

The Senate

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Foreign Affairs, Defence and Trade  
Legislation Committee

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Implementation of the Defence Trade  
Controls Act 2012

Progress report no. 3

March 2015

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ISBN 978-1-76010-180-0

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Printed by the Senate Printing Unit, Parliament House, Canberra.

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# 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.<sup>1</sup> The committee's reporting date was later extended to 15 August 2012.<sup>2</sup>

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.<sup>3</sup>

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

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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.<sup>4</sup>

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.<sup>5</sup> 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.

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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.



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### ***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.<sup>6</sup>

### ***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;

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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.<sup>7</sup>

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'.<sup>8</sup> The University of Sydney suggested the creation of a standing expert committee including representatives of the research sector.<sup>9</sup>

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'.<sup>10</sup>

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

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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.<sup>11</sup>

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'.<sup>12</sup>

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,<sup>13</sup> 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

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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.<sup>14</sup>

### ***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

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14 Explanatory Memorandum, pp 2-4.

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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...<sup>15</sup>

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'.<sup>16</sup>

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.<sup>17</sup>

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

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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).<sup>18</sup>

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.<sup>19</sup>

### **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.

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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.

## 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'.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

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'.<sup>6</sup> On the other hand, the Australian Academy of Science (AAS) pointed out that while the timeframe

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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.<sup>7</sup>

### ***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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

### ***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

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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.



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

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'.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup>

#### *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.<sup>15</sup> Cryptographer Dr Vanessa Teague highlighted difficulties with the definition and scope of controlled technology, including the description of cryptography in the DSGL.<sup>16</sup> 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.<sup>17</sup>

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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.<sup>18</sup>

#### *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.<sup>19</sup>

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.<sup>20</sup>

#### *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.<sup>21</sup>

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.<sup>22</sup>

#### ***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

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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.

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working in affected sectors.<sup>23</sup> While Mr Jones expressed scepticism about the cost estimates provided in the explanatory memorandum (EM) to the bill,<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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.<sup>27</sup>

### ***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.<sup>28</sup>

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.<sup>29</sup>

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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'.<sup>30</sup> 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'.<sup>31</sup>

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.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup> The Department of Industry

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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.

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

### **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

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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**





# Appendix 1

## 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
- 22 The University of Queensland
- 23 Curtin University
- 24 The Computing Research and Education Association of Australasia
- 25 University of Tasmania
- 26 The University of New South Wales
- 27 Dr Vanessa Teague
- 28 University of Technology Sydney

- 29 Australian Academy of Science
- 30 The National Tertiary Education Union
- 31 La Trobe University
- 32 Australian Nuclear Science and Technology Organisation
- 33 Mr Patrick Barry
- 34 The University of Sydney
- 35 The Group of Eight
- 36 Mr Brendan Jones
- 37 Society of University Lawyers
- 38 Department of Industry and Science
- 39 Air Power Australia
- 40 Universities Australia

## **Appendix 2**

### **Additional Information**

- 1 Universities Australia — Additional information dated 11 October 2012
- 2 Letter from the Hon Stephen Smith MP, Minister for Defence regarding consultation on the draft Defence Trade Controls Regulations 2013

