May 10, 2012

Dr. Kathleen Dermody
Committee Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Boeing Response to Written Questions on Notice
Resulting From Boeing Testimony Before the Committee on March 22, 2012
Regarding the Defence Trade Controls Bill 2011

Dear Dr. Dermody,

Please find below Boeing's responses to questions posed to us by the Australian Senate's Standing Committee on Foreign Affairs, Defence and Trade, regarding Boeing's March 21 testimony on the *Defence Trade Controls Bill 2011* and Boeing's prior submissions to the Australian Government on the legislation and its implementing regulations.

Question # 1 – Topic: Sublicenses

Boeing is concerned that Treaty-use may be discouraged if Approved Community prime contractors are unable to work with small-sized companies that are unable to obtain Approved Community membership for reasons of the costs associated with membership (p.[5]). Defence clarified that SMEs as subcontractors to larger members cannot come under the umbrella of the latter's membership. However, if they supply skilled personnel to work for the larger firms then such individuals will come under those firms membership.

Please elaborate on your concerns and clarify whether Defence's response regarding implementation addresses them.

Response: We appreciate the clarification provided by Defence and agree that SMEs acting as subcontractors to larger members should not come under the umbrella of the latter's Approved Community membership. This practice could pose liability concerns. We also agree that contract-labor employees should come under a firm's Approved Community membership. Unfortunately, while there are instances where this employment situation is used, it is generally not a common or routine practice in the aerospace and defense industry and would not solve the problem of a prime contractor's inability to work with its SME subcontractors and suppliers under the treaty provisions.

We believe that the security and screening requirements currently required for Approved Community membership may be considered too financially and operationally burdensome for SMEs to adopt. Unfortunately, the absence of this broad sector of the Australian economy from treaty

eligibility will make the treaty much less useful for Australian industry at large. To expand the ability of SMEs to become Approved Community members and ensure they have the opportunity to benefit from the treaty's advantages – without sacrificing the security features required for Approved Community membership – Boeing respectfully offers the following suggestions:

- Allow companies to designate specific facilities, or specific areas within a facility (e.g., one floor within a building or one section within a facility), as the "Approved Community" area for that company.
- Allow companies to subject only those employees that will be involved in or exposed to treaty-eligible commodities, technical data, and services to enhanced security and screening requirements.

Boeing would look forward to further discussions on this topic to maximize the utility of the treaty for Australian business, while maintaining the security aspects implicit in Approved Community membership.

Question #2 - Visibility of the Application Process

In evidence provided to the Committee on 21 March, Boeing recommended that the regulations include establishment of a 'predictable and transparent licence processing, along with clear completion deadlines' and that 'allocating appropriate resources to allow DECO to operate on those processing times is vital t the success of both government and industry.' Boeing also noted support for 'language incorporated into the regulations for the review of an adverse "significant ties' assessment' and believed 'that concept should be expanded to export permit decisions so that companies have recourse to request a second look at a denied export by senior level policy makers and receive a decision within 30 days.'
Could you elaborate on your suggestion of a license process and an appeals process?

Part a) – License Processing

Response: We believe that a predictable, transparent and consistent process for reviewing requests for export authorizations is essential to industry's ability to conduct international business -- by avoiding costly production and delivery delays, performing to contract deadlines, and maintaining credibility and reputation as reliable international suppliers and business partners.
Export licensing systems impose responsibilities for both industry and government. Applicants must submit complete and concise applications in a timely manner to the government for review. For those applications that include potential policy, technology transfer or security concerns, it is mutually beneficial for all if mechanisms exist to allow for consultation with the government on issues or questions that arise, in order to ensure that the government has all required information on which to base a fully-informed review decision.

The government, for its part, should ensure allocation of resources – in terms of appropriate levels of staffing and training – sufficient to review applications in an efficient, predictable and transparent manner. In order for a review process to be timely and predictable, we would suggest adherence to statutory timeframes by which the government would endeavor to complete their review of the large majority of license applications. Boeing fully understands that cases involving significant issues of policy and security would require longer periods of review.

Further, industry should be afforded the assurance that applications will be reviewed in a consistent manner and have confidence that they will enjoy a level playing field with their competitors – for example, approval policies for similar levels of technology to similar destinations should be adjudicated in a consistent manner for all applicants.

Transparency in the application review process enables both government and industry to track cases under review. By example, in the U.S., companies are able to track, via an on-line system, the various agencies to which applications are referred and the dates of review during the course of the application review process. This assists both businesses and government in several ways. First, it reduces the number of "status check" calls that government employees must field from industry. Second, it allows both the government and industry to identify potential bottlenecks in the inter-agency review process that may be solved through the provision of additional information. Third, it allows businesses and government to better understand trends in review cycles, allowing for more accurate planning and resource allocation decisions.

Part b) – Appeal of Impending Export Permit Denials and Pre-notification of Proposed Conditions

It would be helpful for license applicants to have the opportunity to engage with DECO when a final decision to deny an export permit is imminent, in an effort to both clearly understand the reasons for potential denial, and to have the opportunity to provide additional information that might prove helpful in explaining the proposed export and allow the case to be approved. For example, the U.S. Commerce Department has a well defined, formal process for addressing and escalating license applications facing recommended denial.

Specifically, upon receipt of an agency recommendation for denial, the application is referred to an interagency Operating Committee, chaired by the Department of Commerce. The Committee evaluates all agency positions, and often contacts the applicant for additional information. The Committee Chair has the authority to make an initial decision to approve an application despite an agency denial recommendation. Should the Chair do so, the reviewing agencies have three days to register agreement or objection to the Chair's decision. Upon an objection, the case is subject to a series of escalations, until resolution is achieved.

The U.S. State and Defense Departments have also integrated appeals procedures into their agency review processes. The existence of a structured appeals system allows for collaboration between industry and government and provides clarity to a fully-informed license review process.

The U.S. Department of Commerce also routinely provides pre-notification to applicants when it intends to impose conditions of approval prior to issuance of an export authorization. The Department will provide draft conditions for review by the applicant, requiring a timely response. This practice is helpful to all because it allows for consultation to ensure the conditions are clearly understood by both government and industry and assures the conditions can be implemented in practice. Although not a routine practice, the U.S. Department of Defense sometimes also provides an advance copy of proposed provisos for review, especially in cases with a great deal of complexity. Exporters appreciate this opportunity to understand concerns, ensure they are written in a clear manner and address any issues that might arise in implementing these requirements. These are examples of transparency that help to make the entire export licensing system more efficient and predictable.

Question #3: Brokering

Your submission raises concerns regarding a lack of clarity around the combined use of the terms "arrange' and 'supply' under Section 15 of the bill which establishes brokering offences (p.[2]). The Explanatory Memorandum (EM) clarifies, however, that the term 'arranges' is not intended to cover situations where a first person provides a second person with a point of contact for the supply of DSGL goods or technology or services relating to the DSGL goods/technology where there is no fee, commission or other benefit obtained by the first person. Can you:

- *Respond to the clarification in the EM?*
- *Detail your concerns and suggested recommendations in light of the EM.*

Inform the committee as to whether you have raised such concerns with Defense and of the outcome of such discussions.

Response: We appreciate the language provided in the Explanatory Document (EM), and support the position that the term 'arranges' should not cover point-of-contact referrals.
Regarding the clarification provided in the EM, we would like to offer the following scenario. Boeing would serve the role of the "first person" when providing a freight forwarder (the "second person") with a point of contact for our customer for the supply (shipment) of DSGL goods to that customer. In this shipment-arrangement/supply scenario, even though the freight forwarder would be receiving a fee from Boeing for undertaking the shipment, the term "arrange" in a brokering capacity should not apply to either Boeing or the freight forwarder. We would propose that the exception under Item 64 in Section 15 of the EM be revised to clarify that transport and delivery to a person on behalf of another, even if a fee is involved, is not covered by the term "arrange" and therefore does not constitute a brokering activity.

As we have stated previously, Boeing recommends that key definitions be included in the regulations themselves, not just in the EM. Exporters should be able to interpret the regulations without having to reference a separate document for important primary concepts without which the regulations would not be clear. An EM is useful for areas concerning implementation practice that may change from time to time, but that do not change the underlying structure or meaning of the regulations. In keeping with that preference, Boeing therefore recommends that a definition of the key term "arrange" be included in the implementing regulations. This definition would clarify that freight forwarding and other basic transportation activities are exempt from the concept of 'arranging'.

We have had the pleasure of regular engagement with DECO throughout their consultative process for treaty implementation and have appreciated this opportunity. We are pleased that DECO will be visiting Boeing in Brisbane on June 19th to provide training and a briefing on the proposed regulations. While we have not yet had the opportunity to discuss our thoughts on the need for definitions, we look forward to discussing these concepts with DECO.

Question #4: Brokering

Your submission states that the legislation should require a broker to be located in Australia and notes concerns with Section 15(1) in this regard (p.[2]). You recommend that the bill read Australian person for the purposes of brokering provision (in Section 4).

- *Please explain your concerns regarding Section 15(1) and; Detail your recommendation in this regard.*

Response: We are concerned that the proposed scope of Australian controls is overly broad with respect to some brokering activities occurring outside of Australia and may be duplicative or unworkable in certain situations. However, we do acknowledge that there are, indeed, circumstances where brokering activities performed by Australian persons outside of Australia should be subject to Australia's brokering regulations.

We would respectfully suggest, in situations where an Australian person is employed by a company located in a country that is either a member of the Wassenaar Arrangement or otherwise has a national law regulating brokering activities, that Australian law not require these individual Australian persons to additionally register as brokers in Australia since the activities of the company would already be subject to regulation. We would support the position that Australians independently engaging in brokering activities outside of Australia would be subject to Australian brokering rules.

Please allow us to provide two illustrative examples. First, if a Boeing Australia employee were to transfer to a position within our F/A-18 program in the United States, that employee should not be considered to be engaging in brokering activities, even if the employee was directly participating in sales or business development activities. The sales activities in which the employee would be involved would be bi-lateral sales between the U.S. and a foreign customer, which would not be considered brokering under the current U.S. regulations. Requiring the Boeing Australia employee located in the U.S. to separately register as a broker under Australia's regulations seems untenable in today's highly mobile global environment.

In a second example, if an Australian person were hired independently by Boeing as an international sales consultant (under a consulting contract, not as a regular employee) and was asked to be responsible for selling Boeing defense products to a third country, this *would* be considered brokering under the U.S. regulations, triggering a requirement for the Australian sales consultant to register as a broker in the U.S. If Australia were to also require the individual to possess an Australian brokering registration, it would be duplicative. We acknowledge that if a person is brokering items originating from his own country, he should be subject to controls by that country, regardless of where he is located.

Question #5: Record Keeping

Does Boeing have any comment to make in regards to Defence's evidence at 21 March hearing regarding record keeping?

Response:

Record keeping requirements under the Treaty are numerous, yet we acknowledge that a significant number of these requirements are normal conditions surrounding business performance under an export authorization. Boeing recognizes that the record keeping requirements listed in the implementing regulations closely track the record keeping requirements incorporated into the Treaty, and therefore cannot be altered. This notwithstanding, we would support the comments made by Senator Johnston at the 21 March hearing that consideration should be given to the issue of how to alleviate the practical effects of these recordkeeping (and marking) requirements, particularly involving intangible exports, such as emails and verbal conversations.

Given that the purpose of the treaty is to foster a seamless environment for transfers between members of the Approved Community in both countries, we believe that particular attention should be given to this aspect of treaty compliance, due to concerns that requirements viewed as overly-burdensome could emerge as a deterrent to treaty use. Boeing supports Mr. Shoebridge's comments at the hearing that DECO requirements should align with business 'best practices' whenever possible.

Regarding the important topic of markings, Boeing believes that the definition of what is 'impractical' for marking items will be critical. We believe that the difficulties inherent in the marking and unmarking of items being shipped in and out of treaty eligibility will be a critical determining factor in industry's use of the treaty. We look forward to further discussing this issue with the Standing Committee and DECO, as appropriate.

In an effort to promote collaboration between government and industry on this issue, Boeing believes that it would be advantageous to establish an on-going joint government-industry mechanism for further dialogue and discussion. Information-sharing and pathfinding exercises could be explored in this venue, in an effort to explore methodologies that would minimize regulatory burdens while building upon industry 'best practices' to satisfy legitimate security concerns related to marking requirements under the treaty.

More broadly, Boeing recommends the establishment of a permanent mechanism for government-industry dialogue and collaboration. The creation of an industry advisory panel would provide the government with a valuable source of information and feedback on topics such as technology controls, licensing mechanisms, compliance, and the U.S.-Australia Defense Trade Cooperation Treaty. In the U.S., mechanisms such as the State Department's Defense Trade Advisory Group and the Commerce Department's network of Technical Advisory Committees have become highly valuable sources of government-industry dialogue. Boeing believes that it would be beneficial for DECO to pursue the creation of a similar industry advisory group.

In closing, please accept my thanks for permitting Boeing to provide this follow-up communication with the Committee. Boeing remains committed to working with you on a continuing basis on this important initiative.

Yours sincerely,

Ian Thomas
President
Boeing Australia & South Pacific