

The Senate

Foreign Affairs, Defence and Trade
Legislation Committee

Implementation of the Defence Trade Controls
Act 2012

Progress Report no. 2

May 2014

© Commonwealth of Australia 2014

ISBN 978-1-74229-998-3

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:
<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>.

Printed by the Senate Printing Unit, Parliament House, Canberra

Members of the committee

Core members

Senator Alan Eggleston, LP, WA (Chair)
Senator the Hon Ursula Stephens, ALP, NSW (Deputy Chair)
Senator Anne McEwen, ALP, SA
Senator David Fawcett, LP, SA
Senator Sean Edwards, LP, SA
Senator Peter Whish-Wilson, AG, TAS

Secretariat

Mr David Sullivan, Committee Secretary
Mr Owen Griffiths, Principal Research Officer
Miss Jedidiah Reardon, Senior Research Officer
Ms Penny Bear, Research Officer
Ms Ophelia Tynan, Administrative Officer

Senate Foreign Affairs, Defence and Trade 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/senate_fadt

Table of Contents

Members of the committee	iii
Chapter 1.....	1
Introduction	1
Background.....	1
Previous reports	1
Defence Trade Controls Act 2012	2
Second report—ongoing scrutiny	3
Chapter 2.....	5
Submissions and issues	5
Strengthened Export Controls Steering Group's first report, July 2013	5
Issues identified in Progress Report No. 1	5
Government response to Progress Report No. 1	6
Strengthened Export Controls Steering Group's second report, December 2013 ..	7
Issues raised in submissions	9
Defence Trade Controls Regulations 2013	12
Chapter 3.....	13
Conclusion and recommendations	13
Conclusion	13
Appendix 1	17
Public submissions	17
Appendix 2	19
Government Response to the Progress Report no. 1	19

Chapter 1

Introduction

Background

1.1 On 10 October 2012, the Senate Foreign Affairs, Defence and Trade Legislation Committee tabled its final report on the provisions of the Defence Trade Export Controls Bill 2011. In this report, the committee recommended that:

In light of the ongoing concerns held by stakeholders, the committee believes that implementation of the bill would benefit from further scrutiny. The committee therefore recommends that during the 24 month transition period, the Senate Foreign Affairs, Defence and Trade Legislation Committee conduct a six-monthly examination of progress of the implementation of the provisions of the bill and report to the Senate.¹

1.2 On 11 October 2012, and in accordance with this recommendation and standing order 25(2)(a), the committee formally undertook to monitor the implementation of the provisions of the bill. The committee resolved that, during the transition period following the enactment of the bill, it would conduct regular six-monthly inquiries into the implementation of the provisions of the legislation and report its progress to the Senate. This is the second six-monthly report.

1.3 The Defence Trade Controls Bill 2011 was passed on 1 November 2012, with amendments. The bill received Royal Assent on 13 November 2012. Its companion bill the Customs Amendment (Military End-Use) Bill 2011 also received Royal Assent on 13 November 2012.

1.4 Draft regulations accompanying the bill, the Defence Trade Controls Regulations 2012, were circulated by the Department of Defence for industry consultation between 22 December 2011 and 17 February 2012. The regulations were made on 30 May 2012 and commenced at the same time as the relevant sections of the Defence Trade Controls Act 2012 (the Act).²

Previous reports

1.5 The committee's preliminary report detailed the flaws in the consultation undertaken by Defence on the Defence Trade Controls Bill 2011. Even after the committee recommended Defence undertake urgent consultation with the university and research sectors, the parties could not reach agreement on a preferred option.³ As

1 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Final Report*, recommendation 2.

2 Defence Trade Controls Regulation 2013.

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

at August 2012, Defence and Universities Australia advised the committee that the consultation process had failed to produce a workable compromise.

1.6 Conscious of the importance of the legislation, but insistent that the strengthened export control regime should have no unintended or unnecessary adverse consequences for the university and research sectors, the committee recommended further consultation between Defence and the university and research sectors. Universities Australia convened a series of roundtable discussions chaired by Professor Ian Chubb, the Chief Scientist, which involved all key stakeholders, including Defence.

1.7 On 17 August 2012, soon after the committee had tabled its preliminary report, the then Minister for Defence, the Hon Stephen Smith MP, announced that Mr Ken Peacock AM⁴ and Chief Defence Scientist, Dr Alex Zelinsky, had been appointed to conduct further consultations on the bill, including two further roundtables on 6 and 21 September 2012.

1.8 The committee's final report, tabled in October 2012, took into account the report of Mr Peacock and Dr Zelinsky and the minister's response.⁵ Mr Peacock and Dr Zelinsky recommended amendments to the bill, including a 24 month implementation period during which the provisions of the bill would not apply and a steering group to examine the concerns of stakeholders. These amendments to the bill, agreed to by the Senate and adopted by the House of Representatives, included the establishment of the Strengthened Export Controls Steering Group.

1.9 The committee's first Progress Report on the progress of the implementation of the provisions of the Defence Trade Controls Act 2012 was tabled on 27 June 2013.

Defence Trade Controls Act 2012

1.10 The Act gives effect to the Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation. Signed in 2007 by Prime Minister John Howard and President George W Bush, the treaty was examined by the Australian Joint Standing Committee on Treaties in 2008.⁶ The treaty was ratified on 16 May 2013 when the Minister for Defence, Mr Stephen Smith MP, and His Excellency Jeffrey Bleich, the United States

4 '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.

5 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Final Report*.

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

Ambassador to Australia, exchanged diplomatic notes. The implementing provisions for the treaty in the Act came into effect on 6 June 2013.⁷ Companies are now able to join the Australian Approved Community.⁸ Membership of the Approved Community allows member companies to 'export or transfer Treaty Articles without requiring separate export licenses or permits from either country [the United States or Australia]'.⁹

1.11 In addition to giving effect to the treaty, the Act also:

- introduces controls on the supply of Defence and Strategic Goods List (DSGL) technology and services;
- 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.

Second report—ongoing scrutiny

1.12 As part of its ongoing scrutiny of the implementation of the Act, the committee wrote to organisations and individuals who had made submissions to its previous inquiries or expressed interest in the Act. The committee also wrote to relevant ministers and departments. Since the tabling of its Progress Report No. 1 in June 2013, the committee has received 6 submissions—these are listed at Appendix 1 and published on the committee's website.

1.13 The committee received the second report of the Strengthened Export Controls Steering Group on 25 February 2014. The government response to the recommendation made in the committee's Progress Report No. 1 was tabled on 8 January 2014.

7 Department of Defence website, 'Australia-United States Defence Trade Cooperation Treaty, <http://www.defence.gov.au/UStradeTreaty/index.htm>, (accessed 26 April 2014).

8 Department of Defence website, 'Australia-United States Defence Trade Cooperation Treaty, <http://www.defence.gov.au/UStradeTreaty/index.htm>, (accessed 26 April 2014).

9 Frequently Asked Questions – Australia-US Defence Trade Cooperation Treaty, <http://www.defence.gov.au/ustradetreaty/faqs.asp> (accessed 26 April 2014).

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'.¹

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'.² 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'³ 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.⁴

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/secs-g-reports/>

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

4 Strengthened Export Controls Steering Group, *First Report*, 4 July 2013, p. 2, <https://exportcontrols.govspace.gov.au/steering-group/secs-g-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.⁵

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'⁶ 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'⁷. Further, the response noted that efforts are made to keep applicants aware of the progress of their application through regular updates.⁸

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 2012'⁹.

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.¹⁰

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.¹¹

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.'¹² 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/secsg-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.¹³

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.¹⁴

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'¹⁵ 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.¹⁶

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'.¹⁷

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'.¹⁸

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.¹⁹

16 Strengthened Export Controls Steering Group, *Second Report*, 12 December 2013, p. [4], <https://exportcontrols.govspace.gov.au/steering-group/secsrg-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.²⁰

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.²¹

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.²² 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.²³

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.²⁴

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.²⁵

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.²⁶

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.²⁷

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.²⁸

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.²⁹ 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.

Chapter 3

Conclusion and recommendations

Conclusion

3.1 The implementation of the Defence Trade Controls Act 2012 is nearing the halfway point. The committee is pleased to note the work done to date and, in particular, the consultative atmosphere created by the Strengthened Export Controls Steering Group.

3.2 At this halfway mark, with legislative amendments and consequent changes to the regulations being examined, the committee notes the concerns raised by submitters that any legislative amendments will be subject to thorough consultation. The committee wholeheartedly supports the words of Professor Chubb in his letter to the Minister for Defence and the Minister for Industry, covering the second Strengthened Export Controls Steering Group report:

The Steering Group considers that it is important that the testing process also includes revised draft legislation, so that legislative amendments recommended by the Steering Group have already been tested in practice and exposed to broader stakeholder comment. I seek your support in enabling this aspect of testing to occur in a timely way.¹

3.3 The committee is also supportive of the Steering Group's next steps regarding procedural fairness and regular legislative review which is responsive to stakeholder needs over time. The committee urges Defence to be mindful of the consultation issues which were detailed in the committee's Interim Report on the Defence Trade Controls Bill 2011 and to support the Steering Group in its efforts to ensure any legislative amendments will be workable for all stakeholders.

3.4 The University of Sydney argued in its submission that at least four to six weeks are required for stakeholders to consider an exposure draft of any amendment bill. The committee agrees with this opinion and expects Defence to do everything it can to facilitate adequate time for stakeholders to consider any legislative amendments. The committee is also mindful that any legislative amendments will affect the Defence Trade Controls regulations. It strongly advises Defence to ensure that there is an appropriate amount of time allocated to revising and testing any changes to the regulations as a result of proposed legislative amendments.

3.5 From the evidence received from the steering group, the committee is satisfied that the steering group process is working to ameliorate the concerns of all stakeholders, including industry. It is with concern, however, that the committee notes

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

that similar progress is not being made with DECO. Correspondence received confidentially by the Committee indicates that in one instance at least DECO is amending some of its current processes, but that unlike the steering group, DECO seems intent on increasing the scope of items included on the military list and raising the barriers to obtaining export approval. The confidential example provided indicates that in this case, civilian items that have had been exported for some years to low risk destinations are being restricted.

3.6 The committee notes that DECO has subsequently met with industry to work through these specific issues and that significant progress appears to have been made to alleviate its concerns. The committee, however, expects that DECO will continue to work to implement the findings of the pilot program and will align its current processes with the intent of the steering group's work, seeking where possible to minimise the classification of items as military and optimise certainty for companies seeking approvals.

3.7 Overall, the committee believes that Professor Chubb and the Strengthened Export Controls Steering Group, the organisations involved in the pilot program, as well as DECO and Defence, should be commended for the way in which they have been able to work together on the implementation of the Defence Trade Controls Act 2012. In the committee's view, the consultative model of the Steering Group has significant benefits and the committee suggests that Defence look to this model as it moves forward. The goodwill created by the Steering Group process is also valuable and the committee urges that Defence use this situation to create a lasting consultative mechanism for communicating with stakeholders about future changes to export controls measures.

3.8 The committee acknowledges the hard work done by the Steering Group to build goodwill in the consultative process and asks that Defence build on this by reporting to the committee regarding the process it will use for consulting stakeholders on any proposed legislative amendments and changes to the regulations for the Defence Trade Controls Act 2012.

Recommendation 1

The committee recommends that Defence report to the committee on the process it will use for consulting stakeholders on any proposed legislative amendments and changes to the regulations for the Defence Trade Controls Act 2012 before the committee's next six-monthly review report. The committee expects the report will help reassure stakeholders that the consultative process embodied by the Steering Group will not fail at the conclusion of the implementation period.

Recommendation 2

Further to Recommendation 1 in the committee's first progress report, the committee is keen to ensure that the intent of the steering group guides any changes in the day-to-day processes of DECO as this will assist transition to the provisions of the Defence Trade Controls Act 2012. The committee therefore

recommends that DECO examine the processing of applications and licences in relation to measures being taken to implement the findings of the pilot program and provide a report to the committee prior to the committee's next six-monthly report. The committee is particularly interested in how DECO will implement the steering group findings as regards industry applications.

Chair
Senator Alan Eggleston

Appendix 1

Public submissions

- 1 The University of Sydney
- 2 Department of Industry Innovation, Science, Research and Tertiary Education
- 3 Embassy of the United States of America
- 4 National Tertiary Education Industry Union
- 5 Universities Australia
- 6 Society of University Lawyers
- 7 Mr Peter Goon, Air Power Australia
- 8 Biddington Research Pty Ltd
- 9 Professor Ian Chubb AC
- 10 AI Group Defence Council
- 11 National Tertiary Education Union
- 12 The University of Sydney
- 13 Universities Australia
- 14 National Health and Medical Research Council
- 15 Computing Research & Education
- 16 CORE Australasia
- 17 University of Sydney
- 18 National Tertiary Education Union
- 19 National Health and Medical Research Council
- 20 Universities Australia
- 21 Macquarie University

Appendix 2

Government Response to the Progress Report no. 1



Australian Government

**Senate Standing Committee on Foreign Affairs,
Defence and Trade**

Legislation Committee

**Progress Report No.1 into the *Implementation of
the Defence Trade Controls Act 2012***

Government Response

December 2013

Recommendation 1

The committee recommends that DECO examine the timeliness of processing applications and provide a report to the committee prior to the committee's next six-monthly report. The committee is particularly interested in instances in which there have been delays in processing applications, and what mechanisms are in place to ensure the implementation of the Act does not cause problems in processing applications.

Government Response

Agree

Australia takes seriously its international counter proliferation obligations, using Australian export control laws to ensure Australia exports responsibly. The Defence Export Control Office (DECO) conducts a robust case-by-case assessment process on all applications to export:

- goods controlled for export under Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*;
- non-regulated goods or services that may be prohibited for export under the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*; and
- non-regulated goods that may contribute to a military end-use that would prejudice the security, defence or international relations of Australia, which may be prohibited under section 112BA(1) of the *Customs Act 1901*.

Every effort is made to assess applications within the Government's time frames, and the progress of individual cases is closely monitored.

- For goods controlled under Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958* DECO aims to finalise cases within 15 working days for routine applications, and within 35 working days for applications requiring interagency referral. In 2012, DECO assessed 2960 export applications. Of these 76% were completed within 15- 20 working days, 15% were completed within 20-25 working days, 5 % were completed within 30-35 working days, and 4% were completed over 35 working days.
- For goods or services which may be prohibited for export under the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* and non-regulated goods that may contribute to a 'military end-use', DECO aims to finalise assessments within 15 working days for routine applications and 35 working days for those requiring interagency referral. In 2012, DECO conducted 253 assessments of non-regulated goods. Of these 86% were completed within 15 working days, 10% were completed within 35 working days, and 4% were completed over 35 working days.

DECO provides a fortnightly report to the Minister for Defence and Defence senior management, showing the status of all applications referred for interagency consideration. These are complex and sensitive cases that are pending advice from several agencies, and/or additional information from the applicant. The complexity of these cases is generally due to the sensitivity of the items, the end-user and/or the end-use destination.

Applicants are consulted early and throughout the process and are provided the opportunity to present all relevant information. Where it is determined that an application requires inter-agency consultation, applicants are provided written advice explaining the process and that time frames may extend beyond 35 days. Applicants are provided with regular updates throughout the process.

Regarding the Committee's question about mechanisms that are in place to ensure the implementation of the Act does not cause problems in processing applications, the reporting and monitoring referred to above is key to ensuring timeliness, as is the applicants' constructive and responsive participation. Ministerial and senior official oversight of processing times and sensitive cases provides visibility and the ability to intervene if performance reduces. Defence will continue to ensure that appropriate resources are allocated to deliver both existing regulatory responsibilities and to implement the new strengthened export controls under the *Defence Trade Controls Act 2012*.

Defence is working closely with the Strengthened Export Controls Steering Group to ensure that strengthened export controls are implemented in a way that minimises burden for regulated parties, and that is manageable and sustainable from a regulatory perspective. In May 2013 DECO introduced an online application processing system that will support the requirements of both the existing and new regulation.

Defence acknowledges the Committee's comments about the importance of open and effective communication at paragraphs 2.13-2.18, 2.24 and 3.2, and in Senator Ludlum's additional comments. Steering Group members, the Defence Export Control Office, and representatives from the Department of Innovation are communicating with stakeholder groups, including sectoral peak bodies. The assertion at paragraph 2.16 that Steering Group members have been required by Defence to sign confidentiality undertakings is not correct. 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. Information about the Steering Group's progress is regularly added to its website following every meeting. At its 20 June 2013 meeting, the Steering Group considered a stakeholder engagement plan, which outlines regular communication activities over the two year transition period. This plan is publicly available at <https://exportcontrols.govspace.gov.au/communication>. Defence will work with stakeholders to progressively refine and implement this plan.

Detailed information on the implementation of strengthened export controls to date is contained in the Steering Group's first report on progress to the Minister for Defence and Minister for Research, which was provided to the Committee on 19 August 2013, and is publicly available at <https://exportcontrols.govspace.gov.au/steering-group/secsg-reports>.

Defence would welcome the opportunity to brief the Committee on the progress of strengthened export control implementation to date, and next steps. Defence will also work with the Committee secretariat to ensure that the timing of future six monthly reports are aligned, so that in future the Committee can consider the Strengthened Export Controls Steering Group's six-monthly report before releasing its own report.