

# Chapter 2

## Submissions and issues

### Strengthened Export Controls Steering Group's first report, July 2013

2.1 In its first progress report, the committee noted the progress made by the Strengthened Export Controls Steering Group to set the groundwork for the 24 month implementation period, adding that 'the committee is encouraged by the progress which has been made and looks forward to seeing the Steering Group's first report'.<sup>1</sup>

2.2 The Strengthened Export Controls Steering Group's first report was made public by the Minister for Defence and the Minister for Innovation, Industry and Science. The Steering Group's work, as outlined in its first report, included:

- Establishment of a pilot program to test the Defence Trade Controls legislation and 'identify problems, develop solutions and test the solutions'.<sup>2</sup> The pilot program included eight organisations: Boeing, University of Queensland, Curtin University, Queensland Institute of Medical Research, National Plant Biosecurity Pilot, Electro Optical Systems, Australian Nuclear Science and Technology Organisation, and Australian Cereal Rust Control Program. Each organisation represented a different environment in which to test the legislation.
- Creation of a Legislation and Regulations Assessment Sub-Group to 'support the Steering Group with issues of legal interpretation, particularly to ensure that the legislation, as written, reflects the policy intent'<sup>3</sup> and to advise on possible amendments to the legislation.
- Work relating to a comparison of the Australian export controls regulations with those used in the United States.<sup>4</sup>

### Issues identified in Progress Report No. 1

2.3 Progress Report 1 allowed the committee to check on the progress of the Strengthened Export Controls Steering Group and its work on the implementation of the legislation. Further, the committee was able to take submissions from stakeholders

---

1 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, p. 13.

2 Strengthened Export Controls Steering Group, *First Report*, 4 July 2013, p. 1, <https://exportcontrols.govspace.gov.au/steering-group/semsg-reports/>

3 Strengthened Export Controls Steering Group, *First Report*, 4 July 2013, p. 2, <https://exportcontrols.govspace.gov.au/steering-group/semsg-reports/>

4 Strengthened Export Controls Steering Group, *First Report*, 4 July 2013, p. 2, <https://exportcontrols.govspace.gov.au/steering-group/semsg-reports/>

most interested in the effect of the Defence Trade Controls Act 2012. The committee summarised the concerns about the Steering Group's work raised by submitters as at June 2013:

- confidentiality conditions imposed on Steering Group members;
- the type and amount of information made publicly available on the Steering Group's website; and
- the need for more certainty regarding implementation of the regulations and their impact on industry.<sup>5</sup>

2.4 The committee also recommended that the Defence Export Controls Office (DECO) 'examine the timeliness of processing applications and provide a report to the committee prior to the committee's next six-monthly report'<sup>6</sup> and in particular, the committee asked DECO to examine instances of delays in processing applications and the mechanisms in place to ensure that the implementation of the Defence Trade Controls Act 2012 does not negatively affect the time taken to process applications.

### **Government response to Progress Report No. 1**

2.5 The government response to the committee's recommendation outlined the means by which a case-by-case assessment process is made on all applications to export, noting that 'every effort is made to assess applications within the Government's time frames, and the progress of individual cases is closely monitored'<sup>7</sup>. Further, the response noted that efforts are made to keep applicants aware of the progress of their application through regular updates.<sup>8</sup>

2.6 In regards to mechanisms to ensure that the implementation of the Defence Trade Controls does not impinge on the processing of applications, the government response stated that the current reporting and monitoring mechanisms in place are crucial to ensuring timeliness of process applications. In addition to the current measures, 'Defence will continue to ensure that appropriate resources are allocated to deliver both existing regulatory responsibilities to implement the new strengthened export controls under the Defence Trade Controls Act 2012'<sup>9</sup>.

---

5 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, p. 13.

6 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, p. 14.

7 Government Response to the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, December 2013, p. 2.

8 Government Response to the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, December 2013, p. 3.

9 Government Response to the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, December 2013, p. 3.

2.7 The government response disputed the concerns raised by submitters in the committee's first progress report, in particular asserting that the statement at paragraph 2.16 that Steering Group members are required to sign a confidentiality undertaking was incorrect:

The Steering Group has itself agreed without any requirement being proposed by Defence that official comment should be limited to the Minister for Defence and the Chair of the Steering Group, and also agreed that other Steering Group members are able to (and do) communicate with their stakeholder constituencies.<sup>10</sup>

2.8 Finally, through the government response, Defence offered to brief the committee regarding the progress of the strengthened export control implementation and the next steps of the Steering Group.<sup>11</sup>

### **Strengthened Export Controls Steering Group's second report, December 2013**

2.9 The committee is pleased with the progress made by the Strengthened Export Controls Steering Group in the implementation of the Defence Trade Controls Act 2012. In particular, the committee understands that September 2013 'marked a transition from identifying problems with the legislation as it is currently written, to considering alternative approaches for testing through the Steering Group's Pilot Program.'<sup>12</sup> The committee sees this testing phase as crucial not only to working out the remaining issues with the implementation, but also to finding solutions and, where necessary, examining possible legislative changes.

2.10 In its second report, the Steering Group explained the work involved in the testing phase:

The pilot program is working well and is now expanding its role to testing some proposed solutions to identified problems. These include:

- open licences for lower risk items to lower risk destinations;
- extend maximum licence duration, where appropriate, to 5 years, or the life of a project;
- remove controls on verbal supply;

---

10 Government Response to the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, December 2013, p. 3.

11 Government Response to the Senate Foreign Affairs, Defence and Trade Legislation Committee, *Progress Report No. 1*, December 2013, p. 3.

12 Strengthened Export Controls Steering Group, *Second Report*, 12 December 2013, p. [1], <https://exportcontrols.govspace.gov.au/steering-group/semsg-reports/>

- remove controls on tangible exports for individual use, where the individual is taking controlled technology overseas (for example on a laptop) but will not be sharing that information with another party;
- exempt contractors supporting APS, ADF and Police outside Australia from licences to export/supply DSGL controlled technology;
- refine the scope of brokering controls to better reflect the intent of the legislation that general research activities involving multiple international partners are not captured;
- narrow the scope of the publications offence to Par 1 (the 'Military List' of the DSGL and include a defence of 'due diligence' or equivalent. For rare cases where the Australian Government wishes to prevent a specific publication that releases DSGL controlled technology on Part 2 of the DSGL (the 'Dual Use List'), a prohibition power would be available to the Minister for Defence.<sup>13</sup>

2.11 Other areas of focus for the testing phase include:

- trialling of alternative approaches to the offence of publishing specific details of DSGL technology;
- increasing communication of progress to stakeholders, especially those stakeholders not directly involved in the pilot program, including a Trade Controls Summit in November 2013; and
- development of guidance, awareness raising and training regarding the requirements of compliance under the legislation.<sup>14</sup>

2.12 The report also indicated the next steps for the implementation. At its December meeting, the Steering Group considered regular legislative review. The report noted that '[t]his will be important to ensure that Defence's regulation of exports remains responsive to stakeholder needs over time'<sup>15</sup> and the Steering Group is to provide a recommendation regarding mechanisms for future legislative review. The committee commends this direction and looks forward to seeing the Steering Group's recommendation.

2.13 The Steering Group's December meeting also considered the issue of procedural fairness. The Steering Group's report explained that:

There is scope for Defence to be more transparent about its policies and processes to ensure that Australian exporters have access to procedural

---

13 Strengthened Export Controls Steering Group, *Second Report*, 12 December 2013, p. [2], <https://exportcontrols.govspace.gov.au/steering-group/secsrg-reports/>

14 Strengthened Export Controls Steering Group, *Second Report*, 12 December 2013, pp. [2-3], <https://exportcontrols.govspace.gov.au/steering-group/secsrg-reports/>

15 Strengthened Export Controls Steering Group, *Second Report*, 12 December 2013, pp. [3-4], <https://exportcontrols.govspace.gov.au/steering-group/secsrg-reports/>

---

fairness, including: expected timeframes for export control decisions; access to face-to-face dialogue with the regulator and relevant subject matter experts, especially where Defence intends to recommend that an export be denied; and information about internal and external appeals processes that exporters may access.<sup>16</sup>

2.14 The committee sees significant benefits in the Steering Group conducting further work on the issue of procedural fairness in the export controls process and commends the Steering Group for its work to date.

### **Issues raised in submissions**

2.15 A majority of the submissions received in relation to the progress of the implementation process and the work of the Steering Group report positive achievements. Universities Australia, a participant in the Steering Group, wrote in its submission that '[t]he pilot program established by the steering group to test the impact of the Act is progressing well'.<sup>17</sup>

2.16 The University of Sydney, in its submission, 'acknowledges the much improved approach to consultation adopted by the Department of Innovation and the Department of Defence in recent times, encouraged by the Chief Scientist and the Strengthened Export Controls Steering Group'.<sup>18</sup>

2.17 The NHMRC submission reported that it was pleased with the progress the group is making towards the implementation of the Defence Trade Controls Act 2012. Its submission provided an example of the involvement of the NHMRC in the steering group process:

With the input of a working group NHMRC has drafted a supplement to the Australian Code for the Responsible Conduct of Research (2007) (the Code). This supplement, will be used to provide guidance to universities, medical research institutes, hospitals and the private sector on the dissemination of research findings which may be of concern with respect to national security, or to public health and safety. NHMRC has also developed a second document to provide more specific guidance on dual use research of concern, requirements of the Defence Trade Controls Act 2012 and other relevant legislation. The draft supplement is being used in, and refined through, the pilot projects being supported through the Defence Trade Controls Office. NHMRC is currently seeking feedback on these documents, will incorporate this feedback along with other changes necessitated by any amendments to the legislation.<sup>19</sup>

---

16 Strengthened Export Controls Steering Group, *Second Report*, 12 December 2013, p. [4], <https://exportcontrols.govspace.gov.au/steering-group/secsgr-reports/>

17 Universities Australia, Submission 20, p. 1.

18 University of Sydney, Submission 17, p. 1.

19 National Health and Medical Research Council, Submission 19, p. 1.

2.18 The University of Sydney described the stakeholder consultations being conducted as part of the Steering Group process:

Already in 2014 we have welcomed two productive visits from representatives of the two departments [Department of Industry and Department of Defence]. The first, in February, provided the University with a helpful update about the SECSG's [Strengthened Export Controls Steering Group] current thinking about practical implementation issues. The second, in March, was a very successful briefing seminar co-hosted by the Department of Foreign Affairs and Trade and Defence, which was open to staff from NSW-based universities.<sup>20</sup>

2.19 In its submission Universities Australia also discussed the inclusion of the Department of Foreign Affairs and Trade in communication with the higher education sector on export controls issues:

Universities Australia appreciates the efforts of DECO in working with the Sanctions area of the Department of Foreign Affairs and Trade in improving communication with the university sector. There are a number of obligations that universities are required to meet that are relevant to the Foreign Affairs, Defence and Trade Legislation Committee and greater alignment where possible is important to reducing the regulatory and compliance burden on the sector.<sup>21</sup>

2.20 The NTEU is also positive in its description of the Steering Group's progress. It noted that the recent developments in the implementation process suggested that progress was being made which addressed its previously stated areas of concern.<sup>22</sup> The NTEU highlighted in particular the work done by the Steering Group on a comparison of the Australia export controls regulation with similar regulation in place in the United States, and the Steering Group's decision to examine a risk based approach to export controls.<sup>23</sup>

2.21 Universities Australia and the University of Sydney both stressed the importance of continuing the solid consultative work of the Steering Group with regards to any proposed legislative amendments. Universities Australia argued:

However it is vital that the draft amended legislation is provided to the pilot institutions with sufficient time for testing. It is likely that further issues with the implementation of the Act will be highlighted as the proposed solutions are tested. There is still considerable work and consultation to be undertaken before the end of the transition period and stakeholders need to be given sufficient time to put in place the necessary procedures.<sup>24</sup>

---

20 University of Sydney, Submission 17, p. 1.

21 Universities Australia, Submission 20, p. 1.

22 National Tertiary Education Union, Submission 18, p. 1.

23 National Tertiary Education Union, Submission 18, p. 2.

24 Universities Australia, Submission 20, p. 1.

2.22 The University of Sydney agreed with Universities Australia, differing only in that its submission suggested that a time frame of four to six weeks be allowed for organisations to consider an exposure draft of any proposed legislative amendments.<sup>25</sup>

2.23 However the University of Sydney indicated that the goodwill of the Steering Group consultative process could be built on into the future, and not just in the short term for legislative amendments at the end of the implementation period:

It is important also that a mechanism is established to keep the legislation responsive to changing circumstances and stakeholder needs, and to ensure alignment with international control regimes. This could be achieved by establishing a process for regular review of the operation of the legislation, perhaps by a standing expert committee with research sector representatives.<sup>26</sup>

2.24 The Macquarie University and the Computing Research and Education (CORE) organisation submissions expressed views contrary to the positive comments in the majority of submissions. Macquarie University wrote that they:

...still feel strongly that open and timely communication is required throughout the drafting and finalising of the Defence Trade Controls Act 2011. Several members of our staff, including high level researchers and research support staff, have indicated they still feel ill-equipped to address the scope of the Defence Trade Controls Act 2011 and would like more consultation sessions.<sup>27</sup>

2.25 Macquarie University also argued for more education and information sessions so as to ensure compliance and understanding of staff to the export control requirements. They provided a letter from the Department of Biological Sciences in regards to specific concerns they have about the effect of the Defence Trade Controls Act 2011 on two current research projects.<sup>28</sup>

2.26 CORE's concerns related to offences under the Defence Trade Controls Act 2012; categories of research; changes over time to the DSGL; and restrictions on intangible transfers of technology.<sup>29</sup> The committee notes the reports of the Steering Group in relation to the matters being tested in the pilot programs and considers that the concerns raised by CORE may be already under consideration by the Steering Group.

---

25 University of Sydney, Submission 17, p. 1.

26 University of Sydney, Submission 17, p. 2.

27 Macquarie University, Submission 21, p. 1.

28 Macquarie University, Submission 21, p. 3.

29 Computing Research and Education, Submission 16, pp. 1-2.

2.27 The committee suggests that Defence work with the Macquarie University and the CORE organisation to ensure that these organisations can access the same consultation as other stakeholders in the steering group process.

2.28 The committee did not receive any formal submissions from industry participants in the steering group pilot program or from other industry stakeholders as part of its preparation of this second progress report. The committee subsequently approached industry for feedback and obtained assurances that progress is being made to address its concerns. One industry stakeholder did, however, provide the committee with information regarding increased difficulties in progressing through the DECO approvals process.

### **Defence Trade Controls Regulations 2013**

2.29 In its first progress report, the committee outlined submitters' concerns that there had been delay in publishing the final Defence Trade Controls Regulations and that this had caused uncertainty for industry and the education and research sectors.

2.30 The committee understands that, due to the possibility of legislative amendments to the Defence Trade Controls Act 2012, there will need to be accompanying changes to the regulations. The committee refers Defence and the Steering Group to the comments made by submitters which are outlined above, and expects that any changes to the regulations will be included as part of the consultation process overseen by the Steering Group.