

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

Purpose of the bill

1.5 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 2008.⁴ The joint standing committee supported the treaty and recommended that binding treaty action be taken.⁵

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

5 Joint Standing Committee on Treaties *Report No. 94*, 14 May 2008, p. 44.

1.6 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

1.7 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 Appendix 2.

1.8 Based on a number of submissions and evidence received at the public hearings, the committee became aware that consultation undertaken by Defence on the proposed legislation was seriously deficient and that as a result Defence was in the dark about likely unintended consequences.⁶ 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 allow adequate time for consultation to occur, and for the committee to consider its progress, 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.

1.9 Concerned about the obvious shortcomings in Defence's consultation process, the committee also approached other academic and research organisations to seek their submissions in regard to the effect of the bill on their work. Nine submissions and eight supplementary submissions have since been received.

1.10 Defence commenced consultation in earnest with the Australian research sector about the proposed legislation during March 2012. The process continued and on 21 June 2012 Defence informed the committee 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. A submission from the Department of Industry, Innovation, Science, Research and Tertiary Education (DIISRTE) dated 2 July 2012 suggested that the consultation process had some way to go before all parties could reach agreement on a solution.

6 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report*, paragraphs 4.1–4.4, 4.11–4.15.

1.11 Unfortunately, as detailed in length in the committee's preliminary report, the parties could not reach agreement on a preferred option.⁷ Defence's submission to the committee on 8 August 2012 and Universities Australia's submission on 10 August 2012 both advised the committee that the consultation process had failed to produce a workable compromise.

Preliminary report

1.12 After considering the evidence, submissions and reports on the consultation process, the committee reached the conclusion that the bill should not proceed. While the committee was conscious of the importance of the legislation, it felt that it was equally important to be certain that the strengthened export control regime would have no unintended or unnecessary adverse consequences for the university and research sectors.

1.13 Taking into account the uncertainty surrounding the bill as drafted, the committee decided to present a preliminary report. This measure was intended to underscore the problems raised by the university and research sectors, allow Defence more time to give close consideration to the issues and to consult further if necessary, especially with the research sector. The preliminary report detailed the committee's concerns, particularly with regard to the need for further consultation. In its preliminary report, the committee urged Defence to undertake further consultation with the university and research sectors.⁸

1.14 The committee endorsed the roundtable approach proposed by Universities Australia and recommended that Defence participate in roundtable discussions involving key stakeholders convened by Universities Australia and chaired by the Chief Scientist, Professor Ian Chubb. The committee also recommended that:

...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.

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.⁹

7 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report*, paragraphs 4.17–4.26.

8 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report*, paragraphs 4.27–4.28.

9 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary Report*, paragraphs 4.27–4.28.

1.15 At that time, the committee was encouraged by all stakeholders' support for the legislation and optimistic that their willingness to work cooperatively would produce a mutually satisfactory solution.

Final report

1.16 On 17 August 2012, soon after the committee had tabled its preliminary report, the Minister for Defence, the Hon Stephen Smith MP (the minister), announced that Mr Ken Peacock AM¹⁰ and Chief Defence Scientist, Dr Alex Zelinsky, had been appointed to conduct further consultations on the bill. They held talks with key university and research sector stakeholders, the Chief Scientist and the DIISRTE.¹¹

1.17 The committee understands that the report prepared by Mr Peacock and Dr Zelinsky formed the basis for two roundtable discussions between Defence and the university and research sectors on 6 and 21 September 2012. The roundtables were convened by the Chief Scientist of Australia, Professor Ian Chubb.

1.18 The outcomes of the roundtable process, including proposed amendments, and the committee's recommendations, are discussed in the following chapters.

ITAR reform

1.19 In its preliminary report, the committee noted that it was aware that the US Government was currently undertaking reforms to its International Traffic in Arms Regulations (ITAR) that could have a direct bearing on the operation of some provisions in the bill.

1.20 Since tabling its preliminary report, the committee has received assurances from the minister and the US Ambassador, His Excellency Mr Jeffrey Bleich,¹² that ITAR reform currently being undertake in the US would not affect the provisions of the treaty. The minister advised the committee:

Regardless of when the various US export control reform initiatives do occur, the Treaty will continue to mean:

10 'Mr Peacock chaired the Defence Trade Cooperation Treaty Industry Advisory Panel that supported the development of the Bill. He is a former Member of Council at the Australian War Memorial and former Executive Chairman, Boeing Australia Limited.' The Hon Stephen Smith MP, Minister for Defence; the Hon Jason Clare MP, Minister for Defence Materiel; the Hon Warren Snowdon, Minister for Defence Science and Personnel, 'Joint Media Release – Government to consult on strengthening Australia's defence export controls', Media Release, 17 August 2012.

11 The Hon Stephen Smith MP, Minister for Defence; the Hon Jason Clare MP, Minister for Defence Materiel; the Hon Warren Snowdon, Minister for Defence Science and Personnel, 'Joint Media Release – Government to consult on strengthening Australia's defence export controls', Media Release, 17 August 2012.

12 US Ambassador, Mr Jeffrey Bleich, *Submission 8A*, pp. 1–2.

- Reduced delivery time for new defence projects;
- Improved sustainment, by permitting transfers within the Approved Community without further Australian or US approvals;
- Improved business opportunities, by permitting Australian and US companies to share technical data without licences; and
- Greater opportunities for Australian companies to participate in US contracts.¹³

1.21 The minister noted further that Defence was working closely with the US Department of State Treaty Management Board to ensure the Treaty incorporates the benefits of US export control reform.¹⁴ According to the minister, both Australia and the US were committed to ensuring that by joining the Approved Community members would continue to enjoy benefits. Furthermore, he indicated that the Approved Community operating within the treaty framework would remain attractive over existing control authorisations, including in the context of the reforms underway. He informed the committee that Defence had received a commitment from the US Department of State that the treaty 'will always remain beneficial over the ITAR licence regime'.¹⁵

Acknowledgements

1.22 The committee thanks all those who assisted with the inquiry. It especially acknowledges the contribution of the Chief Scientist, Chief Defence Scientist and the participants in the roundtables who, in good faith, worked hard to reach agreement. The committee hopes that the cooperation which has led to this solution can continue throughout the implementation of the strengthened export controls.

13 The Hon Stephen Smith MP, Minister for Defence, *Submission 15C*, p. 1.

14 The Hon Stephen Smith MP, Minister for Defence, *Submission 15C*, p. 2.

15 The Hon Stephen Smith MP, Minister for Defence, *Submission 15C*, p. 2.

