

Chapter 2

Key issues and committee view

2.1 This chapter addresses issues raised in the submissions received by the committee in relation to the ongoing implementation of the Act, including the provisions of the amendment bill, and sets out the views and recommendations of the committee.

Key issues

Adequacy of consultations

2.2 A large number of submissions received, particularly from the university sector, were very positive about the consultation process undertaken during the two-year transition period. Curtin University described the creation of the Strengthened Export Controls Steering Group (the steering group) and the two-year transition period as a 'very sensible approach' to the issues raised with the Act, and the recent consultations on the amendment bill as 'rapid but effective'.¹

2.3 UNSW said the steering group had 'consulted extensively and very professionally' with both research and industry stakeholders, and that the Defence Export Controls Office (DECO) and the steering group had done a 'tremendous job' in finding workable solutions to difficult problems.² The University of Queensland welcomed the 'extensive and productive relationship' it had developed with DECO and the Department of Industry and Science through its work as one of the steering group's pilot organisations.³

2.4 This view was not universal: the National Tertiary Education Union (NTEU) expressed the view that while the attempt to consult had been genuine, it was not wide-reaching, and the extent of engagement with affected university staff had been inadequate.⁴ Mr Brendan Jones was concerned that industry was under-represented in the consultation process, with only three multi-national companies involved, and no representatives of small dual-use enterprises on the steering group or in the pilot process.⁵

2.5 With regard to consultation on the amendment bill, the NTEU expressed concern about both the length and timing of the government's consultations, taking place 'during a period when many academic staff were not available'.⁶ On the other hand, the Australian Academy of Science (AAS) pointed out that while the timeframe

1 Curtin University, *Submission 23*, p. 1.

2 UNSW, *Submission 26*.

3 The University of Queensland, *Submission 22*.

4 National Tertiary Education Union, *Submission 30*, p. 1.

5 Mr Brendan Jones, *Submission 36*, p. 19.

6 National Tertiary Education Union, *Submission 30*, p. 1.

was tight, the consultations on the bill were the culmination of a lengthy discussion and piloting process. As such, it was satisfied with the overall process.⁷

Provisions of the amendment bill

2.6 Most submissions received by the committee expressed general support for the amendment bill, observing that the bill was a vast improvement on the Act's original provisions, and had 'largely addressed' the key concerns of stakeholders. UNSW said that:

The amendments in the Bill strike the right balance between protecting Australia's national security interests, and allowing scientists to go about their work with other scientists and industry around the world.⁸

2.7 The University of Sydney agreed:

we are confident that the measures proposed in the Bill will significantly reduce the compliance burden for universities, their researchers and support staff, and deliver a regulatory framework that is much better targeted at activities that present real risks to national security. The resulting regulatory regime will be of greater overall benefit and more cost-effective for Government, industry and the public sector research community.⁹

2.8 Some submitters who attended DECO's consultations on the exposure draft of the bill reported that they had heard widespread support for the bill.

2.9 Having said that, submitters identified a range of issues on which concerns remained, or upon which further work needed to be done, including possible further amendment of the legislation in future. The NTEU, for example, asserted that 'there remain a number of critical flaws in the legislation', but believed that these could be significantly addressed through 'minor amendments' to the bill.¹⁰

Supply and publication offences

2.10 The introduction in the bill of an exemption from the permit requirement for oral supply of controlled technology was welcomed as a major relief to researchers, going a long way to address their concerns that ordinary research communication and collaboration would give rise to unintended offences under the original provisions of the Act.

2.11 Representatives of the university sector drew attention to one potential loophole in the amended supply provisions: where supply occurred from a person within Australia to a person normally resident in Australia but temporarily overseas (such as on a work or research trip), without the supplier's knowledge. It was recommended that the offence should not apply in such a situation, provided that the

7 Australian Academy of Science, *Submission 29*.

8 UNSW, *Submission 26*.

9 The University of Sydney, *Submission 34*, p. 1.

10 National Tertiary Education Union, *Submission 30*, p. 2.

receiver did not on-supply the controlled technology to any other person outside Australia.¹¹

2.12 Similarly, researchers welcomed the 'exception' approach to the publication of controlled dual-use technology, whereby a permit would not ordinarily be required, but the minister may prohibit specific publications when warranted. While welcoming the introduction of such a risk-based approach, the NTEU expressed concern about the scope of the ministerial discretion, which extended to potential prejudice to Australia's 'security, defence or international relations', and recommended that the ministerial power be 'clearly prescribed and appropriately constrained'.¹²

2.13 The exemption from a permit requirement for 'pre-publication' supply of dual-use technology was broadly welcomed, although Curtin University expressed the view that while the attempt to remove the ambiguity associated with pre-publication activities was welcome, this would remain difficult to monitor.¹³ In submissions and public consultations, researchers queried the point at which a communication or paper crossed the threshold for pre-publication. The Computing Research and Education Association of Australasia (CoRE) also pointed out that the legislation would not extend to research conducted in the hope of publication, if publication did not in fact eventuate.¹⁴

Definitions

2.14 Some submitters noted ongoing concerns about the clarity of definitions in both the Defence and Strategic Goods List (DSGL) and the Act, leading to difficulty for researchers and industry in knowing the scope of coverage of the permit regime, and determining whether their activities were controlled or not.

2.15 Curtin University expressed concern that 'basic research', an important concept in the supply exemptions, was defined in the Defence and Strategic Goods List (DSGL) but not in the Act itself, and should be.¹⁵ Cryptographer Dr Vanessa Teague highlighted difficulties with the definition and scope of controlled technology, including the description of cryptography in the DSGL.¹⁶ The NTEU said that:

certain phrases in the legislation are likely to be interpreted in a variety of ways and thus without consistency. The interpretation of phrases such as a 'broker' or 'arrange' through s5A and 'pre-publication' or 'preparatory to a publication' ss10(3) may be easily misinterpreted and this deserves further review at a future point in time.¹⁷

11 Group of Eight Australia, *Submission 35*, pp 1-2; Society of University Lawyers, *Submission 37*.

12 National Tertiary Education Union, *Submission 30*, pp 2-3.

13 Curtin University, *Submission 23*, p. 2.

14 Computing Research and Education Association of Australia (CoRE), *Submission 24*, p. 5.

15 Curtin University, *Submission 23*, p. 2.

16 Dr Vanessa Teague, *Submission 27*, p. 1.

17 National Tertiary Education Union, *Submission 30*, p. 5.

2.16 Mr Patrick Barry, an amateur astronomer and entrepreneur, expressed strong concerns that ordinary activities undertaken by citizens such as himself may fall under what he saw as broad 'catch-all' definitions within the Act.¹⁸

Consistency with other jurisdictions

2.17 Recalling an issue raised in discussions about the original Act, CoRE expressed concern that the offences in the amended act would still be more restrictive than those in equivalent legislation in the United Kingdom and the United States. CoRE believed that this would result in comparative disadvantage to the research and technology sector in Australia, and an exodus of Australian experts and innovators to work overseas.¹⁹

2.18 CoRE did, however, support passage of the bill, provided that the 12-month extension of the transition period was included, giving time to rectify this and other flaws in the offence provisions.²⁰

Coverage of government agencies

2.19 Two submitters raised issues in relation to the exception to the offence of supplying DSSL technology without a permit, in cases of supply to or from members of the Australian Public Service, Australian Defence Force, Australian Federal Police, state and territory police, Australian Security Intelligence Organisation (ASIO) or Australian Secret Intelligence Service (ASIS).

2.20 The NTEU objected to the extension of this exception (and also the brokering offence exception) to ASIO and ASIS employees, considering the larger indemnities from criminal liability extended to those agencies under recent counter-terrorism laws.²¹

2.21 The Australian Nuclear Science and Technology Organisation (ANSTO) expressed concern that it was not covered under the supply exemption, expressing its view that staff of all agencies governed by the *Public Governance, Performance and Accountability Act 2013* should enjoy the same protections from prosecution under the Act.²²

The burden of implementation

2.22 The cost and difficulty of complying with the provisions of the Act, even as amended, continued to be of concern to submitters. Two small industry submitters feared that the legislation would result in vastly increased costs and delays for those

18 Mr Patrick Barry, *Submission 33*. It should be noted that some examples cited by Mr Barry appeared based on a misunderstanding of the legislation: for example, that it only governs export of controlled technology, not supply within Australia.

19 Computing Research and Education Association of Australia (CoRE), *Submission 24*, pp 1, 3-4.

20 Computing Research and Education Association of Australia (CoRE), *Submission 24*, p. 7.

21 National Tertiary Education Union, *Submission 30*, p. 5.

22 Australian Nuclear Science and Technology Organisation, *Submission 32*, p. 3.

working in affected sectors.²³ While Mr Jones expressed scepticism about the cost estimates provided in the explanatory memorandum (EM) to the bill,²⁴ the NTEU welcomed the production of cost estimates in the EM as a basis for further review of the legislation's impact in the research sector.²⁵

2.23 The NTEU was critical of some provisions of the bill with regard to procedural fairness for permit applicants, which allowed for broad ministerial discretion and a 90-day response time for ministerial decisions. The NTEU believed that these should be tightened to protect applicants' need for timely and transparent decision-making processes.²⁶

2.24 The University of Queensland requested that the government ensure adequate future funding of DECO to meet the increased demands which would be placed on it when the new permit provisions entered into effect.²⁷

The 12-month transition period

2.25 The overwhelming majority of submissions to the committee supported the inclusion in the amendment bill of a 12-month further transition period before the (amended) Act's offence provisions took effect.

2.26 Several submitters emphasised the importance of DECO's continued work with stakeholders on developing educational materials, guidance and training to ensure that researchers and other affected employees and organisations could navigate the controls and comply with the legislative requirements. La Trobe University said that there remained 'confusion in the university sector about what constitutes "supply" especially in relation to controlled dual-use technology and when a permit would be required', stressing that the training and guidelines under development must be detailed enough to provide sufficient clarity on these issues.²⁸

2.27 The University of Tasmania (UTas) said it understood that the pilot studies undertaken at several universities had been instructive in highlighting difficulties in implementing the control measures, but these had not yet been made publicly available. UTas was one of many organisations which were not yet ready to comply with the legislation, and believed that the 12-month window was crucial to avoid institutions taking 'an overly risk averse approach' which would compromise their own research output, and likely place an unnecessary burden on DECO in the form of excessive permit applications.²⁹

23 Mr Brendan Jones, *Submission 36*, p. 18; Air Power Australia, *Submission 39*, p. 3.

24 Mr Brendan Jones, *Submission 36*, pp 4-7.

25 National Tertiary Education Union, *Submission 30*, pp 3-4.

26 National Tertiary Education Union, *Submission 30*, p. 3.

27 The University of Queensland, *Submission 22*.

28 La Trobe University, *Submission 31*.

29 University of Tasmania, *Submission 25*.

Ongoing consultation mechanisms

2.28 Many submitters to the committee emphasised the importance of ongoing consultation mechanisms. While there was obvious work to do on supporting implementation and compliance with the new provisions, further consultation on outstanding issues was also seen as very important, including by submitters who supported the amendments proposed in the present bill. In this respect several also drew attention to the provisions in the bill for longer-term legislative review, and advocated the need for independent and inclusive mechanisms to ensure that such review was meaningful.

2.29 Dr Teague stated that 'this review has made considerable improvements, but...there is still much more work to do'.³⁰ The University of Sydney, which had been deeply involved in the steering group process and strongly supported the amendment bill, nevertheless noted that 'the issues are complex and it will be vital for [DECO] to continue working with stakeholders on the detail over the coming months', highlighting a number of areas needing 'more detail and clarity'.³¹

2.30 Several submitters specifically recommended that future consultation be conducted through the continued operation of the steering group, which had built valuable relationships and a track record of success and was well placed to carry on the necessary work during the 12-month transition period, and potentially beyond that.³² The University of Sydney said that:

Many important details will need to be finalised during the Act's extended implementation period, and ongoing independent monitoring and advice will be invaluable...

It will be critical that the [further legislative] review is independent, and we recommend that the [steering group] and its working groups are maintained to monitor implementation and conduct or oversee the first review of the scheme's operation.³³

2.31 The University of Sydney recommended that the process could be further strengthened by formalising the provision of expert scientific advice to DECO and the minister within the consultation process.³⁴

2.32 When presenting the amendment bill in the House of Representatives, the government stated that it would seek to extend the steering group's tenure to cover the extended implementation period provided for in the bill.³⁵ The Department of Industry

30 Dr Vanessa Teague, *Submission 27*, p. 1.

31 The University of Sydney, *Submission 34*, p. 2.

32 Curtin University, *Submission 23*, p. 2; University of Tasmania, *Submission 25*; UNSW, *Submission 26*; La Trobe University, *Submission 31*; the University of Sydney, *Submission 34*, p. 2; Group of Eight Australia, *Submission 35*; Universities Australia, *Submission 40*.

33 The University of Sydney, *Submission 34*, p. 2.

34 the University of Sydney, *Submission 34*, p. 2.

35 The Hon Scott Morrison MP, Minister for Social Services, Second Reading speech, *House of Representatives Hansard*, 4 March 2015, p. 10.

and Science also advised the committee of its support for the work of the steering group to continue.³⁶

Committee view

2.33 The committee concludes its two-year monitoring mandate on the Defence Trade Controls Act 2012 on a much more positive note than it began. The consultation and testing process that has taken place under the aegis of the steering group over the last two years is largely a good news story. There are undoubtedly issues which remain to be resolved, and implementation of the Act will present significant ongoing challenges. However, the progress made to date is real and is very welcome.

2.34 The committee commends the members of the steering group, pilot organisations, and all those who have participated in and supported the consultation process, for their diligence and constructive commitment in bringing the process to this point.

2.35 The committee notes that Defence did not report to it, as requested in the last progress report, on the consultation process planned for the amendment bill, and that in the event, the process was launched suddenly and conducted within a very constrained timeframe over the summer holiday period. To that extent, it was less than ideal.

2.36 Nevertheless, it is apparent to the committee that the amendment bill enjoys broad support, particularly within the academic and research community, who believe it has resolved many of the issues which so troubled them in the original Act. Even those who retained serious concerns about aspects of the legislation were mostly supportive of the passage of the amendment bill, observing that it improves upon the provisions of the Act, and will extend the transition period to address ongoing issues. The committee is also well aware that time is now of the essence, with the conclusion of the transition period under the original Act looming in May 2015.

2.37 Bearing these things in mind, the committee also notes that there is universal support for the extension of the transition period in the legislation for another 12 months. The committee agrees that this further time window is essential to enable DECO and stakeholders to make the necessary preparations for compliance with the legislation, and is also an opportunity to continue consultations on remaining issues of concern.

2.38 The committee is mindful that in comparison to the robust representation from universities, it received little direct feedback from the industry sector. Moreover, some of the concerns raised by individual and small business submitters reflected a lack of detailed understanding of the scope and operation of the legislation. The committee is of the view that small and medium enterprises and dual-use businesses represent a subset of the affected community which is particularly in need of proactive awareness-raising, consultation and support as the transition period proceeds. The committee

36 Department of Industry and Science, *Submission 38*, p. 2.

urges DECO and the steering group to make a specific effort to ensure that this less-engaged group of stakeholders is not left behind.

Recommendation 1

2.39 The committee recommends that the Defence Trade Controls Amendment Bill 2015 be passed.

2.40 The committee welcomed advice from many that the steering group had built valuable productive relationships between government and stakeholders, and created a solid platform for the further work necessary over the coming years. In this respect, the committee acknowledges the support expressed in many submissions for the steering group to remain in place throughout the 12-month transition period and even beyond it, bearing in mind the provision that the bill be reviewed two years after its full entry into effect, and every five years thereafter.

2.41 The committee endorses the importance of ongoing consultation between government and stakeholders as implementation of the legislation rolls out, and believes that at least in the initial stages, maintaining the steering group infrastructure is the most sensible way to maximise the likelihood of successful implementation of the Act.

Recommendation 2

2.42 The committee recommends that the Strengthened Export Controls Steering Group be retained, for at least the duration of the 12-month transition period set out in the amendment bill. The committee recommends that during this period the steering group develop recommendations to government in regard to the most appropriate mechanisms for ongoing consultation between stakeholders, and for the periodic review of the legislation.

2.43 The committee acknowledges the feedback provided by stakeholders both within and outside government that its initial scrutiny of the Act, and its ensuing monitoring mandate during the two-year transition period, have played a valuable role in ensuring the momentum and accountability of the consultation process, and the confidence of stakeholders in it.

2.44 The committee is conscious that the work it has been monitoring is not complete. The committee believes that there would be value in continuing its own scrutiny during the 12-month extended transition period proposed in the bill.

2.45 Moreover, the committee notes that the government has not yet responded to the issues raised in its second progress report, particularly in relation to DECO's approach to the licensing process. While the committee welcomes more positive feedback received prior to this report on stakeholders' working relationships with DECO, the committee believes that continued monitoring during the crucial implementation phase is warranted.

2.46 During this period, the committee encourages Defence and the steering group to give careful consideration to the remaining issues raised in this report about the provisions of the Act. In particular, the committee notes submitters' concern about the consequences of accidental supply of controlled technology to a person temporarily

overseas, and requests that Defence provide further information to the committee on how it proposes to deal with this issue.

Recommendation 3

2.47 The committee recommends that it continue to monitor the implementation of the *Defence Trade Controls Act 2012*, as amended, during the further 12-month transition period set out in the amendment bill. The committee should report to the Senate on an interim basis if required, and after the conclusion of the 12-month period, on the further progress of the implementation of the Act and related issues.

Senator Chris Back
Chair

