Chapter 5

Conclusions and recommendations

5.1 Undoubtedly, industry supports the intention of the legislation but has lingering concerns about its implementation and acknowledges that there are 'issues that need to be worked through'.[1] Mr John O'Callaghan, Australian Industry Group Defence Council, told the committee that he was reasonably confident that issues with the regulations would be resolved. Based on the draft regulations he had seen, however, he indicated that he would keep an open mind on the actual start-up date for the legislation, if that date were to be September 2012.[2] He noted that since their release there were issues with the draft regulations and 'additional issues which have arisen, which were not foreshadowed necessarily in the bill'. He stated:

> I think at the macro level the intent of the bill in regard to the definitions is accepted, but in getting into the detail of the regulations there is a degree of nervousness, perhaps, that was not there previously.[3]

5.2 For the research institutions, the bill as currently drafted would simply not deliver on its stated intention that the proposed controls would be limited to high-end specialist research and thus have a limited regulatory and administrative impact on universities. Dr Pamela Kinnear told the committee bluntly that not only would the bill not realise that intention:

> …we believe it will have the opposite effect. It is so widely drawn at present that it will potentially expose a vast array of routine teaching and research activities to such controls.[4]

5.3 The Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) agrees that there are:

> ...potentially negative implications of the Bill, as originally drafted, on the Australian higher education sector, public good research and industry, in particular the pharmaceuticals, biotechnology and nanotechnology sectors, arising from a large change in the regulatory environment.
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> In considering the Bill, it is important to note that Australian research involves a high degree of international collaboration. In 2010 it has been estimated that 42% of Australian research involved international

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1 Mr John O'Callaghan, Executive Officer, Australian Industry Group Defence Council, *Committee Hansard*, 2 March 2012, p. 6.

2 Mr John O'Callaghan, Executive Officer, Australian Industry Group Defence Council, *Committee Hansard*, 2 March 2012, p. 6.

3 Mr John O'Callaghan, Executive Officer, Australian Industry Group Defence Council, *Committee Hansard*, 2 March 2012, p. 7.

4 Dr Pamela Kinnear, Deputy Chief Executive, Universities Australia, *Committee Hansard*, 2 March 2012, p. 23.

> collaboration, compared with 29% in the United States, 44% in Canada, 26% in the European Union and 13% in China. In part, the relatively high level of collaboration is due to our small population, which necessitates greater contact with international researchers than is the case in larger economies, such as the United States and the European Union. Given the importance of international collaboration to Australia's research and innovation, the tightening of regulations envisaged in the Bill may result in a significant administrative burden on the research sector and result in disruption to establishing international collaborations.[5]

5.4 In summary, submissions raised a number of matters. Some go to critical issues that, contrary to the intentions of the proposed legislation, could have a serious deleterious effect on the export activities of companies in Australia. They include:

- exemptions surrounding research and international collaboration;
- clarity around the scope of regulation governing the transfer of intangibles;
- a clear definition of 'arrange' which should be included in the legislation to assist companies in working with brokering regulation; and
- the need for a clearly outlined transition period for the introduction of strengthened export controls.

5.5 Other matters raised, while less about the integrity of the bill, are nonetheless important for the overall success of the new regime. In general they deal with the practical procedures of exporting controlled articles and are mainly concerned with establishing a more simplified and streamlined process—removing roadblocks and reducing red tape. As one witness suggested, industry wants 'clarity, guidance, outreach and help'.[6] For example, Saab's objective in making representations to the committee was 'to assist in the process of making the Australian export control regime work efficiently and achieve its intent without non-value adding cost to either government or industry'.[7] Concerns included:

- simplifying recordkeeping requirements[8]—a number of witnesses referred to onerous recordkeeping—as noted by Mr Giulinn, 'we suddenly have to keep track of a whole lot of stuff in a way that we did not have to do before';[9] and

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5 DIISRTE, *Submission 16*, p. 1.

6 Ms Stephanie Reuer, Director, Global Trade Controls, The Boeing Company, *Committee Hansard*, 21 March 2012, p. 4.

7 *Committee Hansard*, 2 March 2012, p. 9. See also Universities Australia statements, Committee *Hansard*, 2 March 2012, p. 23.

8 Ms Stephanie Reuer, Director, Global Trade Controls, The Boeing Company, *Committee Hansard*, 21 March 2012, p. 9.

9 Mr Andrew Giulinn, Contracts Manager, Saab Systems Pty Ltd, *Committee Hansard*, 2 March 2012, p. 12.

- ensuring that the requirements for joining the Approved Community are not onerous and deter companies from applying to be members.

5.6 The committee is encouraged by the willingness of industry to work with Defence in resolving the practical issues above so as to ensure the success of the new arrangements under the bill. The committee believes that it is likely that many of the issues industry has raised could be resolved through changes to the draft regulations. However, the committee notes the importance of any changes to the draft regulations being the subject of wide consultation with all stakeholders, including research and university sectors. The committee sees significant benefits in Defence aligning its consultation on the draft regulations and the bill so as to ensure that there is no disconnect between the two.

5.7 The committee is also encouraged by the continuing willingness of the research and university sectors, and DIISRTE, to work with Defence to find a way to strengthen export controls without unnecessarily interfering with the work of research organisations and universities. For example, DIISRTE noted that the 'current Bill would adversely impact on the pharmaceuticals, biotechnology and nanotechnology industries, either because they store or use affected materials or they would otherwise collaborate with overseas companies and researchers'.[10] As noted earlier, DIISRTE mentioned that when Defence had consulted with the higher education sector it had dealt directly with Universities Australia and the University of Sydney and not the broader range of universities. It was of the view that the consultation should include all university members. According to DIISRTE, Defence, through Universities Australia, was 'planning to broaden its consultation with universities' and the Department of Innovation would 'facilitate ongoing consultation with the higher education sector'.[11]

5.8 As noted previously, on 20 June the committee received a progress report from Defence detailing its consultation process on the issues raised by Universities Australia. The committee is encouraged by the expanded consultation—Defence has now included other research organisations and is working with DIISRTE and the Department of Health and Ageing to ensure that the public health sector is also included, as per the request from NHMRC in their submission of 30 May.

5.9 In the 20 June progress report, Defence noted that acceptance of any options 'was a matter for government consideration following this consultative process'. The committee believes that the bill should proceed once all issues have been resolved through extensive consultation with all relevant stakeholders and adequate time has been allowed for government to consider and approve the option finally accepted by all sectors.

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

11 DIISRTE, *Submission 16*, p.3.

Post Implementation Review

5.10 Defence noted in the explanatory memorandum that it would conduct a Post Implementation Review which will 'provide retrospective analysis on the merits of the treaty. Defence will start to collect data once the proposed legislation takes effect'. Defence also advised that it would:

> ...also collect data through application forms for both tangible and intangible export and brokering permits to assess the impact of the strengthened export controls and its administrative impact on the Government.[12]

5.11 Submitters such as the Australian Manufacturing Workers' Union noted the importance of the Post Implementation Review:

> The anticipated benefits are tempered by the fact that the Treaty has a built-in 'review' process to be undertaken 12-24 months after it comes into force. Correctly, the impact statement is qualified by the following statement: "At this stage, it is difficult to quantify the Treaty's impact and the Post Implementation Review will be the opportune time to assess it." Indeed, the Post Implementation Review will be important in assessing the impact. AMWU would seek that the review closely examines the impact on Australia's Defence industry through comparative data on import/export balances of Treaty goods; changes of suppliers of goods in both markets; participation rates of Australian SMEs; US tenders won by Australian manufacturers and vice-versa; and employment trends in the industry. Should the review find that the anticipated benefits have not been realised then appropriate and immediate remedial action should be undertaken.[13]

5.12 In its submission, DIISRTE also asserted that a review of the bill would be needed, noting:

> The Department of Innovation considers that a clear communication and education campaign will be needed with the research sector to ensure smooth implementation of the Bill and ensure appropriate compliance. Additionally, to assess the Bill's regulatory impact, it should be reviewed within two years of commencement of the new arrangements, including an evaluation of the impact of the Bill on business (particularly exports), research, and higher education.[14]

5.13 Submitters identified issues which Defence did not envisage as being included in a Post Implementation Review of the treaty. The Post Implementation Review outlined by Defence in the explanatory memorandum is required by the Office of Best Practice Regulation (OPBR)—once completed it would be assessed by OPBR and

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12 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p.7.

13 Australian Manufacturing Workers' Union, *Submission 4*, pp. 4-7.

14 DIISRTE, *Submission 16*, p.3.

sent to the relevant portfolio minister and the Prime Minister.[15] The Post Implementation Review will also be presented to the Joint Standing Committee on Treaties.

Recommendation 8

5.14 In light of the concerns raised during the committee's inquiry regarding the strengthened export controls, the committee recommends that the Post Implementation Review be extended to include review of the strengthened export controls arrangements and the issues outlined by DIISRTE. The committee sees significant benefits in Defence undertaking the review in cooperation with DIISRTE and the Department of Health and Ageing. The committee requests that the Minister provided the committee with a copy of the review.

ITAR reform

5.15 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:

> US Administration has stated its intent to reform ITAR over time according to a set of guiding principles based on four singularities:
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> - a single export control licensing agency
> - a single control list
> - a single enforcement coordination agency; and
> - a single integrated IT system.[16]

5.16 Defence advised further that:

> Australia and the US are committed to ensuring that joining the Approved Community and operating within the Treaty framework will continue to provide benefit to Community members and remain attractive over existing export control authorisations, including in the context of the reforms underway. We are working closely with our US State Department colleagues in the Treaty Management Board to ensure that the Treaty incorporates the benefits of US export control reform and have received a

15 Office of Best Practice Regulation Guidance Note Post-implementation Reviews, Department of Finance and Deregulation, undated, p. 14 of 24, http://www.finance.gov.au/obpr/proposal/docs/pir_guidance_note.pdf (accessed 3 August 2012).

16 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 4.

> commitment from the Department of State that the Treaty will always remain beneficial over the ITAR licence regime.[17]

5.17 Ms Reuer from Boeing spoke of the treaty and the ITAR reforms being able to 'live alongside' each other. She noted that as compared to the ratification of the treaty, 'the export control reform process is proceeding, but it is going to be a longer process'.[18] Mr Giulinn from Saab also thought that the ITAR reforms would not inhibit the treaty, however, he did note that the US was considering amendments to brokering controls and that:

> ...for the treaty we are talking about a bilateral arrangement where we have to understand what our obligations are under that arrangement within the US and in Australia. In regard to the brokering they are two different sets of rules: the US rules and there are our rules. Yes, it would be nice to have the two things aligned, but we cannot expect that because it is not part of one overall arrangement.[19]

5.18 Defence noted that it is working with its US counterparts to ensure that the treaty arrangements incorporate benefits from the reforms, which are yet to be concluded. The committee is concerned that if the reforms are being incorporated into the treaty, this may affect the provisions of the bill and the consultations currently underway. In this regard, however, the committee notes that submitters are not overly concerned with regards to the ITAR reforms and their effect on the treaty.

5.19 From 14 April to 3 May 2012, three members of the committee (including one participating member–Senator Johnston) were part of a delegation of Parliamentarians, which included members from the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade, visiting the US, Europe and the UK. During its US visit, the delegation was able to discuss defence export controls issues with US officials.

5.20 From discussions during the US visit, the delegation noted that:

- The US is contemplating a number of reforms to ITAR, including changing a large number of Defence and dual use items from the Munitions List to the Commercial List. A further reform is a Licence Exception for a number of countries, including Australia, which would allow an item on the Commercial List identified for government end-use to be exported without a licence.

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17 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 4.

18 Ms Stephanie Reuer, Director, Global Trade Controls, The Boeing Company, *Committee Hansard*, 21 March 2012, p. 4.

19 Mr Andrew Giulinn, Contracts Manager, Saab Systems Pty Ltd, *Committee Hansard*, 2 March 2012, p. 13.

- Much work has been undertaken so far by the US in contemplation of legislating reforms to ITAR, including consultation with industry and harmonising definitions. As described above at paragraph 5.15, the aim is to simplify the ITAR.
- The US aim to put the majority of planned reforms into effect by the end of 2012, however the November election will impact this timing.

5.21 While the committee believes that the bill should proceed, it sees significant benefits in delaying consideration of the bill until the effects of the ITAR reforms are clear and the consultation process has concluded.

Recommendation 9

5.22 The committee is disappointed with the consultation undertaken by Defence in regards to this bill. Evidence provided to the committee demonstrates that the consultation conducted by Defence was started too late in the process; lacked transparency; and was not conducted in a way which encouraged consensus in solving the policy problems at hand. The committee draws Defence's attention to the issues outlined in this report.

5.23 The committee notes the importance of proceeding expeditiously with the bill and considers that the efforts shown by all parties during this short consultation process demonstrate that everyone involved understands the importance of the timeframe. The committee considers that it should be possible for Defence to continue consultation and find a solution suitable for all stakeholders prior to the end of the year.

5.24 The committee recommends that the Senate defer consideration of the provisions of the bill until Defence has completed its consultation process; the government has been advised of the results of that consultation and decided on amendments to the proposed legislation; and the committee has had an opportunity to consider any proposed amendments and made its final report on 31 October 2012.

Senator the Hon Ursula Stephens
Chair