

Chapter 1

Introduction

Background

1.1 In November 2011, the government introduced the Defence Trade Controls Bill 2011 into parliament. Pursuant to a report of the Senate Selection of Bills Committee, the provisions of the bill were referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 12 April 2012.¹ The committee's reporting date was later extended to 15 August 2012.²

1.2 In a preliminary report in August 2012, the committee expressed strong concern that the consultations undertaken by the Department of Defence in relation to the bill had been inadequate, and that as a result, the department was in the dark about likely unintended and adverse consequences for the university and research sectors.

1.3 At the committee's request during the inquiry process the department had commenced consultations in March 2012, but these failed to produce agreed outcomes, and raised new issues. In August 2012, the department and Universities Australia advised the committee that the consultation process had failed to produce a workable compromise. The committee reached the firm view that more groundwork was needed to refine the legislation, and recommended that the Senate defer consideration of the bill until the necessary consultations were complete.³

1.4 On 10 October 2012, the committee tabled its final report on the provisions of the bill, taking into account the report of further roundtable consultations conducted in September. The committee recommended various amendments to the bill and particularly supported the inclusion of a 24-month transition period during which its offence provisions would not take effect, while consultations continued. The committee also encouraged the implementation of related agreements reached between the department and stakeholders, including the establishment of a Strengthened Export Controls Steering Group (the steering group).

1.5 In its report, the committee also recommended an ongoing monitoring role for itself:

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

1 *Journals of the Senate*, No.67, 10 November 2011, p. 1823.

2 *Journals of the Senate*, No.87, 22 March 2012, p. 2353.

3 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Preliminary report*, August 2012, p. 43.

Committee conduct a six-monthly examination of progress of the implementation of the provisions of the bill and report to the Senate.⁴

1.6 On 11 October 2012, in accordance with this recommendation and with Senate 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.

1.7 The *Defence Trade Controls Act 2012* (the Act) was passed in November 2012. Related regulations, the Defence Trade Controls Regulations 2012, commenced at the same time as the relevant provisions of the Act. The two-year transition period for the offence provisions under the Act commenced on 16 May 2013.

The Defence Trade Controls Act 2012

1.8 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 2007* (the treaty), which entered into force on 16 May 2013.⁵ The purpose of the treaty is to improve the efficiency of transfers of military and dual-use goods and technology between Australia and the United States by facilitating the export of controlled goods within an 'approved community', without the need for an export licence.

1.9 In addition to giving effect to the treaty, the Act also aims to close gaps in Australia's defence exports regime by controlling non-tangible (electronic) exports, publication and brokering. The Act:

- introduces controls on the intangible export from Australia of technology and services related to military and dual-use goods and technology, as specified on the Defence and Strategic Goods List (DSGL);
- controls publication of controlled information, on the internet or otherwise, by anyone located in Australia or by an Australian citizen or resident located anywhere;
- creates a registration and permit regime for brokering (ie acting as an agent or intermediary for the transfer between destinations outside Australia) of DSGL goods, technology and related services, by anyone located in Australia or by an Australian citizen or resident located anywhere; and
- introduces a number of criminal offences to enforce the new provisions.

Previous progress reports

1.10 The committee has tabled two previous progress reports on the implementation of the Act, the first on 27 June 2013 and the second on 14 May 2014.

4 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Final report*, October 2012, p. 19.

5 [2013] ATS 17.

First progress report

1.11 In its first progress report the committee was encouraged by the attempts being made to resolve outstanding concerns about the Act through the work of the steering group, chaired by the Chief Scientist, Professor Ian Chubb, and comprising representatives of the university sector, industry and government. In addition to meetings and research, the steering group had launched a pilot program to test the impact of the Act on eight organisations in the research and industry sectors, and accompanying training.

1.12 While participating organisations told the committee that they saw the work of the steering group as positive, the committee found that many stakeholders still had reservations about the implementation process, including concerns about the high level of confidentiality imposed upon the proceedings of the steering group and the amount of information made publicly available, and the need for more certainty about implementation of regulations under the Act and their impact on industry.

1.13 The committee also noted concerns about the length of time taken by the Defence Export Controls Office (DECO) to process permit applications, and recommended that DECO report further to the committee on delays experienced and the mechanisms in place to ensure that implementation of the Act did not cause problems with processing applications.⁶

Second progress report

1.14 By the time of the committee's second progress report in June 2014, it had received two reports from the steering group, as well as a response from the government to its first progress report.

1.15 The committee expressed satisfaction with the continued headway made by the steering group, observing that a majority of the submissions received from the research sector were positive about the steering group's achievements and about the government's improved approach to consultation under the encouragement of the steering group. The committee saw the consultative model adopted by the steering group as one with significant benefits, and one which had yielded valuable goodwill.

1.16 The committee noted in particular that in September 2013 the steering group had advanced from identifying problems with the Act, to considering alternative approaches to be tested through the pilot program. Such alternative approaches included:

- open licences and longer-duration licences where appropriate to a lower level of risk;
- removal of controls in certain areas such as verbal supply, export for individual use, and supply to Australian government agencies;
- refining brokering and publication controls;

6 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Implementation of the Defence Trade Controls Act 2012: Progress report no. 1*, June 2013, p. 14.

- increasing communication with stakeholders, especially those not directly involved in the pilot program; and
- development of guidance, awareness raising and training programs to assist organisations' compliance with the legislation.

1.17 The committee saw the testing of new approaches as a crucial phase for finding solutions to the outstanding implementation issues, including potential legislative changes. The committee welcomed work being undertaken at the same time to ensure procedural fairness for applicants in the export controls process.

1.18 The committee drew attention to the views of some submitters stressing the importance of ensuring time for sufficient consultation on any proposed amendments to the legislation (and regulations). The committee urged Defence to be mindful of the consultation issues that had arisen in 2011 and to 'do everything it can to facilitate adequate time for stakeholders to consider any legislative amendments' and to test any consequent regulatory changes.⁷

1.19 In addition, the committee commended the steering group's finding that regular legislative review should be put in place for the future, to ensure that export controls remained responsive to stakeholder needs over time. The committee urged Defence to 'create a lasting consultative mechanism for communicating with stakeholders about future changes to export controls measures'.⁸ The University of Sydney suggested the creation of a standing expert committee including representatives of the research sector.⁹

1.20 While the committee was satisfied that the steering group process was working to ameliorate the concerns of all stakeholders, it expressed concern based upon confidential evidence received from industry that 'similar progress is not being made with DECO', which 'seems intent on increasing the scope of items included on the military list and raising the barriers to obtaining export approval'. The committee noted that DECO was meeting with industry to work through these issues and stated its expectation that DECO would 'align its current processes with the intent of the steering group's work'.¹⁰

1.21 The second progress report made two recommendations:

Recommendation 1

The committee recommends that Defence report to the committee on the process it will use for consulting stakeholders on any proposed legislative

7 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Implementation of the Defence Trade Controls Act 2012: Progress report no. 2*, May 2014, p. 13.

8 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Implementation of the Defence Trade Controls Act 2012: Progress report no. 2*, May 2014, p. 14.

9 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Implementation of the Defence Trade Controls Act 2012: Progress report no. 2*, May 2014, p. 11.

10 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Implementation of the Defence Trade Controls Act 2012: Progress report no. 2*, May 2014, p. 14.

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.¹¹

1.22 At the time of this report, the committee had received no response from the government to its second progress report.

Recent developments

The Defence Trade Controls Amendment Bill 2015

1.23 On 17 December 2014 the Department of Defence issued an exposure draft of the Defence Trade Controls Amendment Bill 2015. The department described the draft as the result of the consultation process undertaken with stakeholders during the two-year consultation period on the 2012 Act. The department invited public comment on the draft by 30 January 2015, adding that '[i]nformal stakeholder engagement and consultation will continue across all sectors after the formal period of consultation has concluded'.¹²

1.24 A series of public consultations on the draft bill were convened by DECO in all capital cities between 19 and 30 January. DECO received more than 30 written submissions to its public consultation process. The steering group arranged its own stakeholder consultation on 17 February.

1.25 The Defence Trade Controls Amendment Bill 2015 (the bill) was introduced into parliament on 26 February 2015, passed by the House of Representatives on 4 March 2015,¹³ and introduced into the Senate the same day.

1.26 The provisions of the bill, contained in Schedule 1, amend the *Defence Trade Controls Act 2012*. The explanatory memorandum (EM) to the bill outlines a

11 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Implementation of the Defence Trade Controls Act 2012: Progress report no. 2*, May 2014, pp 14-15.

12 Department of Defence, 'Public comment sought on Defence Trade Controls Amendment Bill 2015', Media Release, 17 December 2014.

13 House of Representatives, *Votes and Proceedings*, No. 102, 4 March 2015, p. 1172.

substantial number of amendments to the Act. Of particular interest to the committee, the key amendments include:

- providing an additional 12-month implementation period before the offence provisions and record-keeping requirements commence operation. This is consistent with the recommendations of several submitters to the department's consultation process, and with the view of the steering group;
- providing two new exceptions to the supply offence in existing section 10 of the Act:
 - i. for the oral supply of Defence and Strategic Goods List (DSGL) technology, where the supply is not the provision of access to DSGL technology and is not for use in a Weapons of Mass Destruction program or for a military end use;
 - ii. for the supply of dual-use (Part 2) DSGL technology where the supply is preparatory to the publication of Part 2 DSGL technology;
- extending the exception to the offence of supplying DSGL technology without a permit to, or from, certain members of the government, security and law enforcement organisations; and
- reviewing the operation of the Act (except for Parts 3 and 4) which is to be initiated by the minister two years after the commencement of section 10 (the supply offence provisions), and subsequently at intervals of no longer than five years. The persons undertaking the review must provide a written report to the minister and the minister must table a copy in each house of parliament within 15 sitting days.¹⁴

The third report of the steering group

1.27 The steering group submitted its third report to the Minister for Defence and the Minister for Industry and Science on 20 February 2015, and it was provided to the committee on 25 February.

1.28 The steering group reflected positively on the achievements of the consultation process and the resulting amendment bill:

For Australia's export controls to be effective from a national security perspective, industry and research organisations must be able to understand and comply with them. Achieving practical, risk-based regulation without compromising its intent has been our focus in developing and testing the alternative approaches that form the basis of the Defence Trade Controls Amendment Bill.

The Amendment Bill addresses issues identified through the Steering Group process, which are covered in our previous reports. The measures in the Amendment Bill are the result of significant collaboration between your departments and industry and university stakeholders through pilots, working groups, case studies and other consultative activities over the past

14 Explanatory Memorandum, pp 2-4.

two years. The Steering Group wishes to recognise the significant contributions of many companies, universities, research organisations and peak bodies in this respect.

This approach has improved the legislation without diminishing its intent...¹⁵

1.29 The steering group reported that in its consultation with industry, university and research sector stakeholders on 17 February 2015, issues discussed included:

- the scope of the supply, brokering and publication controls;
- the duration of the transition period and stakeholder mechanisms to support implementation of the Act;
- clarification and guidance on definitions, and the criteria under which exports are assessed;
- compliance and liabilities; and
- legislative review.

1.30 The steering group advised that its forum 'confirmed broad stakeholder support for the bill and the consultation process undertaken'.¹⁶

1.31 The steering group also emphasised the importance of the implementation phase ahead, and of ongoing consultation in that regard. Professor Chubb advised ministers that the steering group process had built productive relationships between stakeholders, and that these would 'become even more important as implementation of the new export controls proceeds'. The steering group undertook to provide the ministers with separate advice on the form stakeholder engagement may take over the first two years of implementing the new legislation.¹⁷

1.32 The steering group noted that stakeholders needed time to work with Defence on compliance arrangements, including developing guidance materials, amending business processes and training staff, to ensure their ability to comply with the legislation before its offence provisions came into effect. This was a particular issue for bodies dealing with dual-use rather than defence technologies, such as researchers, and for small and medium enterprises, who had no previous experience with export

15 Letter from Professor Ian Chubb AC, Chief Scientist and Chair, Strengthened Export Controls Steering Group to the Hon Kevin Andrews MP, Minister for Defence and the hon Ian Macfarlane MP, Minister for Industry and Science, 20 February 2015, at <https://exportcontrols.govspace.gov.au/files/2013/08/Third-Report-20-February-2015.pdf>, p. 1.

16 Letter from Professor Ian Chubb AC, Chief Scientist and Chair, Strengthened Export Controls Steering Group to the Hon Kevin Andrews MP, Minister for Defence and the hon Ian Macfarlane MP, Minister for Industry and Science, 20 February 2015, p. 2.

17 Letter from Professor Ian Chubb AC, Chief Scientist and Chair, Strengthened Export Controls Steering Group to the Hon Kevin Andrews MP, Minister for Defence and the hon Ian Macfarlane MP, Minister for Industry and Science, 20 February 2015, p. 1.

controls. The steering group therefore reported that stakeholders supported a 12-month transition period (as subsequently reflected in the bill).¹⁸

1.33 Implementation issues which Defence would need to work through with stakeholders during this period included:

- ongoing consultation mechanisms to identify and address practical implementation issues;
- development of detailed guidance materials, tools and training for compliance (continuing work already taking place under the aegis of the steering group);
- ensuring that controls on the publication of research data were commensurate with controls on other publications; and
- formation of working groups to examine the application of export controls to specific sectors such as life sciences and information and communications technology, to ensure that Australian export controls were consistent with international practice so that Australian companies were not disadvantaged.¹⁹

Ongoing scrutiny – third report of the committee

1.34 This report is the third progress report of the committee. It responds in particular to the third report of the steering group and the negotiation process leading up to the introduction of the amendment bill into parliament. It is the final report of the committee under its monitoring mandate of 11 October 2012.

1.35 On 6 March 2015 the committee wrote to 50 individuals and organisations who had previously made submissions to the inquiry or expressed interest in the Act, as well as the Minister for Defence, the Department of Defence and the Department of Industry. The committee received 19 new submissions, further to the 21 submissions received prior to the committee's previous progress reports. A list of all submissions received to the inquiry is at [Appendix 1](#).

1.36 The committee thanks all those who have assisted with its inquiry.

18 Letter from Professor Ian Chubb AC, Chief Scientist and Chair, Strengthened Export Controls Steering Group to the Hon Kevin Andrews MP, Minister for Defence and the hon Ian Macfarlane MP, Minister for Industry and Science, 20 February 2015, p. 2.

19 Letter from Professor Ian Chubb AC, Chief Scientist and Chair, Strengthened Export Controls Steering Group to the Hon Kevin Andrews MP, Minister for Defence and the hon Ian Macfarlane MP, Minister for Industry and Science, 20 February 2015, p. 2.