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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

Subj: Defence Trade Controls Bill 2011 Exposure Draft
The Parliament of the Commonwealth of Australia
House of Representatives/The Senate

Dear Dr. Dermody,

Boeing Australia ("Boeing") is pleased to submit comments in response to the recent inquiry to industry by the Senate Foreign Affairs, Defence and Trade Committee regarding its *Australia Defence Trade Controls Bill 2011*, cited in the legislation as the *Defence Trade Controls Act 2011*. We appreciate the Committee's outreach to industry on such a critical piece of legislation, and we look forward to working with the Government as the trade controls environment continues to evolve.

Both the revisions to the Australian defence trade controls system and the implementation of the Australia-U.S. Defence Trade Treaty are important developments for Boeing. As a global company, we welcome efforts to align trade controls with international best practices and to harmonize national export controls within the framework of multilateral regime commitments. Further, as a company that represents a large portion of the defence business between the U.S. and Australia, we expect to realize benefits from the U.S.-Australia Defence Trade Treaty and are pleased to offer several recommendations and observations regarding the mechanics of Treaty implementation.

With respect to the language related to Defence Trade Controls in the Bill, our comments focus on the following principal recommendations:

- Creation of a mechanism for the voluntary disclosure of export controls violations
- Clarification of the parameters and scope of the broker registration provisions
- Creation of a "public domain" exception
- Measures to address increased processing times at the Defence Export Control Office (DECO)

With respect to language specific to Treaty implementation, our concerns involve the following principal elements:

- A harmonised definition of the "Approved Community"
- Further explanation and refinement of the Government's monitoring powers under the Treaty
- Treatment of non-Approved Community sub-licencees

Defence Trade Controls Provisions

Brokering Registration

Boeing has significant concerns about the burdens associated with the proposed regulations on brokering. The regulation of brokering is an important step in modernising Australia's export controls system and brings the country in harmony with the Wassenaar Arrangement, which has recommended national legislation controlling arms brokering. Nevertheless, Boeing believes that the broker registration and oversight requirements in the Bill should not be so broad in scope that they capture persons and activities that are not significant from the perspective of Australia's national security interests.

- **Freight Forwarders** - The term "supply," which is defined in section 4 as including supply by way of "sale, exchange, gift, lease, hire or hire-purchase," is broadly used together with the term "arrange" throughout Section 15, which establishes brokering offences. Under this definition, a freight forwarder delivering goods to one customer on behalf of another customer could be construed as "arranging to supply" the goods, therefore offering a brokering service and becoming subject to Section 15. In order to avoid possible confusion, we recommend defining the term "arrange" in the Section 4 definitions in such a way as to make clear that although a freight forwarder may "supply" Defence and Strategic Goods List (DSGL) items, in the normal course of business a freight forwarder does not "arrange" that supply.

- **Sufficient Nexus with Australia**: We believe that the Bill should require that a broker controlled under this legislation be located in Australia. As written, the Bill could exert control over situations in which the parties' nexus with Australia is tenuous (sSection15 sub-s 1(a)(i)). Specifically, where goods are purchased from one foreign country and delivered to another foreign country, the broker involved in such a transaction should be located in Australia; if not, the broker should not be subject to Australia's controls. The export control regimes of the two foreign countries involved in such a transaction should be sufficient for the regulation of such movements.

- **Definition of Person**: For the purposes of the brokering provisions, Boeing recommends amending the Bill to read "Australian person" (as defined in Section 4) in order to better establish the connection between brokering activities to Australian controls.

Voluntary Disclosures

While manufacturers of defence products are dedicated to complying fully with all trade controls laws and regulations, unintentional errors may occur. Boeing recommends that this Bill establish a mechanism for companies to approach the Australian Government and disclose export compliance issues that may be uncovered through monitoring and self assessment of our compliance programs. Such a system of voluntary disclosure would encourage companies to promptly report violations, and would allow the Government to determine if a specific violation could have national security implications that should be addressed. We believe that this process is extremely effective in motivating companies to have an open dialogue with the Government on compliance-related issues and results in continuous improvement in companies' internal compliance programs.

Record-Keeping Requirements

Clarification is needed regarding the mechanics of the record-keeping requirements in the Bill, in particular with respect to the scope of activities for which recordkeeping would be required. For example, Section 51, subsection 1 requires the creation of "a separate record of each activity that the person does under a permit." For services and intangible transfers in particular, individualized record-keeping is very difficult to achieve, and could amount to many thousands of entries. As drafted, the current language does not explain whether a record is required for each controlled defence service, or if every individual email, telephone call, or fax constitutes a separate, recordable export of intangibles subject to export controls. Although some of these questions may be addressed in the more detailed implementing regulations, it is important to include clarifying language in the Bill itself, taking into consideration the practical aspects of each recordkeeping requirement.

Public Domain Exception

We believe that an exception for the export of public domain technology and services should be included in the Bill. Under the draft language, the provision of tangible and intangible technology or services related to a Defence and Strategic Goods List item would always require a permit, even when that technology or service is widely available in the public domain (Section 10). This would unintentionally capture a range of routine transactions that have no bearing on national security, and greatly increase the licensing burden on DECO and exporters. A definition for "public domain" should include information that is widely accessible to the public through print, the media, the Internet, or academic institutions.

Increased Processing Times

We have concerns about the impact that implementation of new export control measures may have on processing times for export authorization requests as a result of increased workloads. Ensuring established and predictable processing times is critical for purposes of business planning and predictability and we believe that language to that effect should be included in the Bill. With that in mind, we recommend the following:

- Allocating funds in the Bill for additional personnel and other expenses that may arise during the implementation period.
- Establishing new or updating existing IT systems to support the review process by ensuring that all stakeholder agencies have timely access to the export authorization request and the position of other agencies.
- Establishing a Help Desk to quickly resolve any administrative issues related to the license application.

Boeing is also concerned about timeframes associated with applications referred to agencies outside of the Defence Export Control Office for review. In these cases, the applicant needs to know to whom the application has been referred, and how long a resolution may take. We respectfully ask the Government to establish a mandatory response time for reviewing agencies, and to provide greater visibility for industry about where an application may be at any given time in the license application review process.

Additionally, we believe that consultation with industry whenever technology release or policy issues with respect to a particular export authorization request arise *before* a decision to return the application without action or deny it is made would give the applicant an opportunity to address and possibly resolve those concerns. In this regard, we recommend the establishment of a formal process for appealing an impending "return without action" or denial disposition which would include escalation to senior levels within the Government

Defence Trade Treaty Comments

Approved Communities

The concept of a Treaty "Approved Community" in Sections 27-30 appears to contrast to the constructs developed in the United States and the United Kingdom. According to the Bill, Approved Community status is conferred on an entire body corporate (Section 27, sub-ss 1-2), with no allowance for the designation of discrete facilities or divisions of a company as an Approved Community.

By contrast, our understanding of both the U.S. and U.K. concept of Approved Community from discussions with U.S. and UK government officials is that an Approved Community in those countries is *facility* specific. In both countries, a company may designate a single facility as its "Approved Community" (indeed, recent presentations by U.K. regulators have indicated that British Approved Communities may even be as specific as discrete locations within a single facility). The rest of the company's sites and offices would be considered distinct from the Approved Community Both the U.K. and U.S. approach to the Approved Community concept provide cost savings and significant logistical flexibility that will increase the use of the Treaty, and Boeing recommends that the Government adopt a similar definition.

Companies could be allowed to designate those sites that will handle U.S.-controlled defence articles and technical data pursuant to the Treaty, while perhaps excluding those facilities that will not come in contact with Treaty articles.

Approved Community Monitoring

Boeing recommends that language clarifying the scope of government monitoring powers be inserted into Sections 41 and 42 of the Bill. Monitoring provisions are necessary to ensure the safety of sensitive Treaty defence articles. Therefore, we believe that industry should have a clear understanding of what the requirements in this area of compliance will be. In this regard, the stringent conditions imposed and the consensus required by treaty partners for selecting a company as a member of an Approved Community should result in a "trusted end user" approach to monitoring. Finally, because Section 42 empowers authorised officers to inspect, copy, and remove materials, the Government should amend this provision to ensure that any information obtained will be used strictly for purposes provided for in the Bill so as to allay industry concerns that sensitive proprietary information could be revealed to competitors, dissuading participation in the Treaty.

Sub-licencee Treatment

Treaty use could be discouraged if an Approved Community prime contractor is unable to work with small-sized companies that are not able to obtain Approved Community membership because of potential costs associated with the requirements for membership, such as the obligation for all employees to be Australian citizens. In many instances, existing programs have significant and long-standing relationships with these sub-licencees. We encourage the Government to establish a mechanism that will allow sublicencees to benefit from the prime contractors' Approved Community status without being subject to exactly the same requirements. This could be achieved by relying on the Approved Community member to ensure that treaty-covered items are properly protected when in the possession of the sublicensee.

In closing, thank you again for permitting Boeing to provide comments on the Defence Trade Controls Bill and to reiterate our desire and commitment to work with the government on a continuing basis on this important initiative. Boeing believes that government-industry engagement is essential in this area, and Boeing stands ready to answer any questions or provide any assistance or input that may be needed as the process advances. Please do not hesitate to contact me directly if you require further information or clarification.

Yours sincerely,

Ian Thomas
President
Boeing Australia & South Pacific