

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 to avoid duplicating the examination being conducted by the Senate committee, it had agreed not to inquire into the bills.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.

Scrutiny of Bills Committee

1.5 The Senate Scrutiny of Bills Committee examined both bills in late November 2011 and raised a number of concerns regarding the Defence Trade Controls Bill 2011.⁴ After noting the response provided by the Minister for Defence, the Scrutiny of Bills Committee recommended that Defence update the bill's explanatory memorandum to include further information.

1.6 The Senate Foreign Affairs, Defence and Trade Legislation Committee notes correspondence from the Minister for Defence to the Chair of the Scrutiny of Bills

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 Scrutiny of Bills Committee *Alert Digest No. 14 of 2011*, 23 November 2011.

Committee dated 26 March 2012, which states that Defence would update the bill's explanatory memorandum after the Legislation Committee's report on the bill. The committee notes the Scrutiny of Bills Committee's recommendations and the Minister's response.

Purpose of the bill

1.7 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 2008.⁵ 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

1.8 The committee advertised the inquiry on its website. It also wrote to relevant ministers and departments calling for written submissions, and contacted a number of other organisations, commentators and academics inviting them to make submissions to the inquiry.

1.9 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 Appendices 2 and 3.

1.10 Evidence received at the public hearings, and in submissions, indicated that Defence had not conducted consultation with the university and research sectors. Representatives of the university sector argued that they would be negatively impacted by the strengthened export controls outlined in the bill; they were concerned that the new controls outlined in the bill would prevent international collaboration on research.

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

1.11 As a result of this evidence, 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 provide time for this consultation to occur, 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.

1.12 The committee was concerned that the research sector in Australia had not been properly engaged by Defence in discussions about the bill. As a consequence, the committee approached other academic and research organisations to seek their submissions in regard to the effect of the bill on their work. Four submissions were received from this second round of invitations to provide submissions. They supported the aims of the bill but also had serious reservations, similar to the university sector, about the impact of the bill as drafted and also about the lack of consultation on the proposed legislation.

1.13 On 20 June 2012, Defence provided the committee with two briefing papers and responses to questions on notice and in writing from the public hearings. Defence advised that its consultation process with the university and research sectors was progressing and that it anticipated the consultation to be concluded by the end of June 2012. By the end of July 2012, Defence anticipated that it would then be able to advise the committee of the results, including possible amendments to the bill. The consultation process, however, has taken longer than expected. The committee is encouraged by submissions from the university and research sectors which demonstrate a desire to work with Defence to find a solution. However, the committee notes with concern the submission from the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) dated 2 July 2012 which suggests that the consultation process has some way to go before all parties could reach agreement on a solution.

Preliminary Report

1.14 The committee acknowledges the concerns raised by submitters regarding the effect of the bill on the university and research sectors and Defence's lack of consultation with these sectors prior to introducing the bill into Parliament.⁶ Since the 21 March 2012 public hearing, Defence has conducted consultations and is considering amendments to the bill. The committee is aware, however, that during this recent four month consultation period new issues have emerged.

6 Universities Australia, *Submission 11*; National Health and Medical Research Council, *Submission 12 and 12A*; Australian Research Council, *Submission 13*; Queensland Government, Minister for Education, Training and Employment, *Submission 14*; DIISRTE, *Submission 16*; Cooperative Research Centres Association, *Submission 17*.

1.15 While the committee is encouraged by Defence's advice⁷ that it has also conducted consultations with the research sector, it notes DIISRTE's observations that the pharmaceutical, biotechnology and nanotechnology industries may also be affected by the strengthened export controls.⁸ The committee is concerned that not enough time has been allowed for consultation on the strengthened export controls in the bill and that Defence has not consulted widely enough.

1.16 In this regard, the committee is conscious that time is rapidly slipping by without any certain resolution. It recognises the importance of the legislation and the general support for the intention of the bill but for the sake of ensuring that there are no adverse unintended consequences, the committee believes that more time is needed for further consultation and consideration. As Mr Michael Kenneally from NewSat observed:

We would rather ensure that what is implemented actually does work efficiently for us. Our preference is that whatever time it takes to get it right is the time it should take.⁹

1.17 The committee is firmly of the view that more groundwork is needed to refine the proposed legislation.

1.18 In addition to allowing more time to complete the necessary groundwork for this legislation, the committee is aware that the United States Government is currently undertaking reforms to its International Traffic in Arms Regulations (ITAR) that may have a direct bearing on the operation of some provisions in the bill, particularly those relating to the implementation of the treaty. Defence explained that the ITAR reform program is 'about streamlining the US approaches and creating simpler lists for people and about creating exemptions such as treaty exemptions'.¹⁰ The treaty, implemented in the second part of the bill, is likely to be affected by reforms made to ITAR as both are gateways by which Australian defence exporters can access the US defence market. The changes are anticipated by the end of 2012.

1.19 In the committee's view, it seems premature for this bill to proceed without the benefit of knowing precisely the detail of these changes and their implications for the legislation now before the Australian Parliament. Unless Defence can provide assurances to the contrary, the committee believes that it would be folly to proceed with the bill at this time while the resolution of important matters remains outstanding.

7 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 27.

8 DIISRTE, *Submission 16*, p. 2.

9 Mr Michael Kenneally, Vice President Satellite Strategy, NewSat Ltd, *Committee Hansard*, 2 March 2012, p. 18.

10 Mr Michael Shoebridge, First Assistant Secretary Strategic Policy, Department of Defence, *Committee Hansard*, 2 March 2012, pp. 37-38.

1.20 Taking into account the uncertainty surrounding the bill as currently drafted, the committee has decided to present a preliminary report. This measure is intended to allow Defence more time to give close consideration to the issues raised by submitters and to consult further if necessary especially with the research sector. The preliminary report outlines the committee's concerns, particularly in regard to the need for further consultation, and makes recommendations.

1.21 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.

Acknowledgements

1.22 The committee thanks all those who assisted with the inquiry.