

## Chapter 2

### Consultations and proposed amendments

2.1 On 17 August 2012, the Minister for Defence, the Hon Stephen Smith MP (the minister), issued a media release thanking the committee for its preliminary report on the bill. The minister announced that he had appointed Mr Ken Peacock AM and the Chief Defence Scientist, Dr Alex Zelinsky, to conduct further consultations on the bill.<sup>1</sup>

2.2 After consulting with key stakeholders, Mr Peacock and Dr Zelinsky prepared a report outlining possible amendments to the bill and implementation options. They also presented issues raised during the consultation and proposed possible solutions in order 'to stimulate discussion and feedback'.<sup>2</sup> In their report, they noted that as a result of consultations commenced in February 2012 several changes had been proposed to the legislation, the most significant involved:

- removing the control of 'defence services', which would have regulated a broader range of teaching and research activities;
- removing controls on transfers inside Australia, which would have regulated all transfers to foreign students and employees in Australia;
- removing controls for Australians located overseas who supply technology; and
- including exemptions for 'in the public domain' and 'basic scientific research' in the Bill if possible.<sup>3</sup>

2.3 The report also noted that Defence proposed to recommend to government additional amendments to the bill such as establishing a 12–24 month transition period for strengthened export controls after passage of the legislation. Other recommendations included establishing an advisory group to advise government on implementation issues during the transition period and conducting a comprehensive pilot program during this period.

2.4 On 13 September 2012, the minister wrote to the committee providing a copy of the report. He indicated that:

The Government in-principle supports the proposals in the report, with the exception that the Bill not be returned to Parliament until re-drafting of the

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1 The Hon Stephen Smith MP, Minister for Defence; the Hon Jason Clare MP, Minister for Defence Materiel; the Hon Warren Snowdon, Minister for Defence Science and Personnel, 'Joint Media Release—Government to consult on strengthening Australia's defence export controls', Media Release, 17 August 2012.

2 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 11.

3 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 9.

Regulations is completed...The Government will continue to engage with stakeholders throughout the implementation process, including with regard to Regulations.<sup>4</sup>

2.5 Mr Peacock and Dr Zelinsky's report was to serve as a consultation paper for discussion with the university and research sectors on proposed further amendments to the bill.<sup>5</sup>

## **Roundtables**

2.6 Recommendation 6 of the committee's preliminary report supported Universities Australia's proposal for a roundtable to be conducted to allow all stakeholders to discuss openly amendments to the bill.<sup>6</sup> This recommendation was subsequently taken up. At this stage it should be noted that the main concern, as described by Universities Australia, was that:

...a Bill designed to support and reduce administrative burden on defence trade has the potential to substantially increase the regulatory burden on a range of civilian innovation activities, with an as yet unknown effect on research in health, agriculture, mining, manufacture and trade.<sup>7</sup>

2.7 The University of Sydney, Universities Australia, and the Chief Scientist informed the committee that two roundtables, convened by the Chief Scientist, Professor Ian Chubb, were conducted with all stakeholders and Defence. They were held on 6 September and 21 September 2012. The roundtable participants included Dr Zelinsky and representatives from Universities Australia, the University of Sydney, the Academy of Technological Sciences, Australian Academy of Science, the Cooperative Research Centres Association, Department of Defence, DIISRTE and a number of other relevant Commonwealth agencies.

2.8 On 28 September, Professor Chubb wrote to the committee about the roundtable process. He described the discussions as fruitful and informed the committee that the parties had reached 'an agreed path forward'.<sup>8</sup> Professor Chubb noted that some representatives from the university sector still held reservations about the timing of the legislation. He was confident, however, that the approach agreed between all stakeholders would be a workable solution:

It has been noted by some representatives of the university sector that in their view a pilot study should precede the enacting of the legislation, not follow it, to enable results from the pilot to inform the final legislation. In my view, the current proposal involving exemptions, legislation with

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4 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 3.

5 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 5.

6 Recommendation 6—Preliminary Report, p. 34.

7 Universities Australia, *Submission 11B*, p. 3.

8 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 1.

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provisions for a transition period, a pilot and a Steering Group with its final advice tabled by Ministers is quite workable. If issues with the Bill are identified through the pilot, the legislation can be amended at a later stage to address these issues. The Steering Group may also recommend to the Ministers that the transition period be extended.<sup>9</sup>

## Outcome of the roundtable discussions

2.9 As noted above, Professor Chubb advised the committee that he was satisfied that a workable solution had been reached through the roundtable process.

In my view, the amended Bill is a significant improvement on the original, addressing key concerns initially identified by the sector. It does give institutions a very substantial role in managing the process. The inclusion of the transition period, pilot study, and the Steering Group should alleviate many of the sector's concerns and act to help minimise any administrative impacts over time.<sup>10</sup>

2.10 In his correspondence to the committee, Professor Chubb provided a copy of the list of agreed outcomes from the roundtable discussions.<sup>11</sup> They were:

- Establish the Strengthened Export Controls Steering Group, reporting to the Minister for Defence and the Minister for Tertiary Education, Skills, Science and Research (the Ministers).
- A transition period of at least 24 months with no offence provisions in effect. The Steering Group may recommend an extension to this non-offence provision transition period.
- A pilot program (not limited to a single pilot) to test the regulatory impact of the regime.
  - The pilot to determine the costs and benefits associated with the regime, the feasibility of its implementation, the processes and interaction required to successfully implement the bill during the transition period, and identify any aspects that require modification prior to the offence provisions coming into full effect.
  - The framework for the pilot to be agreed by the Steering Group and, pending consideration of the Steering Group, will span two grant funding cycles with interim reporting to identify improvements.
  - The pilot will review mechanisms by which organisations can determine thresholds for technologies assessments beyond which an organisation will consult with Defence and, if required, seek a permit.

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9 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 2.

10 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 2.

11 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, pp. 3–4.

- Internal institutional practices and structures (including a supplement to the Australian Code for the Responsible Conduct of Research) to be developed to reduce the need to interact with Government agencies on the legislative regime.
- The Model to be tested as part of the pilot will consist of an export control regime that:
  - Begins with an institutional assessment process for open academically based research in accordance with guidelines incorporated into the supplement to the Australian Code for the Responsible Conduct of Research. This step recognises that not all activities to supply technology to 'develop', 'produce', or in comes cases 'use', an item on the DSGL will involve the level of detail which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions of the DSGL listed item. The institutions involved in activities of this type must have processes for assessing technology and for determining when advice is to be sought from Defence about a possible permit in accordance with established guidelines.
  - Provides exemptions from export controls for research, where:
    - The activity is 'basic scientific research', as defined in the DSGL and Wassenaar Arrangements (Experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective).
    - The technology is already 'in the public domain', as defined in the DSGL (technology or software which has been made available without further restrictions upon its further dissemination (copyright restrictions do not remove technology or software from being in the public domain))
  - Provides exemptions for transfers of technologies within Australia's domestic borders.<sup>12</sup>

2.11 Participants in the roundtable discussions agreed that the following be incorporated into the bill:

- Modification, if necessary, once the results of the pilot studies are known.
- A non-offence transition period of no less than 24 months, and with the possibility of an extension on the recommendations of the Steering Group.
- Pilot studies governed by the Steering Group.

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12 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, pp. 3–4.

- Pilot studies to test the outcomes from the Model.
- A formal evaluation against agreed criteria to include outcomes of pilot studies.
- A final report from the Steering Group to be submitted to the Ministers to be tabled in Parliament.
- Ordinary scientific communication is permissible, where the institution and individual have complied with established guidelines which include the institutional assessment model outlined above.
- The provisions relating to Defence Services are deleted.
- Controls on foreign employees and students in Australia are removed.
- Controls on Australians overseas are removed.<sup>13</sup>

2.12 The committee notes that in his submission of 13 September 2012, the minister advised that the government in-principle supports the proposals in Mr Peacock and Dr Zelinsky's report<sup>14</sup>, which included exemptions for 'in the public domain' and 'basic scientific research'.<sup>15</sup> The Chief Scientist lists amongst the key developments agreed at the roundtable 'exemptions for basic scientific research and for information already in the public domain'.<sup>16</sup>

### **Response by the university sector**

2.13 On 4 October 2012, the committee received a supplementary submission from the University of Sydney regarding their concerns about the amendments and implementation arrangements discussed during the roundtables. Professor Jill Trehwella wrote that:

Regrettably, notwithstanding the welcome but largely procedural improvements that have been achieved in a very short timeframe through the roundtable discussions facilitated by the Chief Scientist in September, our key concerns remain largely unchanged...The only comfort provided to the sector from the roundtable process is a commitment to address the unintended consequences of the legislation by extraordinary post legislation procedural concessions...<sup>17</sup>

2.14 The University of Sydney noted that during the roundtable discussions a difference of opinion arose between Defence and the university sector regarding the scope of export controls as they apply to US universities. Endeavouring to understand the scope of the export control regimes applying to researchers in the US, the

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13 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 4.

14 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 3.

15 The Hon Stephen Smith MP, Minister for Defence, *Submission 15B*, p. 5.

16 Professor Ian Chubb, Australian Chief Scientist, *Submission 21*, p. 1.

17 University of Sydney, *Submission 7B*, p. 1.

university sought independent advice from a law firm in Washington. The university suggested that the committee consider the scope of the proposed exemptions for research in the bill in the context of the exemptions provided for research under US law. It was seeking to bring the Australian legislation into alignment with the US system of export controls which would 'also serve to streamline the currently proposed complex post legislation requirement'.<sup>18</sup> Sydney University recommended that the bill be amended sufficiently:

...to ensure that the resulting control regime is no broader in scope or more stringent than the arrangements in place for fundamental research in accredited institutions of higher learning in the US.<sup>19</sup>

2.15 The University of Sydney was of the view that this proposition had broad support.<sup>20</sup>

2.16 The committee considers the request of the University of Sydney to be fair and reasonable: the effect of the bill should not place Australian universities and research organisations at a disadvantage compared to their counterparts in the US.

2.17 Universities Australia also identified the coverage of the legislation as a substantial concern. It was concerned particularly about:

...the risk that the Australian legislation imposes, or is interpreted so as to impose, greater restrictions on Australian universities and researchers than are applied in the United States.<sup>21</sup>

2.18 In its view, Australian researchers 'should be subject to similar but not more severe regulatory constraints than their US counterparts'. For Universities Australia this matter was one requiring 'priority attention'.<sup>22</sup>

2.19 The committee understands the universities' call for the bill to take account of the legislation governing similar institutions in the US and supports their stand that Australian legislation should not impose heavier burdens. In this regard, the committee suggests that the government be guided by this principle when drafting amendments to the bill.

### ***Outstanding concerns***

2.20 Universities Australia noted that the roundtable process had addressed many of the concerns raised by the universities and that they supported amendments to the bill which reflect the agreed outcomes of the roundtable. It advised the committee,

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18 University of Sydney, *Submission 7B*, p. 1.

19 University of Sydney, *Submission 7B*, p. 2.

20 University of Sydney, *Submission 7B*, p. 1.

21 Universities Australia, *Submission 11B*, p. 6.

22 Universities Australia, *Submission 11B*, p. 7.

however, that the sector had some remaining concerns about the impact of the legislation. The outstanding issues include:<sup>23</sup>

- that the scope of the legislation provides greater restrictions on research activity than similar legislation in the US;
- effect of the bill on 'Freedom of inquiry';
- development of self-assessment processes;
- publication of research and criminal penalties in the bill;
- additional risks and costs incurred as the new regime is implemented; and
- effect on Australia's ongoing engagement in international research.

2.21 The committee notes that many of these unresolved issues will be tested in the 24 month pilot program contained in the list of agreed outcomes from the round table. The committee relies upon Defence to commit to and implement expeditiously any amendments which are proposed from the pilot program.

2.22 The committee notes the pilot program will be complex, and will result in proposals to amend the bill. The committee believes it would be premature for any government amendments to the bill in 2012 to be made contrary to any agreements reached during the roundtable.

### **Importance of transition period**

2.23 Clearly, Universities Australia still holds significant concerns about the effect of the legislation as currently framed on Australia's research capacity, and the social and economic benefits that flow from it. Even so, it was of the view that should the bill proceed, it would support the incorporation of amendments that 'fully and accurately reflect the outcomes of the roundtable discussions' as a means of 'mitigating, at least partially, the risks to Australian research posed by the scheme'.<sup>24</sup> It recommended that:

...should Parliament pass amended legislation, the minimum two year transition period must enable outstanding concerns to be examined and addressed prior to the full impact of the legislation coming into effect.<sup>25</sup>

2.24 It should be noted that Universities Australia stressed that outstanding concerns not addressed during the roundtable process 'must be dealt with substantively in the trial phase and under the auspices of the Steering Group'.<sup>26</sup> Universities Australia highlighted the central importance of the transition period:

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23 Universities Australia, *Submission 11B*, pp. 6–8.

24 Universities Australia, *Submission 11B*, p. 2.

25 Universities Australia, *Submission 11B*, p. 4.

26 Universities Australia, *Submission 11B*, p. 5.

It is critical, therefore, that the proposed minimum two year transition period is enacted and facilitates a thorough and robust assessment of the impact of the legislation on defence trade, the effectiveness and efficiency of the control regime, and also the conduct and output of Australian research.<sup>27</sup>

2.25 The committee fully endorses this view.

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27 Universities Australia, *Submission 11B*, p. 5.