The Senate

Foreign Affairs, Defence and Trade Legislation Committee

Defence Trade Controls Bill 2011 [Provisions]

Preliminary report

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Members of the committee

Core Members

Senator the Hon Ursula Stephens, ALP, NSW (Chair)
Senator Alan Eggleston, LP, WA (Deputy Chair)
Senator Mark Bishop, ALP, WA
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Miss Jedidiah Reardon, Senior Research Officer
Ms Penny Bear, Research Officer (from 9 March 2012)
Ms Alpana Modi, Research Officer (until 5 March 2012)
Ms Jo-Anne Holmes, Administrative Officer

Senate Foreign Affairs, Defence and Trade Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Phone: + 61 2 6277 3535
Fax: + 61 2 6277 5818
Email: fadt.sen@aph.gov.au
Internet: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/index.htm

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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

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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 advice[7] 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.

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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.

Chapter 2

Strengthened export controls

2.1 The bill has two key purposes and its parts can be divided up accordingly: to give effect to the treaty (Parts 3 to 8) and to strengthen Australia's defence export controls (Part 2). The explanatory memorandum states that the bill will:

> ...give effect to the *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*. The Bill will also strengthen Australia's export controls to align them with international best practice.[1]

2.2 In this chapter, the committee examines Part 2 of the bill—dealings in items in the Defence Strategic Goods List (DSGL). It considers the provisions dealing with implementing the Defense Trade Cooperation Treaty in the following chapter.

2.3 Part 2 of the bill is intended to strengthen Australia's control over activities involving defence and dual-use goods. The bill includes provisions covering:

- intangible transfer of technology relating to defence and strategic goods, such as transfer by electronic means;
- provision of services related to defence and strategic goods and technology, such as training and maintenance services; and
- brokering the supply of defence and strategic goods, technology and services.

Changes to current defence export control regime–strengthening export controls

2.4 Australia is a member of several export control regimes, including: the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies; Australia Group; Nuclear Suppliers Group, and Missile Technology Control Regime.[2] Defence notes in the explanatory memorandum that the measures proposed in the bill introduce the controls developed by other countries in the Wassenaar Arrangement, including arms brokering and intangible transfers of technology.[3]

2.5 The bill regulates dealings in items listed in the DSGL, as well as items covered under the treaty. The bill also creates offences relating to brokering or transfer of items listed in the DSGL.

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1 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 4.

2 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 4.

3 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 4.

Current trade framework[4]

2.6 Currently, before a person can trade in defence goods, technology and related services between Australia and the US, they need to obtain relevant authorisation from the appropriate government authorities. In Australia, the requirements for such authorisations are set out in section 112 of the *Customs Act 1901* and regulation 13E of the *Customs (Prohibited Export) Regulations 1958* and Part 2 of the bill.

2.7 Submitters recognised the importance of the purpose of the legislation. While they welcome the intention that sits behind the legislation and are looking to secure a robust regime, they also want unnecessary barriers or impediments to exporting controlled articles removed.

2.8 Although operating in different sectors—research and industry—submitters' concerns about the strengthened export controls were similar. They argued that the regulation of the transfer of intangibles and strengthened controls around brokering would create a substantial compliance burden and affect research and international collaboration.

Regulation of transfer of intangibles

2.9 The explanatory memorandum notes in relation to Part 2 of the bill, that:

> At present, technology listed in the DSGL requires permission from the Minister for Defence for it to be exported in the form of a tangible good (for example, on paper or a computer drive). This Bill introduces provisions to control identical technology when transferred via intangible means, for instance via email, facsimile or internet.[5]

2.10 Under the bill, control over transfer of technology through intangible means would be overseen by Defence. For example, a person seeking to transfer technology via an email would require a permit under clause 11 of the bill. Under this clause, the Minister for Defence approves permits. If a permit is refused, the Minister must provide the person notice of the refusal and reasons for the refusal.[6]

2.11 Subclause 11(4) allows the Minister to 'give the person a permit to do a specified activity if the Minister is satisfied that the activity would not prejudice the security, defence or international relations of Australia'. Neither the bill nor the regulations elaborate on the issues the Minister may consider in determining whether the activity would prejudice the security, defence or international relations of Australia—only the explanatory memorandum provides a list of issues, and notes that 'these criteria are consistent with the considerations made in assessing an application

4 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 61.

5 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 46.

6 *Defence Trade Controls Bill 2011*, ss. 11(6).

for the export of DSGL tangible goods or technology under the *Customs (Prohibited Export) Regulations 1958'*.[7]

2.12 Companies, research organisations, universities or other organisations who work with DSGL technologies will require the permits described in clause 11. It is therefore important for the criteria used in determining the success of an applicant be outlined in legislation. The committee notes that the criteria for approval of an application to become a member of the Approved Community have been listed in the bill at subclause 27(3). Further, the *Customs (Prohibited Export) Regulations 1958* lists conditions for assessing applications for the export of DSGL goods or technology.

Recommendation 1

2.13 The committee recommends that the government consider including in the bill the criteria provided in the explanatory memorandum in relation to permits issued under clause 11 so that the Parliament can scrutinise them properly and potential applicants can be clear as to the criteria that will be used to assess their applications.

2.14 The bill creates offences as part of its regulation of transfer of intangibles. A person commits an offence if he/she supplies DSGL technology to a foreign person and does so without a permit or in breach of the condition of the permit. Also, under similar conditions, the bill creates an offence relating to the provision of defence services.[8]

2.15 'Foreign person' is defined in clause 4 as being a person who is not an Australian person. 'Australian person' is defined:

> Australian person means:
>
> (a) the Commonwealth, a State or a Territory or an authority of the Commonwealth, a State or a Territory; or
>
> (b) an individual who is an Australian citizen; or
>
> (c) an individual who is, within the meaning of the *Migration Act 1958*, the holder of a permanent visa; or
>
> (d) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

2.16 Subclause 10(3) provides exceptions to the offences in relation to the supply of technology under the treaty, for example in an Approved Community.

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7 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 49.

8 *Defence Trade Controls Bill 2011*, ss. 10(2).

Regulation of transfer of intangibles–issues raised by submissions

2.17 Several submitters noted that controls on intangible goods would create a significant compliance burden on industry. The Defence Teaming Centre broadly canvassed its membership and summarised these concerns in its submission:

> The decision to place controls on non-tangible goods, whilst logical, will add a significant overhead to many members, especially those who deal with training, systems engineering and consultancy. This will mean that the cost and time needed to tender for overseas opportunities for these companies is likely to be too great. Unless the export approval process is significantly accelerated, this could lead to companies in this space losing significant market share. Concern was also expressed that the way that export applications are currently implemented is inadequate to cover the wide range of intangible that will now be covered, which will only lead to delays in the approval process.[9]

2.18 Mr Andrew Giulinn of Saab Systems Pty Ltd (Saab) observed that some definitional issues would need to be resolved in order to assist compliance with the regulation of intangibles. He explained:

> There are cost of compliance issues with this arrangement and, obviously, initially some definitional issues to try and work out what it is that is covered and what we need to have in place to be able to meet the requirements. That is probably the biggest concern for us once the bill is sorted out in terms of the detail of it: what do we need to do internally to try and deal with this? So, while we might get a licence now to make sure we are covered for tangible exports even if we are expecting most of them to be intangible exports, there is a lot behind this bill in terms of record-keeping and that sort of thing that we need to be conscious of. That is probably where the biggest cost of compliance will come for us.[10]

2.19 Submitters from the university sector noted the effect that these controls would have on research and development in Australian universities. Professor Graham Mann summed up the concerns at the 21 March public hearing:

> Think about the fact that the extension of this legislation to intangible transfers is really the critical issue here. The goods themselves are easy to regulate. When you talk about the intangible aspects of research such as: communication among researchers; forming of teams to address the problems proposed by academic influenza [an example of collaboration: the problems associated with influenza used for research purposes]; the way people talk to each other; design projects; seek funding for those projects; disclose what they intend to do to get the money for those projects; the implementation and management of them; the results; the analysis; and the reporting of those results in an open research community to get the best and

9 Defence Teaming Centre, *Submission 1*, p. 2.

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

> most effective research actually happening and delivering the intangibles are everything in this.[11]

2.20 Professor Mann's evidence also indicated that the scope of the term 'intangibles' could be quite broad. In questions taken on notice, the committee asked Defence to address specifically this matter. In its response, Defence advised that:

> Customs legislation only applies to the export of tangible goods and technology. The new strengthened export control provisions in the Bill will close the existing gap in Australian export controls by regulating the intangible supply of technology and provision of defence services. The Bill does not specifically refer to 'intangible transfers' or 'intangible export', however, the Wassenaar Arrangement state parties use the term and throughout a period of extensive consultation, Defence has found 'intangible transfers' to be a commonly-used expression that is understood by industry.[12]

Recommendation 2

2.21 In consultation with all relevant sectors, the committee recommends that Defence provide examples to illustrate the scope of the definition of 'intangibles' and 'intangible transfer' in the explanatory memorandum.

Brokering

2.22 Brokering forms another part of the bill's framework for strengthening export controls. The explanatory memorandum notes in relation to Division 2—Brokering:

> Currently, Australian persons, and foreign persons in Australia, can arrange the supply of DSGL goods and technology or the provision of services associated with those items from a place outside Australia to another place outside Australia without Government authorisation.
>
> The international export control regimes to which Australia belongs have long recognised that brokers have been involved in the delivery of military equipment to countries under arms embargoes, and to criminal organisations and armed groups, including those believed to be engaged in terrorism.
>
> The purpose of this Division is to allow the Australian Government to regulate the brokering of controlled goods or technology and the provision of services in relation to such goods or technology when that transaction is arranged by an Australian or the arranging occurs wholly or partly in Australia. This will be achieved through a power to register brokers and

11 Professor Graham Mann, Associate Dean, Research, Sydney Medical School, University of Sydney, *Committee Hansard*, 21 March 2012, p. 20.

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

> issue permits to engage in brokering activities involving DSGL goods, technologies and services.[13]

2.23 Subclause 15(1) creates an offence in regard to arranging supplies and provision of defence services in relation to the DSGL, in the instance where the arranging occurs without appropriate permits. 'Arrange' is not defined in the bill; however, the explanatory memorandum provides this information:

> The term 'arranges' is intended to include, but is not limited to, circumstances where for a fee, commission or other benefit, a person acts as an agent or intermediary between two or more parties in negotiating transactions, contracts or commercial arrangements for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology.
>
> The term 'arranges' is not intended to cover situations where a first person provides a second person with a point of contact for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology and there is no fee, commission or other benefit obtained by the first person.[14]

2.24 Persons may apply for registration as a broker under the conditions set out in Division 3. A registered broker may apply for a permit under clause 16. The Minister for Defence may approve a person's registration as a broker (Division 3) and may approve the granting of permits (clause 16).

Brokering–issues raised by submissions

2.25 Boeing Australia and South Pacific (Boeing) and Saab both raised concerns regarding elements of the brokering regulation. Boeing submitted that the scope of the registration and oversight requirements for brokers was too broad and that as a result it captured persons and activities which were not necessary for the intent of the bill—that is to protect national security interests. Boeing provided a specific example:

> 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 items, in the

13 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, p. 52.

14 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, pp. 53-54.

> normal course of business a freight forwarder does not "arrange" that supply.[15]

2.26 Saab too was concerned about the scope of the brokering requirements. Mr Giulinn explained:

> Saab notes the reference on page 53 of the explanatory memorandum to a fee commission or other benefit. Saab accepts this would reduce the scope of the brokering rule and align more closely with intent, which is, in our view, to stop uncontrolled movement of technology and where it is being arranged by somebody who is getting some sort of fee for it and therefore there might be a potential for them to prefer to ignore export control regimes around the world. Saab's concern remains, however, firstly because the explanatory memorandum says the term 'arranged' includes but is not limited to circumstances where a fee, commission or other benefit is involved, so it is not only those but also leaves things that do not require a fee.
>
> ...
>
> Saab is also concerned as to when during the business development process the activity becomes controlled brokering. The issue here is that early activities to develop business, which might include arranging the movement of items between overseas locations, often requires speed and flexibility. It would be impractical to be required to apply for a licence in that situation and it could be years before that initial contact results in a contract and subsequently the actual transfer. The department has indicated that the need for a licence would start from the point of sale. Saab awaits further information as to how this might work.[16]

2.27 It is clear from evidence received by the committee that while the intention of the brokering regulation is clear, the requirements under the bill require further definition to take into account the practicalities of conducting business. Defence has responded to these concerns, noting:

> The preference of submitters to have key terms defined in the Bill rather than in the regulations or EM [explanatory memorandum] has been noted by Defence. It is acknowledged that this particular concern was raised in the context of the Bill's reference to the term 'arranges' in the brokering offences contained in Part 2, Division 2 of the Bill.
>
> The term 'arranges' is intended to be read using the ordinary meaning of the term in conjunction with the additional guidance provided by the explanation given in the EM at pages 53-54. The EM provides clear examples of situations that 'arranges' is intended to cover, as well as situations that are to be regarded as outside the scope of the term.

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15 Boeing Australia and South Pacific, *Submission 6*, p. 2.

16 Mr Andrew Giulinn, Contracts Manager, Saab Systems Pty Ltd, *Committee Hansard*, 2 March 2012, p. 11.

> Defence has considered the submissions made in relation to this point, in addition to the comments made by the Committee, and would be prepared to include a definition of the term 'arranges' in the Bill that is consistent with the guidance in the EM, if recommended by the Committee.[17]

2.28 The committee explored the reasons for having key terms defined in the explanatory memorandum at both public hearings. Defence's explanation for not including definitions of key terms in the bill was not convincing. The committee, however, is encouraged by Defence's new willingness to do so.

Recommendation 3

2.29 The committee recommends that Defence include the definition of 'arrange' in the bill, and that in defining the term Defence consult with submitters who have raised issues regarding the scope of the term.

2.30 For future drafting, the committee draws Defence's attention to the *Acts Interpretation Act 1901*, in particular the use of extrinsic material in the interpretation of an act, and notes that clarity of definitions greatly assists the efforts of those who have to comply with the legislation.

Lack of transition arrangements in the bill

2.31 Four submitters, including Saab, registered concerns regarding transition arrangements: specifically that no arrangements had been outlined in the bill or the regulations for the transition to the new strengthened export controls.[18] The government has noted in the explanatory memorandum; in the Second Reading Speech; and in its response to the Scrutiny of Bills Committee, that implementation of the measures in the bill will include education and consultation with industry. However, while submitters such as the Defence Teaming Centre and the AMWU note that industry education is required, most industry submitters were concerned about:

- when new measures would take effect,
- whether there would be a gradual process, and
- the status of in-train projects.

2.32 Universities Australia also argued for transition arrangements noting that:

> Universities require a very substantial transition period before the Bill is enforced against universities, so that they and the authority have sufficient time to intelligently deal with the administrative and technical challenges contained in the Bill. Due to the de-centralised nature of universities, it will take considerable time to train staff to a level that is sufficient, as well as

17 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 5.

18 Division 5 of the bill provides for transition to the Defense Trade Cooperation Treaty.

> provide that training across entire campuses, including overseas campuses where impacted.[19]

2.33 Defence responded to submitters' concerns in an answer to a question on notice:

> The Bill's commencement provisions provide that the Bill will not commence operation until the Treaty comes into force. Once the Bill has passed through the Australian Parliament, the Treaty will not come into force until the US President has ratified the Treaty, the Attorney-General has sent correspondence to the Federal Executive Council and there has been a bilateral exchange of notes to agree upon a Treaty commencement date.
>
> In light of continuing consultations with the university and research sectors, the strengthened export control provisions of the Bill and Regulations may need some changes, and may delay the Bill's passage through Parliament. This, combined with the process above, will give Defence, industry and universities a period of time to prepare to meet the requirements of the Bill.[20]

2.34 It should be noted that the period of time needed to ratify the treaty cannot be defined. The committee is concerned that the approach outlined by Defence does not provide certainty for the industry, research and university sectors affected by the strengthened export controls. Further, Defence suggested that the time taken for the bill to pass Parliament should be sufficient for organisations to prepare for the regulatory changes—this assumes that there would be no substantial changes to the bill made by Parliament.

Recommendation 4

2.35 The committee recommends that Defence, in consultation with the industry, research and university sectors, establish a timeline for the gradual transition to the strengthened export controls regulated by the bill.

19 Universities Australia, *Submission 11*, p. 7.

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

Chapter 3

Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation

3.1 The *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation* (the treaty) was signed by the former Prime Minister John Howard on 5 September 2007 at the time of the 19th APEC Ministerial Meeting in Sydney.[1] The Implementing Arrangement was signed on 14 March 2008. The Implementing Arrangement details the way in which the treaty will be implemented in both countries.[2] Part 3 of the bill implements the treaty.

3.2 The purpose of the treaty is to remove selected export restrictions on defence trade between Australia and the US. Implementation of the treaty is intended to create a simpler, more cost effective system.[3] Defence noted in evidence that:

> The Treaty framework is intended to remove the administrative delays associated with existing Australian and US export-licensing systems. It is expected to reduce delivery times for new projects and improve program schedules…It is intended to increase opportunities for Australian companies to bid on eligible US contracts…and to reduce obstacles for improved cooperation between US and Australian companies, which will benefit Australia's defence capability.[4]

3.3 The current US defence export control system, the International Trade in Arms Regulations (ITAR), requires that licences are sought for each separate trade transfer. Under the treaty, the US and Australia will create a framework which allows licence-free trade within an Approved Community.[5]

3.4 The treaty was considered by the Joint Standing Committee on Treaties (joint committee) which, after noting the concerns of some submitters in regards to the cost

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1 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 33.

2 Parliamentary Library, *Bills Digest No. 91, 2011-12*, 22 February 2012, p. 4; Article 14, *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*.

3 Parliamentary Library, *Bills Digest No. 91, 2011-12*, 22 February 2012, p. 5.

4 Mr Michael Shoebridge, First Assistant Secretary Strategic Policy, Department of Defence, *Committee Hansard*, 2 March 2012, p. 30.

5 Parliamentary Library, *Bills Digest No. 91, 2011-12*, 22 February 2012, p. 6.

of implementing the treaty, recommended that binding action be taken in regards to the treaty.[6]

3.5 The majority of submissions received by the Senate Foreign Affairs, Defence and Trade Legislation Committee in regards to the bill expressed support for the aims of the treaty and the opportunities outlined by Defence.

Obligations under the treaty

3.6 The Defence Trade Controls Bill 2011 and the draft Defence Trade Controls Regulations 2012 address the domestic ratification requirements of the treaty. In the US, reforms to ITAR are being completed as part of ratification requirements. The treaty will come into force when Australia's and the United States' domestic requirements are complete.

3.7 Part 3 of the bill implements the treaty and comprises, amongst other things, the criteria for membership of the Australian Approved Community. Parts 4 and 5 of the bill detail the monitoring powers given to the Defence to ensure compliance in relation to the Australian Approved Community. Part 6 lists record keeping requirements for members of the Australian Approved Community.

Approved Community under the treaty

3.8 The treaty removes the requirement for a license or permit to be obtained for each transaction conducted by members of the Approved Community, and instead imposes obligations in relation to Australian and US Defence Articles traded or transferred under the treaty.[7] 'Under articles 4 and 5 respectively, Australia and the US agree to establish, maintain and monitor an Approved Community of government facilities and non-government companies'.[8] Defence has stated in relation to the Approved Community that:

> Applying for membership in the Approved Community will be a voluntary commercial decision. Those entities that choose not to join the Treaty will continue to operate within existing Australian and US defence export controls…Entry into the Australian Approved Community will be a commercial cost-benefit decision for individual companies, based on the level of businesses a company is likely to undertake with the US Government or with US defence companies.[9]

3.9 In its report on the treaty, the joint committee noted that:

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6 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 43.

7 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 35.

8 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 35.

9 Defence Export Control Office, *The Defence Trade Cooperation Treaty – Defence Export Control Office Booklet*, date not supplied, p. 1 of 2, http://www.defence.gov.au/deco/publications/brochures/DTCT.pdf (accessed 3 August 2012).

> …it is clear from the evidence that those companies who are not a part of the Approved Community will be at a competitive disadvantage.[10]

3.10 Under article 14 of the treaty, an Implementing Arrangement has been signed by both Australia and the US. The Implementing Arrangement 'supplements the provisions of the treaty by prescribing detailed procedures and standards to be adopted by the Parties'.[11] Included in the Implementing Arrangement are, amongst other things, arrangements for inclusion of an Australian entity in the Australian Approved Community and exemption of certain Defence Articles from the scope of the treaty.[12]

Approved Community–provisions in the bill

3.11 The bill lists three groups who make up the Australian Approved Community:

- A person who is a body corporate and holds a clause 27 approval;
- Employees or persons engaged under a contract for services by a body corporate approved under clause 27 can also be a Australian Community member if they meet the requirements to be specified in the requirement to be specified in the regulation under the bill; and
- Federal, State and Territory Government employees with the required minimum security clearance and a 'need to access' US Defence Articles.[13]

3.12 Clause 27 of the bill allows a person who is a body corporate to apply to the Minister for Defence for approval to be a member of the Australian Approved Community. In assessing the application, the Minister must have regard to the criteria set out in subclause 27(3).

3.13 Subclause 28(4) creates an offence for an Australian Approved Community member who holds an approval under clause 27 but does not comply with a condition specified in the regulations. The maximum penalty for this offence is up to 600 penalty units. A strict liability offence in relation to failure to comply with a condition of approval is created by subclause 28(5) and this offence attracts a maximum penalty of up to 300 penalty units.

Approved Community–concerns raised by submissions

3.14 In general, submitters saw the implementation of the treaty and the removal of the obligation to have a permit under the ITAR process to be positive for Australian industry. However, a key source of concern was that the process for becoming a member of the Approved Community would be onerous, both in terms of cost and of

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10 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 41.

11 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 36.

12 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, pp. 36-37.

13 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, pp. 61-62.

time. The Defence Teaming Centre noted the 'significant investment' needed to introduce an ITAR control regime into a company and that:

> Companies who must operate in multiple export environments will not be able to take advantage of the treaty, as the conflict between ITAR guidelines and the access needed by dual—or third country—nationals to the materiel is too great. The conflict between ITAR rules and access provisions for other control regimes will impact companies across the entire industry, including Prime contractors, Small and Medium Enterprises and ancillary service providers such as freight forwarders.[14]

3.15 Saab emphasised that the Australian export control regime should operate without 'adding cost to either government or industry' and to 'minimise competitive hurdles for Australian Defence exports whilst retaining appropriate controls'.[15]

3.16 Submitters such as Boeing were of the view that the penalties imposed under the Approved Community structure may deter potential participants. One corporation's confidential submission also noted that US Government approval is required for membership of the Australian Approved Community, whereas membership of the US Approved Community is based on registration with the US Directorate of Defense Trade Controls.

3.17 Defence has acknowledged that it is difficult to quantify the direct impact on industry of enforcing compliance given that the costs will vary depending on a range of factors such as the 'size of the business, the extent of their existing exports of controlled goods, services and technology and/or the maturity of their business practices, including record management'.[16] Such costs are separate to any additional costs associated with record-keeping as required under the legislation, staff training and any additional costs associated with determining whether a permit is required under the legislation. There may also be investment costs associated with denial of a permit or limitations imposed thereafter.[17] Other costs to industry which have been identified in the explanatory memorandum relate to the following:

- ensuring and maintaining facilities to meet the requirements to hold, store and protect treaty articles;
- ensuring and maintaining information technology infrastructure to satisfy the requirements to store or transmit treaty-related information electronically;

14 Defence Teaming Centre, *Submission 1*, p. 5.

15 Mr Andrew Giulinn, Saab Systems Pty Ltd, *Committee Hansard*, 2 March 2012, p. 9; Saab Systems Pty Ltd, *Submission 5*, p. 2.

16 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, p. 14.

17 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, p. 22.

- the time required by company employees to complete application forms and undertake training provided by the government to meet all membership requirements;
- meeting membership conditions including costs involved in the:
    a) development or amendment of existing policies and procedures to ensure authorised access to treaty articles;
    b) facilitation of internal audits to assure compliance with treaty membership obligations;
    c) assurance process and assistance to Authorised Offices in this regard;
    d) establishment and retention of records of prescribed activities;
    e) reporting to government of business conducted under the treaty framework including treaty article transfer and results of internal compliance processes.[18]

Re-export under the treaty

3.18 Under Articles 8 and 6, Australia and the US agree that members of the Approved Community may export and transfer Defence Articles without licences. Under Article 9, re-transfers and re-exports of Defence Articles require the approval of both the Australian and US Governments, although the treaty allows for some mutually determined exceptions. In Article 1 're-transfer' and 're-export' are defined as:

> "Re-export" means the movement of previously Exported Defense Articles by a member of the Australian Community from the Approved Community to a location outside the territory of Australia;
>
> "Re-transfer" means the movement of previously Exported Defense Articles by a member of the Australian Community from the Approved Community to a location within the Territory of Australia.

Re-export—provisions in the bill

3.19 Clause 28 under Part 3 of the bill lists the approval conditions which must be met for organisations wishing to become a member of the Approved Community. The explanatory memorandum notes that the approval conditions stipulate that 'the re-transfer or re-export as defined in the treaty of a US Defence Article cannot occur without prior approvals of the US and Australian Governments'.[19]

18 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, p. 33.

19 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, p. 64.

Re-export—concerns raised by submissions

3.20 Submitters raised concerns with regards to the prohibitions on re-export under the bill: that articles exported under the treaty must not be re-transferred or re-exported outside the Approved Community. The Defence Teaming Centre noted that:

> Several companies also questioned the lack of ability to re-export goods. As many companies are performing integration work as part of a supply chain, Defence articles from the US occasionally need to be re-exported to a third country. The treaty provisions do nothing to simplify this process, and with the expansion of the control regime to cover more articles this will lead to increased overheads for supply-chain focussed companies.[20]

3.21 Mr Michael Kenneally from NewSat also raised concerns regarding re-export by contrasting the framework under the treaty with the current situation:

> We do not have the skills base in Australia to do a lot of what we are doing in terms of the design of a satellite, and so we have engaged a network of specialist advisers to help us on the Jabiru satellite program, most of them based out of the US. However, under the rules of ITAR, if we have a technical assistance agreement where US companies export to us, if we communicate that data to anyone else, that is a re-export of the technology and has to be listed on the TAA. We believe that this is one of the areas of complication for the bill as it is going forward, because re-export is not covered in the arrangements that we have seen.[21]

3.22 Defence responded to these concerns by noting that:

> The provisions of the Bill relevant to the Treaty reflect the intent of the Treaty itself, and are designed to enable simpler trade in defence goods between Australia and the US. Trade within the Treaty framework is confined to mutually agreed scope lists on which the included activities contain elements of eligible bilateral trade…As a bilateral Treaty, there was no intention to provide exemptions from existing controls for re-exports to other countries. Exports to countries other than the US will still require the authorisations they currently require under existing controls. As a result, the Bill does not change arrangements for re-exports to third countries—this type of activity will remain subject to export controls.[22]

3.23 The committee understands the background and purpose for the treaty, but notes that companies that need to pass goods through a non-Australian/non-US location as part of a supply chain would need to work under the current framework to

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20 Defence Teaming Centre, *Submission 1*, p. 2.

21 Mr Michael Kenneally, Vice President Satellite Strategy, NewSat Ltd, *Committee Hansard*, 2 March 2012, p. 16.

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

obtain permits for that location. For some companies, this would make becoming a member of the Approved Community less attractive.

Recordkeeping under the treaty

3.24 Article 12 of the treaty stipulates that each Party require entities within the Approved Community to 'maintain detailed records of all [Exporting, Transferring, Re-transferring, Re-exporting or receiving Defense Articles] movements'.[23]

3.25 Article 12 also requires that the records maintained by entities in the Approved Community be available on request to the other Party, in accordance with procedures under the Implementing Arrangements.

Recordkeeping–provisions in the bill

3.26 Part 6 of the bill outlines the requirements for the making and retaining of records as part of the Approved Community. Subclauses 58(1) to (5) provides that separate records must be kept; the time in which they must be made; and the retention of the record. Subclause 58(4) notes that the form of record may be prescribed in the regulations. Subclause 58 (6) creates an offence in relation to failure to create and retain the required records.

3.27 Clauses 59 to 62 deal with the production and inspection of records and create an offence for failure to comply with a notice to produce records (subclause 59(4)). Further information regarding record keeping requirements is also detailed in the regulations at regulation 31.

Recordkeeping–concerns raised by submissions

3.28 In its submission, Boeing argued that clarification was needed regarding the practicalities of record-keeping requirements and in particular the scope of the requirements. Boeing noted:

> 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.[24]

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23 Article 12, *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*.

24 Boeing Australia and South Pacific, *Submission 6*, p. 3.

3.29 In Saab's view, companies will have an added compliance burden with regards to record-keeping, and the differences between requirements for the Approved Community and those for the strengthened export controls:

> There is a lot more required at the back end—for instance, on the record-keeping side because we suddenly have to keep track of a whole lot of stuff in a way that we did not have to before. We need to make a distinction between this bill's implementation of the treaty and the other two aspects of this bill, which are intangible and brokering controls, which are purely Australian.

3.30 Defence noted that Saab was correct in that the record-keeping requirements for the strengthened export controls and those for the movements of defence articles under the treaty are different:

> While Defence is able to vary the record-keeping requirements for strengthened export controls, the record keeping requirements in the Bill and the Regulations for Treaty activities have some flexibility but need to reflect Australia's commitments under the Treaty. As the Regulations are currently drafted, the record-keeping requirements for the strengthened export controls and those implementing the Treaty provisions have a high level of consistency. Any changes to the record-keeping requirements for strengthened export controls and Treaty activities may be different for each area and may introduce inconsistency between the Treaty and the strengthened export control record-keeping requirements.[25]

3.31 Given submitters' concerns regarding the definition of a record and the practical considerations of making and retaining records, the committee asked Defence if it would consider providing examples in the legislation or the explanatory memorandum. The committee is encouraged by Defence's response that 'the Government is considering options to amend the record-keeping requirements in the Regulations to include a minimum of information'.[26]

Recommendation 5

3.32 The committee recommends that Defence undertake consultation with industry in order to eliminate unnecessary record-keeping.

Security procedures under the treaty

3.33 Articles 6, 8 and 11 of the treaty 'require each Party to establish procedures to ensure that all Defence Articles are clearly marked or identified as being traded pursuant to the treaty at various points of their movement'.[27]

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25 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 14.

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

27 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 35.

3.34 Security procedures, including marking and identification of Defence Articles, are detailed in the regulations at Part 3.

Security procedures—issues raised by submissions

3.35 In its evidence to the committee, Ms Stephanie Reuer from The Boeing Company raised concerns that the marking of goods and technology may cause concern for companies. She noted:

> ...the significant effort associated with the required marking and re-marking of items and data. This requirement may create an environment in which companies elect to forgo some of the advantages of the treaty. We recommend that the marking be accomplished through the marking of associated commercial documents normally provided with shipments.
>
> ...
>
> With the way the treaty is written, items would have to be physically marked in some manner, unless it was impracticable to do so. The examples given are aerosols and chemicals. But in the aerospace and defence business, marking components or subassemblies is a very, very difficult thing to do and a very costly thing to do. We also have to be concerned in this business about foreign object debris. So having to mark those parts is, I think, a considerable request. Once items come into the community they have to be marked. If you need to send them back to somebody outside the community for whatever reason, maybe the supplier is not part of the community, they have to be unmarked. Then if they come back in, they have to be re-marked. So you can see that that constant marking and re-marking can be very dissuasive to treaty use.[28]

3.36 Defence noted that similar concerns had been raised in regard to the regulations, and advised:

> Marking requirements to Treaty articles were seen to be onerous and unclear—Defence has raised this issue with the US and the common understanding is that marking of items is only required where it is practicable to do so—more specific implementation guidance will be developed.[29]

3.37 The committee notes that marking and handling of Defence Articles is a condition placed on members of the Approved Community. Under clause 28 of the bill, members of the Approved Community commit an offence if they fail to comply with any of the conditions of membership. In order to encourage industry to become

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28 Ms Stephanie Reuer, Director, Global Trade Controls, The Boeing Company, *Committee Hansard*, 21 March 2012, pp. 2-3.

29 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 10.

members of the Approved Community, it is important that the sector is provided with clear practical guidance on matters such as marking requirements.

Transitioning provisions in the bill

3.38 Under Division 5 of the bill, clause 35 details procedures for transitioning Defence Articles from a previous licence to the framework established under the treaty. Under subclauses 35(1) and (2), a person must make an application to the Minister in regards to transitioning the Defence Article.

3.39 Subclause 35(5) provides that, should the Minister refuse the transition, then the Minister must inform the person of the refusal and the reasons for the refusal.

3.40 Saab made some comments in relation to the transitioning provisions, raising concerns regarding the 'practical implications of the different requirements of the proposed US and Australian implementations of the treaty with regard to the transition from existing ITAR export licences to the treaty exemption to ITAR of US-controlled items already in Australia'.[30] Mr Giulinn advised the committee, in relation to this concern, that Saab had discussed the issues with Defence. As a result:

> The department have indicated it has been proposed to the US that all transitions to the treaty instigated by Australian companies are done through the department, providing a single interface with the US Department of State on such matters. The two reasons for that being suggested are (1) it would make it easier for the Australian companies because we do not have to know who to talk to at the US Department of State and follow US processes that we are not familiar with and (2) the Australian department would know which items are being moved from the existing arrangements through to the treaty arrangements.[31]

3.41 Clearly, a number of the problems identified with Division 5 of the bill could be resolved by close consultation with industry.

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30 Saab Systems Pty Ltd, *Submission 5*, p. 3.

31 Mr Andrew Giulinn, Contracts Manager, Saab Systems Pty Ltd, *Committee Hansard*, 2 March 2012, p. 10.

Chapter 4

Consultation

Failure to consult with university and research sectors

4.1 Evidence given at the committee's 2 and 21 March public hearings, particularly by witnesses from Universities Australia and the University of Sydney, demonstrated that Defence had failed to adequately consult with all stakeholders on the bill. The substantial part of Defence's consultation process with universities and other relevant research stakeholders began during March 2012; four months after the bill had been introduced and only after the committee recommended that Defence conduct the process.

4.2 Defence outlined its consultation process in answer to questions taken on notice at the public hearings. The process included the release of an exposure draft of the bill, a series of consultation workshops (from information provided these workshops were aimed at industry), and release of draft regulations for consultation. While Defence noted that it contacted Universities Australia, it provided no information about the nature or extent of the contact with other universities and research organisations.

4.3 The inadequacies of Defence's consultation process were first brought to the committee's attention by Dr Pamela Kinnear from Universities Australia during the 2 March 2012 public hearing:

> I will finish my opening statement by making the point that it is very unfortunate that we are having to address these issues at this point in time. We do understand the stage that the legislation is at. We think the situation could have been avoided through greater levels of engagement between the government and the university sector, and possibly even internally to government. We would like to point out that we do not understand how the regulatory impact statement can have assessed that the impact on universities will be small when in its own admission it did not have any data to support its conclusion, and it did not consult with the university sector.[1]

4.4 Defence disagreed with Universities Australia's assertions regarding consultation.[2] The committee notes, however, that when the exposure draft of the bill was released for public consultation on 15 July 2011, the explanatory memorandum included a Regulation Impact Statement which detailed the impact of the legislation

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1 Dr Pamela Kinnear, Deputy Chief Executive, Universities Australia, *Committee Hansard*, 2 March 2012, p. 24.

2 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), pp. 25-26.

on academic institutions. In its advice to the committee, Defence indicated that it received no response to its letter sent to Universities Australia on 9 May 2011, prior to the exposure draft process. Given this lack of response, it is difficult for the committee to understand how Defence reached the conclusion in the Regulation Impact Statement that the bill would not have a detrimental effect on academic institutions.

4.5 In the explanatory memorandum to the bill, Defence outlines the consultation conducted with industry.[3] The Australian Industry Group Defence Council also discussed in their submission the consultation process Defence had undertaken with their members. Despite this consultation, companies such as Saab and Boeing raised concerns with the committee and indicated that further detail was required from Defence, particularly in relation to the regulations accompanying the bill.

4.6 On 20 June 2012, Defence provided answers to the committee's questions taken on notice and written questions following the public hearings. As part of this information, Defence advised the committee that its consultation process, which started in March, would be concluded by the end of June 2012 and that Defence would be able to advise the committee of an outcome at the end of July.

4.7 Also, as a result of the concerns about the effect of the bill on research organisations raised by Universities Australia and the University of Sydney, the committee invited a number of other research organisations to make submissions to the committee's inquiry. The National Health and Medical Research Council (NHMRC), the Australian Research Council, and the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) responded. The Queensland Government also made a submission regarding the effect the proposed legislation could have on universities and research organisations.

4.8 The NHMRC, the Australian Research Council and DIISRTE all referred to the consultation process and each recommended that further consultation be conducted. They made clear that they were willing to work with Defence to find a solution to concerns about the bill's effect on research.

4.9 The NHMRC and DIISRTE noted in their submissions, dated 15 June and 2 July respectively, that Defence had provided two options papers. One contained three options for amending the bill (of which option 3 was the submitters' preferred option) and a second paper had four options. The submitters had concerns regarding option four. For example, the NHMRC expressed strong reservations about this option:

> Option 4 as presented raises a number of questions and concerns. As presented, and without clear advice and definitions, implementation of Option 4 may result in a significant increase in regulatory burden for

3 Explanatory Memorandum, *Defence Trade Controls Bill 2011*, p. 14.

> researchers and institutions in comparison to Option 3, which appears to largely address concerns raised by the research community.[4]

4.10 Given the concerns raised by these submitters, the committee is concerned that Defence's proposed timeline does not allow sufficient time for the conclusion of consultation and the creation of a suitable solution for all stakeholders.

Consultation since 21 March 2012

4.11 The committee gained the impression that Defence was not well prepared and was caught by surprise by the concerns raised in some submissions, particularly the comments made by Universities Australia. Indeed, Defence found itself in a position in March, four months after the legislation had been introduced in Parliament, where it had to undertake extensive consultation about some provisions in the bill, most notably those dealing with the application of the legislation to intangible transfers. This aspect of the bill remains one of the pressing concerns still requiring a resolution. Unfortunately any conversation on this matter started very late. Indeed, Universities Australia was of the view that the situation could have been avoided through 'greater levels of engagement between the government and the university sector and possibly internally to government'. For example, as noted earlier, Universities Australia could not understand:

> …how the regulatory impact statement can have assessed that the impact on universities will be small when in its own admission it did not have any data to support its conclusion, and it did not consult with the university sector.[5]

4.12 Sydney University supported this view. It noted that when preparing the bill, Defence 'had no information available to it indicating the number of activities in Australian universities likely to be affected'.[6] Furthermore, at the hearing on 21 March Dr Michael Biercuk informed the committee that discussion with Defence about such matters had started 'about an hour ago'.[7] At the same hearing, Professor Mann told the committee that there was 'a job of work to be done, not just an instrument, which we have not seen yet, which may have lots of exemptions'. He was of the view that Defence had 'grossly underestimated how many exemptions there would need to be'.[8]

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4 National Health and Medical Research Council, *Submission 12, Supplementary Submission*, p. 2.

5 Dr Pamela Kinnear, Deputy Chief Executive, Universities Australia, *Committee Hansard*, 2 March 2012, p. 24.

6 University of Sydney, *Submission 7*, p. 1.

7 Dr Michael Biercuk, Faculty of Science, School of Physics, University of Sydney, *Committee Hansard*, 21 March 2012, p. 22.

8 Professor Graham Mann, Associate Dean, Research, Sydney Medical School, University of Sydney, *Committee Hansard*, 21 March 2012, p. 20.

4.13 Even as late as 30 May, the NHMRC informed the committee that while the university sector had been consulted, the Medical Research Institute (MRI) sector and the public health sector had not. It also had strong reservations about the bill, noting that the legislation 'may have ramifications not only for the university sector, but also for other institutions that conduct health and medical research…' NHMRC then stated:

> In order to ensure that the MRI sector will be consulted, my Office will provide details of the draft Bill to (Association of Australian Medical Research Institutes) AAMRI and provide contact details for AAMRI to the Defence Bill secretariat. However, both the MRI and the public health sectors should be included in the consultation process.[9]

4.14 In this regard, the NHMRC suggested broad consultation once the bill had been redrafted, which should 'include the peak body for MRIs and the health sector'. At this late stage, the committee received a similar submission from the Australian Research Council, which was of the view that the concerns raised were 'sufficiently serious as to justify further consultation with universities about the proposed controls, prior to their implementation'.[10]

4.15 As noted earlier, Defence commenced consultation in earnest with the Australian research sector about the proposed legislation during March 2012. The consultation was continuing when on 21 June 2012, the committee received information from Defence indicating that it had met with Universities Australia and agreed to develop principles and options for further consultation and discussion with the university and research sectors.

4.16 On 2 July, the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) stated that it was encouraged with the progress of consultations between Defence and the higher education sector since March 2012. It noted, however, that the consultations were continuing and Defence was 'still developing options for consultation with the sector'. Indeed, based on the perspective of its portfolio agencies, DIISRTE identified another issue that was 'yet to be addressed'—the treatment of statutory authorities, whose staff have not been granted exemption from committing offences under the bill. DIISRTE also noted that while Defence had dealt directly with Universities Australia and the University of Sydney, it had not done so with the broader range of universities. It suggested that universities 'may have different viewpoints and it would be desirable to broaden the consultation process to include all Universities members'.[11] It noted that Defence was planning to do so.

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9 NHMRC, *Submission 12*, p. 2.

10 Australian Research Council, *Submission 13*, p. 2.

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

Conclusion of consultation process

4.17 On 9 August, Professor Jill Trewhella, Deputy Vice-Chancellor (Research) at the University of Sydney, advised the committee that

> It is with considerable regret that I must inform the Committee that at present the university sector is unable to support what we understand to be Defence's preferred position relating to this Bill and its implementation.
>
> In our view the current Option 4, which we understand to be Defence's preferred position, is inconsistent with the regulatory principles that we understood had been agreed by Defence early in the consultations.[12]

4.18 Universities Australia shares the concerns of the University of Sydney, noting that

> Since March, Universities Australia has engaged in discussions with the Department of Defence...with the intention of securing a workable outcome. Despite early promise of progress and a commitment from the Department to work collaboratively, we have been disappointed that there has not been the opportunity for open or considered sectoral engagement on the issues, and to date adequate responses to our concerns have not been provided.[13]

4.19 The universities argue that their concerns have not been recognised by Defence. A set of amendments to the bill to resolve the issues raised by the universities, known as option 3, was proposed during consultations and supported by the universities, research organisations, and DIISRTE.[14] The University of Sydney explains that option 3

> ...balances the competing demands of providing controls for high-risk activities and ensuring protection for innovative research, education and freedom of inquiry. It accomplishes this by targeting enforcement to a relatively small class of high-risk activities which have limited overlap with typical academic research (e.g. advanced "experimental development" activities pertaining to Very Sensitive controlled goods). Exemptions for basic, strategic basic and applied scientific research ensure that it is possible to create a culture of compliance among the limited pool of researchers engaged in activities that potentially carry security risks.[15]

4.20 Defence propose a different set of amendments to the bill, known as option 4. In June, Defence circulated a paper with both options 3 and 4 to stakeholders. The

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12 University of Sydney, *Submission 7A*, pp. 1-2.

13 Universities Australia, *Submission 11A*, p. 1.

14 University of Sydney, *Submission 7A*, p. 3; Universities Australia, *Submission 11A*, p. 1; NHMRC, *Submission 12A*, pp. 1-2; DIISRTE, *Submission 16*, pp. 2-3.

15 University of Sydney, *Submission 7A*, p. 3.

universities, research organisations and DIISRTE have all raised concerns with option 4.[16] Universities Australia explains that:

> ...from our perspective, it was evident that the proposed new option [option 4] had numerous shortcomings that would not achieve the objective sought. Universities Australia provided a formal response expressing our concerns about the new option [option 4] and reiterating our preference for the core elements of 'Option 3' to form the basis of any solution...Despite some advantages provided by exempting supply of intangible technologies within Australian borders, the sheer volume of international collaborative activity in a digital age means that Option 4 would, in practice, be little different, in practice, to the draft legislation currently before Parliament. More importantly, it fails to address the Bill's own stated objective to apply to a limited and small volume of high-end, specialist research. In doing so, it risks constraining low risk research of high public value, with few obvious benefits to national security.[17]

4.21 Both the University of Sydney and Universities Australia raise concerns with the way in which the consultation has been conducted by Defence. For example,

> Significantly, on 10 July 2012 Defence advised Universities Australia in writing that it intended to recommend amendments to the Bill to introduce permit requirements for academic publications involving DSGL technologies. Coming so late in the consultation process, Defence's reversal of its previous verbal advice (made during the consultations) that it did not intend to control publication of university research, raises profound questions of principle, policy and process.
>
> Universities Australia requested written advice from Defence about its proposal to control publications as part of Option 4. To date, no such advice has been forthcoming. This means that we have had no detailed information on which to make an assessment of the practicalities of Defence's plans.[18]

4.22 On 9 August, Defence wrote to inform the committee it was 'unlikely that Defence and the university and research sectors will reach agreement on a preferred option and, as a result, consultation has moved towards the practical implementation of the legislation'.[19] As noted above, the cause of the disagreement is that the university and research sectors and DIISRTE prefer option 3, while Defence argues for option 4.

4.23 Defence asked the committee to 'adopt'[20] option 4 and endorse the amendments that Defence proposes in support of this option. Amongst other

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16 University of Sydney, *Submission 7A*, p. 3; Universities Australia, *Submission 11A*, p. 1; NHMRC, *Submission 12A*, pp. 1-2; DIISRTE, *Submission 16*, pp. 2-3.

17 Universities Australia, *Submission 11A*, p. 2.

18 University of Sydney, *Submission 7A*, pp. 3-4.

19 Department of Defence, *Submission 15A*, p. 1.

20 Department of Defence, *Submission 15A*, p. 3.

arguments, Defence lists the following reasons the committee should endorse option 4:

> It implements Australia's obligations under the Wassenaar Arrangement to implement controls on intangible transfer of controlled technology;
>
> It is most consistent with the existing tangible export control model and therefore provides a more simple and common approach. It also reduces potential cost to businesses as they will not need to establish separate compliance systems for tangible and intangible controls.[21]

4.24 Defence lists the proposed amendments which could be made to the bill explaining that:

> To implement Option 4 and address other aspects that have arisen during the course of consultation, if accepted by the Committee, the Bill could be altered by:
>
> - making the Bill consistent with Australia's existing tangible export controls by:
>   - removing controls on supplies of technology inside Australia;
>   - removing controls for Australians located overseas who supply technology; and
>   - applying controls to all supplies of technology from Australia to anyone outside Australia;
> - including definitions for 'in the public domain' and 'basic scientific research' in the Bill and Regulations;
> - removing controls on defence services; and
> - including an additional control on publishing information where it will transfer controlled technology to the public domain.[22]

4.25 Defence proposes to work with the university and research sectors to assist them in implementing option 4, should the committee agree that bill be amended in this way.[23]

> Defence will remain engaged with the Department of Innovation, Industry, Science, Research and Tertiary Education and UA [Universities Australia] on outreach activities and materials, so that we can benefit from their knowledge of how to best communicate with the sector. Planned measures include:
>
> - a simple user guide to help individuals to understand and navigate the Defence and Strategic Goods List;

21 Department of Defence, *Submission 15A*, p. 3.

22 Department of Defence, *Submission 15A*, p. 4.

23 Department of Defence, *Submission 15A*, p. 9.

- 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.[24]

4.26 Universities Australia, and the other research organisations, remains willing to work with Defence to find a solution. However, Universities Australia notes that 'agreement can only be achieved through a transparent consultation process in which all stakeholders from the research community and other affected organisations are brought together'.[25] Universities Australia suggested that the Chief Scientist, Professor Ian Chubb, could assist in resolving the consultation deadlock. It informed the committee that Professor Chubb has accepted an invitation to convene a roundtable of key stakeholders.[26] Universities Australia supports a roundtable in that it is

> ...an initiative that is consistent with our calls during the consultation process to move beyond the series of bilateral conversations that had characterised the Department's approach. A roundtable would enable the key stakeholders to hear the Department's proposal and reasoning and develop their own response in light of perspectives that extend beyond narrow sectoral interests.[27]

Recommendation 6

4.27 The committee endorses the roundtable approach proposed by Universities Australia and recommends that Defence participate in the roundtable of key stakeholders convened by Universities Australia and chaired by the Chief Scientist, Professor Ian Chubb. The committee also recommends that the further consultation be conducted by Defence with key stakeholders, until the issues raised can be resolved to the satisfaction of all parties. Further, the committee recommends that consultation be conducted in an open and transparent manner, and sufficient time allowed for key stakeholders to consider the complex issues and respond.

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24 Department of Defence, *Submission 15A*, p. 9.

25 Universities Australia, *Submission 11A*, p. 3.

26 Universities Australia, *Submission 11A*, p. 3.

27 Universities Australia, *Submission 11A*, p. 3.

4.28 The committee further recommends that, in designing the implementation of the strengthened export controls, Defence create an advisory group of key stakeholders which must have input into each part of the process. Key stakeholders in the group should include, but not be limited to: DIISRTE, the Department of Health and Ageing, NHMRC, Universities Australia, and the Chief Scientist of Australia.

Recommendation 7

4.29 The regulations are an important part of the implementation of the strengthened export controls. Defence has proposed that the regulations will be amended in line with any amendments made to the bill. The committee recommends that the regulations form an integral part of the consultation process.

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.
>
> 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:
>
> - 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

Appendix 1

List of submissions

Public submissions

1 Defence Teaming Centre

2 Confidential

3 US Trade and Export Control Services

4 Australian Manufacturing Workers' Union (AMWU)

5 Saab Systems Pty Ltd

6 Boeing Australia and South Pacific

7 The University of Sydney
7A Supplementary Submission

8 Ambassador of the United States of America

9 NewSat Ltd

10 Australian Industry Group

11 Universities Australia
Covering Letter
11A Supplementary Submission

12 National Health and Medical Research Council (NHMRC)
12A Supplementary Submission

13 Australian Research Council

14 Minister for Education, Training and Employment, Hon John-Paul Langbroek MP, Queensland Government

15 Minister for Defence, the Hon. Stephen Smith MP
15A Department of Defence - Supplementary Submission

16 Department of Industry, Innovation, Science, Research and Tertiary Education

17 Cooperative Research Centres Association

Appendix 2

Public hearings and witnesses

Friday 2 March 2012—Canberra

BEECHER, Ms Glenda, Universities Australia (Monash University)

CUNLIFFE, Mr Mark, Head, Defence Legal, Department of Defence

CURTOTTI, Mr Michael, Universities Australia (Australian National University)

GIULINN, Mr Andrew, Contracts Manager, Saab Systems Pty Ltd

KENNEALLY, Mr Michael, Vice President Satellite Strategy, NewSat Limited

KINNEAR, Dr Pamela, Deputy Chief Executive, Universities Australia

KIRKWOOD, Mr Angus, Assistant Secretary Export and Arms Control, Strategic Policy Division, Department of Defence

O'CALLAGHAN, Mr John, Executive Officer, Australian Industry Group Defence Council

SHOEBRIDGE, Mr Michael, First Assistant Secretary Strategic Policy, Strategic Policy Division, Department of Defence

SILSBURY, Ms Elissa, Business Analyst, NewSat Limited

WALKER, Ms Rebecca, Senior Advisor, Australian Industry Group Defence Council

Wednesday 21 March 2012—Canberra

ASPLUND, Mr Mark, Regional Counsel, Boeing Australia Holdings Pty Ltd

BIERCUK, Dr Michael, University of Sydney

CANNING, Professor John, University of Sydney

KIRKWOOD, Mr Angus, Assistant Secretary Export and Arms Control, Strategic Policy Division, Department of Defence

MANN, Professor Graham, University of Sydney

PAYNE, Mr Timothy, University of Sydney

REUER, Ms Stephanie, Director, Global Trade Controls, The Boeing Company

SHOEBRIDGE, Mr Michael, First Assistant Secretary Strategic Policy, Strategic Policy Division, Department of Defence

THOMAS, Dr Ian, President, Boeing Australia and South Pacific

TREWHELLA, Professor Jill, Deputy Vice-Chancellor, University of Sydney

Appendix 3

Additional information, tabled documents, and answers to questions on notice

1. Universities Australia – Answers to questions on notice (from public hearing, 2 March 2012, Canberra)

2. Saab Systems Pty Ltd – Answers to questions on notice (from public hearing, 2 March 2012, Canberra)

3. NewSat Limited – Answers to questions on notice (from public hearing, 2 March 2012, Canberra)

4. Boeing Australia and South Pacific – Answers to questions on notice (from public hearing, 21 March 2012, Canberra)

5. Department of Defence – Answers to questions on notice (from public hearings, 2 and 21 March 2012, Canberra)

6. Department of Defence – Answers to written questions on notice

Appendix 4

Answers to questions on notice from Department of Defence received 20 June 2012

Australian Government

Department of Defence
Strategy Executive

Strategic Policy Division
Department of Defence
R1-1-A005
CANBERRA ACT 2600

Tel: 02 6265 1883
Fax: 02 6265 3091

Senator Ursula Stephens
Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Stephens

I am writing in response to your request for Defence to provide a response in relation to the Defence Trade Controls Bill 2011 (the Bill). My response will address the issues raised during the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee) public hearings on 2 March 2012 and 21 March 2012, and answer the questions on notice received by Defence on 9 March 2012 and 5 April 2012.

This response will provide answers in the context of the current version of the Bill. At the Committee's request, Defence has been consulting with the university and research sectors. The Principles and Options document that forms the basis of this consultation is attached. I anticipate that this process will be complete by the end of June 2012 and Defence will be able to advise you of the results, including possible amendments to the Bill, by the end of July 2012.

Questions on notice – 09 March 2012

1. **Regulatory requirements for Approved Community.** *What is Defence's view on the proposition that the Bill may act as a disincentive to the establishment of the Approved Community as it may impose significant regulatory requirements and penalties (including strict liability offences).*

The Bill sets up a framework that allows the Treaty to be implemented into Australian domestic legislation. The Treaty enables licence-free trade between Australian and US members of an 'Approved Community'. The Approved Community will include government facilities and companies in both countries. Australia and the US will mutually determine the defence articles and the specified end-uses that define the scope of the Treaty.

The Treaty framework will remove the administrative delays associated with the existing Australian and US export licensing systems. This is expected to:

- Reduce delivery times for new projects and improve program schedules and sustainment processes by permitting transfers within the Approved Community without further US approvals.
- Increase opportunities for Australian companies to bid on eligible US contracts without the need to wait for US access approval.
- Reduce obstacles for improved cooperation between US and Australian companies to benefit Australia's defence capability.

Membership of the Approved Community is voluntary and those Australian companies that choose not to apply for membership will continue to operate within existing Australian and US export control systems.

In removing the licence requirement there need to be appropriate mechanisms in place to prevent and deter defence articles being moved outside the Approved Community or used for purposes other than those specified under the Treaty.

As the Treaty is an exemption under the US International Traffic in Arms Regulations (ITAR) framework, its compliance obligations have been aligned with existing compliance obligations for companies who currently trade in US ITAR controlled technology.

The maximum penalty for the criminal offences related to an Australian Community member is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for exporting tangible goods and technology listed on the Defence and Strategic Goods List (DSGL) without a ministerial permission. It is also consistent with the penalties under sections 10, 14 and 15 of the Bill.

2. **Education and training.** *The Australian Manufacturing Workers' Union highlighted the importance of education and outreach services explaining the changes to industry. Could Defence detail the education training programs that will be undertaken?*

Defence has undertaken extensive industry consultation during the development of this Bill. The Bill's consultation was conducted over two major phases during December 2010 and August 2011. Consultation on the Regulations was conducted from December 2011 to February 2012.

Additionally, there have been wide-ranging and continuing conversations with key stakeholders and industry. Defence established a small group of representative figures from defence industry to enable more detailed discussion of key provisions. These Defence Trade Cooperation Treaty Industry Advisory Panel (DIAP) sessions were moderated by Mr Ken Peacock AM, a former CEO from a major defence prime. The feedback from the consultation has been taken into account when developing the Bill. As a result of the consultation, the Bill and Explanatory Memorandum were amended. Defence is now in the process of considering the comments received on the Regulations.

The Defence Export Control Office (DECO) is developing a comprehensive communications plan to raise awareness of strengthened export control aspects of the Bill and its implications for government agencies, academic institutions and industry.

DECO will provide information and guidance on how the Bill aligns Australia with international best practice by closing legislative gaps relating to the:

a. intangible transfer of technology listed in the DSGL (e.g. emailing blueprints of military vehicles or performance data for night vision equipment);

b. provision of defence services related to goods and technology listed in the DSGL (e.g. providing assistance in the design of a military vehicle or the maintenance of night vision equipment); and

c. brokers arranging the supply of DSGL goods, technology or defence services.

The communications plan will include public awareness raising through the DECO Newsletter, information flyers and targeted mail-outs, media releases, advertising, editorials in industry publications, presentations and outreach activities at related conferences and trade shows.

DECO will also specifically target developing and emerging dual-use industries by using advice from industry groups and defence networks to identify areas and opportunities for outreach in these sectors.

DECO will undertake Export Control Awareness Training (ECAT) in Canberra, Adelaide, Melbourne, Sydney, Perth and Brisbane before and after the commencement of the Bill. The free ECAT training sessions will provide specific guidance on both the strengthened export control and Treaty aspects of the Bill, along with an overview of the wider export controls including the permit application process.

Defence is aware that additional tailored outreach will need to be provided to the academic sector which unlike defence industry, to date, has had limited exposure to current controls for tangible defence exports Additional measures will include working with key personnel in universities to assist them to become familiar with the Bill provisions and the Defence and Strategic Goods List and to jointly identify activities that may be subject to permit requirements. The Wassenaar Arrangement Best Practice guidelines encourage industry and academic institutions to appoint export control officers to assist the institutions to self-regulate by designing and implementing internal compliance programs. Defence will be able to provide advice to institutions, should they choose to appoint an export control officer. This outreach will build on consultation now underway with the university sector.

For Part 3 of the Bill relating to the Treaty, Defence is drafting guidance to assist industry to understand the requirements of the Bill and the new administrative implementation processes. The Treaty Pathfinder program will assist Defence to identify training needs and formulate appropriate and relevant guidance for industry and Defence participants.

Defence continues to consult with industry through the DIAP, peak industry bodies such as the Australia Industry Group and the Australian Industry & Defence Network, and through other outreach activities such as industry conferences and trade shows to ensure industry concerns are identified and considered in implementation planning processes.

Direct support will be available to companies through a combination of web-site information, email and free-call telephone enquiry lines. Targeted training for specific companies and organisations will be considered upon request where it provides significant reach and value for money.

3. **Record keeping.** *A number of submitters referred to the record keeping requirements which they regard as 'significant' and which would add to the administrative costs of Defence industry.*

The detailed provisions prescribing the record-keeping requirements are contained in Regulation 31 of the draft regulations. The public consultation period for the Regulations closed on 17 February 2012. Defence has considered the comments received and is working towards making the record-keeping requirements as practical as possible.

In answer to the three specific questions raised by the Committee:

3.1 *How has Defence responded to concerns about what industry regard as onerous record keeping requirements?*

Defence is committed to ensuring that the record-keeping obligations are as practical as possible. Defence recognises the common theme of industry's comments about the record-keeping requirements for strengthened export controls and Treaty activities. Defence is currently exploring options to amend the Regulations to prescribe a minimum level of record keeping, and when the risk of the activity warrants further measures, Defence will impose additional record-keeping conditions on the permit (for strengthened export controls) or membership approval (for Treaty).

While Defence is able to vary the record-keeping requirements for strengthened export controls, the record-keeping requirements in the Bill and the Regulations for Treaty activities have some flexibility but need to reflect Australia's commitments under the Treaty.

Defence is also exploring avenues to amend the Regulations to provide a simpler mechanism for industry and universities to record a series of related activities over a period of time.

3.2 *Has Defence considered taking a risk based approach to record keeping, requiring more in relation to items of high risk and less in respect of more mundane activities?*

Yes. This is reflected in the approach described in subparagraph 3.1

above. If this approach is adopted, it will also provide greater consistency with the current requirements for tangible export controls which impose record-keeping requirements by way of permit conditions.

3.3 *In consultation with industry and universities, does Defence intend to clarify and simplify the record keeping requirements?*

Defence is considering simplified record-keeping requirements in consultation with industry and universities.

Questions on notice – 05 April 2012

4. **Definitions in the EM.** *Concerns have been raised by submitters in regards to Defence's decisions around clauses being placed in the Bill, the EM, or the draft Regulations. Could you outline the rationale for placing definitions in the EM and not the Bill or the draft Regulations*

The preference of submitters to have key terms defined in the Bill rather than in the regulations or EM has been noted by Defence. It is acknowledged that this particular concern was raised in the context of the Bill's reference to the term 'arranges' in the brokering offences contained in Part 2, Division 2 of the Bill.

The term 'arranges' is intended to be read using the ordinary meaning of the term in conjunction with the additional guidance provided by the explanation given in the EM at pages 53-54. The EM provides clear examples of situations that 'arranges' is intended to cover, as well as situations that are to be regarded as outside the scope of the term.

Defence has considered the submissions made in relation to this point, in addition to the comments made by the Committee, and would be prepared to include a definition of the term 'arranges' in the Bill that is consistent with the guidance in the EM, if recommended by the Committee.

5. **Scrutiny of Bills – definitions in the EM and regulations**. *In 2011 and 2012, the Scrutiny of Bills Committee raised concerns that 'important matters' including defences for offences that have been left to the regulations be included in the primary legislation. The committee also sought the Minister's advice as to why matters in the EM or left to the regulations were not included in the primary legislation. The Minister for Defence responded in February 2012 providing explanation for the proposed approach. Can you outline action that has been taken to alleviate the concerns of the Scrutiny Committee regarding these matters?*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee:

> *In delegating exceptions to the regulations, appropriate safeguards have been considered and put in place to ensure that the offence provisions are clear and the scope and effect of the offences are plain and unambiguous. The content of the*

offences in the Bill and the exceptions contained in the regulations are cross-referenced to ensure seamless navigation between the Bill and its regulations. Drafting notes, which serve as additional navigational markers, have also been included to assist in legislative interpretation.

Where an exception makes reference to a separate legislative instrument, as is the case in subparagraph 11(2) of the draft regulations which refers to regulation 13E of the Customs (Prohibited Exports) Regulations 1958, it is justified in the circumstances that the exception be delegated to the regulations to allow the reference to that legislative instrument to be amended in a timely manner.

Further, in circumstances where the content of an exception to an offence involves a necessary level of detail, it is appropriate that the exception be delegated to the regulations. Draft regulation 12 creates an exception to the offences for the supply of technology and provision of defence services in relation to Australian Defence Articles. This exception introduces the concept of Australian Defence Articles which is a concept that is particularly detailed and is dealt with exclusively in the regulations.

Prior to commencement of the Bill and regulations, the Defence Export Control Office (DECO) will extend its outreach programs to individuals and companies to attempt to ensure that these parties are made aware of the operation of the offence provisions. In addition to these outreach programs DECO maintains, a dedicated website with links to relevant legislation and legislative instruments and alerts on changes to export controls laws.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the Explanatory Memorandum (EM). On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

6. **Scrutiny of Bills – discretionary powers.** *The Scrutiny of Bills Committee raised concerns regarding the discretionary powers conferred on the Minister under Clause 10 to grant or refuse a permit to supply technology or provide services related to DSGL goods. The committee suggested that the criteria listed as permissible considerations in the EM in the primary legislation to provide guidance for the exercise of power. Further to the Minister's response, the committee requested that key information in this regard be included in the EM. Can you establish for the committee the rationale for such discretionary powers and outline what action has been taken to alleviate the Scrutiny Committee's concerns?*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee:

Clauses 11, 14 and 16 confer a discretionary power in circumstances where I am required to grant or revoke a permit or to issue a prohibition notice for the supply of technology or provision of defence services. In exercising the powers to grant a permit under clauses 11 and 16, I must be satisfied that the activity for which the licence is sought would not prejudice the security, defence or international relations

of Australia. In revoking a permit and issuing a prohibition notice I must be satisfied that the activity would prejudice the security, defence or international relations of Australia.

The Government's policy is to encourage the export of defence and dual-use goods where it is consistent with Australia's broad national interests. Australia's export control system is the means by which this consistency is ensured. Applications to export defence and dual-use goods are considered on a case-by-case basis. The assessment of these applications take into account the considerations listed on page 48 of the Explanatory Memorandum. These considerations were developed in line with the policy criteria (page 11 of the Explanatory Memorandum) agreed by the Prime Minister and the Ministers of involved key portfolios including the Department of Foreign Affairs and Trade and the Australian Customs and Border Protection Service.

The listed considerations outlined in the Explanatory Memorandum are able to be accessed by the public through the DECO website. To further assist industry in understanding the application processes and any significant changes in export control policies, additional guidance is available to industry through ongoing outreach activities provided by DECO and a dedicated telephone support line.

Australia's export control policies and procedures need to be flexible in order to take into account changes in defence and dual use technology, use and delivery of that technology, Australia's strategic priorities and threats to regional and international security. Due to the changing nature of the export control environment, wide discretionary powers are necessary and it would not be appropriate for a set of fixed considerations to be included in the Bill.

I consider this discretion is appropriate and necessary to support Australia's capacity to protect its national interests and contribute to reducing the threat to regional and international security by working with like-minded countries. This discretion is consistent with the powers that I hold under existing legislation; including, Regulation 13E of the Customs (Prohibited Exports) Regulations 1958 and the Weapons of Mass Destruction (Preventions of Proliferation) Act 1995.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the EM. On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

7. **Scrutiny of Bills – reversed evidentiary burden.** *The Scrutiny Committee was also concerned with Clause 31 regarding the reversed evidentiary burden of onus of proof and sought further information regarding exceptions and whether they could be outlined in the primary legislation. Can you explain the rationale for this course of action and outline any action taken to address the Scrutiny Committee's concerns.*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee that:

The draft regulations (regulation 25) set out the circumstances in which all or some of the main Treaty offences in subsections 31(1) to (6) will not apply. Currently the regulations as drafted create the following two exceptions:

- *in circumstances where an Australian Community member supplies goods, technology or defence services and holds a valid licence or other authorisation granted by the Government of the United States of America that permits the supply; and*
- *in circumstances where an Australian Community member supplies goods or technology to an approved intermediate consignee for the purpose of transporting the US Defence Articles.*

These two provisions include a level of detail that should not be included in the primary legislation and for this reason, these exceptions have been delegated to the regulations. The exceptions will be subject to parliamentary scrutiny as the regulations are a disallowable instrument.

The reversed evidentiary burden of the onus of proof in cases where the applicability of the exception is peculiarly within the defendant's personal knowledge is consistent with Commonwealth criminal law policy. The exceptions included in the draft regulations have been drafted with the defendant bearing the evidential burden. This shift in the onus of proof recognises that the applicability of the exception to a particular Australian Community member will be within the member's personal knowledge. For example, the Australian Government would be unlikely to know whether an Australian Community member holds a valid licence or other authorisation granted by the United States Government. In such circumstances it would be significantly more resource intensive and costly for the Australian Government to disprove the existence of the authorisation than for the Australian Community member to prove its existence.

I consider it appropriate that the exceptions outlined above are delegated to the regulations and that Commonwealth criminal law policy has been applied appropriately in reversing the evidential burden of the onus of proof.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the EM. On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

8. **Differences in exposure drafts.** *Can you outline for the committee what the primary differences are between the February 2012 exposure draft of the regulations and the draft December 2011 version?*

The primary difference between the December 2011 and February 2012 versions of the draft Regulations is the inclusion of merits review provisions in the February 2012 version, for an adverse decision by the Minister regarding approval of an intermediate consignee. The review provisions in Regulation 28 apply to both applications for approval of an intermediate consignee and the cancellation of an approval. The December 2011 version contained a note following subregulation 26(10) that a further version would be released to detail these merit review provisions and the February

2012 release fulfilled this commitment. There were also some minor changes to provision numbering.

9. **Consultation on draft Regulations.** *During the 2 March hearing Defence noted that it had begun to collate the responses to the draft Regulation consultation process. Could Defence outline the main concerns which have been received in regards to the draft regulations?*

Defence received five submissions which expressed the following concerns about the Regulations. Defence's response to these concerns is noted in *italics* below:

- Marking requirements for Treaty articles were seen to be onerous and unclear – *Defence has raised this issue with the US and the common understanding is that marking of items is only required where it is practicable to do so – more specific implementation guidance will be developed;*

- Bilateral trade under the Treaty provisions without export licenses might have potential inconsistencies with the transparency required by the Arms Trade Treaty – *consistent with current export controls, all Treaty-related exports will be declared to the Australian Customs and Border Protection Service*;

- Administrative requirements to apply for Approved Community membership were seen as burdensome on universities – *unless universities are accessing US defence technology which falls within the scope of the Treaty, it is unlikely that they would apply to become Approved Community members*;

- Assessment of Approved Community membership was perceived as potentially leading to delays - *the processes will be similar to the process for dealing with ITAR items but would be a one-off application, as compared to the multiple applications under the current Australian and US export control regulations*;

- There was a perceived lack of guidance on the handling of articles that are transferred between the Treaty regime and regular export control – *see the discussion on Pathfinder program in paragraph 10 and paragraphs 16 and 17*;

- In the significant ties assessment process in Part 1 of the Regulations , a suggestion was made that the referral to US should be deferred until the procedural fairness procedure has been completed – *procedural fairness is a core element of the process, including merits review, and the referral to the US happens at the end of the process and only if the applicant seeks to have the referral proceed*;

- Details of what information will be required on the Annual Compliance Report for Approved Community members were requested – *this will be provided by administrative guidance*; and

- Record keeping for each activity was seen as unnecessary – *see paragraphs 3 and 15.*

10. **Additional issues in relation to draft DTC Regulations.** *The committee has received evidence suggesting that additional issues (such as IT matters, cost implications and arrangements for the Pathfinder Program) have arisen in relation to the draft regulations which were not necessarily foreshadowed in the bill. How do you respond to these concerns?*

The Australian and US Governments are jointly developing a Pathfinder program to test the Treaty's scope, policies and procedures. The Pathfinder program is a preparatory exercise, not an activity that will be regulated through the Bill and the Regulations. The objective is to identify where improvements to administrative and operational processes can be made prior to the Treaty entering into force. Pathfinder participation is completely voluntary. Defence will select appropriate test projects and programs and then invite related companies that meet eligibility criteria to participate. There is no requirement for companies to participate. Defence will keep the costs of participating in Pathfinder to a minimum.

To keep costs down for industry, Defence will absorb the costs involved in processing Approved Community applications and security clearances. Other costs for individual companies that choose to join the Approved Community will vary, however those companies already engaged in defence business will have many of the required processes in place.

The new IT system under contract to replace the current DECO system is a business system in Defence and is not regulated by the Bill or Regulations.

11. **Concerns raised by Universities.** *Universities Australia is concerned that it is 'not adequate' to rely on regulations as secondary instruments to deliver the legislative intent of the bill and that there is a need to ensure that the intention set out in the EM is enshrined in the legislation thereby ensuring that institutions have full statutory protection. What is your response to these concerns? Universities Australia suggest that the Bill should include an exemption modelled on Section 8 of the UK Act. In evidence to the Committee, Defence noted that a similar exemption will be created in a legislative instrument. Could you expand upon the verbal evidence provided to the Committee? Was insertion of the exemption into the Bill considered during drafting? Could you outline how the consultations with Universities Australia will fit into the proposed timeline for implementation of the export controls and how long you have allowed for the consultations?*

The legislative intent of the Bill is clear in that the intangible supply of technology will be controlled. There will be exemptions for certain technology in the 'public domain' and for 'basic scientific research'. It is important these concepts are fully defined in secondary instruments so that the definitions can stay abreast of changes in the way that technology may be supplied.

Defence did not consider including a provision similar to section 8 of the UK Act while the Bill was drafted as it was considered that the definitions for 'public domain' and 'basic scientific research' were best defined in secondary instruments. Defence's continuing consultation with the university sector is contemplating a model which refers to 'public domain' and 'scientific research' in the Bill and fully defines the concepts in the Regulations.

At the Committee's request, Defence has been conducting consultation with the university and research sectors. The Principles and Options document that has formed the basis of this consultation to date is attached. When that consultation is finalised and decisions on the way forward have been taken by Government, I will be able to advise you of the proposed approach. I anticipate that this consultation will be

complete by the end of June 2012 and Defence will be able to provide you with an update by the end of July 2012.

12. **Timetable.** *What are the necessary steps that must be undertaken before September including in relation to the regulations? What is your timetable in the lead-up to proclamation of the bill?*

The Regulations will need to be amended in light of the comments received during the public consultation and to include any consequential amendments to the Regulations that flow from any changes to the Bill.

Defence is continuing to work on the domestic implementation processes for the Treaty in collaboration with other government parties, industry and academia. The implementation timetable in the lead-up to the proclamation of the Bill will focus primarily on the operation of the Pathfinder Program from May-July 2012. After Pathfinder testing is finalised, Defence will analyse the results, conduct further consultation with industry as appropriate and finalise processes.

The Bill's commencement provisions provide that the Bill will not commence operation until the Treaty comes into force. Once the Bill has passed through the Australian Parliament, the Treaty will not come into force until the US President has ratified the Treaty, the Attorney-General has sent correspondence to the Federal Executive Council and there has been a bilateral exchange of notes to agree upon a Treaty commencement date. This will give Defence, industry and universities time to prepare to meet the requirements of the Bill, with Defence providing outreach support.

Once the Pathfinder Program is complete, how will findings from the program be used?

The Pathfinder Program is designed to test the policies and processes required to implement the Treaty. Participants will be requested to provide comment on the results and opinion on improvement opportunities. The results will be made available to peak industry and consultative groups and through a network of established Defence contacts. Defence will use Pathfinder to identify any opportunities to improve the processes with the intent of making them more effective and practical for industry and government. The objective is to settle processes and provide assurance and confidence to both government and industry before the Treaty enters into force.

13. **Facility accreditation.** *Article 4 of the Treaty appears to allow arrangements for a single facility as an Approved Community. Defence's evidence at the last hearing suggested that specific divisions within a company can be accredited. According to Boeing, the US and UK concept of an Approved Community appears to be 'facility specific'. Submitters are concerned that the concept of an Approved Community as 'facility specific' has not been captured in Sections 27-30 of the bill concerning an Approved Community. Is there a risk that the bill will not meet the intention of the Treaty if such a concept is not captured in the bill? Can Defence supply references to the relevant parts of the Bill and Regulations which provides that specific facilities can be registered?*

The Treaties, while similar, differ slightly in their approach to suit the domestic requirements of the participants. For Australia, the Approved Community will comprise bodies corporate that, after gaining approval from the Minister, are Approved Community members in their own right. However, a body corporate only needs to have those facilities accredited that it intends to use for the movement, storage and handling of US Defence Articles.

This approach provides more flexibility to industry in how companies conduct the aspects of their business involving trade in Treaty articles. There is no requirement for a company to accredit all of its facilities if Treaty trade is only a small part of its business and this trade can be confined to a single facility. Defence's evidence at the last hearing is accurate, insofar that different divisions of a company may be located in separate premises and these premises can be accredited separately for Treaty trade as befits the company's commercial interests.

Section 27(3)(a) of the Bill provides that one of the criteria that the Minister must have regard to in assessing an application for membership of the Approved Community is whether the body corporate 'has access to a facility that is included, or that is capable of being included, on a list, managed by the Department, of facilities accredited for storing and handling classified information and material.' The legislative requirement is that a potential member must have access to at least one facility – it is not required that the potential member own that nominated facility. The Department will manage administratively the list of accredited facilities, to which Approved Community members can apply to add facilities according to their business requirements.

14. **US approval for community membership.** *Membership of the Australian Approved Community requires US Government approval whereas membership of the US Community is based on registration with the Directorate of Defence Trade Controls. Given the level of due diligence needed to become a member of the Australian Community, why is US approval required? Could you explain why the US Government retains the right of veto for Australian industry when the Australian Government has no input into the Directorate of Defence Trade Controls registration process?*

The Treaty exists within the broader ITAR framework, and is an exemption within ITAR. The majority of trade that is expected to be conducted under the Treaty regime is in US defence articles, and the Treaty reflects the US position to retain control and monitor access to its technology. As with the ITAR framework, the Treaty reflects the US position to retain control and monitor access to its technology. Gaining US approval will remove the need for companies in the Australian Community to continually seek licences from the US for trade in Treaty-eligible US defence articles. Admission to the Australian Community constitutes a permission to trade in US Defence Articles that would ordinarily be controlled under the existing ITAR framework. The US retains the right to deny such applications.

Article 4(c) of the Treaty requires that Australia and the US mutually determine the eligibility requirements for the inclusion of bodies corporate on the list of Australian Community members. The provision in s27(4) of the Bill that the Minister must not approve an application unless the US Government has also approved the application

fulfils this requirement for mutual agreement. The Treaty does not have the same requirement for the US Community as US exporters must undergo a similar application and approval process to become registered with the US Government as an exporter of controlled goods. Given they must already comply with ITAR under their registration, The Government did not want to add additional compliance requirements for US companies to meet in order to trade with Australian companies under the Treaty.

Subsections 11(3)-(5) of the Treaty's Implementing Arrangement allows for bilateral consultation and Australian Government action if concerns are raised about a US Community member's ability to protect Australian defence articles. Following these consultations, the Minister may decide to issue directions to the Australian Community in accordance with s33(1) of the Bill preventing future dealings with that US Community member. Although Australian input has not been incorporated into the US registration process, the Bill provides the Minister with an appropriate measure of domestic control over trade conducted under the Treaty.

15. **Record keeping.** *Submitters have raised concerns regarding record keeping. Saab noted that companies will have to keep track of things they didn't have to before and make a distinction between the bill's implementation of the treaty and the two other aspects of the bill – intangible and brokering controls. Others are concerned about individualised record keeping. Please outline for the committee:*

- *How Defence has responded to these concerns; and*

Paragraph 3 of this Response outlines Defence's consideration and intentions for record keeping for strengthened export controls and Treaty activities.

The Bill contains record-keeping requirements for strengthened export controls and movements of defence articles under the Treaty. While Defence is able to vary the record-keeping requirements for strengthened export controls, the record-keeping requirements in the Bill and the Regulations for Treaty activities have some flexibility but need to reflect Australia's commitments under the Treaty. As the Regulations are currently drafted, the record-keeping requirements for the strengthened export controls and those implementing the Treaty provisions have a high level of consistency. Any changes to the record-keeping requirements for strengthened export controls and Treaty activities may be different for each area and may introduce inconsistency between the Treaty and the strengthened export control record-keeping requirements.

For the Treaty provisions of the Bill, in exchange for the licence-free movement of US Defence articles within the Approved Community record keeping requirements are necessary to ensure that those articles are being transferred and safeguarded in accordance with obligations under the Treaty. The requirements imposed are sufficient to ensure an appropriate level of accountability and traceability. Companies trading in US technology should already be familiar with meeting requirements under ITAR and will therefore likely have many of the required processes already in place.

- *The record keeping requirements set out in the regulations.*

The record keeping requirements for both strengthened export controls and Treaty activities are set out in regulation 31. If a record is required to be made (pursuant to section 58 of the Bill), the record should contain:

- a description of the goods or technology supplied, or the defence service provided
- the permit, licence or authorisation under which the person does the activity, and any unique identifier given to the permit or authorisation
- the name of the person receiving a supply of goods, technology or defence services, and the time and date of supply
- the name of any intermediate consignee involved in the activity, and the date the goods or technology are supplied to the intermediate consignee
- the date and time at which, and the place from which, goods or technology were provided
- the place at which goods, technology or defence services were received and the date and time of receipt
- the method by which the goods or technology were supplied, or the defence services were provided, to the recipient
- if the activity involves the electronic transfer of defence services, details sufficient to identify the transfer
- the marking applied to an Article 3(1) US Defence Article or an Article 3(3) US Defence Article supplied by the person, or that is included in the accompanying documentation
- the marking applied to an item of technology provided by the person, or that is included in the accompanying documentation
- the marking given to a defence service, included in accompanying documentation
- the security classification (if any) given to an Article 3(1) US Defence Articles, an Australian Defence Article, or an item of technology included in accompanying documentation
- the marking applied to an Australian Defence Article supplied by the person, or that is included in the accompanying documentation

Further, has Defence considered the addition of an example of activities on which records should be kept to the Bill or the EM? Please provide examples of how the record keeping requirements would work in practice.

For strengthened export controls, as the Regulations are currently drafted, an example of record keeping would be: if a researcher sent an email to a foreign researcher explaining how to produce a toxin controlled under the DSGL (e.g. cholera toxin under DSGL 1C351) which was authorised by a permit, then the researcher could include a reference to a permit number in the email and the email itself would be a sufficient record of the supply.

Noting the comments from industry about record-keeping for strengthened export controls, the Government is considering options to amend the record-keeping requirements in the Regulations to include a minimum of information. An example of how this might work is if a defence industry member wanted to market their DSGL-controlled technology in a low-risk overseas location, a record of the permit number, the technology marketed and the country involved may be sufficient. If the same technology were to be marketed in a higher-risk destination, the permit may impose a condition that each person who attended the marketing sessions and the location and date of the marketing sessions would also need to be recorded.

The Regulations are not prescriptive about the method of making these records and it could vary from a diary note, to the ability to access the required data from the company's business systems, to a full database record of the marketing session, noting the locations, dates and attendees. Where corporate business and information systems record such information, the intent is to use existing good business practice and not require separate information and record-keeping systems to be created.

For the Treaty provisions, the Explanatory Memorandum provides an overview of the record-keeping provisions required to be imposed on Approved Community members under the Bill. Defence is working with industry on Treaty implementation to ensure that the record-keeping requirements are practical, but also recognises that existing good business practices and processes are expected to meet much of the compliance obligation.

When these provisions are settled, Defence will include more examples in the Regulations' explanatory statement.

16. **Re-export limitations.** *Submitters have raised concerns regarding an inability to re-export goods under the bill to a third country (Sub 1, p.[2]). Please explain the limitations on the re-export of goods and of the underlying rationale?*

The provisions of the Bill relevant to the Treaty reflect the intent of the Treaty itself, and are designed to enable simpler trade in defence goods between Australia and the US. Trade within the Treaty framework is confined to mutually agreed scope lists on which the included activities contain elements of eligible bilateral trade. The scope lists include - Australian Government End-Use Projects, Australia-US Combined Programs, Australia-US Combined Operations, Exercises and Counter-Terrorism Operations and US Government End-Use Projects. As a bilateral Treaty, there was no intention to provide exemptions from existing controls for re-exports to other countries. Exports to countries other than the US will still require the authorisations they currently require under existing controls. As a result, the Bill does not change arrangements for re-exports to third countries – this type of activity will remain subject to the existing export controls.

17. **Transfer outside community needing US approval.** *Please clarify whether articles imported into the Australian Approved Community cannot be transferred outside the Approved Community without further approvals whilst articles exported to the US are not subject to the same controls as they are deemed to be controlled under the ITAR. If this is correct, please explain the reasons for the discrepancy.*

The intent of the Treaty is to provide less restrictive access for Australian industry to US controlled technology. All articles imported into the Australian Approved Community will continue to be controlled under ITAR; the benefit of the Treaty is that individual authorisations will not be required for each article. Trade within the Treaty framework is permitted through a licence exemption under ITAR – so if US-origin goods are transitioned out of the scope of the Treaty they will need appropriate authorisations under ITAR.

Australian articles exported to the US under the Treaty will be subject to the same controls as currently exist for US ITAR technology. The US has access restrictions in place under ITAR that are commensurate with those that Australian industry will be subject to. Seeking to add specific retransfer controls on Australian origin non-ITAR technology would create a greater level of regulation than exists under current Australian export controls.

18. **TAAs for re-export.** *NewSat raised concern that the bill is silent on the re-export of ITAR controlled items and questioned whether Technical Assistance Agreements were still required for re-export. Please respond.*

The Bill strengthens Australian export controls and gives effect to the Treaty. It has no effect on obligations under ITAR outside the scope of the Treaty. ITAR Authorisations, including Technical Assistance Agreements, will still be required to re-export ITAR-controlled items outside of the US and Australian Approved Communities.

19. **Monitoring powers.** *A number of submitters raised the issue of monitoring powers, which seem excessively broad. Could you explain to the committee the exercise and intention of this power? Are they limited to compliance or do they extend into other areas? (see Boeing sub 6, p. [5].)*

Part 4 of the Bill sets out the monitoring powers which will be exercised by Authorised Officers to ensure the protection of controlled articles and encourage industry compliance with their Treaty obligations. These powers only extend to the monitoring of bodies corporate that hold a section 27 approval, that is, Approved Community members. It is a condition of this approval that Approved Community members allow Authorised Officers to enter their premises for the purpose of ensuring that they are complying with their obligations set out in the legislation and satisfying any conditions of their approval. It is not intended that Authorised Officers will use these powers to investigate offences, as this activity is more appropriately conducted by the Australian Federal Police.

Monitoring powers are limited by the requirements of the Bill and the Regulations. The monitoring powers exercised by Authorised Officers are limited to holders of a

section 27 approval, that is, body corporate members of the Approved Community. An authorised officer must give at least 24 hours' notice before they can enter premises. The monitoring powers do not extend to the strengthened export controls detailed in Part 2 of the Bill

20. **Right of entry.** *The right of entry provisions also seem unnecessarily broad and excessive without the appropriate judicial oversight mechanisms evident in other legislation. Could you explain any limitations placed on this right to enter without judicial oversight? Does the right to enter extend to when the occupier is not present even in instances where a breach is not suspected?*

The powers of Authorised Officers to enter premises under section 41 can only be exercised for the purposes of monitoring the compliance of Approved Community members with Treaty and record keeping provisions of the Bill and compliance with conditions of an approval. Section 41(2) requires Authorised Officers to give 24 hours notice of an intention to enter premises. Entry is limited to those premises identified on the application for Approved Community membership, any other premises identified by a body corporate and any premises used for business operations. Entry does not extend to places of residence.

The purpose of empowering an Authorised Officer under the Act is to facilitate entry to premises for the purposes of conducting monitoring activities, not to conduct investigations for suspected breaches. There is no scope for an Authorised Officer to enter premises in circumstances where the occupier (or a representative of an occupier) is not present. In providing a notice of entry at least 24 hours in advance, Defence expects that arrangements would be made by the body corporate to ensure that a representative is present to facilitate and assist with Defence's monitoring activities.

21. **Need for parallel licensing.** *Mr Hyland of US Trade & Export Control Services submitted comments that go to the issue of exemptions which will still require parallel licensing activity/cost on the part of Australian industry. We have not had a comprehensive answer from Defence as to what these exemptions are and what percentage of Australian defence contracts would be affected by them.*

The Exempted Defense Articles list is currently available on the US Directorate of Defense Trade Controls website. These exemptions include such categories as nuclear propulsion, missile technology, hot-gas turbine technology and related source code. The list has been agreed bilaterally. Australia did not add any exemptions to the list and it is expected that as confidence grows in Treaty process the list will be reduced.

There is nothing in the Bill that will require parallel licensing. For a particular defence article, industry members will either operate under the ITAR exemptions for the Treaty, or under the standard ITAR provisions. Defence recognises that some defence projects will need to operate under both systems for different articles and this will be tested under the Pathfinder program.

Membership of the Approved Community is a voluntary decision and those companies that trade in both exempt and eligible articles must make the decision on whether to join the Approved Community based on the benefits expected for their

individual situation. If an Australian company is primarily trading articles exempt from the scope of the Treaty, it is unlikely they would join the Approved Community.

The Treaty is a further exemption which may be applied within broader ITAR controls. Consistent with current processes, there are certain sensitive technologies the US has retained the right to licence for export.

Issues from evidence - strengthened export controls

22. **Explanation of brokering arrangements and ITAR amendments.**

It is an offence under Section 15 of the Bill for a person to arrange the supply of DSGL goods, technology or the provision of defence services outside Australia without a permit or in contravention of a permit condition. As outlined in paragraph 5 above, the term 'arranges' is intended to be read using the ordinary meaning of the term in conjunction with the additional guidance provided by the explanation given in the EM at pages 53-54 which states:

> *The term 'arranges' is intended to include, but is not limited to, circumstances where for a fee, commission or other benefit, a person acts as an agent or intermediary between two or more parties in negotiating transactions, contracts or commercial arrangements for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology.*
>
> *The term 'arranges' is not intended to cover situations where a first person provides a second person with a point of contact for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology and there is no fee, commission or other benefit obtained by the first person.*

Industry has commented that the use of the phrase 'but is not limited to' in paragraph 63 of the EM does not assist industry to clearly identify what activities would fall within the scope of 'arranging'. The Government is considering deleting this phrase from the EM.

The scope of brokering controlled under the US ITAR is broader and therefore, more highly regulated, than under the Bill. The Bill's brokering controls have been drafted to satisfy the measures agreed by Wassenaar Arrangement participating states for Arms Brokering in 2003. While Defence is alert to the US ITAR brokering amendments, the intention is to align the Bill's brokering provisions with the Wassenaar Arrangement obligations.

23. **Implementation of the strengthened export controls and the role of the Australian Customs and Border Protection Service.**

Existing export control legislation requires exporters of tangible goods or technology that is listed on the DSGL to obtain permission from the Minister for Defence (administered by DECO) prior to making an export declaration to the Australian Customs and Border Protection Service (Customs and Border Protection). This

process will remain for tangible goods and technology despite the introduction of the strengthened export controls as it enables Defence, as the policy agency, to decide whether the export of the goods and technology should be permitted in accordance with our international obligations and domestic policy. Secondly, it satisfies the requirements for Customs and Border Protection, as the administrator of the *Customs Act 1901*, to assess an export against the full range of obligations contained in that Act.

Under the Bill, in the circumstance where a person will be exporting an intangible good, or providing a defence service, as with tangible exports, permission will be required from DECO, but, unlike tangible exports, no declaration will need to be made to Customs and Border Protection as the technology or services will not pass through a physical border. DECO will assess an application against the criteria outlined in the EM at paragraph 73.

To facilitate the introduction of the strengthened export controls, DECO will be rolling out a replacement permit issuing system. This new system, which is intended to be in place before the Bill is enacted, will allow industry to lodge a single application to obtain permission to comply with the existing export controls and the new strengthened export controls. The system will also allow industry to lodge separate applications to register as brokers and obtain permission to conduct brokering activities. DECO will assess each application holistically, looking at the intended activities and grant the relevant permission, where appropriate, to best balance the needs of industry against the level of risk.

The administrative arrangements for issuing the new permissions are still being considered but the intent, as expressed by the Defence witnesses before the Committee, will be to facilitate a simple 'one input - one output' approach to ensure the process is simple for both exporters and Government agencies to administer. It may still be that, under law, two permits will be required in some circumstances but this will be facilitated through the single approach described.

24. **Definition of intangible export.** Concern was raised by a Committee member as to whether the definition of an 'intangible export' is clear enough for working purposes and whether information going backwards and forwards would create difficulties for industry.

Customs legislation only applies to the export of tangible goods and technology. The new strengthened export control provisions in the Bill will close the existing gap in Australian export controls by regulating the intangible supply of technology and provision of defence services. The Bill does not specifically refer to 'intangible transfers' or 'intangible exports', however, the Wassenaar Arrangement state parties use the term and throughout a period of extensive consultation, Defence has found 'intangible transfers' to be a commonly-used expression that is understood by industry.

25. **Multinational company and intangibles.** An example was given to the Committee to indicate that foreign employees of multinational companies will have to apply for a permit when they are supplying DSGL technology out of Australia,

regardless of the fact that they may be dealing with foreign-origin technology while in transit or visiting temporarily.

This is a correct interpretation of the Bill. The Bill was drafted to apply to any supply of DSGL technology by a foreign person from within Australia or by an Australian person operating overseas. Defence envisages that a broad permit could be obtained by multinational companies to provide coverage for this scenario over a period of time.

26. **Wassenaar exemptions for brokering activities.** The Committee has received evidence arguing that the Wassenaar exemption for brokering under the Bill should be broadened.

The exemption in section 15(4) of the Bill covers transfer of goods and technology from one place within a Wassenaar Arrangement participating state to another place within the same Wassenaar Arrangement participating state. Further broadening the Wassenaar exemption would be a matter of further policy consideration by Government and the Parliament.

27. **Transition period.** The Committee queried several witnesses on the absence of transition periods and grandfathering provisions in the Bill.

The Bill's commencement provisions provide that the Bill will not commence operation until the Treaty comes into force. Once the Bill has passed through the Australian Parliament, the Treaty will not come into force until the US President has ratified the Treaty, the Attorney-General has sent correspondence to the Federal Executive Council and there has been a bilateral exchange of notes to agree upon a Treaty commencement date.

In light of continuing consultations with the university and research sectors, the strengthened export control provisions of the Bill and Regulations may need some changes, and may delay the Bill's passage through Parliament. This, combined with the process above, will give Defence, industry and universities a period of time to prepare to meet the requirements of the Bill.

Transition will not be an issue for the Treaty provisions of the Bill because industry members will not be subject to the Treaty offence provisions of the Bill until they are Approved Community members and choose to transition goods or technology to the Treaty.

28. **Universities Australia's (UA's) nine requested amendments.** As requested by the Committee, Defence has considered UA's nine requested amendments (in italics) and responds as follows:

28.1 *Include in the Bill an objects clause that expressly recognises the importance of education and research industry, and the need to protect and preserve its integrity and continuation for the benefit of the Australian community while also complying with international obligations to prevent proliferation of weapons.*

Defence does not believe that such a provision is warranted. The Bill has not included an objects clause for any sector of Australian industry to expressly recognise the importance of their particular industry and their industry's contribution to the Australian economy and community. Defence is equally committed to ensuring minimal impact on all sectors of the economy while complying with Australia's international obligations.

28.2 *Include in the Bill exceptions to the application of its prohibition on the transfer of knowledge to allow the continuation of university education and research activities, drawing on the UK situation as an example of a possible approach.*

The United Kingdom (UK) legislative framework is different to the Australian framework. The UK's section 8 of the Export Control Act 2002 (UK) limits the UK Secretary of State's power to make 'control orders' regulating activities that communicate ordinary scientific research or publicly available information unless the control order is necessary. In this way the UK Secretary of State can limit activities that fall within ordinary scientific research and publicly available information when it 'is necessary' to do so.

The UK Guidance on Export Control Legislation for academics and researchers in the UK, states that any person wishing to transfer technology by electronic means out of the UK or EU will need a permit.

28.3 *Including in the Regulations an exemption for all teaching as part of an accredited course and for all research except where it assists with a weapons program or weapons proliferation.*

All technology that is already in the 'public domain' will not require a permit. The definition of 'public domain' information will include course work taught in schools or higher education institutions. The draft definitions for 'public domain' and 'scientific research' are attached to this Response and will be released for public consultation.

28.4 *Set out explicit provision defining exempt research, which is sufficiently broad to enable continuation of university teaching and research activity.*

Response is under 28.5 below.

28.5 *Set out explicit provision defining exempt public domain information, which is sufficiently broad to enable continuation of university teaching and research activity.*

As the Bill is currently drafted, technology is defined in section 4 of the Bill. Section 4 provides that the Minister can specify information that does not fall within the scope of technology for the purposes of the

Bill. This will be done by a legislative instrument. The legislative instrument will exclude information that is in the public domain and basic scientific research. This instrument will result in the controls being more likely to apply to post-graduate courses and high-end research. Where DECO determines that a permit is required, the permit system will be flexible enough to provide coverage for a range of activities over a period of time.

As a result of the consultation with the university and research sectors, it is possible that this model will change to include reference to the exemptions for 'public domain' and 'scientific research' in the Bill with full definitions of the terms in the Regulations.

It is important that this exclusion is fully defined in an instrument or the Regulations so that it is flexible and responsive to changes in the domestic and international technology environments and related policy development. The DSGL is an example of a legislative instrument that must be flexible and capable of timely amendment. This includes both the addition of new and emerging technology, and the removal of technology no longer considered at risk. The DSGL allows the Government to comply with changes in international best practice as to which goods and services are controlled. At the same time it is not a volatile list but provides a clear basis around which businesses and universities can plan their business decisions and teaching and research activity. Under existing arrangements, DECO consults with industry members it identifies as being potentially affected by new controls before Australia provides international commitments to implement those controls.

28.6 *Make provision for a new power for the authority to issue binding guidance to the university (and other) sector, drawing on the example of ATO Guidelines.*

It is not necessary for the Bill to include the power to issue binding guidance as the DSGL identifies which goods and technology are subject to export controls. The Wassenaar Arrangement Best Practices for Implementing Intangible Transfer of Technology Controls of 2006 encourage Wassenaar Arrangement participating states to support 'self-regulation by industry and academic institutions that possess controlled technology, including by assisting them in designing and implementing internal compliance programs and encouraging them to appoint export control officers'. Universities will be responsible for identifying those technologies or services that may require a permit under the Bill and DECO will provide assistance in this regard. Any person who supplies technology or provides defence services has this same responsibility.

Applications lodged with DECO will result in an assessment of whether the goods, technology or services are controlled by reference to controlled items listed on the DSGL. On the basis of DECO's

assessment, the Minister may issue a permit to allow the supply of technology or provision of services. In some cases the assessment will be that the technology or services are not controlled. Based on the UK experience of implementing intangible controls, only 1.8% of applications for intangible permits were refused. DECO will issue policy guidance to assist with the understanding of and compliance with the Bill.

28.7 *Amend the record-keeping obligations where a permit is issued to have regard to compliance in a university context, which they currently do not contemplate.*

In light of comments received during the consultation period on the Regulations, Defence recognises there is a need to consider the record-keeping requirements for strengthened export controls across all sectors. Defence is currently exploring options to amend the Regulations to prescribe a minimum level of record keeping for all intangible transfers and impose additional permit conditions when the risk warrants it. Defence is also exploring options to change the Regulations to enable a simpler way for industry and universities to record a series of related transactions over a period of time. To assist universities to understand these requirements, the Regulations' Explanatory Statement will include examples to demonstrate the record-keeping requirements in the university context.

28.8 *Include a defence to the offence under the Bill where due diligence can be demonstrated.*

The offence provisions in Part 2 of the Bill are consistent with export control provisions in the Customs (Prohibited Exports) Regulations 1958 and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*. The provisions will apply to any person supplying technology listed on the DSGL or providing defence services relating to technology or goods listed on the DSGL, including defence industry, universities and academia.

A defence of due diligence is more appropriate for strict liability offences. There are a limited number of strict liability offences, all of which relate to permit conditions and record keeping; being, subsections 13(1), 18(1), 28(5) and 58(6).

As the main offences contained in Part 2 of the Bill are not strict liability offences, they require a higher burden of proof than strict liability offences and the defence of due diligence has not been included. With these, as is the case under other legislation, the prosecution will need to prove fault by demonstrating that the person intended or was reckless to the circumstances of the offence.

Although the Bill does not contain a due diligence defence, Defence would certainly consider any due diligence conducted by the alleged

offender in deciding the most appropriate compliance response. Defence would consider a range of factors; including, what efforts were made to prevent the alleged offence from occurring (e.g. training, policy, procedures, legal advice) and what action has been taken to prevent a re-occurrence.

28.9 *Include in the Bill the touted approach to compliance to provide certainty.*

Defence does not support including its compliance approach in the legislation and will provide administrative guidance on the DECO website.

DECO will continue to adopt a compliance approach that promotes industry's self-assessment. A key element of Defence's approach to compliance is providing education and support to industry so they understand their obligations. This compliance approach encourages voluntary disclosure of breaches.

The compliance model means that DECO will continue to support all industry participants who attempt to comply with the regulatory measures but do not always succeed. More stringent compliance measures will be taken for industry members that either do not want to comply or have actively decided not to comply.

Compliance responses will include client education, comprehensive audits and prosecution.

Further guidance will be provided administratively and the DECO website will be updated to reflect this compliance approach.

29. **Human Papilloma virus example.** One witness used the human papilloma virus as an illustrative example to say that the research would have been controlled and required a permit.

Defence notes that the human papilloma virus is not controlled by the current DSGL amendment. The utility of the human papilloma virus as a biological weapon is too low to warrant its inclusion among the controlled viruses that are currently listed in the DSGL (under item 1C351). Accordingly, there would be no need for a university to apply for a permit to conduct research which supplies technology relating to the virus.

30. **Continuing consultation.** To date, Defence has conducted extensive outreach activities with Universities Australia (UA), including:

- 9 May 2011 – letter (copy enclosed) to UA including two page explanation of the implication for academic sector - no response received;
- 15 July - 26 August 2011 - draft Bill released for public consultation - no submission received from UA;

- 5 August 2011 - invited UA to attend Canberra industry consultation session – UA representative attended;
- 2 November 2011 – Bill entered Parliament;
- early December 2011 - DECO became aware that UA response to the Autonomous Sanctions Bill included UA comment on the Bill;
- 12 December 2011 - DECO officer followed up with UA to ascertain whether UA wanted to supply feedback on the Bill;
- 13 December 2011 - teleconference between DECO officers and UA;
- 22 December 2011 - 17 Feb 12 - public consultation period on draft DTC Regulations;
- 3 February 2012 – teleconference with DECO officers and UA officers;
- 9 February 2012 - UA submission to the Senate on the Bill;
- 17 February 2012 - UA submission on the draft DTC Regulations;
- 1 March 2012 - DECO sent letter to UA addressing concerns raised in teleconference (copy enclosed);
- 1 March 2012 – Michael Shoebridge telephone conversation with Dr Kinnear;
- 13 March 2012 – Angus Kirkwood telephone conversation with Dr Kinnear;
- 13 March 2012 – Michael Shoebridge telephone conversation Dr Kinnear;
- 29 March 2012 – consultation between Defence and Universities Australia;
- 13 April 2012 – Defence distributed Principles and Options document (version 1) to relevant Government agencies, industry, and research and academic sectors;
- 20 April 2012 – Defence distributed Principles and Options document (version 2) to relevant Government agencies, industry, and research and academic sectors;
- 24 April 2012 – consultation between Defence and Universities Australia;
- 27 April 2012 – Defence distributed Principles and Options document (version 4) to relevant Government agencies, industry, and research and academic sectors;
- 10 May 2012 – Universities Australia provided formal response to Principles and Options document distributed on 27 April 2012; and
- 04 - 17 May 2012 – comments received from various members of industry and research sectors.

Defence has also conducted consultations with the research sector and sought comment from the following individuals and organisations on the Principles and Options document:

- Australia's Chief Scientist;
- Australian Academy of Science;
- Academy of Technological Sciences and Engineering;
- Australian Radiation Protection and Nuclear Safety Agency;
- through Department of Industry, Innovation, Science, Research and Tertiary Education: Commonwealth Scientific and Industrial Research Organisation, Australian Research Council, Australian Nuclear Science and Technology Organisation and Australian Institute of Marine Science; and
- through Department of Health and Ageing: National Health and Medical Research Council and public health laboratories.

Noting that any changes that result from Government consideration of these consultations with the academic and research sectors will also affect the industry sector, Defence has also sought comment from the industry members who had provided comment to the Committee on the strengthened export control aspects of the Bill and from the members of the Defence Industry Advisory Panel that has been involved throughout the development of the Bill.

Defence is continuing the consultation process and expects to adjust or increase the options as part of that iterative process. Defence expects feedback from the university, research and industry sectors on further options by the end of June 2012.

Issues from evidence - Australian-US Trade Treaty

31. **Costs to join the Approved Community.** The cost to companies and tertiary institutions to become compliant with the requirements in the Bill will vary depending on existing security arrangements and business practices. The security principles for Australian Approved Community members will be the same as the principles currently employed for the protection of ITAR 'controlled unclassified' articles accessed by Australian companies under existing licence arrangements. For classified items, the security measures currently required will remain unchanged.

Compliance costs and impacts are key issues that have been raised by companies and peak bodies during Defence's consultation program concerning Treaty implementation. Approved Community members will be obliged to meet Treaty standards in terms of ensuring physical security, information technology protection, personnel security clearances and compliance. The way Australia is implementing the Treaty is to work with companies so that existing good business practices and processes will meet much of the compliance obligations.

To minimise overheads, the Government has decided not to charge applicants for the

costs involved in processing applications and Approved Community personnel security clearances. Only relevant areas of nominated facilities will undergo assessment and accreditation, however companies will be responsible for meeting the costs for implementation of any required security controls for those facilities. The entire company does not have to implement controls and those companies currently engaged in defence business will already have many of the required controls in place.

Any initial administrative overheads to become an Approved Community member will have long term effect and should override the continued administrative burden required to obtain individual licences.

Companies will have the option of continuing to operate within the existing Australian and US export control systems.

32. **Extension of Approved Community membership to subsidiaries and contract companies.** Membership of the Approved Community is a voluntary business decision for each individual company to make. Regardless of size, companies must apply separately for Approved Community membership. The assessment of suitability for membership is conducted for the applicant only and does not extend to subsidiaries or support companies. Each company must individually meet requisite conditions and agree to the obligations of membership. Application for membership is a once only activity which, if approved, will enable continuing licence-free trade in eligible goods, technology and services.

The Bill defines an Approved Community member as a body corporate that holds an approval under section 27, or a person who is employed or is engaged under a contract for services by a body corporate that holds an approval under section 27 and who satisfies the requirement prescribed by the Regulations. Employees or contractors who meet these requirements will be approved to access Treaty articles.

A body corporate with section 27 approval could nominate a person who is contracted to them to deliver services, for access to Treaty articles at their approved facilities. This would remove the need for the contractor to become an Approved Community member in their own right, yet still allow them to participate in Treaty activities.

33. **The International Traffic in Arms Regulations (ITAR).** The Committee queried how membership of the Approved Community would remain beneficial as ITAR undergoes reform and what the current and proposed amendments to the ITAR were.

33.1 **Treaty benefit over ITAR reforms.** The ITAR is being reformed according to a set of guiding principles based on four singularities:

- a single export control licensing agency,
- a single control list,
- a single enforcement coordination agency, and
- a single integrated IT system.

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 colleagues in the Treaty Management Board to ensure that the Treaty incorporates the benefits of US export control reform and have received a commitment from the Department of State that the Treaty will always remain beneficial over the ITAR licence regime.

As outlined to Australian companies recently by a senior US Department of State official, the key benefits of the Treaty exemption over standard ITAR are:

- the Treaty is here now, whereas many of the ITAR reforms under consideration may take considerable time to come into effect;
- Approved Community members can use the Treaty exemption without a need to apply and wait for approval – this is important when it comes to bidding on contracts;
- Approved Community members will know the scope and all the conditions upfront, so they can better structure bids/contracts;
- Treaty conditions do not change so compliance procedures are predictable; and,
- membership is valid indefinitely.

The obvious continuing benefit is that applying to join the Approved Community is a once only process, and membership removes the need to continually obtain individual export licences for technology related to projects within the scope of the Treaty; thus saving time and money.

Membership to the Approved Community will also reduce the need for Australian companies to seek individual approvals, such as Technical Assistance Agreements. As indicated in the key points, membership will allow timely access to controlled information which will enable members to bid on eligible US contracts, therefore increasing business opportunities for Australian companies because it removes the need to wait for US access approval.

33.2 **ITAR Amendments**. Amendments to the ITAR are published annually on 1 April. Since 1 April 2011 there have been six amendments to the ITAR;

1. Final Rule on Additional Method of Electronic Payment of Registration Fees

2. Final Rule on Sudan

3. Final Rule on Filing, Retention, and Return of Export Licenses and Filing of Export Information

4. Update on the policy regarding Libya to reflect the United Nations Security Council arms embargoes

5. Final Rule on Dual Nationals and Third-Country Nationals Employed by End-Users

6. Final Rule on Electronic Payment of Registration Fees

33.3 **ITAR Proposed Rules.** The proposed rules to amend the ITAR are enclosed.

Issues from evidence - common to strengthened export control and Treaty provisions

34. **Greater role for the Defence Materiel Organisation (DMO).** One witness encouraged a greater role for the DMO in the development of the Bill.

The DMO has been actively consulted throughout the development of the Bill and is represented at the regular Defence Trade Cooperation Treaty (SES Band 2 level) Meetings, the DTCT Industry Advisory Panel (DIAP) Meetings and the US-Australian Treaty Management Board Meetings. Further, the DMO has chaired a roundtable meeting which brought DMO and Strategic Policy Division representatives together with CEOs of defence prime contractors, several of whom have representatives on the DIAP.

DMO is actively engaged in the procurement of Defence equipment. It is appropriate that the responsibility for developing and implementing the Bill lie with Strategic Policy Division as the current administrators for controls on the export of defence and dual-use goods. Input from the DMO has been valuable in guiding the development of both the legislation and implementing policies. DMO will use the Treaty provisions and will be an important part of the practical operation.

35. **Review of current DECO decisions.** The Committee made mention of the lack of appeal rights in relation to exports that have been prohibited.

Currently the Minister may only prohibit the supply or export of goods or services (that are not regulated by Customs legislation) under the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (the WMD Act) where the Minister has reason to believe or suspect that the goods or services would or might be used or assist in a WMD program. While the WMD Act does not include specific review mechanisms, the Minister's decision to issue a prohibition notice may be

reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). Mr Bill Blick AM PSM is currently conducting a review into the WMD Act and is due to report to the Minister in the middle of this year. The Terms of Reference of review include consideration of whether a process to review decisions made under the WMD Act or regulations should be established.

While there is no scope under Customs legislation for the Minister to prohibit an export of tangible goods or technology listed on the DSGL, a decision to not issue a permit for an export may also be subject to review under the ADJR Act.

The Bill introduces merits review for a number of decisions made under the Bill to ensure a level of accountability and openness in decision making. These decisions will be subject to review of the facts, law and policy considerations of the original decision. There are a limited a number of decisions under the Bill which have specific factors that justify excluding them from merit review. These factors include decisions that are personally vested in the Minister (non-delegable decisions) due to their highly sensitive content and the fact that they involve issues of the highest consequence to Government.

It is important to note that rights of review under the ADJR Act for all decisions made under the Bill are retained.

Yours sincerely

Michael Shoebridge
First Assistant Secretary
Strategic Policy Division
Encl