifying any possible amendments or improvements to legislation, regulations and/or the administrative arrangements.

Defence will invest in extensive stakeholder engagement during the pilot program.

Offence exemptions for ADF, APS and police

The Bill provides offence exemptions for ADF, APS and police officers acting in the course of their duties.

Proposed resolution for discussion

The Bill contains specific exemptions to the supply and brokering offences for APS, ADF and police officers acting in the course of their duties. These exemptions mean that these employees can not be prosecuted for offences; however, they do not exempt the requirement for all APS, ADF and police to apply for permits.

During the course of consultations, other Commonwealth authorities and State governments requested these offence exemptions be extended to cover their employees. Research institutions also consider that it is inequitable to provide offence exemptions to government sector employees. Any amendment to the bill could ensure that all researchers, including those operating under Federal or State jurisdictions, be subject to the same export control regulations.

Scope of regulation

The proposed legislative controls may capture 'low-risk' education and research activities and are not focussed at the 'highest risk' areas such as high-end specialised research activities.

Proposed resolution for discussion

Discussions have canvassed whether the controls could target the 'highest risk' areas of research. Universities refer to early discussions which talked about risk being highest in 'very specialised and high-end' research. These discussions led to considering broad filters to exclude what at that time was seen as lower-risk categories of basic and applied research.

The DSGL, by design, only includes goods and technologies that are of sufficient sensitivity to warrant regulation. Hence, any activity that involves the provision of goods

or technologies on the DSGL needs to be assessed. Assessing tangible exports under the existing laws has shown that the vast majority of exports are approved.

During the transition period, a pilot program could be established to test a range of different activities. This would be overseen by the Advisory Group to assess the impact of the legislation and to recommend changes prior to the end of the transition period.

DSGL processes

Several stakeholders have queried why items are included on the DSGL and what is the DSGL process.

Proposed resolution for discussion

The export control regimes that determine what ultimately goes into the DSGL meet annually, and Defence can raise proposals at the relevant regime meeting (noting the DSGL items come from all four regimes - the Wassenaar Arrangement, the Missile Technology Control Regime, the Australia Group, and the Nuclear Suppliers Group).. Proposals are regularly put up by participating states to introduce, clarify, or remove controls. All proposals are argued on their technical merits, considering security risk in the context of the practicality and utility of regulation. Participating states must agree changes by consensus.

Department of Foreign Affairs and Trade and Defence representatives attend the regime meetings and present a whole-of-government position when Australia votes on a control (either new, change or remove). This includes assessment of the implementation impact and this has been the case in recent controls relating to tangible goods. With the introduction of intangible controls, that same assessment would still occur and, for intangible aspects, we'd expect the university and research sectors to be engaged.

The regime meetings all have 'technical experts meetings' that consider and advise on the controls. These meetings are attended by qualified officials with relevant technical backgrounds. Expert advice can be sought in advance from both within and outside of Government to assist with the development of the proposal if necessary.

The proposed Advisory Group could also engage with the university and research sectors to inform this review of items listed on the DSGL. This would take advantage of specialist technical knowledge within the sectors to help ensure the DSGL keeps up with technical change and advances. These arrangements could also ensure that Defence adequately consult with Australian stakeholders to inform the annual DSGL review process.

Self-assessment

Researchers have suggested that they could self-assess.

Proposed resolution for discussion

Universities have expressed a preference for self-assessment and noted that Defence assessors may not be able to adequately assess risk in technology transfers. The Wassenaar Guidance notes that it will be important for universities to implement internal governance processes to raise awareness of, and facilitate compliance with, legal

requirements. Defence will continue to engage with universities and research institutions to help facilitate self-assessment.

Researchers are well-placed to identify the technical capabilities of their research goods and technology, while Government has access to the information and expertise necessary to assess the proliferation risk of supplying technology to overseas recipients, i.e. end-users.

Through appropriate due diligence measures, universities and research institutions can ensure export controls are implemented, including facilitating the requests for permits and any necessary reporting.

Definitions

The terms 'in the public domain' and 'basic scientific research' need to be better defined.

Proposed resolution for discussion

The exemptions for 'in the public domain' and 'basic scientific research' are currently contained in the DSGL to reflect the internationally agreed Wassenaar Arrangement definitions. For the sake of clarity and to assist with understanding, these exemptions could be replicated in the legislation.

The Office of Parliamentary Counsel could be tasked to include these definitions in the Bill as far as is possible, and where this is not possible, to further explain the concepts in the Regulations. There would then be no requirement for a legislative instrument.

The draft definitions at Annex A match the definitions in the DSGL to ensure the exemptions for the existing tangible export of goods under the *Customs Act 1901* match the intangible supply of technology relating to those same goods under the Bill. Also, these definitions will ensure Australia is consistent with other member states of the Wassenaar Arrangement.

Consultation on the explanatory examples of 'in the public domain' and whether any examples are needed to better explain 'basic scientific research' will support understanding of the legislation. This consultation could continue throughout the pilot program steered by the Advisory Group.

Competitiveness

The controls on the supply of intangible transfers of technology could adversely affect the Australian academic and research community's ability to be internationally competitive in the global research environment.

Proposed resolution for discussion

The Australian Government is committed to increasing our international engagement and to take advantage of emerging opportunities. Australia has a world class research capability, but as a relatively small nation, needs to enable international engagement and tap into the other 97% of research undertaken outside Australia.

In order to meet its Wassenaar obligations, Australia also needs to introduce controls on the supply of DSGL technologies and software. This would close the gap in Australia's export controls and align those controls with the expected best-practices as outlined in the Wassenaar Guidance that were agreed in 2006. The introduction of controls on intangible transfers of technology will also lift Australia's standing in the international community as a trusted custodian of sensitive technology, especially with the other 40 countries who are signatories to the Wassenaar Arrangement and potentially lead to greater involvement in international collaborative programs.

Finding the right balance will be critical to ensuring we do not impede opportunities to capitalise on global developments. Where research involves lower risk activities, permits should be broad and flexible to enable unimpeded collaboration.

Administrative burden

The controls will introduce an unmanageable level of administrative burden on researchers.

Proposed resolution for discussion

Under the legislative proposal, increased understanding of DSGL goods will be needed.

It is important that those who use DSGL goods become familiar with the sensitive nature of the goods they are using and understand that while its purpose may be for the public good, there are security risks posed by the controlled goods and the technology associated with these goods.

In order to ensure that the level of regulation is appropriate for meeting the policy objectives and to identify ways in which administrative burden can be minimised, the following aspects could be considered as part of a pilot program:

- The proportion of technology that would be exempt due to the 'in the public domain' exemption and the 'basic scientific research' exemption.
- How well an institution or researcher is positioned, as experts in their fields, to understand the segment or segments of the DSGL that relate to their research – recognising that there would be an initial familiarisation effort.
- How easy it is for institutions and researchers to use the various Defence tools and documentation, including the ability to search the DSGL using its index and electronic searching.
- The effectiveness of Defence's outreach programs to assist institutions to implement internal awareness and education programs.
- Testing the scope of the DSGL technology controls and its impact on research, noting that the DSGL does not control all technology associated with DSGL goods; rather, the DSGL only controls certain types of information (technologies) associated with DSGL goods:

- For many DSGL goods, the technology would only be controlled if the supplied technology would enable the 'production' or 'development' of the DSGL good.

- For fewer, more sensitive DSGL goods, the technology would be controlled if the supplied technology would enable the 'production', 'development' or 'use' of the DSGL good.

- Whether it is practical to consider the use of DSGL goods and technology at the start of a research project to establish whether there is likely to be a permit requirement.

- To test the Bill's compliance and regulatory regime focus at the organisational level (company, university, research agency or institution) with organisations being responsible for implementing compliance schemes that will identify researchers, research projects and research programs that are affected by the legislation. Organisations will apply for permits on behalf of the affected groups and will be responsible for reporting compliance.

- To test the types of permits required to facilitate research activities and, depending on the collaboration destination and the sensitivity of the DSGL technology, whether broad permits could be issued for each research project, or programs of work, to authorise:

  - technologies specified in the permit; and

  - supplies to specified collaborative partners or, for lower risk technologies, to the countries named in the permits.

  The intent is to reduce administrative burden by granting permits for specific research programs and projects for extended periods (preferably for the life of the program or grant where risk allows) and not be transactionally based.

- The application process; to ensure it is not overly complex and to validate processing timeframes – currently 15 working days for standard applications and 35 working days for sensitive applications, noting that in rare cases, an application may take longer if it is especially sensitive or complex.

- To ensure that record-keeping obligations are practical and manageable.

Publication
Any control on publication will fetter free intellectual inquiry.

Proposed resolution for discussion

The exemption for 'in the public domain' means that information which is already publicly available would not need a permit. While this usefully recognises that publicly available information should not be subject to regulation, it does introduce a significant vulnerability in that it would potentially allow any person to publish sensitive information as a way of making it 'in the public domain' and therefore not subject to control. As currently drafted, the Bill requires an organisation or person to have a permit to supply controlled

technology to another person but there is no restriction on their ability to provide that same technology to the world at large.

Publication should be an organisational or individual responsibility to ensure that controlled information isn't published wilfully. An offence for publishing controlled information could be included which would apply if the proposed publication would communicate how to 'develop', 'produce' or in some cases 'use', the DSGL goods (akin to the practice around publishing classified information). This would eliminate the need to obtain permits to publish research results.

Compliance

Research institutions or researchers will risk prosecution if they fail to comply with the new controls.

Proposed resolution for discussion

Implementation of the Bill will be by the Defence Export Control Office (DECO) which administers the existing tangible export controls. DECO adopts a voluntary compliance model which includes exporters and suppliers being encouraged to develop internal compliance programs that assist them to meet legislative requirements. Programs usually include aspects such as awareness raising and procedures specifically designed to guard against the unauthorised export of goods and supply of technology.

The model allows for the voluntary disclosure of mistakes and non-compliance with the legislation. DECO supports all industry participants who attempt to comply with the regulatory measures but do not always succeed. DECO works closely with organisations to fix the mistake by assisting them to improve their internal compliance programs to guard against the risk of future non-compliance. As with the existing tangible export control framework, more stringent enforcement measures are available when organisations either do not want to comply or have actively decided not to do so.

Support to university and research sectors

The controls will be difficult to implement in the research sector due to the dynamic, iterative and serendipitous nature of the research process.

Proposed resolution for discussion

The implementation plan will provide support and assistance to universities and research institutions to recognise the special needs of the sector and instigate processes for awareness raising, permit applications and review of research in the same way that industry already does for tangible exports. This is recognised in the Wassenaar Guidance which outlines the need for academic institutions to implement internal compliance programs.

Outreach programs and materials to communicate these regulatory changes to the university and research sectors will be developed. The Advisory Group will support the development of the outreach programs and materials to benefit from their knowledge and to best communicate the regulations. Planned measures might include:

- a simple user guide to help individuals understand and navigate the DSGL;
- a sector-specific publication to assist the academic and research sectors to understand what Australia's export control system means for them (similar to the product developed previously for the mining industry);
- tools and guidance to help academic and research institutions to build internal compliance frameworks that are appropriate for their organisations;
- sector-specific outreach sessions for key export compliance staff (train the trainers); and
- sector-specific outreach sessions with researchers to help them understand their obligations and how the export control process works.

The pilot program will provide data to inform the Advisory Group as to the effectiveness of these outreach programs and materials.

Defence will ensure that these activities are properly resourced.

Concerns raised about the policy objectives

Consulted organisations have raised concerns that the legislative proposal is based on a desire for alignment with the tangible supply regime and the approach adopted by the UK.

Proposed resolution for discussion

Introduction of the legislative proposal meets many aims:

- It implements Australia's international obligations under the Wassenaar Arrangement;
- It protects the goods and technologies listed in the DSGL;
- It recognises that due to a range of existing domestic security arrangements, the supply of technology within Australia presents a lower level of risk and accordingly, applies no controls on technology supplies within Australia. This would allow foreign students to study in Australia or foreign employees to work in the industry, university and research sectors in Australia without a permit;
- It recognises the heightened risk for technology supplies outside Australia and accordingly applies appropriate controls, with certain exemptions, to these supplies;
- It is most consistent with the existing tangible export control model and therefore provides a simpler, common approach. As such, it reduces potential cost to organisations that are complying with existing tangible controls as they will not need to establish separate compliance systems for tangible and intangible controls;
- Once tested through a pilot study, there may be a significant reduction in the level of regulation due to the exemptions of technology that are "in the public domain" and to a lesser extent if they are supplied in the course of "basic scientific research". These exemptions would be consistent with the exemptions that are currently listed in the DSGL and applied to tangible exports;

- Once tested through a pilot study, the narrow and specific nature of 'production', 'development' and 'use' technology controls in the DSGL may mean that the level of control is less than perceived in many sectors; and
- The US Senate agreed to the ratification of the treaty on several conditions, binding on the US President, one of which was to certify to Congress that the Government of Australia has enacted legislation to strengthen its export controls, including intangible transfers of controlled technology.

Concerns raised about exemptions in the US controls

Consulted organisations have raised the issue that US export controls provide broad exemptions to research institutions around intangible transfers and only apply to 'high-end' defence technologies.

Proposed resolution for discussion

US export controls do not provide broad exemptions to universities around intangible transfers

US International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) rules control military and dual-use items and technologies and are not limited to "high end defence technologies".

No institutions in the US are exempted from US ITAR or EAR-based export controls. For a foreign national to have access to controlled US Munitions List (USML) or Commerce Controlled List (CCL) items (to include intangibles like technical data), within the US or overseas, a license is required, regardless of where they work.

> Within the US system, if you would need a license to export the item/technical data to a particular country, you would need a license to provide that item/technical data to a foreign national operating in a university or private sector environment.

If a university wanted to use a specifically controlled toxin, a piece of controlled equipment, or controlled technical data, they would need a license from the US Government to transfer this technical data or allow access to the controlled item to a foreign national in the US or abroad.

The US controls only exempt the outcomes/findings of fundamental research that involved the use of controlled goods or technology, with some restrictions. The exemptions would not apply if those outcomes/findings included the publication or supply of controlled technical data.

Definitions for consultation

Technology 'in the public domain'

(1) Technology will be 'in the public domain' if it:
- (a) is 'in the public domain'; and
- (b) meets the requirements of paragraph (5).

(2) Technology will be 'in the public domain' if it has been made available without restrictions upon its further dissemination (copyright restrictions do not remove technology from being 'in the public domain').

(3) The following are examples of technology that, if available to the public, are 'in the public domain':
- (a) technology published in a book, journal or newspaper;
- (b) technology published on the internet;
- (c) technology available as a subscription service;
- (d) technology distributed at a conference, public meeting or seminar, trade show or exhibition;
- (e) technology about a scientific principle taught as part of an accredited course at an educational institution; and
- (f) technology available in a patent.

(4) For paragraph (3)(d), information that is distributed at a conference, public meeting or seminar, trade show or exhibition is taken to be available to the public if it is available to a sector of the public.

(5) This paragraph sets out requirements for paragraph (1)(b).
- (a) It is a requirement that technology in the public domain has not entered the public domain in contravention of:
  - (i) a law of the Commonwealth; or
  - (ii) a law of a foreign country relating to security; or
  - (iii) a security classification that has been given to the information by:
    - (A) the Commonwealth; or
    - (B) the government of a foreign country.
- (b) It is a requirement that technology is not subject to a restriction on its access or use (other than a copyright restriction), for example, a security classification given to the information by:
  - (i) the Commonwealth; or
  - (ii) the government of a foreign country.

Technology used in 'basic scientific research'

'Basic scientific research' means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective.

Appendix 5

FOREIGN AFFAIRS, DEFENCE AND TRADE

LEGISLATION COMMITTEE

Defence Trade Controls Bill 2011

SUBMISSION

SUBMISSION NUMBER: **21**

SUBMITTER

Professor Ian Chubb, Chief Scientist of Australia

Chief Scientist

28 September 2012

Senator Ursula Stephens
Chair
Senate Foreign Affairs, Defence and
Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Senator Stephens

I am writing to advise you of the outcomes of the consultation between the Department of Defence and the university and research sectors on the *Defence Trade Controls Bill (2011)*, which I have now completed.

On 6 September and 21 September 2012 I convened roundtables aimed at reaching an agreed path forward on the Bill, and address concerns with various aspects of the Bill raised by the university and research sectors.

Roundtable participants included the Chief Defence Scientist, Dr Alex Zelinsky, and representatives from Universities Australia, the University of Sydney, the Academy of Technological Sciences, Australian Academy of Science, the Cooperative Research Centres Association, Department of Defence, Department of Industry, Innovation, Science, Research and Tertiary Education and a number of other relevant Commonwealth agencies.

Discussions were fruitful and we reached an agreed path forward, although there are still reservations held by some representatives of the university sector regarding the timing of the legislation.

A list of outcomes agreed to at the roundtable is attached (Attachment A) for your information. In summary, the key developments include:

- establishment of a Strengthened Export Controls Steering Group;
- a transition period of at least 24 months with no offence provisions in effect;
- pilot studies (governed by the Steering Group) to test the regulatory impact of the regime;
- the final Report from the Steering Group to be tabled by Ministers;
- internal institutional practices and structures (including a supplement to the Australian Code for the Responsible Conduct of Research) to be developed to reduce the need to interact with Government agencies on the legislative regime;
- exemptions for basic scientific research and for information already in the public domain.

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Pending approval of the terms of reference by the Minister for Defence, I will chair the Steering Group which will provide comprehensive oversight of the 24 months transition period and pilot studies. The Steering Group will monitor and evaluate processes established by the research organisations and Department of Defence to ensure the implementation of the Bill achieves the appropriate balance between supporting research activity and international engagement while protecting national security. The Steering Group will report 6-monthly to both the Minister for Defence, and the Minister for Tertiary Education, Skills, Science and Research. The Ministers are to jointly table the final report of the Steering Group in Parliament.

It has been noted by some representatives of the university sector that in their view a pilot study should precede the enacting of the legislation, not follow it, to enable results from the pilot to inform the final legislation. In my view, the current proposal involving exemptions, legislation with provisions for a transition period, a pilot and a Steering Group with its final advice tabled by Ministers is quite workable. If issues with the Bill are identified through the pilot, the legislation can be amended at a later stage to address these issues. The Steering Group may also recommend to the Ministers that the transition period be extended.

In my view, the amended Bill is a significant improvement on the original, addressing key concerns initially identified by the sector. It does give institutions a very substantial role in managing the process. The inclusion of the transition period, pilot study, and the Steering Group should alleviate many of the sector's concerns and act to help minimise any administrative impacts over time.

I support the amended legislation, incorporating agreed outcomes from the roundtable process.

If you have any further questions, please do not hesitate to contact me.

Yours sincerely

Professor Ian Chubb AC
Chief Scientist

cc: The Hon Stephen Smith
Minister for Defence

Senator the Hon Chris Evans
Minister for Tertiary Education, Skills, Science and Research

Attachment A

Agreed outcomes of the roundtable discussion chaired by the Chief Scientist on 21 September 2012

- Establish the Strengthened Export Controls Steering Group, reporting to the Minister for Defence and the Minister for Tertiary Education, Skills, Science and Research (the Ministers).

- A transition period of at least 24 months with no offence provisions in effect. The Steering Group may recommend an extension to this non-offence provision transition period.

- A pilot program (not limited to a single pilot) to test the regulatory impact of the regime.
  - The pilot to determine the costs and benefits associated with the regime, the feasibility of its implementation, the processes and interaction required to successfully implement the bill during the transition period, and identify any aspects that require modification prior to the offence provisions coming into full effect.
  - The framework for the pilot to be agreed by the Steering Group and, pending consideration of the Steering Group, will span two grant funding cycles with interim reporting to identify improvements.
  - The pilot will review mechanisms by which organisations can determine thresholds for technologies assessments beyond which an organisation will consult with Defence and, if required, seek a permit.

- Internal institutional practices and structures (including a supplement to the Australian Code for the Responsible Conduct of Research) to be developed to reduce the need to interact with Government agencies on the legislative regime.

- The Model to be tested as part of the pilot will consist of an export control regime that:
  - Begins with an institutional assessment process for open academically based research in accordance with guidelines incorporated into the supplement to the Australian Code for the Responsible Conduct of Research. This step recognises that not all activities to supply technology to 'develop', 'produce', or in comes cases 'use', an item on the DSGL will involve the level of detail which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions of the DSGL listed item. The institutions involved in activities of this type must have processes for assessing technology and for determining when advice is to be sought from Defence about a possible permit in accordance with established guidelines.
  - Provides exemptions from export controls for research, where :
    - The activity is ‘basic scientific research’, as defined in the DSGL and Wassenaar Arrangements (Experimental or theoretical work

undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective).

- The technology is already 'in the public domain', as defined in the DSGL (technology or software which has been made available without further restrictions upon its further dissemination (copyright restrictions do not remove technology or software from being in the public domain))

- Provides exemptions for transfers of technologies within Australia's domestic borders.

- The legislation that is passed must incorporate or allow for the following:
  - modification, if necessary, once the results of the pilot studies are known.
  - A non-offence transition period of no less than 24 months, and with the possibility of an extension on the recommendations of the Steering Group.
  - Pilot studies governed by the Steering Group.
  - Pilot studies to test outcomes from the Model.
  - A formal evaluation against agreed criteria to include outcomes of pilot studies.
  - A final report from the Steering Group to be submitted to the Ministers to be tabled in Parliament.
  - Ordinary scientific communication is permissible, where the institution and individual have complied with established guidelines which include the institutional assessment model outlined above
  - The provisions relating to Defence Services are deleted.
  - Controls on foreign employees and students in Australia are removed.
  - Controls on Australians overseas are removed.
- The indicative flowchart that has been tabled, incorporating an institutional management framework for research that falls below a certain technology assessment threshold and, above that threshold, an application for a permit to Defence would have to be made. This is to be tested during the pilot.

- Amendments to the legislation and the regulations to be drafted reasonably quickly, with appropriate consultation with the sector. A small sub group will meet to consider the amendments.

- NHMRC to take the lead in developing a supplement to the Australian Code for the Responsible Conduct of Research applicable to universities and other research institutions, including government agencies and be:
  - developed in consultation with relevant research institutions, government departments, other funding agencies, and the Steering Group;
  - supported by the existing reference group.