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

Ursula
Dear Senator

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).

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- 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.