

Operations of the Defence Export Control Office

Introduction

- 6.1 From the perspective of the Australian defence industry, the prompt approval of export applications is essential to meet contractual obligations and to maintain business reputation among customers.
- 6.2 The Defence Export Control Office (DECO) is responsible for approving applications to export defence materiel and technology from Australia.
- 6.3 Australian laws itemise materiel and technology subject to export controls. Upon receiving an application, DECO assesses the proposed export against these laws and the Australian Government's defence export policy. These controls apply to materiel and technology with both civil and military uses and anyone seeking to export them.
- 6.4 During the inquiry, comments in submissions and at public hearings pertaining to DECO's performance were largely favourable. There were some suggested improvements, which are discussed later in this chapter; however, DECO's overall performance was praised.
- 6.5 ASC Pty Ltd submitted that DECO provides 'invaluable direct assistance to industry in matters relating to defence technologies.'¹ Boeing submitted that overall, in the year prior to July 2014, 'DECO operations have improved significantly'.² The University of Queensland's submission stated that DECO officers are 'professional and consultative' and 'all

1 ASC Pty Ltd, *Submission 11*, p.1.

2 Boeing, *Submission 23*, p.2.

University permit applications have been dealt with promptly'.³ Hawker Pacific Pty Ltd described its interactions with DECO as being 'productive and efficient'.⁴ Mr John O'Callaghan (Director, Defence and Government Relations, Australian Industry Group) said its performance had been 'outstanding'.⁵ ASPI's submission characterised their processes as 'necessary and appropriate, though refinements to processes are possible and desirable.'⁶

- 6.6 Other general observations relating to DECO were positive. Thales Australia submitted:

In Thales' experience DECO is performing well in straight forward applications to non-sensitive destinations. ... The ongoing role and continuous improvement process in DECO is recognised and welcomed.⁷

- 6.7 Mr Aaron Thompson (Business Unit Manager, Global Supply Chain, Ferra Engineering) said:

These days we have a good relationship with DECO. It is a very streamlined process. ... We can get licensing turned around within two to four weeks. So our experience with DECO is quite positive.⁸

- 6.8 Mr Michael Halloran (Managing Director, Supacat Pty Ltd) said:

We have worked with DECO to obtain licences for a number of countries in the region to go and market products, and that has been a reasonably simple and straightforward process. We had no complaints there.⁹

- 6.9 He added:

But broadly speaking, having dealt for the last 15-20 years with the American ITAR [International Traffic in Arms Regulations] system, and with the British, German and French, I find the Australian processes reasonably sensible and reasonably straightforward by comparison.¹⁰

- 6.10 Information provided by Defence shows that DECO is processing most export applications within their target time of 15 working days, which demonstrates the basis for the positive views expressed above.
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3 University of Queensland, *Submission 25*, p.1.

4 Hawker Pacific Pty Ltd, *Submission 33*, p.2.

5 Dunk and O'Callaghan, *Committee Hansard*, 13 February 2015, p.8.

6 ASPI, *Submission 20*, p.2.

7 Thales Australia, *Submission 19*, p.9.

8 Gaka, Hill and Thompson, *Committee Hansard*, 17 October 2014, p.44.

9 Halloran, *Committee Hansard*, 31 October 2014, p.13.

10 Halloran, *Committee Hansard*, 31 October 2014, p.13.

- 6.11 Unfortunately, Defence was unable to provide the Committee with DECO's budgetary and expenditure information, which would have allowed a more complete view of performance.¹¹
- 6.12 The Senate Foreign Affairs, Defence and Trade Legislation Committee has been inquiring into the *Defence Trade Controls Act 2012*. As the provisions of the Act enter into force in stages, the Senate Committee has been undertaking periodic inquiries into the implementation of the Act and has made three progress reports to date.¹² This report will not seek to duplicate the recommendations or functions of the Senate Committee.

Role and operation of the Defence Export Control Office

- 6.13 The Department of Defence's Defence Export Control Office is responsible for the processing of applications and issuance of licences, on behalf of the Defence Minister, for the export of regulated materiel and technology. In the context of this inquiry, defence exporters rely upon the timely and efficient operation of DECO to ensure statutory licencing requirements are met and that contractual obligations to customers and clients are fulfilled. According to the Department of Defence's submission, the primary role of DECO is to regulate 'the export of defence and dual-use goods as part of Australia's system of export controls.'¹³
- 6.14 Defence's submission stated:
- Recognising the time-sensitive nature of export opportunities, DECO works to assess export applications as quickly as possible, and offers 'in principle' assessments so that exporters can determine for marketing purposes whether the future export of a particular product to a particular destination would be likely to receive export approval.¹⁴
- 6.15 Australian companies seeking to export defence materiel or technology are required to lodge an application to DECO, which assesses the application in accordance with relevant legislation.
- 6.16 DECO may consult external agencies, such as DFAT, which has responsibility for managing exports subject to *ad hoc* sanctions regimes.

11 Department of Defence, *Response to Questions on Notice* (Question No. 27).

12 Senate Foreign Affairs, Defence and Trade Legislation Committee, 'Implementation of the *Defence Trade Controls Act 2012*: Progress Report No.1' (June 2013); Progress Report No.2 (May 2014); and Progress Report No.3 (May 2015).

13 Department of Defence, *Submission 41*, p.11.

14 Department of Defence, *Submission 41*, p.12.

6.17 DECO is located in the Strategic Policy Division of the Department of Defence.¹⁵ According to its website, DECO is led by an assistant secretary and its functions are divided into four areas:

■ **Risk analysis:**

If items are not controlled by the Defence and Strategic Goods List, DECO's Risk Analysis team then proceeds to assess whether they are controlled by catch-all legislation that allows the Minister to prohibit two sorts of exports:

- Items that could contribute to a weapons of mass destruction program;
- Or items that could be for a military end-use that could prejudice Australia's defence, security or international relations.

■ **DECO Operations:**

DECO Operations is responsible for assessing controlled defence and strategic goods for export. To achieve this outcome, DECO Operations administers the Standing Interdepartmental Committee for Defence Exports and works with international partners to ensure compliance with Australia's international export regime obligations.

■ **Information technology and technology assurance:**

DECO Technical Assessors are the gateway to DECO's regulation of controlled exports by providing technical advice to Defence, external government agencies and industry stakeholders on the applicability of Australian export controls to specific export transactions. The IT [information technology] team engages with various service providers to manage our online licensing system.

■ **Strategic engagement and outreach:**

Stakeholder Engagement and Outreach is available to assist exporters to understand their obligations and the export controls process by:

- Fostering dialogue and understanding about the exportability of controlled goods and technologies;
- Raise awareness about illicit methods used to obtain controlled goods; and
- Ways exporters can report suspicious incidents and approaches.¹⁶

15 Department of Defence, 'Strategy Executive', at <<http://www.defence.gov.au/SE/>> (viewed 26 August 2015).

16 DECO 'Our People', at <<http://www.defence.gov.au/DECO/People.asp>> (viewed 26 August 2015).

- 6.18 According to the 'Branch Plan 2013-2015' on its website, DECO aims to fulfil five deliverables:
- Deliver expert advice;
 - Enable responsible exports;
 - Enhance communication and collaboration;
 - Maintain a capable, agile and sustainable workforce; and
 - Improve business practices.¹⁷
- 6.19 Defence's submission described DECO's current resource levels as being 'limited'.¹⁸ The Committee sought from the Department of Defence details of DECO's budget, expenditure and the estimated cost per export application processed. Defence advised that both DECO's budget and the 'unit cost' per application processed are incalculable.¹⁹
- 6.20 From 2011 to 2015, DECO has had around 30 staff. Defence advised that as at May 2015, current staffing stands at 27.35 full-time equivalent staff.²⁰
- 6.21 DECO assesses all exports on a case-by-case basis, although assessment of export applications is based on five general criteria:
- International obligations:
 - ⇒ UN Security Council resolutions
 - ⇒ International agreements
 - Human rights:
 - ⇒ Risk of goods being used to facilitate serious human rights abuses
 - Regional security:
 - ⇒ Aggravation of a threat or situation that contributes to instability
 - ⇒ Use in internal or external conflicts
 - National security:
 - ⇒ Australian and allied interests
 - ⇒ Australian military capability being threatened by potential adversaries
 - Foreign policy
 - ⇒ WMD programs being developed by rogue states or terrorists
 - ⇒ Reactions of third countries and the impact on Australia's regional relations

17 DECO 'Defence Export Control Office Branch Plan 2013-2015', at <<http://www.defence.gov.au/DECO/Plan.asp>> (viewed 26 August 2015).

18 Department of Defence, *Submission 41*, p.13.

19 Department of Defence, *Response to Questions on Notice* (Question No. 27).

20 Department of Defence, *Response to Questions on Notice* (Question No. 27).

⇒ Diversion to mercenary, terrorist or criminal activities.²¹

6.22 Defence's submission provided an overview of DECO's assessment processes for defence exports, which is shown in the table 6.1 below.

Table 6.1 Defence Export Control Office assessment process

Phase	Assessment process	Procedural fairness measures
Application	The applicant lodges their application through the DECO portal. DECO acknowledges application and advises that target timeframes are 15 working days for standard cases, and 35 working days for complex cases.	When an application is lodged, DECO emails the client acknowledging receipt and advise indicative timeframes.
Technical Assessment	DECO's technical assessors determine whether the item is controlled by the Defence and Strategic Goods List (DSGL), or if it may be subject to the WMD Act 1995 or the military end-use (MEU) provision of the Customs Act 1901.	Technical assessors may contact the applicant for further technical details to inform their assessment.
Risk Assessment	DECO's risk assessors determine the risk of exporting the item against five export policy criteria. ²² Applications which need detailed assessment, or 'complex cases', are referred to seek input from relevant subject matter experts and policy areas.	DECO will keep applicant informed if target timeframes will not be met. DECO will notify the applicant if their case is complex. This notification will take the form of a letter that advises the applicant of non-classified aspects of the assessment. The letter will invite the applicant to provide additional information to support their case. DECO will provide the technical assessment as an attachment to the letter.
Executive Decision	The DECO team reviews all cases and provides approval for most cases. If there are concerns about an export, DECO will prepare advice for the Minister for Defence. Only the Minister for Defence can deny or prohibit an export.	Before DECO recommends to the Minister that an export should be denied or prohibited, DECO will advise the applicant and offer to discuss the case.
Finalisation	DECO will send the outcome of the decision to the applicant by email. If export approvals have conditions, applicants must comply with these and submit compliance reports as indicated.	If the Minister denies or prohibits an export, the applicant is provided with a written decision, including reasons, and advice on rights of review.

Source: Adapted from Department of Defence, *Submission 41, attachment*

6.23 The Committee sought information from the Department of Defence regarding the number of export applications received and permits issued.

6.24 Defence advised that applications are categorised according to:

- Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*;
- The *Defence Trade Controls Act 2012*; or

21 Department of Defence, *Submission 41, attachment*

22 As noted, the five criteria are: international obligations, human rights, regional security, national security and foreign policy.

- Those subject to a general assessment relevant to the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* and the Military End-Use provision at Section 112BA(1) of the *Customs Act 1901* (known as the MEU provision).²³

6.25 Defence advised that it could provide the Committee with figures from 29 April 2013 onwards, when DECO's online permit processing system commenced. Statistics prior to this date would have to be collated manually from paper records.²⁴

Table 6.2 Export applications related to Regulation 13E

Period	Applications received ²⁵	Permits issued ²⁶
1 July 2015 to 11 October 2015	1033	633
1 July 2014 to 30 June 2015	3864	2780
1 July 2013 to 30 June 2014	3859	2681
29 April 2013 to 30 June 2013	518	171

Source: Department of Defence Response to Questions on Notice (Question 28)

Table 6.3 Export applications related to the Defence Trade Controls Act

Period	Permits issued
1 July 2015 to 11 October 2015	55
1 July 2014 to 30 June 2015	18

Source: Department of Defence Response to Questions on Notice (Question 28)

Table 6.4 Export assessments related to WMD Act and MEU provisions

Period	Export control assessments ²⁷
1 July 2015 to 11 October 2015	146
1 July 2014 to 30 June 2015	549
1 July 2013 to 30 June 2014	511
29 April 2013 to 30 June 2013	49

Source: Department of Defence Response to Questions on Notice (Question 28)

23 Department of Defence, *Response to Questions on Notice* (Question No. 27).

24 Department of Defence, *Response to Questions on Notice* (Question No. 27).

25 Defence noted: 'The "Applications received" column are all Applications to Export Controlled Goods and Technology loaded on to the DECO system for processing, including those relating to goods not to be actually controlled for export. Dependent on the good or technology in questions, the application will be assessed under the relevant piece of legislation which DECO administers.'

26 Defence noted: 'The "Permits issued" column reflects only those permits issued under Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*.'

27 Defence noted: 'Assessments issued to applicants on whether a particular good or technology is listed in the DSGI including 'catch-alls' under the WMD Act and MEU provision.'

6.26 According to DECO's website, the benchmark for assessing applications is as follows:

Other than in exceptional circumstances, the assessment time for routine applications is up to 15 working days (commencing from the date a complete application, with all supporting documentation, is received). For applications requiring referral to SIDCDE [Standing Interdepartmental Committee on Defence Exports], the assessment time is up to 35 working days. DECO will inform applicants of the referral.²⁸

6.27 Information provided by Defence shows that since 1 July 2014, over 90 per cent of applications are being processed within 15 working days, which represents an improvement since 2012.

Table 6.5 Percentage of export applications processed within 15 working days

Period	0-15 days	16-20	21-25	26-30	31-35	36+ days
1 July 2015 to 11 October 2015	94.28	2.47	1.78	0.79	0	0.69
1 July 2014 to 30 June 2015	92.71	3.52	0.86	0.54	0.42	1.95
1 July 2013 to 30 June 2014	81.86	8.82	3.42	1.82	0.84	3.24
29 April 2013 to 30 June 2013	68.28	17.54	10.82	3.36	0	0

Source: Department of Defence Response to Questions on Notice (Question No. 27)

6.28 Figures for the 2012 calendar year have been published separately, showing that there were 2,960 Regulation 13E export applications and 253 applications for WMD or MEU exports processed during that time. During 2012, 76 per cent of Regulations 13E applications were being completed between 15 to 20 working days and 4 per cent were longer than 35 working days. Among WMD Act and MEU applications, 86 per cent were being completed within 15 working days and 4% were taking longer than 35 working days.²⁹

6.29 The Committee was informed that since the introduction of a new online system for lodging applications, processing times had greatly improved.

6.30 Ms Susan Kerr (Export Controls Manager, ASC Pty Ltd) said that on average, in ASC's experience, standard applications would take two to

28 DECO 'Application Process', at <<http://www.defence.gov.au/deco/ApplicationProcess.asp>> (viewed 26 August 2015).

29 Government Response to the Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation Committee Progress Report No. 1 into the Implementation of the Defence Trade Controls Act 2012, December 2013.

three weeks to process. In rare cases of a sensitive technology export, an application could take two months.³⁰ Notwithstanding, Ms Kerr said that the online system has expedited processing times:

Now it is an electronic submission; it happens in seconds. The time frame to approve has halved; that has been extraordinary and really welcome.³¹

- 6.31 Boeing's submission stated that since the introduction of the new system, 'licence processing times have been reduced significantly.'³² Saab Australia submitted that in general, DECO's responsiveness is commendable and the Office has displayed a 'willingness to work with Saab to facilitate assessments efficiently and effectively, and with regard to Saab's timelines.'³³ However, Saab noted that in future, performance would be dependent on DECO's available funding.³⁴
- 6.32 Sonartech Atlas submitted that the new online process has 'proven to be easy to follow and simple to complete.'³⁵ However, the submission added that the company had 'rarely' had its applications processed within benchmark timelines, which Sonartech Atlas attributed to 'almost all of our applications having to be referred to the SIDCDE.'³⁶
- 6.33 The Committee received one submission expressing concern that DECO would no longer accept applications by post nor issue forms in hard copy. The submission stated:
- DECO management has made some rather arrogant city-centric assumptions about the resources available to people needing to contact DECO.³⁷
- 6.34 However, this statement was exceptional when compared with views expressed in other submissions and at public hearings in relation to DECO's performance.
- 6.35 As the body approving defence exports, DECO's operations are affected by the export controls determined by relevant international organisations and the regulatory framework in Australia law.

30 Kerr, *Committee Hansard*, 9 October 2014, p.11.

31 Kerr, *Committee Hansard*, 9 October 2014, p.9.

32 Boeing, *Submission 23*, p.2.

33 Saab Australia Pty Ltd, *Submission 10*, pp.4-5.

34 Saab Australia Pty Ltd, *Submission 10*, p.5.

35 Sonartech Atlas, *Submission 26*, p.10.

36 Sonartech Atlas, *Submission 26*, p.11.

37 Sawday, *Submission 4*, p.4.

Regulation of defence exports

- 6.36 Australian law restricts the movement of materiel and technology that poses a risk to the proliferation of weapons of mass destruction (WMD) or conventional weapons in accordance with international export control regimes. Implementation of these controls is largely the responsibility of DECO.
- 6.37 The four key international export control regimes are the Wassenaar Arrangement (WA),³⁸ the Nuclear Suppliers Group (NSG),³⁹ the Australia Group (AG)⁴⁰ and the Missile Technology Control Regime (MTCR).⁴¹ The range of materiel and technology subject to common international controls is broad and covers the following categories and parameters:
- Systems or assemblies, facilities, equipment and components;
 - Test, inspection and production equipment;
 - Materials;
 - Software; and
 - Technology and any related technology.⁴²
- 6.38 International export control regimes are not treaties, but rather agreements formed among countries who voluntarily participate by standardising their laws and synchronising procedures for transfers of sensitive materiel and technology. The regimes are intended to prevent the horizontal proliferation of conventional weapons and WMDs, whilst allowing transfers of dual-use products in cases where the end use has a legitimate civilian or commercial purpose. Enforcement and implementation is the
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38 The Wassenaar Arrangement is a non-binding international agreement that seeks to deny transfer of conventional arms and dual-use goods and technologies. See <<http://www.wassenaar.org/introduction/index.html>> (viewed 26 August 2015).

39 The NSG seeks to regulate the trade of nuclear technology that may be used to produce nuclear weapons or nuclear explosive devices, whilst permitting trade for peaceful purposes. See <<http://www.nuclearsuppliersgroup.org/en/guidelines>> (viewed 26 August 2015).

40 The AG's objective is to establish among its members 'licensing measures to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment' to prevent proliferation of chemical and biological weapons. See <<http://www.australiagroup.net/en/objectives.html>> (viewed 26 August 2015).

41 The MTCR aims to prevent the proliferation of 'missiles, complete rocket systems, unmanned air vehicles, and related technology for those systems capable of carrying a 500 kilogram payload at least 300 kilometres, as well as systems intended for the delivery of weapons of mass destruction (WMD)'. See <<http://www.mtcr.info/english/objectives.html>> (viewed 26 August 2015).

42 Refer to the MTCR 'Equipment, Software and Technology Annex'; Wassenaar Arrangement 'List of Dual-Use Goods and Technologies and Munitions List'; Nuclear Suppliers Group 'Guidelines for Nuclear Transfers'; Australia Group 'Common Control Lists'.

responsibility of individual member countries and is achieved by the enactment of national laws.

Australian export control law

6.39 In Australia, the central point of reference for regulating export of sensitive materiel and technology is the Defence and Strategic Goods List (DSGL). Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958* prohibits the export of goods within this list without a licence or written permission from the Minister for Defence.⁴³ The *Defence and Strategic Goods List* is itself a legislative instrument made under the *Customs Act 1901*. The DSGL is framed in complex technical and scientific language and is based upon the specifications and thresholds agreed by member countries of the aforementioned international export control regimes.

6.40 The Department of Foreign Affairs and Trade's (DFAT) submission stated:

The publicly available common control lists developed through the AG, as well as other regimes, provide the basis for Australia's Defence and Strategic Goods List managed by the Defence Export Control Office under the authority of the Minister for Defence.⁴⁴

6.41 Mr Christopher Birrer (Acting First Assistant Secretary, Strategic Policy Division, Department of Defence) said that Australia must 'keep in lock step with like-minded countries' on export control standards.⁴⁵ He said:

The Defence Export Control Office attends meetings of those export control regimes along with colleagues from the Department of Foreign Affairs and Trade. For those international regimes and international controls to work, whether it be the Wassenaar arrangement on military goods or the Australia Group, in terms of chemical and biological precursors, it does require countries to have a uniformed approach towards controls. That is an important part of Australia's non-proliferation agenda and efforts. In doing that, we also work with experts in the community on those particular technologies, because they do get very specific and very detailed in terms of what a controlled item is and what is not.⁴⁶

6.42 He continued:

At the end of the day, the controls are there in order to make sure that dangerous technologies do not get into the wrong hands, do

43 *Customs (Prohibited Exports) Regulations 1958* (Cth) r.13E(2).

44 DFAT, *Submission 34*, p.2.

45 Birrer and Bourke et al, *Committee Hansard*, 24 March 2015, p.8.

46 Birrer and Bourke et al, *Committee Hansard*, 24 March 2015, p.8.

not get into the hands of either states with weapons programs of concern or of terrorists and others, and so we do want people to be a lot more mindful of where their technologies might end up. When we sit down and speak to industry and academics, that point is understood. Nobody out there wants to be the source of a proliferation concern.⁴⁷

- 6.43 The *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* contains a general prohibition on the provision of goods or services that 'will or may be used in a WMD program' or 'will or may assist a WMD program'.⁴⁸ These terms are defined as:

A plan or program for the development, production, acquisition or stockpiling of nuclear, biological or chemical weapons or missiles capable of delivering such weapons.⁴⁹

- 6.44 The Act allows the responsible Minister to issue a written permit for exports, provided that:

The Minister is satisfied that the supply or export of the goods or the provision of the services in accordance with the application would not be contrary to Australia's international or treaty obligations or the national interest.⁵⁰

- 6.45 In anticipation that a person may attempt to export materiel or technology without a licence, the *Customs Act 1901* allows the Defence Minister to issue a notice against a person to prohibit them from exporting goods for uses 'that would prejudice the security, defence or international relations of Australia.'⁵¹ Enforcement and compliance at the border is the responsibility of the Australian Customs and Border Protection Service. In the event of a breach, Customs may respond through education, warnings, administrative sanctions or prosecution.⁵²

Restrictions on re-export of US technology

- 6.46 In order to gain access to US military technology, Australia has bilaterally agreed to conform to US International Traffic in Arms Regulations (ITAR).

47 Birrer and Bourke et al, *Committee Hansard*, 24 March 2015, p.9.

48 *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) s.10 and s.11.

49 *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) s.3.

50 *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (Cth) s.13.

51 *Customs Act 1901* (Cth) s.112BA(1).

52 Department of Defence, *Submission 41*, p.13.

In exchange for access to US technology, Australia must not re-export US technology without approval.⁵³

- 6.47 The Australia-US Defence Cooperation Treaty, which entered into force in May 2013, allows for some defence exports to occur without requiring an export licence. Defence's website states:

The Treaty is intended to improve the efficiency of eligible two-way transfers between Australia and the US by facilitating the export of controlled goods within an Approved Community, without the need for an export licence. The implementing legislation, the *Defence Trade Controls Act 2012* (the Act), commenced on 6 June 2013.

...

The Approved Community comprises an Australian Community and a US Community. Both communities include government and non-government entities that have applied for and been approved as members of the Approved Community. Each community is managed by their respective Government.⁵⁴

- 6.48 Boeing recommended that the Australian Government consider aligning with US export control reform:

We would suggest that Government look into alignment with certain elements of the US Export Control Reform initiatives – in particular licensing exemptions... as well as for less sensitive military items recently removed from the United States Munitions List... Adaptation of a similar practice by Government for key Australian allies and strategic partners would significantly reduce administrative processing requirements in both industry and government.⁵⁵

Exports restricted due to temporary sanctions regimes

- 6.49 DFAT is responsible for administering temporary sanctions regimes, such as those agreed by resolution of the UN Security Council. These sanctions may extend beyond military exports, such as the requirement to freeze financial assets.
- 6.50 DFAT's submission outlined its role in export control:

53 DMO, 'US Technology Transfer: Presentation to Industry' [undated] at <http://www.defence.gov.au/strategy/deco/docs/ITAR_Industry.pdf> (viewed 26 August 2015).

54 Department of Defence, 'About the Treaty', at <<http://www.defence.gov.au/ustradetreaty/aboutthetreaty.asp>> (viewed 26 August 2015).

55 Boeing, *Submission 23*, p.2.

- Managing Australia's contribution to, and engagement in, the four main export control regimes;
 - Regulating sanctions compliance, both under UN Security Council resolutions and autonomous sanctions; [and]
 - Screening visa applications to assess direct or indirect links to WMD proliferation.⁵⁶
- 6.51 The UN Security Council has established numerous sanctions regimes, which include the following:
- Resolution 1540 (2004), preventing transfer of weapons of mass destruction and delivery systems to non-state actors;
 - Resolution 1718 (2006) imposed on North Korea; and
 - Resolution 1737 (2006) imposed on Iran.⁵⁷
- 6.52 Additionally, Australia has imposed autonomous sanctions against some countries, such as Russia, Syria and others listed on DFAT's website.⁵⁸ Administration of sanctions legislation and approval of exports in this context is subject to approval by the Foreign Minister or a delegate.⁵⁹
- 6.53 DFAT submitted:
- DFAT is committed to administering Australian sanctions laws diligently, but also in a way that enables trade, consistent with legislation, wherever possible. ... We aim to administer Australian sanctions laws in a way that is predictable and transparent, thereby simplifying compliance for Australian businesses, universities and individuals; and ensuring the integrity and reputation of Australian exports, including defence exports.⁶⁰
- 6.54 DFAT's submission stated that the department would 'work closely' with DECO to avoid duplication of effort where items are regulated under similar laws.⁶¹

Export pre-approval

- 6.55 Prior to signing contracts, Australian exporters can seek in-principle approval from DECO for the anticipated export, which is valid for a specified period of time. If this time expires, re-approval is then required.

56 DFAT, *Submission 34*, p.2.

57 UN Security Council, 'Subsidiary Organs', at <<http://www.un.org/en/sc/subsidiary/>> (viewed 26 August 2015).

58 DFAT, 'Australia and Sanctions' at <<http://dfat.gov.au/international-relations/security/sanctions/pages/about-sanctions.aspx>> (viewed 26 August 2015).

59 DFAT, 'Australia and Sanctions' at <<http://dfat.gov.au/international-relations/security/sanctions/pages/about-sanctions.aspx>> (viewed 26 August 2015).

60 DFAT, *Submission 34*, p.3.

61 DFAT, *Submission 34*, p.3.

6.56 Sonartech Atlas submitted that export permits should have a longer validity period.⁶² Mr Mark Baker (Managing Director, Sonartech Atlas) said the company has a contract to supply a submarine mission system to South Korea, which is due to be delivered beyond the 12-month period of in-principle export approval granted by DECO. He said that in the interim, 'we are working at our own risk' because the existing approval has lapsed.⁶³ He explained:

We were able to get the in-principle approval. That was okay. Then, we signed the contract and moved forward to get the actual licence or the export permit. Because it is only valid for 12 months we could not have one issued, because the first delivery of equipment, documentation or data was going to fall outside the 12 months. We are now operating in a period where we are in contract, working towards supplying a system that we do not have an export permit for.⁶⁴

6.57 Similarly, BAE Systems submitted:

The new online system appears to have improved the processing of marketing licences, however, a 12 month licence is far too short for the pursuit of defence exports. A more appropriate time period would be 36 months, with a simple "tick the box if you wish to renew" on the assumption that nothing has strategically changed.⁶⁵

6.58 Mrs Katrina Binotto (Contract Management Officer, Hawker Pacific Pty Ltd) said that on occasions, tenders and bids are made without approval and the company proceeds at its own risk.⁶⁶

6.59 Mr Michael Halloran (Managing Director, Supacat Pty Ltd) said:

I think I noticed that some of the other submissions mentioned the 12-month licence regime. Given that it is typically a 10-year process and a one-year license gets about the first three phone calls out of the way and we are back for another license, I think that is an obvious thing to fix. The licences can be withdrawn at any time in any case.⁶⁷

6.60 Austal's submission stated:

62 Sonartech Atlas, *Submission 26*, p.12.

63 Baker, Schulte and Sedgman, *Committee Hansard*, 17 October 2014, p.16.

64 Baker, Schulte and Sedgman, *Committee Hansard*, 17 October 2014, p.16.

65 BAE Systems, *Submission 3*, p.5.

66 Binotto, *Committee Hansard*, 31 October 2014, p.23.

67 Halloran, *Committee Hansard*, 31 October 2014, p.13.

The role of DECO from an Austal perspective is to efficiently support the licensing and approval of defence exports. ... It would be useful for DECO to be able to provide better information regarding the likely timeline for approvals and the probability of a successful approval being realised. ... Australia needs to ensure that DECO remains an enabler to exports.⁶⁸

Approval of sensitive exports

- 6.61 In complex cases, DECO coordinates assessment of export applications with relevant experts from across Defence and other Government agencies. For this purpose, the Standing Interdepartmental Committee on Defence Exports (SIDCDE) has been established to review sensitive or complex cases where specialist information from global export control partners may be required.⁶⁹
- 6.62 Input to assessment may be sourced from:
- Department of Foreign Affairs and Trade;
 - Intelligence and security organisations;
 - Navy, Army and Air Force and the Capability Development Group; (following release of the First Principles Review in April 2015, the CDG's functions have been succeeded by the Capability Acquisition and Sustainment Group); and
 - Other Government departments on an as-needed basis.⁷⁰
- 6.63 As noted above, involvement of the SIDCDE may arise in complex cases. DECO's website describes its structure, role and functions as follows:
- SIDCDE's role is to advise the Defence Minister on sensitive exports;
 - When considering sensitive exports, SIDCDE takes into account the 'possible impacts on Australia's security, political, other trade interests, as well as the effects on global and regional stability as defined in Australia's Export Control Policy.'
 - SIDCDE is chaired by the Department of Defence and comprises representatives from the Department of Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, Austrade, the Attorney-General's Department and the Australian Customs and Border Protection Service.⁷¹

68 Austal, *Submission 31*, p.13.

69 Department of Defence, *Submission 41*, p.12.

70 Department of Defence, *Submission 41*, pp.12-13.

71 DECO 'Standing Interdepartmental Committee on Defence Exports' at <<http://www.defence.gov.au/deco/SIDCDE.asp>> (viewed 26 August 2015).

- 6.64 The Australian Strategic Policy Institute submitted:
- While the majority of export approvals are relatively straightforward, complex cases potentially involve sensitive intelligence assessments; judgements about the legal basis of individual exports; securing inter-departmental consensus on the right approach; and strategic assessments about the impact on regional and ADF capabilities.⁷²
- 6.65 Thales Australia stated in its submission:
- Currently the consideration of sensitive applications can take up to 35 working days or longer, which may result in losing the momentum and the opportunity for export. A reduction in this waiting time would be of considerable benefit to companies developing export opportunities.⁷³
- 6.66 Saab Australia Pty Ltd submitted:
- Saab understands and accepts the need for controls over the export of certain technologies... Saab therefore accepts the need for:
- Good corporate citizens; and
 - For an effective Government/agency 'gatekeeper' in the form of DECO, to each play their part to prevent the proliferation of technologies that Saab deals with in order to protect Australia, its citizens and our way of life.⁷⁴
- 6.67 In its submission, Sonartech Atlas observed:
- This topic extends beyond the Defence Export Controls Office, because the issue of export control and more importantly the processing and assessment of applications is broader than that office.⁷⁵
- 6.68 The Australian Strategic Policy Institute submitted:
- While complex export approvals can take more time than industry likes, the implications of authorising inappropriate exports can be very serious.⁷⁶
- 6.69 Ms Susan Kerr (Export Controls Manager, ASC Pty Ltd) said that pre-approval 'can be difficult', depending on whether the technology is

72 ASPI, *Submission 20*, p.2.

73 Thales Australia, *Submission 19*, p.9.

74 Saab Australia Pty Ltd, *Submission 10*, p.1.

75 Sonartech Atlas, *Submission 26*, p.9.

76 ASPI, *Submission 20*, p.2.

sensitive.⁷⁷ She said re-application may be required for each new export of the same items, 'if it is quite sensitive technology.'⁷⁸

6.70 Mr William Taylor (Senior Strategy and Business Development Manager, QinetiQ Australia) said:

...countries that rely heavily on imported defence technology, such as Australia, are often subject to complex external regulations that can curtail export opportunities, especially where the role of domestic industry is often to add value to or provide services or componentry to complex systems manufactured or designed elsewhere. Such regulations usually proscribe destinations for controlled items and determine the security requirements for staff that can be engaged in those export programs.⁷⁹

6.71 He continued:

It is apparent that the arrangements surrounding defence exports are not like those for other goods, and we readily accept the need for additional oversight and proper consideration of the circumstances under which defence products or services are exported. But regulation, particularly surrounding intellectual property and controlled technology, can constrain access to the defence export market, and – noting the sensitivities associated with defence materiel – the global defence market is not necessarily an open market.⁸⁰

6.72 Sonartech Atlas submitted that there had been questions asked by customers regarding the classification status of information lodged via DECO's new online system. Sonartech Atlas observed that the process will need to be capable of handling and storing information at a level of classification commensurate with customer expectations.⁸¹

6.73 Obligations arising from International Trade in Arms Regulations impose additional considerations for exports involving US technology. Australia risks losing access to this technology if unauthorised exports occur and US companies have been fined for their involvement in breaches.⁸²

77 Kerr, *Committee Hansard*, 9 October 2014, p.9.

78 Kerr, *Committee Hansard*, 9 October 2014, p.10.

79 Taylor and Watters, *Committee Hansard*, 13 February 2015, p.10.

80 Taylor and Watters, *Committee Hansard*, 13 February 2015, p.10.

81 Sonartech Atlas, *Submission 26*, p.10.

82 DMO, 'US Technology Transfer: Presentation to Industry' [undated] at <http://www.defence.gov.au/strategy/deco/docs/ITAR_Industry.pdf> (viewed 26 August 2015).

Areas of possible improvement or reform

- 6.74 During the inquiry, several issues relating to DECO's operations were brought to the Committee's attention. These related to the following themes:
- Administrative arrangements and the division of responsibilities among government agencies;
 - Communication from DECO regarding the status of export applications, timely updates on rule changes and avenues for reviewing decisions;
 - Complex regulations, in particular the challenge of understanding the requirements of the Defence and Strategic Goods List and related procedures; and
 - Changes to risk management policies, which might include reduced regulatory oversight of exports by trusted companies to low-risk destinations.

Administrative arrangements

- 6.75 Saab Australia's submission expressed concern that there are multiple government departments and agencies responsible for export control legislation.⁸³ Saab's submission stated:

Saab would prefer to see all controls over the movement of military and dual-use technologies arise under one Act (or a small set of Acts, sensibly divided in scope), with one agency/Government interface, providing a one-stop-shop and ensuring consistency and alignment regardless of the basis for controls.⁸⁴

- 6.76 Saab Australia summarised existing arrangements in its submission, as shown in the table 6.6 below.

83 Saab Australia Pty Ltd, *Submission 10*, p.2.

84 Saab Australia Pty Ltd, *Submission 10*, p.4.

Table 6.6 Overview of Australian Government export control legislative responsibilities

Department/agency	Legislation	Operation
Customs	Customs Act	Assessing, issuing and enforcing import permits
Customs	Customs Act	Enforcing export permits
Defence (DECO)	Customs Act	Assessing and issuing export permits
Defence (DECO)	Weapons of Mass Destruction (WMD) Act	Assessing and issuing export permits
Defence (DECO)	Defence Trade Controls Act	Assessing and issuing supply (intangibles) and brokering permits
DFAT	Autonomous Sanctions Act	Enforcing autonomous sanctions

Source: Saab Australia Pty Ltd, *Submission 10*, p.3

6.77 Mr Andrew Guilinn (Contracts Manager and Export Control Director, Saab Australia Pty Ltd) said:

We have the sanctions that come through DFAT. We have import controls under Customs. We have the existing Customs controls over tangible exports. We have the new intangible controls coming through the DTC Act. And we have the Weapons of Mass Destruction Act. That causes some difficulty for us... I can only imagine what that means for those who are not as involved and as understanding of all this as we are.⁸⁵

6.78 The Export Council of Australia submitted that there is 'scope to improve communication and coordination' between DECO, DFAT and Customs.⁸⁶

6.79 Austrade (a member of the Strategic Trade Controls working group) confirmed that 'DECO has developed practical mechanisms for Whole of Government framing of Australia's export controls system.'⁸⁷

Communication regarding status of applications

6.80 ASC Pty Ltd's submission stated that to determine the progress of a permit application lodged online, 'industry must contact DECO via phone or email' and wait up to two working weeks to receive a reply.⁸⁸

6.81 Saab's submission stated that a combination of an online portal and direct email contact with DECO is used to progress applications and lodge questions. According to Saab, there are 'difficulties of having to tie

85 Giulinn, Ogden and Rosenfield, *Committee Hansard*, 10 October 2014, p.2.

86 Export Council of Australia, *Submission 27*, p.3.

87 Austrade, *Submission 30*, p.2.

88 ASC Pty Ltd, *Submission 11*, p.2.

- together information and status across a number of emails... and the status of applications is not clear to Saab unless contact is made'.⁸⁹
- 6.82 Boeing submitted that DECO should introduce an 'expected response time' policy for email requests relating to the 'clarification of and/or reconsideration of license terms and conditions.'⁹⁰
- 6.83 ASPI's submission proposed that DECO establish a contact group with industry, so DECO can 'assess the performance of export control processes.' Industry, through its involvement, would benefit from 'closer engagement about DECO processes.'⁹¹
- 6.84 Mr David Shiner (Vice President, International Sales, Austal) said that receiving feedback from DECO was important, particularly regarding delays. He said:
- In the event that there are going to be delays, Austal would clearly want to understand that sooner rather than later. That is often not the case with the licence applications with DECO. More often than not, you are driven by time frames you have very little control of, so it is just a frustration. To be able to have more currency in communication around the status of applications would be beneficial.⁹²
- 6.85 ASC Pty Ltd's submitted that DECO's industry outreach, 'including export control conferences and free e-learning training modules' have been valuable.⁹³
- 6.86 Nevertheless, ASC Pty Ltd suggested there could be 'detailed online guidance on recent Australian and US export control reforms'. The submission stated:
- With few exceptions, current guidance comprises high-level summaries. ASC sees an opportunity for DECO to work closely with industry to develop detailed best practice guidelines for the implementation of Australian and US export controls regulations, thereby optimising industry compliance...⁹⁴
- 6.87 ASC proposed that DECO could introduce a subscription service to keep industry updated of procedural changes, stating that in the past, there had been a 'lack of notification' that 'resulted in goods being detained by Customs'. The submission stated:
-

89 Saab Australia Pty Ltd, *Submission 10*, p.4.

90 Boeing, *Submission 23*, p.2.

91 ASPI, *Submission 20*, p.3.

92 Shiner, *Committee Hansard*, 13 February 2015, p.31.

93 ASC Pty Ltd, *Submission 11*, p.1.

94 ASC Pty Ltd, *Submission 11*, p.2.

For example, recently the General Export Permit category was removed without notifying industry and without providing details of the change on agency websites.⁹⁵

- 6.88 Defence's submission stated that DECO conducts workshops in capital cities to educate and assist exporters. In addition, DECO had 'recently modernised its website to make it more user-friendly in response to stakeholder feedback.'⁹⁶ Defence's submission stated:

DECO is placing particular emphasis on travelling to meet with companies that are particularly affected by aspects of the export controls, to work through the specific issues relevant to their circumstances, and to see what can be done to address these issues.⁹⁷

- 6.89 Sonartech Atlas submitted that more information about the basis of DECO decisions would assist exporters, which could avoid 'wasted efforts' on applications unlikely to be successful. The submission added that explanations could be provided via classified briefings.⁹⁸

- 6.90 Sonartech Atlas submitted:

Under the current arrangements, when an export permit is denied, it is not possible to obtain advice on the actual grounds/reasons for denial. Or at least it has not been possible for us to obtain definitive advice regarding the grounds for refusal.⁹⁹

- 6.91 The submission added that there is 'no mechanism' for reviewing a decision.¹⁰⁰ The Committee sought advice from Defence on available review mechanisms when export applications are unsuccessful, which confirmed that review is possible:

DECO provides applicants with the right to review a decision and provides procedural fairness to the applicant at a number of points throughout the application process.¹⁰¹

- 6.92 In addition:

DECO will notify an applicant if an application has been denied and provide reasons for the decision and advice on their review rights. Applicants are entitled to seek review of a decision made under regulation 13E of the *Customs (Prohibited Exports) Regulations*

95 ASC Pty Ltd, *Submission 11*, p.2.

96 Department of Defence, *Submission 41*, p.14.

97 Department of Defence, *Submission 41*, p.15.

98 Sonartech Atlas, *Submission 26*, p.9.

99 Sonartech Atlas, *Submission 26*, p.11.

100 Sonartech Atlas, *Submission 26*, p.12.

101 Department of Defence, *Response to Questions on Notice* (Question No. 27).

1958 or the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* under the *Administrative Decisions (Judicial Review) Act 1977*; however, where a matter falls outside the scope of the ADJR Act there may grounds for an applicant to seek relief under section 39B of the *Judiciary Act 1903* (Cth).¹⁰²

6.93 In any event, only very few export applications are denied or subject to prohibition, as indicated in table 6.7 below. The usual reason for an application not to proceed is that it is withdrawn by the exporter.

Table 6.7 Number of export applications received and rejected or denied

Period	Withdrawn by exporter	Denial of an actual or 'in principle' export by the Minister for Defence	Prohibition notices (WMD Act and/or MEU provision)
1 July 2015 to 11 October 2015	57	0	0
1 July 2014 to 30 June 2015	234	3	1
1 July 2013 to 30 June 2014	166	2	3
29 April 2013 to 30 June 2013	19	0	0

Source: Department of Defence Response to Questions on Notice (Question No. 28).

Complex regulations

6.94 During the inquiry, evidence given indicated that some exporters have found contemporary export control laws to be excessively complex.

6.95 Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958* prohibits the export of goods prescribed on the Defence and Strategic Goods List (DSGL) without a licence or written permission from the Minister for Defence.¹⁰³ Most export applications received by DECO are subject to Regulation 13E. The current version of the *Defence and Strategic Goods List* (as at 9 April 2015) is 431 pages in length.¹⁰⁴

6.96 The following is a sample item from among the 'dual-use' materials, chemicals, toxins and micro-organisms category of the DSGL:

1C117: Materials for the fabrication of 'missile' components as follows:

102 Department of Defence, *Response to Questions on Notice* (Question No. 27).

103 *Customs (Prohibited Exports) Regulations 1958* (Cth) r.13E.

104 *Defence and Strategic Goods List* (Compilation No.6), 9 April 2015.

- Tungsten and alloys in particulate form with a tungsten content of 97% by weight or more and a particle size of 50×10^{-6} m ($50\mu\text{m}$) or less;
- Molybdenum and alloys in particulate form with a molybdenum content of 97% by weight or more and a particle size of 50×10^{-6} m ($50\mu\text{m}$) or less;
- Tungsten materials in solid form having all of the following:
 - ⇒ Any of the following material compositions:
 - ⇒ Tungsten and alloys containing 97% by weight or more of tungsten;
 - ⇒ Copper infiltrated tungsten containing 80% by weight or more of tungsten; or
 - ⇒ Silver infiltrated tungsten containing 80% by weight or more of tungsten; and
 - ⇒ Able to be machined to any of the following products:
 - ⇒ Cylinders having a diameter of 120mm or greater and a length of 50mm or greater;
 - ⇒ Tubes having an inner diameter of 65mm or greater and a wall thickness of 25 mm or greater and a length of 50mm or greater; or
 - ⇒ Blocks having a size of 120mm by 120mm by 50mm or greater.

Technical Note:

In 1C117, 'missile' means complete rocket systems and unmanned aerial vehicle systems capable of a range exceeding 300 km.¹⁰⁵

6.97 DECO's website advises that goods, services or technology known to be controlled must be submitted for assessment prior to export. Further:

If you are unsure about the control status of your commodity you may request an assessment of your goods or services by submitting a completed Application to Export Controlled Goods and Technology form.¹⁰⁶

6.98 In addition, uncontrolled items may require an assessment to verify status:

For any exports of non-controlled goods, services or technologies, where there is a suspicion that the commodities may be used for a weapons of mass destruction (WMD) program, advice should be sought from DECO by submitting an Application to Export Controlled Goods and Technology Form. All applications for

¹⁰⁵ *Defence and Strategic Goods List (Compilation No.6)*, 9 April 2015, r.1C117.

¹⁰⁶ DECO, 'Application Process', at <http://www.defence.gov.au/DECO/ApplicationProcess.asp> (viewed 26 August 2015).

export are assessed with consideration to the DSGL, Customs Amendment (Military End-Use) Act, sanctions legislation, and the WMD Act. If your goods are not controlled you will receive a Outcome of Export Control Assessment letter to attach to your export documentation.¹⁰⁷

- 6.99 Consequently, Australian exporters are expected to be aware of the capabilities of their product, conscious of whether it could be used for a WMD program and educated about the details of highly prescriptive export control laws, such as the regulation from the *Defence and Strategic Goods List* shown above.
- 6.100 Ms Susan Kerr (Export Controls Manager, ASC Pty Ltd) noted the potential for defence exporters to interpret export control laws differently. She said:
- We have 30 or so reasonably sized defence companies in Australia and, if they are all going their own way, all interpreting the legislation their own way and implementing it in their own way, you will end up with a compliance regime that is not necessarily consistent or standardised.¹⁰⁸
- 6.101 She said the style and form of the DSGL could be improved:
- We could specifically say what parts on that list are controlled, as the ITAR now does – align ourselves with the US and EU practice. That would remove a lot of the lack of understanding of what really is controlled under the act and smooth out everybody’s processes in Customs, in DECO and across industry in general.¹⁰⁹
- 6.102 Lockheed Martin Australia’s submission stated that ‘the bureaucratic and regulatory environment for defence exports is considered onerous.’¹¹⁰
- 6.103 Similarly, the Tasmanian Government submitted that based on advice from industry, preparing documentation and answering questions ‘is considered onerous.’ Furthermore:
- Firms struggle with the wording and while intending to comply with the questions asked and being transparent, risk jeopardising a project and having products prohibited.¹¹¹
- 6.104 Hawker Pacific Pty Ltd submitted:

107 DECO, ‘Application Process’, at <http://www.defence.gov.au/DECO/ApplicationProcess.asp> (viewed 26 August 2015).

108 Kerr, *Committee Hansard*, 9 October 2014, p.10.

109 Kerr, *Committee Hansard*, 9 October 2014, p.12.

110 Lockheed Martin Australia, *Submission 39*, p.2.

111 Tasmanian Government, *Submission 29*, p.3.

A significant barrier to the growth of our Defence exports is the complexity of the legislative requirements of export controls, and the risks and penalties associated with inadvertant breaches.¹¹²

- 6.105 The Northern Territory Government's submission stated that businesses face a 'Pandora's box' to understand the requirements of export control laws, intellectual property and the International Traffic in Arms Regulations.¹¹³
- 6.106 For ease of reference, a 'DSGL Quick Reference Guide' on DECO's website describes the types of items subject to regulation in plain language. For illustrative purposes, some examples are shown below:
- Bombs, torpedoes, rockets, missiles, other explosive devices and charges, components and accessories;
 - Equipment for launching, deploying, decoying, disruption, detection and jamming;
 - Chemical or biological toxic agents, 'riot control agents', radioactive materials, related equipment, components, and materials;
 - Vessels of war, special naval equipment, accessories and components;
 - Aircraft, unmanned airborne vehicles, aero-engines and aircraft equipment, and related equipment and components;
 - Nuclear reactors, gas centrifuges, and equipment and materials especially designed for nuclear use;
 - Crucibles, valves, robots, vibration test systems, vacuum pumps, chemical processing, and handling equipment;
 - Microwave components, acoustic wave devices, high energy devices, switching devices, and detonators; and
 - Gyros, accelerometers, inertial navigation systems, and flight control systems.¹¹⁴
- 6.107 Notwithstanding this guidance, the Export Council of Australia's submission noted that 'the regulatory process can be particularly challenging to navigate' for inexperienced defence exporters.¹¹⁵
- 6.108 Hawker Pacific Pty Ltd's submission noted that advice can be required quickly. With access to self-assessment tools, this would 'allow industry

112 Hawker Pacific Pty Ltd, *Submission 33*, p.1.

113 Northern Territory Government, *Submission 5*, p.7.

114 DECO 'DSGL Quick Reference Guide' at <http://www.defence.gov.au/DECO/DSGLQRG.asp> (viewed 26 August 2015).

115 Export Council of Australia, *Submission 27*, p.3.

to access the specialised knowledge without over-burdening the DECO.’¹¹⁶ CEA Technologies made similar comments in its submission.¹¹⁷

6.109 At present, DECO’s website has a questionnaire and DSGL search function to assist exporters identify whether an export might be controlled. For example, searching for the term ‘gyro’ returns results highlighting the relevant provisions of the DSGL.¹¹⁸

6.110 Mr Christopher Birrer (Acting First Assistant Secretary, Strategic Policy Division, Department of Defence) said that a new online tool is being developed:

That would help companies to better understand how their technologies might fit in to the DSGL, and therefore be controlled; or might not, and therefore not be controlled. Just like how we have companies or researchers who are not sure whether or not their technologies are controlled, we also have instances where people believe that they might be controlled. But, once this tool comes online, it will show them that it is not. Often, people do have a false positive as well, in terms of believing that what they are working on is controlled when it is not. So it goes both ways.¹¹⁹

6.111 He added that there is ongoing dialogue with industry and academics, ‘in terms of practical advice on implementation.’¹²⁰ Defence’s submission noted that DECO works ‘closely with relevant peak bodies to expand engagement on export controls within defence and dual-use industries.’¹²¹

6.112 The Victorian Government submitted that ‘increased and targeted outreach’ by DECO would assist industries with ‘appreciation of DECO’s operational requirements.’¹²² Recent changes to the law could also be explained. The submission stated:

This is particularly relevant for dual-use technologies, where Victorian industries may be unaware of their business development activities entering the scope of the [DTC] Act. ... Increased Victorian industry awareness... will enable Victoria to identify legal and legitimate defence export opportunities that do not conflict with the terms set out in the new legislation.¹²³

116 Hawker Pacific Pty Ltd, *Submission 33*, p.1.

117 CEA Technologies, *Submission 38*, p.3.

118 See <<https://dsgl.defence.gov.au/pages/home.aspx>> (viewed 26 August 2015).

119 Birrer and Bourke et al, *Committee Hansard*, 24 March 2015, p.8.

120 Birrer and Bourke et al, *Committee Hansard*, 24 March 2015, p.8.

121 Department of Defence, *Submission 41*, p.14.

122 Victorian Government, *Submission 36*, p.14.

123 Victorian Government, *Submission 36*, pp.14-15.

- 6.113 In contrast, the NSW Government submitted that workshops facilitated by DECO have been ‘especially valuable for businesses seeking to grow exports to the United States.’¹²⁴
- 6.114 CEA Technologies stated in its submission:
DECO has been effective in providing industry with forums to help industry navigate the current changes to defence export controls and defence trade cooperation with the US.¹²⁵
- 6.115 CEA Technologies added that ‘face-to-face training’ should remain part of DECO’s interaction with industry.¹²⁶
- 6.116 Mr Robert Forbes (Commercial Director, CEA Technologies Pty Ltd) said that as the Australian industry’s engineering expertise had increased, there had been a corresponding increase in complexity of technology and materiel being produced for export overseas:
Therefore, DECO has had to move itself from really just agreeing to most technologies being transferred, with their main concern being on the countries that they go to, to being actually concerned about the technologies that are exported, and the capability and the IP concerns. So it has had to expand, and is learning as it goes along.¹²⁷
- 6.117 Mr Christopher Birrer (Acting First Assistant Secretary, Strategic Policy Division, Department of Defence) said that the Strengthened Export Controls Steering Group, established in preparation of the *Defence Trade Controls Act 2012* entering into force, was comprised of specialists and has been working on ‘a lot of details of implementation, with subject matter experts and with export control managers.’¹²⁸
- 6.118 An informal association of industry and government participants Export Control Forum has been formed to facilitate direct discussions on export control laws and policy, as well as making available advice and training.¹²⁹ Austrade’s submission suggested this forum could serve as a point of coordination for defence exports support.¹³⁰

124 NSW Government, *Submission 42*, p.2.

125 CEA Technologies, *Submission 38*, p.3.

126 CEA Technologies, *Submission 38*, p.3.

127 Davis and Forbes, *Committee Hansard*, 28 October 2014, p.2.

128 Birrer and Bourke et al, *Committee Hansard*, 24 March 2015, p.8.

129 AI Group, ‘Export Control Forum’, at <<http://www.aigroup.com.au/industrysectors/defence/exportforum>> (viewed 26 August 2015).

130 Austrade, *Submission 30*, p.3.

Risk management

- 6.119 Advancements in new technology, military tactics and increased defence expenditure among Asian countries, whilst an opportunity for Australian businesses, presents a challenge for defence export regulators. Australian interests may be compromised in the event that defence materiel and technology were ever delivered into the wrong hands.
- 6.120 The Department of Foreign Affairs and Trade submitted:
- Australia maintains an excellent international reputation as a responsible arms exporter, based on our active engagement on counter-proliferation issues, strong adherence to international obligations, including UN Security Council sanctions and role in the four main export control regimes. Protecting this reputation is not only in the national interest, it opens up trade opportunities that may not otherwise be available.¹³¹
- 6.121 The Department of Defence's submission stated that Australia 'could adopt risk-based approaches... to provide a leaner and more effective export control system'.¹³²
- 6.122 In 1996, a report of Australian National Audit Office recommended that Defence, in conjunction with Customs, DFAT and the then-Department of Primary Industries and Energy, 'develop a risk management plan for managing risks associated with export controls for defence-related goods.' At the time, Defence agreed to this recommendation.¹³³
- 6.123 ANAO's report observed:
- No economically feasible export control system is likely to provide perfect assurance against any possible illegal exports of controlled items. Essentially, a cost-effective export control system manages the risks associated with unlawful exports of defence relevant goods, having regard to resource limitations. The risks should be identified, analysed, ranked and managed.¹³⁴
- 6.124 Saab Australia's submission supported the consideration of a risk-based approach as part of reforms to DECO, stating:
- DECO has been open to considering having low-risk technologies to low-risk destinations treated differently to other proposed exports, particularly where the exporter is known to DECO and

131 DFAT, *Submission 34*, p.1.

132 Department of Defence, *Submission 41*, p.13

133 Australian National Audit Office, 'Defence Export Facilitation and Controls', Audit Report No.26 of 1995-96, p.36.

134 Australian National Audit Office, 'Defence Export Facilitation and Controls', Audit Report No.26 of 1995-96, p.35.

where there is no evidence that the exporter is not able or willing to work within the export control rules.¹³⁵

- 6.125 Mr Andrew Hudson (Export Council of Australia) said that trusted exporters should have the benefit of faster export approvals. He said that Australian Trusted Trader,¹³⁶ currently under development, would provide a way to streamline export approvals:
- ...by virtue of being in the Trusted Trader Program, Customs' concerns about their compliance and cargo security issues are removed and therefore, even if they need to go to all these different agencies, it should be a much quicker process. Ideally at the end there should be one agency giving approvals.¹³⁷
- 6.126 Northrop Grumman stated in its submission that embracing new technologies including 'autonomous systems, unmanned vehicles stealth technologies and micro-satellites' could 'position the Australian defence industry for a greater share of defence exports.'¹³⁸ The submission noted that Asian defence spending, based on 2012 figures, exceeds the expenditure of NATO and non-NATO countries of Europe.¹³⁹ Northrop Grumman observed that whilst Australia is the world's eighth largest importer of defence systems and armaments, Australia 'remains behind on the scale of defence industry exports compared to comparable nations.'¹⁴⁰
- 6.127 Similarly, Supacat Pty Ltd's submission stated that Australia is 'underweight' in terms of defence exports and could provide services and products to ASEAN countries.¹⁴¹ Mrs Katrina Binotto (Contract Management Officer, Hawker Pacific Pty Ltd) noted in her evidence that the Asian market is expanding.¹⁴²
- 6.128 However, many countries in the Indo-Pacific region are not members of international export control regimes; specifically, the Missile Technology Control Regime, the Wassenaar Arrangement, the Australia Group or Nuclear Suppliers Group. China is a member of the NSG, though remains

135 Saab Australia Pty Ltd, *Submission 10*, p.2.

136 According to Department of Immigration and Border Protection's website, Australian Trusted Trader aims to 'streamline and facilitate trade and enhance supply chain security.' See <<https://www.border.gov.au/Busi/Trus>>.

137 Hudson, *Committee Hansard*, 31 October 2014, p.37.

138 Northrop Grumman, *Submission 28*, p.4.

139 Northrop Grumman, *Submission 28*, p.3.

140 Northrop Grumman, *Submission 28*, p.3.

141 Supacat Pty Ltd, *Submission 18*, p.3.

142 Binotto, *Committee Hansard*, 31 October 2014, p.24.

outside the other three export control regimes. South Korea and Japan are members of all four regimes.¹⁴³

6.129 Admission to these regimes is usually by consensus and may be subject to various considerations; however, membership criteria of the respective regimes require a prospective applicant to demonstrate a commitment to non-proliferation and have the ability to enforce an effective domestic export control system.¹⁴⁴

6.130 The 2013 Defence White Paper stated:

The Indo-Pacific region poses key challenges for Australia's export control efforts as it generates a large portion of dual-use goods (which have both a civil and military purpose), and contains key trade routes and transshipment hubs. Australia and regional neighbours will need to work together to implement and strengthen export control measures, uphold UN Security Council resolutions and support regional counter-proliferation efforts.¹⁴⁵

6.131 The 2010 Defence Industry Policy Statement observed:

The general effectiveness of international export control regimes and treaties in controlling the movement of controlled items has made it difficult for proliferators to acquire controlled items. Proliferators are therefore resorting to procuring non-controlled equivalents, which fall just below the technical parameters of the items listed on the DSGL, or using deceptive procurement methods.¹⁴⁶

6.132 And also noted that:

Regrettably... Australian goods and services have been exploited by proliferators for illicit purposes despite their sale having every appearance of being legitimate.¹⁴⁷

143 'MTCR Partners' at <<http://www.mtcr.info/english/partners.html>>; 'Participating States' at <<http://www.wassenaar.org/participants/index.html>>; 'Participants' at <<http://www.nuclearsuppliersgroup.org/en/participants1>>; and 'Australia Group Participants' at <<http://www.australiagroup.net/en/participants.html>> (viewed 26 August 2015).

144 'MTCR Partners' at <<http://www.mtcr.info/english/partners.html>>; 'How Does the Wassenaar Arrangement Work?' at <<http://www.wassenaar.org/introduction/howitworks.html>>; 'Participants' at <<http://www.nuclearsuppliersgroup.org/en/participants1>>; 'Australia Group Membership' at <<http://www.australiagroup.net/en/membership.html>> (viewed 26 August 2015).

145 Department of Defence, 'Defence White Paper 2013', May 2013, p.27.

146 Department of Defence, 'Building Defence Capability: A Policy for a Smarter and More Agile Defence Industry Base', June 2010, p.60.

147 Department of Defence, 'Building Defence Capability: A Policy for a Smarter and More Agile Defence Industry Base', June 2010, p.60.

- 6.133 Thales Australia's submission observed that the defence export policies of certain countries can be explained by a desire to achieve self-reliance and progress technical knowledge, as part of either global aspirations or due to a direct threat to their sovereignty.¹⁴⁸ Other factors influencing policies of the largest defence export countries, according to Thales, were geo-political considerations, government policy and commercial interests.¹⁴⁹
- 6.134 Mr Andrew Giulinn (Contracts Manager and Export Control Director, Saab Australia Pty Ltd) said that NATO and EU countries have common arrangements, whereas Asia is a 'perfect example' of a region having 'their own rules.'¹⁵⁰ He said the Australian Government could:
- ...continue to try to talk to those governments about becoming part of the anti-proliferation regime, which is where a lot of the commonality comes in for the countries we deal with most in terms of our supply. ... Our region is the Asia-Pacific, so that is where the difficulties there lie.¹⁵¹
- 6.135 Mr Christopher Jenkins (CEO, Thales Australia and New Zealand) said that approving exports involves 'important strategic choices'.¹⁵² He said:
- I am not saying they [DECO] are doing a bad job. It is just that sometimes we put simple questions to them – you know, exporting Bushmasters to the Netherlands; well, why not? Exporting antisubmarine warfare sonars to Singapore; interesting question. It defines the strategic risk profile, white paper concerns – all of those things.¹⁵³
- 6.136 Mr Jenkins added:
- If Australia, DECO, were able to create a kind of a pre-planned approach to how exports could be successful in a country, or be blocked from going to that country, that would be a very helpful way of speeding that process.¹⁵⁴
- 6.137 ASPI suggested that Ministerial guidance could be provided to Defence, to minimise Ministerial referrals.¹⁵⁵ However:

148 Thales Australia, *Submission 19*, p.2.

149 Thales Australia, *Submission 19*, p.3.

150 Giulinn, Ogden and Rosenfield, *Committee Hansard*, 10 October 2014, p.2.

151 Giulinn, Ogden and Rosenfield, *Committee Hansard*, 10 October 2014, p.2.

152 Jenkins, *Committee Hansard*, 17 October 2014, p.22.

153 Jenkins, *Committee Hansard*, 17 October 2014, p.22.

154 Jenkins, *Committee Hansard*, 17 October 2014, p.22.

155 ASPI, *Submission 20*, p.2.

Ministers must be satisfied that the right delegations of authority are in place to allow speedy decision at appropriate levels in the Defence Department.¹⁵⁶

- 6.138 ASPI added that DECO could strengthen cooperation with the US, UK, Canada, New Zealand and Japan as a means of drawing upon international best practice in export control matters.¹⁵⁷
- 6.139 In addition, ASPI's submission recommended that internal Defence arrangements should ensure a separation between export control compliance and export facilitation, 'to make sure that neither legitimate objective compromises the other.'¹⁵⁸ The Swedish Government, for example, has created a separation between the roles of defence export promotion and defence export regulation.
- 6.140 A submission from the Swedish Minister for Defence explained that in Sweden, export promotion is the responsibility of the Ministry of Defence, whereas the agency responsible for the administration of export control regulations falls under the Minister for Trade's portfolio and is located within the Swedish Ministry for Foreign Affairs.¹⁵⁹
- 6.141 The Department of Defence's submission stated that risk management approaches are being considered to reduce regulatory burden. Options under consideration include:
- Streamlined, broader licences for lower-risk items going to lower-risk destinations;
 - Extending maximum licence duration from the current two years to five years, or the life of a project;
 - Enabling greater self-assessment by exporters as to the control-status of their items; and
 - Exempting Australian Government agencies, military, police, and contractors supporting Australian Government business from needing to obtain export licences.¹⁶⁰
- 6.142 Defence's submission explained its reasoning:
- The intent of these approaches is to focus DECO's limited resources on working with exporters that are exporting higher-risk items and to higher-risk destinations, to resolve their applications as quickly as possible. DECO must implement these changes in such a way that delivers genuine benefits for exporters, and continues to meet Australia's counter-proliferation obligations. To

156 ASPI, *Submission 20*, p.3.

157 ASPI, *Submission 20*, p.3.

158 ASPI, *Submission 20*, p.3.

159 Swedish Minister for Defence, *Submission 45*, pp.1-2.

160 Department of Defence, *Submission 41*, p.13.

achieve this, DECO is working with exporters from industry and academia to test these approaches, and is liaising with its counterparts in the US, UK and EU to learn from their experiences in implementing their risk-based approaches.¹⁶¹

Implementation of the *Defence Trade Controls Act 2012*

- 6.143 At the time of this inquiry, the *Defence Trade Controls Act 2012* (DTC Act 2012) is partially in force. In accordance with Section 2 of the Act, key provisions are scheduled to commence on 2 April 2016 and accordingly the scope of DECO's responsibilities would be expanded.
- 6.144 From April 2016, the Act will cover the intangible supply and publication of DSGL technology, providing visibility and control over the export of information (such as information circulated via email). The provisions will affect the defence industry and other research entities, such as universities.
- 6.145 In 2015, an amendment to the Act narrowed the scope of the publication offence to only apply to sensitive military technology, with a ministerial prohibition for publication of military or dual-use DSGL technology that would prejudice the security, defence or international relations of Australia.¹⁶² As recognised in the explanatory memorandum to the 2015 amendment, the *DTC Act 2012* created regulatory burdens on stakeholders. The amendments sought to strike a balance between Australia's 'counter-proliferation objections and the promotions and advancement of innovation and economic objectives'.¹⁶³ The *DTC Amendment Act 2015* has therefore reduced the regulatory burden to a level lower than originally proposed.¹⁶⁴
- 6.146 When remaining amendments enter into force, the *DTC Act 2012* will make it an offence for a person to supply goods or technology on the DSGL without holding a permit granted by the responsible Minister.¹⁶⁵ The Act states:

The Minister may give the person a permit for a specified supply if, having regard to the criteria prescribed by the regulations for the purposes of this subsection and to any other matters that the Minister considers appropriate, the Minister is satisfied that the

161 Department of Defence, *Submission 41*, p.13.

162 *Defence Trade Controls Amendment Act 2015* (Cth) item 32.

163 *Defence Trade Controls Amendment Bill 2015*, Explanatory Memorandum, p.12.

164 *Defence Trade Controls Amendment Bill 2015*, Explanatory Memorandum, p.24.

165 *Defence Trade Controls Act 2012* (Cth) s.10.

supply would not prejudice the security, defence or international relations of Australia.¹⁶⁶

- 6.147 The Act will also make it an offence for a person in Australia to act as a broker for the supply of goods or technology controlled by the DSGL without holding a permit for this purpose.¹⁶⁷
- 6.148 The Department of Industry submitted that DECO has had, in its view, 'a highly consultative approach with the research and industry sectors to address concerns and ensure appropriate implementation of the Act.'¹⁶⁸
- 6.149 A steering group chaired by Chief Scientist Professor Ian Chubb AC was established to advise on the Act's implementation. The steering group is subject to regular oversight by the Senate Standing Committee on Foreign Affairs, Defence and Trade.¹⁶⁹ Boeing's submission recommended establishing a permanent successor to the Group, to advise DECO and Government generally.¹⁷⁰
- 6.150 Hawker Pacific Pty Ltd expressed concern that regulatory changes in both Australia and the United States had 'resulted in significant confusion for defence industry', which had necessitated educational, operational and systems changes.¹⁷¹ Hawker Pacific Pty Ltd commented:
- In the future, it would be ideal if changes could be either 'harmonised', or even set to form some sort of alignment between the individual governmental requirements.¹⁷²
- 6.151 The University of Queensland commented in its submission that pressure on DECO's permit system will be 'increased dramatically' when provisions in the *Defence Trade Controls Act* take effect in April 2016. The system would be expanded to include permits for supply and brokering. UQ's submitted stated:
- The University requests that these factors be taken into account when deciding the level of funding to be allocated to DECO to ensure that office can meet its operational and administrative requirements.¹⁷³
- 6.152 According to Saab Australia, on occasions two export permits may be issued for the same export, if it includes both tangible (physical) and

166 *Defence Trade Controls Act 2012* (Cth) s.11.

167 *Defence Trade Controls Act 2012* (Cth) s.10, s.15 and s.16.

168 Department of Industry, *Submission 22*, p.4.

169 Department of Industry, *Submission 22*, p.4.

170 Boeing, *Submission 23*, p.1.

171 Hawker Pacific Pty Ltd, *Submission 33*, p.2.

172 Hawker Pacific Pty Ltd, *Submission 33*, p.2.

173 University of Queensland, *Submission 25*, p.1.

intangible (electronic or email) features.¹⁷⁴ Saab Australia Pty Ltd noted in its submission that 'intangible' electronic methods, such as email, may be used to transfer technology.¹⁷⁵ Saab Australia described this as an 'unnecessary overhead for both Government and industry.'¹⁷⁶

- 6.153 The Senate's Foreign Affairs, Defence and Trade Legislation Committee has been overseeing implementation of the DTC Act and its amendments.
- 6.154 Prior to the Act being passed, there were a number of concerns, especially by universities, regarding the effect of the legislation on Australia's research sectors. On 10 October 2012, the Senate Committee tabled its report on the Defence Trade Controls Bill 2011, noting that the Senate Committee fully endorsed the view that the outstanding concerns should be addressed through a transition period which assesses the impact of the legislation.¹⁷⁷ The Committee recommended that a 24-month transition period be established, and during this period, a six monthly progress report on the progress of the implementation of the DTC legislation would be presented to the Senate. The Committee further recommended that through the implementation process, Defence foster closer links with the research and university sectors and relevant departments.¹⁷⁸
- 6.155 Subsequently, three progress reports have been presented, in June 2013, May 2014 and March 2015 respectively. The most recent progress report noted that there were issues yet to be resolved, but described the progress made over the two-year monitoring period as 'very welcome.' The Senate Committee endorsed the importance of ongoing consultation between stakeholders and government during the implementation phase and supported an additional 12-month monitoring period. Additionally, the report noted the concerns 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'.¹⁷⁹

174 Saab Australia Pty Ltd, *Submission 10*, p.2.

175 Saab Australia Pty Ltd, *Submission 10*, p.2.

176 Saab Australia Pty Ltd, *Submission 10*, p.3.

177 Senate Foreign Affairs, Defence and Trade Legislation Committee, 'Defence Trade Controls Bill 2011 [Provisions]: Final Report', October 2012, p.14.

178 Senate Foreign Affairs, Defence and Trade Legislation Committee, 'Defence Trade Controls Bill 2011 [Provisions]: Final Report', October 2012, pp.19-20.

179 Senate Foreign Affairs, Defence and Trade Legislation Committee, 'Implementation of the Defence Controls Act 2012: Progress Report No.3, October 2012, pp.16-17.

Committee comment

- 6.156 Views of the Defence Export Control Office were generally favourable, with the exception of some concerns that communication with industry could be improved, particularly in relation to implementation of the *Defence Trade Controls Act 2012*. Recent reforms appear to have improved performance and made DECO more responsive to industry. There has been extensive concern expressed by industry regarding consultation with Defence surrounding the *Defence Trade Controls Act 2012*. This report will not seek to duplicate the recommendations or functions of the Senate Committee.
- 6.157 Export control laws can be complex and understanding them would require a combination of legal and specialised technical knowledge. The laws can affect individuals and companies not directly involved with the defence industry and are relevant to a wide range of stakeholders. Information, education and training should be made available to increase industry's understanding of legal obligations.
- 6.158 There was some evidence suggesting that DECO's responsiveness to applicant requests for information could be improved. DECO should continue to engage with industry to find ways to improve standards of service.
- 6.159 For example, the standard period of export approval can be too short. Extended approval periods and easing the process for renewal could reduce unnecessary regulatory oversight, depending on the risks involved in each case. This would avoid the uncertainty created in situations where products are reaching the final stages of completion and export approval lapses.
- 6.160 Industry's desire to export into countries that do not subscribe to international export control standards may pose a risk management dilemma for the Australian Government. Depending on destination and the nature of the export, DECO may receive a greater volume of complex cases to assess. Defence's submission indicated that a risk management framework may be developed and the Committee agrees with this course.
- 6.161 Nevertheless, the Committee cautions against an inappropriate relaxation of export control standards. Proliferators may attempt to exploit reduced levels of compliance, Australia may compromise its reputation as a responsible defence exporter and foreign governments may eventually respond by reducing Australian access to sensitive defence materiel and technology. This could in turn affect Australian defence exporters who rely on foreign sources of supply to build their products.

- 6.162 Furthermore, as previously noted, the Committee is of the view that DECO should be kept functionally separate from export promotion to avoid any actual or perceived conflicts of interest arising.

Recommendations

Recommendation 17

The Committee recommends that the Department of Defence enhance the existing risk-based approach to assessing applications to export materiel and technology subject to Australian export control laws.

Recommendation 18

The Committee recommends that the Defence Export Control Office improve the defence export approval process by:

- Providing timely updates to applicants on the status of their application;
- Ensuring information regarding regulatory change is promptly communicated to relevant stakeholders;
- Allowing export licences to be valid for longer periods;
- Introducing a simplified process for renewal where approval expires; and
- Managing this process depending on the risks in each case.

Recommendation 19

The Committee recommends that the Department of Defence publicly report the Defence Export Control Office's budget, expenditure, numbers of applications processed and overall performance on an annual basis.

Senator David Fawcett
Chair
Defence Sub-Committee

25 November 2015

The Hon Teresa Gambaro MP
Chair
Joint Standing Committee on Foreign
Affairs, Defence and Trade

25 November 2015

