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Senator Ursula Stephens
Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Stephens

I am writing in response to your request for Defence to provide a response in relation to the Defence Trade Controls Bill 2011 (the Bill). My response will address the issues raised during the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee) public hearings on 2 March 2012 and 21 March 2012, and answer the questions on notice received by Defence on 9 March 2012 and 5 April 2012.

This response will provide answers in the context of the current version of the Bill. At the Committee's request, Defence has been consulting with the university and research sectors. The Principles and Options document that forms the basis of this consultation is attached. I anticipate that this process will be complete by the end of June 2012 and Defence will be able to advise you of the results, including possible amendments to the Bill, by the end of July 2012.

Questions on notice – 09 March 2012

1. **Regulatory requirements for Approved Community.** *What is Defence's view on the proposition that the Bill may act as a disincentive to the establishment of the Approved Community as it may impose significant regulatory requirements and penalties (including strict liability offences).*

The Bill sets up a framework that allows the Treaty to be implemented into Australian domestic legislation. The Treaty enables licence-free trade between Australian and US members of an 'Approved Community'. The Approved Community will include government facilities and companies in both countries. Australia and the US will mutually determine the defence articles and the specified end-uses that define the scope of the Treaty.

The Treaty framework will remove the administrative delays associated with the existing Australian and US export licensing systems. This is expected to:

- Reduce delivery times for new projects and improve program schedules and sustainment processes by permitting transfers within the Approved Community without further US approvals.
- Increase opportunities for Australian companies to bid on eligible US contracts without the need to wait for US access approval.
- Reduce obstacles for improved cooperation between US and Australian companies to benefit Australia's defence capability.

Membership of the Approved Community is voluntary and those Australian companies that choose not to apply for membership will continue to operate within existing Australian and US export control systems.

In removing the licence requirement there need to be appropriate mechanisms in place to prevent and deter defence articles being moved outside the Approved Community or used for purposes other than those specified under the Treaty.

As the Treaty is an exemption under the US International Traffic in Arms Regulations (ITAR) framework, its compliance obligations have been aligned with existing compliance obligations for companies who currently trade in US ITAR controlled technology.

The maximum penalty for the criminal offences related to an Australian Community member is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for exporting tangible goods and technology listed on the Defence and Strategic Goods List (DSGL) without a ministerial permission. It is also consistent with the penalties under sections 10, 14 and 15 of the Bill.

2. **Education and training.** *The Australian Manufacturing Workers' Union highlighted the importance of education and outreach services explaining the changes to industry. Could Defence detail the education training programs that will be undertaken?*

Defence has undertaken extensive industry consultation during the development of this Bill. The Bill's consultation was conducted over two major phases during December 2010 and August 2011. Consultation on the Regulations was conducted from December 2011 to February 2012.

Additionally, there have been wide-ranging and continuing conversations with key stakeholders and industry. Defence established a small group of representative figures from defence industry to enable more detailed discussion of key provisions. These Defence Trade Cooperation Treaty Industry Advisory Panel (DIAP) sessions were moderated by Mr Ken Peacock AM, a former CEO from a major defence prime. The feedback from the consultation has been taken into account when developing the Bill. As a result of the consultation, the Bill and Explanatory Memorandum were amended. Defence is now in the process of considering the comments received on the Regulations.

The Defence Export Control Office (DECO) is developing a comprehensive communications plan to raise awareness of strengthened export control aspects of the Bill and its implications for government agencies, academic institutions and industry.

DECO will provide information and guidance on how the Bill aligns Australia with international best practice by closing legislative gaps relating to the:

a. intangible transfer of technology listed in the DSGL (e.g. emailing blueprints of military vehicles or performance data for night vision equipment);

b. provision of defence services related to goods and technology listed in the DSGL (e.g. providing assistance in the design of a military vehicle or the maintenance of night vision equipment); and

c. brokers arranging the supply of DSGL goods, technology or defence services.

The communications plan will include public awareness raising through the DECO Newsletter, information flyers and targeted mail-outs, media releases, advertising, editorials in industry publications, presentations and outreach activities at related conferences and trade shows.

DECO will also specifically target developing and emerging dual-use industries by using advice from industry groups and defence networks to identify areas and opportunities for outreach in these sectors.

DECO will undertake Export Control Awareness Training (ECAT) in Canberra, Adelaide, Melbourne, Sydney, Perth and Brisbane before and after the commencement of the Bill. The free ECAT training sessions will provide specific guidance on both the strengthened export control and Treaty aspects of the Bill, along with an overview of the wider export controls including the permit application process.

Defence is aware that additional tailored outreach will need to be provided to the academic sector which unlike defence industry, to date, has had limited exposure to current controls for tangible defence exports Additional measures will include working with key personnel in universities to assist them to become familiar with the Bill provisions and the Defence and Strategic Goods List and to jointly identify activities that may be subject to permit requirements. The Wassenaar Arrangement Best Practice guidelines encourage industry and academic institutions to appoint export control officers to assist the institutions to self-regulate by designing and implementing internal compliance programs. Defence will be able to provide advice to institutions, should they choose to appoint an export control officer. This outreach will build on consultation now underway with the university sector.

For Part 3 of the Bill relating to the Treaty, Defence is drafting guidance to assist industry to understand the requirements of the Bill and the new administrative implementation processes. The Treaty Pathfinder program will assist Defence to identify training needs and formulate appropriate and relevant guidance for industry and Defence participants.

Defence continues to consult with industry through the DIAP, peak industry bodies such as the Australia Industry Group and the Australian Industry & Defence Network, and through other outreach activities such as industry conferences and trade shows to ensure industry concerns are identified and considered in implementation planning processes.

Direct support will be available to companies through a combination of web-site information, email and free-call telephone enquiry lines. Targeted training for specific companies and organisations will be considered upon request where it provides significant reach and value for money.

3. **Record keeping.** *A number of submitters referred to the record keeping requirements which they regard as 'significant' and which would add to the administrative costs of Defence industry.*

The detailed provisions prescribing the record-keeping requirements are contained in Regulation 31 of the draft regulations. The public consultation period for the Regulations closed on 17 February 2012. Defence has considered the comments received and is working towards making the record-keeping requirements as practical as possible.

In answer to the three specific questions raised by the Committee:

3.1 *How has Defence responded to concerns about what industry regard as onerous record keeping requirements?*

Defence is committed to ensuring that the record-keeping obligations are as practical as possible. Defence recognises the common theme of industry's comments about the record-keeping requirements for strengthened export controls and Treaty activities. Defence is currently exploring options to amend the Regulations to prescribe a minimum level of record keeping, and when the risk of the activity warrants further measures, Defence will impose additional record-keeping conditions on the permit (for strengthened export controls) or membership approval (for Treaty).

While Defence is able to vary the record-keeping requirements for strengthened export controls, the record-keeping requirements in the Bill and the Regulations for Treaty activities have some flexibility but need to reflect Australia's commitments under the Treaty.

Defence is also exploring avenues to amend the Regulations to provide a simpler mechanism for industry and universities to record a series of related activities over a period of time.

3.2 *Has Defence considered taking a risk based approach to record keeping, requiring more in relation to items of high risk and less in respect of more mundane activities?*

Yes. This is reflected in the approach described in subparagraph 3.1

above. If this approach is adopted, it will also provide greater consistency with the current requirements for tangible export controls which impose record-keeping requirements by way of permit conditions.

3.3 *In consultation with industry and universities, does Defence intend to clarify and simplify the record keeping requirements?*

Defence is considering simplified record-keeping requirements in consultation with industry and universities.

Questions on notice – 05 April 2012

4. **Definitions in the EM.** *Concerns have been raised by submitters in regards to Defence's decisions around clauses being placed in the Bill, the EM, or the draft Regulations. Could you outline the rationale for placing definitions in the EM and not the Bill or the draft Regulations*

The preference of submitters to have key terms defined in the Bill rather than in the regulations or EM has been noted by Defence. It is acknowledged that this particular concern was raised in the context of the Bill's reference to the term 'arranges' in the brokering offences contained in Part 2, Division 2 of the Bill.

The term 'arranges' is intended to be read using the ordinary meaning of the term in conjunction with the additional guidance provided by the explanation given in the EM at pages 53-54. The EM provides clear examples of situations that 'arranges' is intended to cover, as well as situations that are to be regarded as outside the scope of the term.

Defence has considered the submissions made in relation to this point, in addition to the comments made by the Committee, and would be prepared to include a definition of the term 'arranges' in the Bill that is consistent with the guidance in the EM, if recommended by the Committee.

5. **Scrutiny of Bills – definitions in the EM and regulations**. *In 2011 and 2012, the Scrutiny of Bills Committee raised concerns that 'important matters' including defences for offences that have been left to the regulations be included in the primary legislation. The committee also sought the Minister's advice as to why matters in the EM or left to the regulations were not included in the primary legislation. The Minister for Defence responded in February 2012 providing explanation for the proposed approach. Can you outline action that has been taken to alleviate the concerns of the Scrutiny Committee regarding these matters?*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee:

> *In delegating exceptions to the regulations, appropriate safeguards have been considered and put in place to ensure that the offence provisions are clear and the scope and effect of the offences are plain and unambiguous. The content of the*

offences in the Bill and the exceptions contained in the regulations are cross-referenced to ensure seamless navigation between the Bill and its regulations. Drafting notes, which serve as additional navigational markers, have also been included to assist in legislative interpretation.

Where an exception makes reference to a separate legislative instrument, as is the case in subparagraph 11(2) of the draft regulations which refers to regulation 13E of the Customs (Prohibited Exports) Regulations 1958, it is justified in the circumstances that the exception be delegated to the regulations to allow the reference to that legislative instrument to be amended in a timely manner.

Further, in circumstances where the content of an exception to an offence involves a necessary level of detail, it is appropriate that the exception be delegated to the regulations. Draft regulation 12 creates an exception to the offences for the supply of technology and provision of defence services in relation to Australian Defence Articles. This exception introduces the concept of Australian Defence Articles which is a concept that is particularly detailed and is dealt with exclusively in the regulations.

Prior to commencement of the Bill and regulations, the Defence Export Control Office (DECO) will extend its outreach programs to individuals and companies to attempt to ensure that these parties are made aware of the operation of the offence provisions. In addition to these outreach programs DECO maintains, a dedicated website with links to relevant legislation and legislative instruments and alerts on changes to export controls laws.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the Explanatory Memorandum (EM). On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

6. **Scrutiny of Bills – discretionary powers.** *The Scrutiny of Bills Committee raised concerns regarding the discretionary powers conferred on the Minister under Clause 10 to grant or refuse a permit to supply technology or provide services related to DSGL goods. The committee suggested that the criteria listed as permissible considerations in the EM in the primary legislation to provide guidance for the exercise of power. Further to the Minister's response, the committee requested that key information in this regard be included in the EM. Can you establish for the committee the rationale for such discretionary powers and outline what action has been taken to alleviate the Scrutiny Committee's concerns?*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee:

Clauses 11, 14 and 16 confer a discretionary power in circumstances where I am required to grant or revoke a permit or to issue a prohibition notice for the supply of technology or provision of defence services. In exercising the powers to grant a permit under clauses 11 and 16, I must be satisfied that the activity for which the licence is sought would not prejudice the security, defence or international relations

of Australia. In revoking a permit and issuing a prohibition notice I must be satisfied that the activity would prejudice the security, defence or international relations of Australia.

The Government's policy is to encourage the export of defence and dual-use goods where it is consistent with Australia's broad national interests. Australia's export control system is the means by which this consistency is ensured. Applications to export defence and dual-use goods are considered on a case-by-case basis. The assessment of these applications take into account the considerations listed on page 48 of the Explanatory Memorandum. These considerations were developed in line with the policy criteria (page 11 of the Explanatory Memorandum) agreed by the Prime Minister and the Ministers of involved key portfolios including the Department of Foreign Affairs and Trade and the Australian Customs and Border Protection Service.

The listed considerations outlined in the Explanatory Memorandum are able to be accessed by the public through the DECO website. To further assist industry in understanding the application processes and any significant changes in export control policies, additional guidance is available to industry through ongoing outreach activities provided by DECO and a dedicated telephone support line.

Australia's export control policies and procedures need to be flexible in order to take into account changes in defence and dual use technology, use and delivery of that technology, Australia's strategic priorities and threats to regional and international security. Due to the changing nature of the export control environment, wide discretionary powers are necessary and it would not be appropriate for a set of fixed considerations to be included in the Bill.

I consider this discretion is appropriate and necessary to support Australia's capacity to protect its national interests and contribute to reducing the threat to regional and international security by working with like-minded countries. This discretion is consistent with the powers that I hold under existing legislation; including, Regulation 13E of the Customs (Prohibited Exports) Regulations 1958 and the Weapons of Mass Destruction (Preventions of Proliferation) Act 1995.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the EM. On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

7. **Scrutiny of Bills – reversed evidentiary burden.** *The Scrutiny Committee was also concerned with Clause 31 regarding the reversed evidentiary burden of onus of proof and sought further information regarding exceptions and whether they could be outlined in the primary legislation. Can you explain the rationale for this course of action and outline any action taken to address the Scrutiny Committee's concerns.*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee that:

The draft regulations (regulation 25) set out the circumstances in which all or some of the main Treaty offences in subsections 31(1) to (6) will not apply. Currently the regulations as drafted create the following two exceptions:

- *in circumstances where an Australian Community member supplies goods, technology or defence services and holds a valid licence or other authorisation granted by the Government of the United States of America that permits the supply; and*
- *in circumstances where an Australian Community member supplies goods or technology to an approved intermediate consignee for the purpose of transporting the US Defence Articles.*

These two provisions include a level of detail that should not be included in the primary legislation and for this reason, these exceptions have been delegated to the regulations. The exceptions will be subject to parliamentary scrutiny as the regulations are a disallowable instrument.

The reversed evidentiary burden of the onus of proof in cases where the applicability of the exception is peculiarly within the defendant's personal knowledge is consistent with Commonwealth criminal law policy. The exceptions included in the draft regulations have been drafted with the defendant bearing the evidential burden. This shift in the onus of proof recognises that the applicability of the exception to a particular Australian Community member will be within the member's personal knowledge. For example, the Australian Government would be unlikely to know whether an Australian Community member holds a valid licence or other authorisation granted by the United States Government. In such circumstances it would be significantly more resource intensive and costly for the Australian Government to disprove the existence of the authorisation than for the Australian Community member to prove its existence.

I consider it appropriate that the exceptions outlined above are delegated to the regulations and that Commonwealth criminal law policy has been applied appropriately in reversing the evidential burden of the onus of proof.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the EM. On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

8. **Differences in exposure drafts.** *Can you outline for the committee what the primary differences are between the February 2012 exposure draft of the regulations and the draft December 2011 version?*

The primary difference between the December 2011 and February 2012 versions of the draft Regulations is the inclusion of merits review provisions in the February 2012 version, for an adverse decision by the Minister regarding approval of an intermediate consignee. The review provisions in Regulation 28 apply to both applications for approval of an intermediate consignee and the cancellation of an approval. The December 2011 version contained a note following subregulation 26(10) that a further version would be released to detail these merit review provisions and the February

2012 release fulfilled this commitment. There were also some minor changes to provision numbering.

9. **Consultation on draft Regulations.** *During the 2 March hearing Defence noted that it had begun to collate the responses to the draft Regulation consultation process. Could Defence outline the main concerns which have been received in regards to the draft regulations?*

Defence received five submissions which expressed the following concerns about the Regulations. Defence's response to these concerns is noted in *italics* below:

- Marking requirements for Treaty articles were seen to be onerous and unclear – *Defence has raised this issue with the US and the common understanding is that marking of items is only required where it is practicable to do so – more specific implementation guidance will be developed;*

- Bilateral trade under the Treaty provisions without export licenses might have potential inconsistencies with the transparency required by the Arms Trade Treaty – *consistent with current export controls, all Treaty-related exports will be declared to the Australian Customs and Border Protection Service*;

- Administrative requirements to apply for Approved Community membership were seen as burdensome on universities – *unless universities are accessing US defence technology which falls within the scope of the Treaty, it is unlikely that they would apply to become Approved Community members*;

- Assessment of Approved Community membership was perceived as potentially leading to delays - *the processes will be similar to the process for dealing with ITAR items but would be a one-off application, as compared to the multiple applications under the current Australian and US export control regulations*;

- There was a perceived lack of guidance on the handling of articles that are transferred between the Treaty regime and regular export control – *see the discussion on Pathfinder program in paragraph 10 and paragraphs 16 and 17*;

- In the significant ties assessment process in Part 1 of the Regulations , a suggestion was made that the referral to US should be deferred until the procedural fairness procedure has been completed – *procedural fairness is a core element of the process, including merits review, and the referral to the US happens at the end of the process and only if the applicant seeks to have the referral proceed*;

- Details of what information will be required on the Annual Compliance Report for Approved Community members were requested – *this will be provided by administrative guidance*; and

- Record keeping for each activity was seen as unnecessary – *see paragraphs 3 and 15.*

10. **Additional issues in relation to draft DTC Regulations.** *The committee has received evidence suggesting that additional issues (such as IT matters, cost implications and arrangements for the Pathfinder Program) have arisen in relation to the draft regulations which were not necessarily foreshadowed in the bill. How do you respond to these concerns?*

The Australian and US Governments are jointly developing a Pathfinder program to test the Treaty's scope, policies and procedures. The Pathfinder program is a preparatory exercise, not an activity that will be regulated through the Bill and the Regulations. The objective is to identify where improvements to administrative and operational processes can be made prior to the Treaty entering into force. Pathfinder participation is completely voluntary. Defence will select appropriate test projects and programs and then invite related companies that meet eligibility criteria to participate. There is no requirement for companies to participate. Defence will keep the costs of participating in Pathfinder to a minimum.

To keep costs down for industry, Defence will absorb the costs involved in processing Approved Community applications and security clearances. Other costs for individual companies that choose to join the Approved Community will vary, however those companies already engaged in defence business will have many of the required processes in place.

The new IT system under contract to replace the current DECO system is a business system in Defence and is not regulated by the Bill or Regulations.

11. **Concerns raised by Universities.** *Universities Australia is concerned that it is 'not adequate' to rely on regulations as secondary instruments to deliver the legislative intent of the bill and that there is a need to ensure that the intention set out in the EM is enshrined in the legislation thereby ensuring that institutions have full statutory protection. What is your response to these concerns? Universities Australia suggest that the Bill should include an exemption modelled on Section 8 of the UK Act. In evidence to the Committee, Defence noted that a similar exemption will be created in a legislative instrument. Could you expand upon the verbal evidence provided to the Committee? Was insertion of the exemption into the Bill considered during drafting? Could you outline how the consultations with Universities Australia will fit into the proposed timeline for implementation of the export controls and how long you have allowed for the consultations?*

The legislative intent of the Bill is clear in that the intangible supply of technology will be controlled. There will be exemptions for certain technology in the 'public domain' and for 'basic scientific research'. It is important these concepts are fully defined in secondary instruments so that the definitions can stay abreast of changes in the way that technology may be supplied.

Defence did not consider including a provision similar to section 8 of the UK Act while the Bill was drafted as it was considered that the definitions for 'public domain' and 'basic scientific research' were best defined in secondary instruments. Defence's continuing consultation with the university sector is contemplating a model which refers to 'public domain' and 'scientific research' in the Bill and fully defines the concepts in the Regulations.

At the Committee's request, Defence has been conducting consultation with the university and research sectors. The Principles and Options document that has formed the basis of this consultation to date is attached. When that consultation is finalised and decisions on the way forward have been taken by Government, I will be able to advise you of the proposed approach. I anticipate that this consultation will be

complete by the end of June 2012 and Defence will be able to provide you with an update by the end of July 2012.

12. **Timetable.** *What are the necessary steps that must be undertaken before September including in relation to the regulations? What is your timetable in the lead-up to proclamation of the bill?*

The Regulations will need to be amended in light of the comments received during the public consultation and to include any consequential amendments to the Regulations that flow from any changes to the Bill.

Defence is continuing to work on the domestic implementation processes for the Treaty in collaboration with other government parties, industry and academia. The implementation timetable in the lead-up to the proclamation of the Bill will focus primarily on the operation of the Pathfinder Program from May-July 2012. After Pathfinder testing is finalised, Defence will analyse the results, conduct further consultation with industry as appropriate and finalise processes.

The Bill's commencement provisions provide that the Bill will not commence operation until the Treaty comes into force. Once the Bill has passed through the Australian Parliament, the Treaty will not come into force until the US President has ratified the Treaty, the Attorney-General has sent correspondence to the Federal Executive Council and there has been a bilateral exchange of notes to agree upon a Treaty commencement date. This will give Defence, industry and universities time to prepare to meet the requirements of the Bill, with Defence providing outreach support.

Once the Pathfinder Program is complete, how will findings from the program be used?

The Pathfinder Program is designed to test the policies and processes required to implement the Treaty. Participants will be requested to provide comment on the results and opinion on improvement opportunities. The results will be made available to peak industry and consultative groups and through a network of established Defence contacts. Defence will use Pathfinder to identify any opportunities to improve the processes with the intent of making them more effective and practical for industry and government. The objective is to settle processes and provide assurance and confidence to both government and industry before the Treaty enters into force.

13. **Facility accreditation.** *Article 4 of the Treaty appears to allow arrangements for a single facility as an Approved Community. Defence's evidence at the last hearing suggested that specific divisions within a company can be accredited. According to Boeing, the US and UK concept of an Approved Community appears to be 'facility specific'. Submitters are concerned that the concept of an Approved Community as 'facility specific' has not been captured in Sections 27-30 of the bill concerning an Approved Community. Is there a risk that the bill will not meet the intention of the Treaty if such a concept is not captured in the bill? Can Defence supply references to the relevant parts of the Bill and Regulations which provides that specific facilities can be registered?*

The Treaties, while similar, differ slightly in their approach to suit the domestic requirements of the participants. For Australia, the Approved Community will comprise bodies corporate that, after gaining approval from the Minister, are Approved Community members in their own right. However, a body corporate only needs to have those facilities accredited that it intends to use for the movement, storage and handling of US Defence Articles.

This approach provides more flexibility to industry in how companies conduct the aspects of their business involving trade in Treaty articles. There is no requirement for a company to accredit all of its facilities if Treaty trade is only a small part of its business and this trade can be confined to a single facility. Defence's evidence at the last hearing is accurate, insofar that different divisions of a company may be located in separate premises and these premises can be accredited separately for Treaty trade as befits the company's commercial interests.

Section 27(3)(a) of the Bill provides that one of the criteria that the Minister must have regard to in assessing an application for membership of the Approved Community is whether the body corporate 'has access to a facility that is included, or that is capable of being included, on a list, managed by the Department, of facilities accredited for storing and handling classified information and material.' The legislative requirement is that a potential member must have access to at least one facility – it is not required that the potential member own that nominated facility. The Department will manage administratively the list of accredited facilities, to which Approved Community members can apply to add facilities according to their business requirements.

14. **US approval for community membership.** *Membership of the Australian Approved Community requires US Government approval whereas membership of the US Community is based on registration with the Directorate of Defence Trade Controls. Given the level of due diligence needed to become a member of the Australian Community, why is US approval required? Could you explain why the US Government retains the right of veto for Australian industry when the Australian Government has no input into the Directorate of Defence Trade Controls registration process?*

The Treaty exists within the broader ITAR framework, and is an exemption within ITAR. The majority of trade that is expected to be conducted under the Treaty regime is in US defence articles, and the Treaty reflects the US position to retain control and monitor access to its technology. As with the ITAR framework, the Treaty reflects the US position to retain control and monitor access to its technology. Gaining US approval will remove the need for companies in the Australian Community to continually seek licences from the US for trade in Treaty-eligible US defence articles. Admission to the Australian Community constitutes a permission to trade in US Defence Articles that would ordinarily be controlled under the existing ITAR framework. The US retains the right to deny such applications.

Article 4(c) of the Treaty requires that Australia and the US mutually determine the eligibility requirements for the inclusion of bodies corporate on the list of Australian Community members. The provision in s27(4) of the Bill that the Minister must not approve an application unless the US Government has also approved the application

fulfils this requirement for mutual agreement. The Treaty does not have the same requirement for the US Community as US exporters must undergo a similar application and approval process to become registered with the US Government as an exporter of controlled goods. Given they must already comply with ITAR under their registration, The Government did not want to add additional compliance requirements for US companies to meet in order to trade with Australian companies under the Treaty.

Subsections 11(3)-(5) of the Treaty's Implementing Arrangement allows for bilateral consultation and Australian Government action if concerns are raised about a US Community member's ability to protect Australian defence articles. Following these consultations, the Minister may decide to issue directions to the Australian Community in accordance with s33(1) of the Bill preventing future dealings with that US Community member. Although Australian input has not been incorporated into the US registration process, the Bill provides the Minister with an appropriate measure of domestic control over trade conducted under the Treaty.

15. **Record keeping.** *Submitters have raised concerns regarding record keeping. Saab noted that companies will have to keep track of things they didn't have to before and make a distinction between the bill's implementation of the treaty and the two other aspects of the bill—intangible and brokering controls. Others are concerned about individualised record keeping. Please outline for the committee:*

- *How Defence has responded to these concerns; and*

Paragraph 3 of this Response outlines Defence's consideration and intentions for record keeping for strengthened export controls and Treaty activities.

The Bill contains record-keeping requirements for strengthened export controls and movements of defence articles under the Treaty. While Defence is able to vary the record-keeping requirements for strengthened export controls, the record-keeping requirements in the Bill and the Regulations for Treaty activities have some flexibility but need to reflect Australia's commitments under the Treaty. As the Regulations are currently drafted, the record-keeping requirements for the strengthened export controls and those implementing the Treaty provisions have a high level of consistency. Any changes to the record-keeping requirements for strengthened export controls and Treaty activities may be different for each area and may introduce inconsistency between the Treaty and the strengthened export control record-keeping requirements.

For the Treaty provisions of the Bill, in exchange for the licence-free movement of US Defence articles within the Approved Community record keeping requirements are necessary to ensure that those articles are being transferred and safeguarded in accordance with obligations under the Treaty. The requirements imposed are sufficient to ensure an appropriate level of accountability and traceability. Companies trading in US technology should already be familiar with meeting requirements under ITAR and will therefore likely have many of the required processes already in place.

- *The record keeping requirements set out in the regulations.*

The record keeping requirements for both strengthened export controls and Treaty activities are set out in regulation 31. If a record is required to be made (pursuant to section 58 of the Bill), the record should contain:

- a description of the goods or technology supplied, or the defence service provided
- the permit, licence or authorisation under which the person does the activity, and any unique identifier given to the permit or authorisation
- the name of the person receiving a supply of goods, technology or defence services, and the time and date of supply
- the name of any intermediate consignee involved in the activity, and the date the goods or technology are supplied to the intermediate consignee
- the date and time at which, and the place from which, goods or technology were provided
- the place at which goods, technology or defence services were received and the date and time of receipt
- the method by which the goods or technology were supplied, or the defence services were provided, to the recipient
- if the activity involves the electronic transfer of defence services, details sufficient to identify the transfer
- the marking applied to an Article 3(1) US Defence Article or an Article 3(3) US Defence Article supplied by the person, or that is included in the accompanying documentation
- the marking applied to an item of technology provided by the person, or that is included in the accompanying documentation
- the marking given to a defence service, included in accompanying documentation
- the security classification (if any) given to an Article 3(1) US Defence Articles, an Australian Defence Article, or an item of technology included in accompanying documentation
- the marking applied to an Australian Defence Article supplied by the person, or that is included in the accompanying documentation

Further, has Defence considered the addition of an example of activities on which records should be kept to the Bill or the EM? Please provide examples of how the record keeping requirements would work in practice.

For strengthened export controls, as the Regulations are currently drafted, an example of record keeping would be: if a researcher sent an email to a foreign researcher explaining how to produce a toxin controlled under the DSGL (e.g. cholera toxin under DSGL 1C351) which was authorised by a permit, then the researcher could include a reference to a permit number in the email and the email itself would be a sufficient record of the supply.

Noting the comments from industry about record-keeping for strengthened export controls, the Government is considering options to amend the record-keeping requirements in the Regulations to include a minimum of information. An example of how this might work is if a defence industry member wanted to market their DSGL-controlled technology in a low-risk overseas location, a record of the permit number, the technology marketed and the country involved may be sufficient. If the same technology were to be marketed in a higher-risk destination, the permit may impose a condition that each person who attended the marketing sessions and the location and date of the marketing sessions would also need to be recorded.

The Regulations are not prescriptive about the method of making these records and it could vary from a diary note, to the ability to access the required data from the company's business systems, to a full database record of the marketing session, noting the locations, dates and attendees. Where corporate business and information systems record such information, the intent is to use existing good business practice and not require separate information and record-keeping systems to be created.

For the Treaty provisions, the Explanatory Memorandum provides an overview of the record-keeping provisions required to be imposed on Approved Community members under the Bill. Defence is working with industry on Treaty implementation to ensure that the record-keeping requirements are practical, but also recognises that existing good business practices and processes are expected to meet much of the compliance obligation.

When these provisions are settled, Defence will include more examples in the Regulations' explanatory statement.

16. **Re-export limitations.** *Submitters have raised concerns regarding an inability to re-export goods under the bill to a third country (Sub 1, p.[2]). Please explain the limitations on the re-export of goods and of the underlying rationale?*

The provisions of the Bill relevant to the Treaty reflect the intent of the Treaty itself, and are designed to enable simpler trade in defence goods between Australia and the US. Trade within the Treaty framework is confined to mutually agreed scope lists on which the included activities contain elements of eligible bilateral trade. The scope lists include - Australian Government End-Use Projects, Australia-US Combined Programs, Australia-US Combined Operations, Exercises and Counter-Terrorism Operations and US Government End-Use Projects. As a bilateral Treaty, there was no intention to provide exemptions from existing controls for re-exports to other countries. Exports to countries other than the US will still require the authorisations they currently require under existing controls. As a result, the Bill does not change arrangements for re-exports to third countries – this type of activity will remain subject to the existing export controls.

17. **Transfer outside community needing US approval.** *Please clarify whether articles imported into the Australian Approved Community cannot be transferred outside the Approved Community without further approvals whilst articles exported to the US are not subject to the same controls as they are deemed to be controlled under the ITAR. If this is correct, please explain the reasons for the discrepancy.*

The intent of the Treaty is to provide less restrictive access for Australian industry to US controlled technology. All articles imported into the Australian Approved Community will continue to be controlled under ITAR; the benefit of the Treaty is that individual authorisations will not be required for each article. Trade within the Treaty framework is permitted through a licence exemption under ITAR – so if US-origin goods are transitioned out of the scope of the Treaty they will need appropriate authorisations under ITAR.

Australian articles exported to the US under the Treaty will be subject to the same controls as currently exist for US ITAR technology. The US has access restrictions in place under ITAR that are commensurate with those that Australian industry will be subject to. Seeking to add specific retransfer controls on Australian origin non-ITAR technology would create a greater level of regulation than exists under current Australian export controls.

18. **TAAs for re-export.** *NewSat raised concern that the bill is silent on the re-export of ITAR controlled items and questioned whether Technical Assistance Agreements were still required for re-export. Please respond.*

The Bill strengthens Australian export controls and gives effect to the Treaty. It has no effect on obligations under ITAR outside the scope of the Treaty. ITAR Authorisations, including Technical Assistance Agreements, will still be required to re-export ITAR-controlled items outside of the US and Australian Approved Communities.

19. **Monitoring powers.** *A number of submitters raised the issue of monitoring powers, which seem excessively broad. Could you explain to the committee the exercise and intention of this power? Are they limited to compliance or do they extend into other areas? (see Boeing sub 6, p. [5].)*

Part 4 of the Bill sets out the monitoring powers which will be exercised by Authorised Officers to ensure the protection of controlled articles and encourage industry compliance with their Treaty obligations. These powers only extend to the monitoring of bodies corporate that hold a section 27 approval, that is, Approved Community members. It is a condition of this approval that Approved Community members allow Authorised Officers to enter their premises for the purpose of ensuring that they are complying with their obligations set out in the legislation and satisfying any conditions of their approval. It is not intended that Authorised Officers will use these powers to investigate offences, as this activity is more appropriately conducted by the Australian Federal Police.

Monitoring powers are limited by the requirements of the Bill and the Regulations. The monitoring powers exercised by Authorised Officers are limited to holders of a

section 27 approval, that is, body corporate members of the Approved Community. An authorised officer must give at least 24 hours' notice before they can enter premises. The monitoring powers do not extend to the strengthened export controls detailed in Part 2 of the Bill

20. **Right of entry.** *The right of entry provisions also seem unnecessarily broad and excessive without the appropriate judicial oversight mechanisms evident in other legislation. Could you explain any limitations placed on this right to enter without judicial oversight? Does the right to enter extend to when the occupier is not present even in instances where a breach is not suspected?*

The powers of Authorised Officers to enter premises under section 41 can only be exercised for the purposes of monitoring the compliance of Approved Community members with Treaty and record keeping provisions of the Bill and compliance with conditions of an approval. Section 41(2) requires Authorised Officers to give 24 hours notice of an intention to enter premises. Entry is limited to those premises identified on the application for Approved Community membership, any other premises identified by a body corporate and any premises used for business operations. Entry does not extend to places of residence.

The purpose of empowering an Authorised Officer under the Act is to facilitate entry to premises for the purposes of conducting monitoring activities, not to conduct investigations for suspected breaches. There is no scope for an Authorised Officer to enter premises in circumstances where the occupier (or a representative of an occupier) is not present. In providing a notice of entry at least 24 hours in advance, Defence expects that arrangements would be made by the body corporate to ensure that a representative is present to facilitate and assist with Defence's monitoring activities.

21. **Need for parallel licensing.** *Mr Hyland of US Trade & Export Control Services submitted comments that go to the issue of exemptions which will still require parallel licensing activity/cost on the part of Australian industry. We have not had a comprehensive answer from Defence as to what these exemptions are and what percentage of Australian defence contracts would be affected by them.*

The Exempted Defense Articles list is currently available on the US Directorate of Defense Trade Controls website. These exemptions include such categories as nuclear propulsion, missile technology, hot-gas turbine technology and related source code. The list has been agreed bilaterally. Australia did not add any exemptions to the list and it is expected that as confidence grows in Treaty process the list will be reduced.

There is nothing in the Bill that will require parallel licensing. For a particular defence article, industry members will either operate under the ITAR exemptions for the Treaty, or under the standard ITAR provisions. Defence recognises that some defence projects will need to operate under both systems for different articles and this will be tested under the Pathfinder program.

Membership of the Approved Community is a voluntary decision and those companies that trade in both exempt and eligible articles must make the decision on whether to join the Approved Community based on the benefits expected for their

individual situation. If an Australian company is primarily trading articles exempt from the scope of the Treaty, it is unlikely they would join the Approved Community.

The Treaty is a further exemption which may be applied within broader ITAR controls. Consistent with current processes, there are certain sensitive technologies the US has retained the right to licence for export.

Issues from evidence - strengthened export controls

22. **Explanation of brokering arrangements and ITAR amendments.**

It is an offence under Section 15 of the Bill for a person to arrange the supply of DSGL goods, technology or the provision of defence services outside Australia without a permit or in contravention of a permit condition. As outlined in paragraph 5 above, the term 'arranges' is intended to be read using the ordinary meaning of the term in conjunction with the additional guidance provided by the explanation given in the EM at pages 53-54 which states:

> *The term 'arranges' is intended to include, but is not limited to, circumstances where for a fee, commission or other benefit, a person acts as an agent or intermediary between two or more parties in negotiating transactions, contracts or commercial arrangements for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology.*
>
> *The term 'arranges' is not intended to cover situations where a first person provides a second person with a point of contact for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology and there is no fee, commission or other benefit obtained by the first person.*

Industry has commented that the use of the phrase 'but is not limited to' in paragraph 63 of the EM does not assist industry to clearly identify what activities would fall within the scope of 'arranging'. The Government is considering deleting this phrase from the EM.

The scope of brokering controlled under the US ITAR is broader and therefore, more highly regulated, than under the Bill. The Bill's brokering controls have been drafted to satisfy the measures agreed by Wassenaar Arrangement participating states for Arms Brokering in 2003. While Defence is alert to the US ITAR brokering amendments, the intention is to align the Bill's brokering provisions with the Wassenaar Arrangement obligations.

23. **Implementation of the strengthened export controls and the role of the Australian Customs and Border Protection Service.**

Existing export control legislation requires exporters of tangible goods or technology that is listed on the DSGL to obtain permission from the Minister for Defence (administered by DECO) prior to making an export declaration to the Australian Customs and Border Protection Service (Customs and Border Protection). This

process will remain for tangible goods and technology despite the introduction of the strengthened export controls as it enables Defence, as the policy agency, to decide whether the export of the goods and technology should be permitted in accordance with our international obligations and domestic policy. Secondly, it satisfies the requirements for Customs and Border Protection, as the administrator of the *Customs Act 1901*, to assess an export against the full range of obligations contained in that Act.

Under the Bill, in the circumstance where a person will be exporting an intangible good, or providing a defence service, as with tangible exports, permission will be required from DECO, but, unlike tangible exports, no declaration will need to be made to Customs and Border Protection as the technology or services will not pass through a physical border. DECO will assess an application against the criteria outlined in the EM at paragraph 73.

To facilitate the introduction of the strengthened export controls, DECO will be rolling out a replacement permit issuing system. This new system, which is intended to be in place before the Bill is enacted, will allow industry to lodge a single application to obtain permission to comply with the existing export controls and the new strengthened export controls. The system will also allow industry to lodge separate applications to register as brokers and obtain permission to conduct brokering activities. DECO will assess each application holistically, looking at the intended activities and grant the relevant permission, where appropriate, to best balance the needs of industry against the level of risk.

The administrative arrangements for issuing the new permissions are still being considered but the intent, as expressed by the Defence witnesses before the Committee, will be to facilitate a simple 'one input - one output' approach to ensure the process is simple for both exporters and Government agencies to administer. It may still be that, under law, two permits will be required in some circumstances but this will be facilitated through the single approach described.

24. **Definition of intangible export.** Concern was raised by a Committee member as to whether the definition of an 'intangible export' is clear enough for working purposes and whether information going backwards and forwards would create difficulties for industry.

Customs legislation only applies to the export of tangible goods and technology. The new strengthened export control provisions in the Bill will close the existing gap in Australian export controls by regulating the intangible supply of technology and provision of defence services. The Bill does not specifically refer to 'intangible transfers' or 'intangible exports', however, the Wassenaar Arrangement state parties use the term and throughout a period of extensive consultation, Defence has found 'intangible transfers' to be a commonly-used expression that is understood by industry.

25. **Multinational company and intangibles.** An example was given to the Committee to indicate that foreign employees of multinational companies will have to apply for a permit when they are supplying DSGL technology out of Australia,

regardless of the fact that they may be dealing with foreign-origin technology while in transit or visiting temporarily.

This is a correct interpretation of the Bill. The Bill was drafted to apply to any supply of DSGL technology by a foreign person from within Australia or by an Australian person operating overseas. Defence envisages that a broad permit could be obtained by multinational companies to provide coverage for this scenario over a period of time.

26. **Wassenaar exemptions for brokering activities.** The Committee has received evidence arguing that the Wassenaar exemption for brokering under the Bill should be broadened.

The exemption in section 15(4) of the Bill covers transfer of goods and technology from one place within a Wassenaar Arrangement participating state to another place within the same Wassenaar Arrangement participating state. Further broadening the Wassenaar exemption would be a matter of further policy consideration by Government and the Parliament.

27. **Transition period.** The Committee queried several witnesses on the absence of transition periods and grandfathering provisions in the Bill.

The Bill's commencement provisions provide that the Bill will not commence operation until the Treaty comes into force. Once the Bill has passed through the Australian Parliament, the Treaty will not come into force until the US President has ratified the Treaty, the Attorney-General has sent correspondence to the Federal Executive Council and there has been a bilateral exchange of notes to agree upon a Treaty commencement date.

In light of continuing consultations with the university and research sectors, the strengthened export control provisions of the Bill and Regulations may need some changes, and may delay the Bill's passage through Parliament. This, combined with the process above, will give Defence, industry and universities a period of time to prepare to meet the requirements of the Bill.

Transition will not be an issue for the Treaty provisions of the Bill because industry members will not be subject to the Treaty offence provisions of the Bill until they are Approved Community members and choose to transition goods or technology to the Treaty.

28. **Universities Australia's (UA's) nine requested amendments.** As requested by the Committee, Defence has considered UA's nine requested amendments (in italics) and responds as follows:

28.1 *Include in the Bill an objects clause that expressly recognises the importance of education and research industry, and the need to protect and preserve its integrity and continuation for the benefit of the Australian community while also complying with international obligations to prevent proliferation of weapons.*

Defence does not believe that such a provision is warranted. The Bill has not included an objects clause for any sector of Australian industry to expressly recognise the importance of their particular industry and their industry's contribution to the Australian economy and community. Defence is equally committed to ensuring minimal impact on all sectors of the economy while complying with Australia's international obligations.

28.2 *Include in the Bill exceptions to the application of its prohibition on the transfer of knowledge to allow the continuation of university education and research activities, drawing on the UK situation as an example of a possible approach.*

The United Kingdom (UK) legislative framework is different to the Australian framework. The UK's section 8 of the Export Control Act 2002 (UK) limits the UK Secretary of State's power to make 'control orders' regulating activities that communicate ordinary scientific research or publicly available information unless the control order is necessary. In this way the UK Secretary of State can limit activities that fall within ordinary scientific research and publicly available information when it 'is necessary' to do so.

The UK Guidance on Export Control Legislation for academics and researchers in the UK, states that any person wishing to transfer technology by electronic means out of the UK or EU will need a permit.

28.3 *Including in the Regulations an exemption for all teaching as part of an accredited course and for all research except where it assists with a weapons program or weapons proliferation.*

All technology that is already in the 'public domain' will not require a permit. The definition of 'public domain' information will include course work taught in schools or higher education institutions. The draft definitions for 'public domain' and 'scientific research' are attached to this Response and will be released for public consultation.

28.4 *Set out explicit provision defining exempt research, which is sufficiently broad to enable continuation of university teaching and research activity.*

Response is under 28.5 below.

28.5 *Set out explicit provision defining exempt public domain information, which is sufficiently broad to enable continuation of university teaching and research activity.*

As the Bill is currently drafted, technology is defined in section 4 of the Bill. Section 4 provides that the Minister can specify information that does not fall within the scope of technology for the purposes of the

Bill. This will be done by a legislative instrument. The legislative instrument will exclude information that is in the public domain and basic scientific research. This instrument will result in the controls being more likely to apply to post-graduate courses and high-end research. Where DECO determines that a permit is required, the permit system will be flexible enough to provide coverage for a range of activities over a period of time.

As a result of the consultation with the university and research sectors, it is possible that this model will change to include reference to the exemptions for 'public domain' and 'scientific research' in the Bill with full definitions of the terms in the Regulations.

It is important that this exclusion is fully defined in an instrument or the Regulations so that it is flexible and responsive to changes in the domestic and international technology environments and related policy development. The DSGL is an example of a legislative instrument that must be flexible and capable of timely amendment. This includes both the addition of new and emerging technology, and the removal of technology no longer considered at risk. The DSGL allows the Government to comply with changes in international best practice as to which goods and services are controlled. At the same time it is not a volatile list but provides a clear basis around which businesses and universities can plan their business decisions and teaching and research activity. Under existing arrangements, DECO consults with industry members it identifies as being potentially affected by new controls before Australia provides international commitments to implement those controls.

28.6 *Make provision for a new power for the authority to issue binding guidance to the university (and other) sector, drawing on the example of ATO Guidelines.*

It is not necessary for the Bill to include the power to issue binding guidance as the DSGL identifies which goods and technology are subject to export controls. The Wassenaar Arrangement Best Practices for Implementing Intangible Transfer of Technology Controls of 2006 encourage Wassenaar Arrangement participating states to support 'self-regulation by industry and academic institutions that possess controlled technology, including by assisting them in designing and implementing internal compliance programs and encouraging them to appoint export control officers'. Universities will be responsible for identifying those technologies or services that may require a permit under the Bill and DECO will provide assistance in this regard. Any person who supplies technology or provides defence services has this same responsibility.

Applications lodged with DECO will result in an assessment of whether the goods, technology or services are controlled by reference to controlled items listed on the DSGL. On the basis of DECO's

assessment, the Minister may issue a permit to allow the supply of technology or provision of services. In some cases the assessment will be that the technology or services are not controlled. Based on the UK experience of implementing intangible controls, only 1.8% of applications for intangible permits were refused. DECO will issue policy guidance to assist with the understanding of and compliance with the Bill.

28.7 *Amend the record-keeping obligations where a permit is issued to have regard to compliance in a university context, which they currently do not contemplate.*

In light of comments received during the consultation period on the Regulations, Defence recognises there is a need to consider the record-keeping requirements for strengthened export controls across all sectors. Defence is currently exploring options to amend the Regulations to prescribe a minimum level of record keeping for all intangible transfers and impose additional permit conditions when the risk warrants it. Defence is also exploring options to change the Regulations to enable a simpler way for industry and universities to record a series of related transactions over a period of time. To assist universities to understand these requirements, the Regulations' Explanatory Statement will include examples to demonstrate the record-keeping requirements in the university context.

28.8 *Include a defence to the offence under the Bill where due diligence can be demonstrated.*

The offence provisions in Part 2 of the Bill are consistent with export control provisions in the Customs (Prohibited Exports) Regulations 1958 and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*. The provisions will apply to any person supplying technology listed on the DSGL or providing defence services relating to technology or goods listed on the DSGL, including defence industry, universities and academia.

A defence of due diligence is more appropriate for strict liability offences. There are a limited number of strict liability offences, all of which relate to permit conditions and record keeping; being, subsections 13(1), 18(1), 28(5) and 58(6).

As the main offences contained in Part 2 of the Bill are not strict liability offences, they require a higher burden of proof than strict liability offences and the defence of due diligence has not been included. With these, as is the case under other legislation, the prosecution will need to prove fault by demonstrating that the person intended or was reckless to the circumstances of the offence.

Although the Bill does not contain a due diligence defence, Defence would certainly consider any due diligence conducted by the alleged

offender in deciding the most appropriate compliance response. Defence would consider a range of factors; including, what efforts were made to prevent the alleged offence from occurring (e.g. training, policy, procedures, legal advice) and what action has been taken to prevent a re-occurrence.

28.9 *Include in the Bill the touted approach to compliance to provide certainty.*

Defence does not support including its compliance approach in the legislation and will provide administrative guidance on the DECO website.

DECO will continue to adopt a compliance approach that promotes industry's self-assessment. A key element of Defence's approach to compliance is providing education and support to industry so they understand their obligations. This compliance approach encourages voluntary disclosure of breaches.

The compliance model means that DECO will continue to support all industry participants who attempt to comply with the regulatory measures but do not always succeed. More stringent compliance measures will be taken for industry members that either do not want to comply or have actively decided not to comply.

Compliance responses will include client education, comprehensive audits and prosecution.

Further guidance will be provided administratively and the DECO website will be updated to reflect this compliance approach.

29. **Human Papilloma virus example.** One witness used the human papilloma virus as an illustrative example to say that the research would have been controlled and required a permit.

Defence notes that the human papilloma virus is not controlled by the current DSGL amendment. The utility of the human papilloma virus as a biological weapon is too low to warrant its inclusion among the controlled viruses that are currently listed in the DSGL (under item 1C351). Accordingly, there would be no need for a university to apply for a permit to conduct research which supplies technology relating to the virus.

30. **Continuing consultation.** To date, Defence has conducted extensive outreach activities with Universities Australia (UA), including:

- 9 May 2011 – letter (copy enclosed) to UA including two page explanation of the implication for academic sector - no response received;
- 15 July - 26 August 2011 - draft Bill released for public consultation - no submission received from UA;

- 5 August 2011 - invited UA to attend Canberra industry consultation session – UA representative attended;
- 2 November 2011 – Bill entered Parliament;
- early December 2011 - DECO became aware that UA response to the Autonomous Sanctions Bill included UA comment on the Bill;
- 12 December 2011 - DECO officer followed up with UA to ascertain whether UA wanted to supply feedback on the Bill;
- 13 December 2011 - teleconference between DECO officers and UA;
- 22 December 2011 - 17 Feb 12 - public consultation period on draft DTC Regulations;
- 3 February 2012 – teleconference with DECO officers and UA officers;
- 9 February 2012 - UA submission to the Senate on the Bill;
- 17 February 2012 - UA submission on the draft DTC Regulations;
- 1 March 2012 - DECO sent letter to UA addressing concerns raised in teleconference (copy enclosed);
- 1 March 2012 – Michael Shoebridge telephone conversation with Dr Kinnear;
- 13 March 2012 – Angus Kirkwood telephone conversation with Dr Kinnear;
- 13 March 2012 – Michael Shoebridge telephone conversation Dr Kinnear;
- 29 March 2012 – consultation between Defence and Universities Australia;
- 13 April 2012 – Defence distributed Principles and Options document (version 1) to relevant Government agencies, industry, and research and academic sectors;
- 20 April 2012 – Defence distributed Principles and Options document (version 2) to relevant Government agencies, industry, and research and academic sectors;
- 24 April 2012 – consultation between Defence and Universities Australia;
- 27 April 2012 – Defence distributed Principles and Options document (version 4) to relevant Government agencies, industry, and research and academic sectors;
- 10 May 2012 – Universities Australia provided formal response to Principles and Options document distributed on 27 April 2012; and
- 04 - 17 May 2012 – comments received from various members of industry and research sectors.

Defence has also conducted consultations with the research sector and sought comment from the following individuals and organisations on the Principles and Options document:

- Australia's Chief Scientist;
- Australian Academy of Science;
- Academy of Technological Sciences and Engineering;
- Australian Radiation Protection and Nuclear Safety Agency;
- through Department of Industry, Innovation, Science, Research and Tertiary Education: Commonwealth Scientific and Industrial Research Organisation, Australian Research Council, Australian Nuclear Science and Technology Organisation and Australian Institute of Marine Science; and
- through Department of Health and Ageing: National Health and Medical Research Council and public health laboratories.

Noting that any changes that result from Government consideration of these consultations with the academic and research sectors will also affect the industry sector, Defence has also sought comment from the industry members who had provided comment to the Committee on the strengthened export control aspects of the Bill and from the members of the Defence Industry Advisory Panel that has been involved throughout the development of the Bill.

Defence is continuing the consultation process and expects to adjust or increase the options as part of that iterative process. Defence expects feedback from the university, research and industry sectors on further options by the end of June 2012.

Issues from evidence - Australian-US Trade Treaty

31. **Costs to join the Approved Community.** The cost to companies and tertiary institutions to become compliant with the requirements in the Bill will vary depending on existing security arrangements and business practices. The security principles for Australian Approved Community members will be the same as the principles currently employed for the protection of ITAR 'controlled unclassified' articles accessed by Australian companies under existing licence arrangements. For classified items, the security measures currently required will remain unchanged.

Compliance costs and impacts are key issues that have been raised by companies and peak bodies during Defence's consultation program concerning Treaty implementation. Approved Community members will be obliged to meet Treaty standards in terms of ensuring physical security, information technology protection, personnel security clearances and compliance. The way Australia is implementing the Treaty is to work with companies so that existing good business practices and processes will meet much of the compliance obligations.

To minimise overheads, the Government has decided not to charge applicants for the

costs involved in processing applications and Approved Community personnel security clearances. Only relevant areas of nominated facilities will undergo assessment and accreditation, however companies will be responsible for meeting the costs for implementation of any required security controls for those facilities. The entire company does not have to implement controls and those companies currently engaged in defence business will already have many of the required controls in place.

Any initial administrative overheads to become an Approved Community member will have long term effect and should override the continued administrative burden required to obtain individual licences.

Companies will have the option of continuing to operate within the existing Australian and US export control systems.

32. **Extension of Approved Community membership to subsidiaries and contract companies.** Membership of the Approved Community is a voluntary business decision for each individual company to make. Regardless of size, companies must apply separately for Approved Community membership. The assessment of suitability for membership is conducted for the applicant only and does not extend to subsidiaries or support companies. Each company must individually meet requisite conditions and agree to the obligations of membership. Application for membership is a once only activity which, if approved, will enable continuing licence-free trade in eligible goods, technology and services.

The Bill defines an Approved Community member as a body corporate that holds an approval under section 27, or a person who is employed or is engaged under a contract for services by a body corporate that holds an approval under section 27 and who satisfies the requirement prescribed by the Regulations. Employees or contractors who meet these requirements will be approved to access Treaty articles.

A body corporate with section 27 approval could nominate a person who is contracted to them to deliver services, for access to Treaty articles at their approved facilities. This would remove the need for the contractor to become an Approved Community member in their own right, yet still allow them to participate in Treaty activities.

33. **The International Traffic in Arms Regulations (ITAR).** The Committee queried how membership of the Approved Community would remain beneficial as ITAR undergoes reform and what the current and proposed amendments to the ITAR were.

33.1 **Treaty benefit over ITAR reforms.** The ITAR is being reformed according to a set of guiding principles based on four singularities:

- a single export control licensing agency,
- a single control list,
- a single enforcement coordination agency, and
- a single integrated IT system.

Australia and the US are committed to ensuring that joining the Approved Community and operating within the Treaty framework will continue to provide benefit to Community members and remain attractive over existing export control authorisations, including in the context of the reforms underway. We are working closely with our US colleagues in the Treaty Management Board to ensure that the Treaty incorporates the benefits of US export control reform and have received a commitment from the Department of State that the Treaty will always remain beneficial over the ITAR licence regime.

As outlined to Australian companies recently by a senior US Department of State official, the key benefits of the Treaty exemption over standard ITAR are:

- the Treaty is here now, whereas many of the ITAR reforms under consideration may take considerable time to come into effect;
- Approved Community members can use the Treaty exemption without a need to apply and wait for approval – this is important when it comes to bidding on contracts;
- Approved Community members will know the scope and all the conditions upfront, so they can better structure bids/contracts;
- Treaty conditions do not change so compliance procedures are predictable; and,
- membership is valid indefinitely.

The obvious continuing benefit is that applying to join the Approved Community is a once only process, and membership removes the need to continually obtain individual export licences for technology related to projects within the scope of the Treaty; thus saving time and money.

Membership to the Approved Community will also reduce the need for Australian companies to seek individual approvals, such as Technical Assistance Agreements. As indicated in the key points, membership will allow timely access to controlled information which will enable members to bid on eligible US contracts, therefore increasing business opportunities for Australian companies because it removes the need to wait for US access approval.

33.2 **ITAR Amendments**. Amendments to the ITAR are published annually on 1 April. Since 1 April 2011 there have been six amendments to the ITAR;

1. Final Rule on Additional Method of Electronic Payment of Registration Fees

2. Final Rule on Sudan

3. Final Rule on Filing, Retention, and Return of Export Licenses and Filing of Export Information

4. Update on the policy regarding Libya to reflect the United Nations Security Council arms embargoes

5. Final Rule on Dual Nationals and Third-Country Nationals Employed by End-Users

6. Final Rule on Electronic Payment of Registration Fees

33.3 **ITAR Proposed Rules.** The proposed rules to amend the ITAR are enclosed.

Issues from evidence - common to strengthened export control and Treaty provisions

34. **Greater role for the Defence Materiel Organisation (DMO).** One witness encouraged a greater role for the DMO in the development of the Bill.

The DMO has been actively consulted throughout the development of the Bill and is represented at the regular Defence Trade Cooperation Treaty (SES Band 2 level) Meetings, the DTCT Industry Advisory Panel (DIAP) Meetings and the US-Australian Treaty Management Board Meetings. Further, the DMO has chaired a roundtable meeting which brought DMO and Strategic Policy Division representatives together with CEOs of defence prime contractors, several of whom have representatives on the DIAP.

DMO is actively engaged in the procurement of Defence equipment. It is appropriate that the responsibility for developing and implementing the Bill lie with Strategic Policy Division as the current administrators for controls on the export of defence and dual-use goods. Input from the DMO has been valuable in guiding the development of both the legislation and implementing policies. DMO will use the Treaty provisions and will be an important part of the practical operation.

35. **Review of current DECO decisions.** The Committee made mention of the lack of appeal rights in relation to exports that have been prohibited.

Currently the Minister may only prohibit the supply or export of goods or services (that are not regulated by Customs legislation) under the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (the WMD Act) where the Minister has reason to believe or suspect that the goods or services would or might be used or assist in a WMD program. While the WMD Act does not include specific review mechanisms, the Minister's decision to issue a prohibition notice may be

reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). Mr Bill Blick AM PSM is currently conducting a review into the WMD Act and is due to report to the Minister in the middle of this year. The Terms of Reference of review include consideration of whether a process to review decisions made under the WMD Act or regulations should be established.

While there is no scope under Customs legislation for the Minister to prohibit an export of tangible goods or technology listed on the DSGL, a decision to not issue a permit for an export may also be subject to review under the ADJR Act.

The Bill introduces merits review for a number of decisions made under the Bill to ensure a level of accountability and openness in decision making. These decisions will be subject to review of the facts, law and policy considerations of the original decision. There are a limited a number of decisions under the Bill which have specific factors that justify excluding them from merit review. These factors include decisions that are personally vested in the Minister (non-delegable decisions) due to their highly sensitive content and the fact that they involve issues of the highest consequence to Government.

It is important to note that rights of review under the ADJR Act for all decisions made under the Bill are retained.

Yours sincerely

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Pamela Kinnear
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Dear Ms Kinnear

I am writing in response to the issues that Universities Australia (UA) raised regarding the *Defence Trade Controls Bill 2011* (the DTC Bill) at the teleconference held on 3 February 2012 and in your pre-meeting email the day before the teleconference. The Department of Defence (Defence) appreciated the opportunity to discuss those issues with UA and will welcome your continued dialogue with Defence in the process of implementing the DTC Bill and developing the supporting regulations and legislative instruments. Defence is mindful that this is a new area of regulation for the academic sector and, as a result we will need to work closely with universities to ensure that the changes are well understood. The new technology and defence services and brokering controls in the DTC Bill are essential to eliminate identified gaps in Australia's export control system and align Australia with the accepted best practice of the export control regimes to which Australia belongs. The new legislation will ensure that Australia contributes to important international efforts to prevent proliferation.

Universities perform an essential role in leading innovation through high-end research and educating the future generations of professionals; including, scientists, engineers, chemists, biologists, IT specialists and medical practitioners. For this reason, it is crucial that academics are aware of the purpose and need for defence export control legislation and the associated regulatory framework. Universities will be invaluable, not only to educate future generations of academics and professionals in this critical area, but also in the continuing efforts to safeguard defence technology.

You have raised a number of specific issues including:

- clarity of the legislation, such as the definition of technology in section 4 of the DTC Bill;
- that concepts of 'public domain' and 'basic scientific research' should be in the primary legislation or regulations;
- exclusion of foreign students from the definition of 'Australian person' in section 4 of the DTC Bill;
- absence of due diligence provisions in the DTC Bill that may safeguard universities/researchers and provide a balance to the high penalties proscribed in the legislation;
- administrative and compliance burden;
- transition period;
- possibility to provide binding advice that is similar with that for the Australian taxation law;
- the legislation's compatibility with anti-discrimination law; and
- coherence of the Government policies – encouraging or limiting innovation and Australia's academic capability and competitiveness in education export.

It is important to note that the DTC Bill was passed by the House of Representatives on 21 November 2011 and is currently the subject of a Foreign Affairs, Defence and Trade Senate Legislative Committee

inquiry. While there is limited scope for the Government to make changes to the Bill at this stage, the Government will consider any recommendations made by the Senate Committee. I understand that you have made a submission to the Senate Committee and I am grateful that you also provided a copy of your submission to Defence. I have used that submission to further inform my responses in the paragraphs below.

Technology definition (including public domain and basic scientific research)

The DTC Bill provides a definition for technology which excludes information that is specified in a legislative instrument made by the Minister. The rationale for excluding certain information (including information in the 'public domain' and 'basic scientific research') from the definition of technology through a legislative instrument is to provide a mechanism that is flexible and responsive to changes in the domestic and international technology environment and related policy development. The advantage of a legislative instrument is that it is able to be amended quickly and, unlike an amendment to an Act, does not require passage through Parliament. The Defence and Strategic Goods List is an example of a legislative instrument requiring the ability to adapt. It allows the Government to comply with changes in international best practice as to which goods and services are controlled. At the same time, it is not a volatile list but provides a clear basis around which companies can plan their business decisions. In the interests of ensuring similar flexibility and ease of amendment, it was decided that the Bill would provide for a legislative instrument to be made rather than including exclusions to the technology definition in the regulations.

The legislative instrument will clarify the scope of the new controls in terms of intangible transfer of technology listed in the Defence and Strategic Goods List (DSGL) and provision of related services. Defence is currently developing this instrument and will consult with defence industry and UA when a draft is available.

Foreign students

Student visas obtained by foreign students are one form of a large range of temporary visas issued by the Australian Government. Student visas are not included in the definition of 'Australian person' because the temporary visa screening process is designed for policy objectives that significantly differ to the policy objectives of defence export controls.

In light of the intended exclusion of certain information (public domain and basic scientific research) from the definition of technology, Defence expects many courses will not be captured by the new controls and permits will not be required for those courses attended by foreign students. The controls may require universities to apply for permits where foreign students are undertaking particular postgraduate work or participating in research projects, or where international researchers are involved in collaborative research projects that involve technology listed on the DSGL.

Due diligence

The offence provisions in Part 1 of the DTC Bill are consistent with export control provisions in the Customs (Prohibited Exports) Regulations 1958 and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*. The provisions will apply to any person supplying technology listed on the DSGL or providing defence services relating to technology or goods listed on the DSGL, including defence industry, universities and academia.

You have raised concerns that the DTC Bill does not include a specific due diligence defence, such as the defence provided in subsection 16(7) of the *Autonomous Sanctions Act 2011*. Unlike the offence in the Autonomous Sanctions Act, the offences in Part 1 of the DTC Bill are not strict liability offences. This means that in prosecuting an offence under the Autonomous Sanctions Act, there is no requirement for the prosecution to prove fault, as the element will be satisfied by simply showing that the physical elements were engaged in, or existed. The defence of due diligence provides a balance to counter the

strict liability that attaches to the offence in the sanctions legislation. As the offences contained in Part 1 of the DTC Bill require a higher burden of proof, the defence of due diligence has not been included.

Although the DTC Bill does not contain a similar due diligence defence, Defence would certainly consider any due diligence conducted by the alleged offender in considering the most appropriate compliance response. Defence would consider a range of factors; including, what efforts were made to prevent the alleged offence from occurring (e.g. training, policy, procedures, legal advice) and what action has been taken to prevent a re-occurrence.

Record-keeping and compliance costs

The current record-keeping requirements set out in the regulations apply to any individual or body corporate that supplies DGSL-listed technology or provides defence services in relation to DSGL-listed technology. Defence has not included specific record-keeping requirements for each different stakeholder group; rather, Defence has deliberately adopted a non-proscriptive approach in relation to exactly how records are to be kept so that industry members and universities have the flexibility to create or tailor record-keeping systems that are suitable and practical for implementation in their respective sectors. Defence will work with UA to streamline those record-keeping requirements where possible and would welcome UA's views on how the record-keeping processes might be streamlined from a university's practical perspective.

Universities and their academics will need to undertake preliminary assessments to ascertain whether permits are required under the new controls. Such assessments will need to be undertaken by any individual or body corporate engaging in the supply of DSGL-listed technology or the provision of defence services, including defence industry and the academic sector.

When developing the DTC Bill, Defence included measures to reduce the compliance burden. The DTC Bill provides for permits to be issued that cover multiple activities and/or for a period of time. This flexibility in issuing permits will limit unnecessary permit applications and in turn, reduce compliance and administrative costs. Defence is committed to raising awareness on the new technology controls by providing guidance on the DTC Bill through training, the Defence Export Control Office website and other outreach activities.

Transition period

The DTC Bill will not commence operation until the Australian-United States Defense Trade Cooperation Treaty comes into force. The Treaty will not come into force until the President of the United States has ratified the Treaty, the Attorney-General has sent correspondence to the Federal Executive Council and there has been a bilateral exchange of notes to agree a Treaty commencement date. This is unlikely to occur before September 2012, giving Defence, industry and universities a period of time to prepare to meet the requirements of DTC Bill.

Binding advice

Binding advice would not be appropriate for the policy objectives of defence export controls. The export control legislation delivers policy objectives that are significantly different from those of taxation law.

Anti-discrimination law

Defence has taken into account Australia's human rights and anti-discrimination obligations and the DTC Bill complies with those obligations. As you may be aware, a new parliamentary process has recently been introduced to review the compliance of all new government legislation with Australia's human rights obligations. Defence is preparing a Human Rights Statement of Compatibility that is required to be prepared for the regulations. Further information on this new process is available on the Attorney-General's Department website.

Coherence of Government policies

Australia is a member of all major arms and dual-use export control regimes and the Australian Government is committed to implementing the obligations agreed under those regimes. Security threats continue to change globally, and the ability to regulate those threats has to be able to respond to the fact that rapid advances in communications technology enable controlled technology and related services to be intangibly transferred to parties who could use those items to directly or indirectly threaten Australia's defence, security and international relations. In this environment, Defence strives to balance concerns of national security and Australia's international obligations with the impact of the new export control legislation on industry and the academic sector.

As mentioned previously in this letter, Defence is drafting a technology instrument to further clarify the scope of Part 1 of the DTC Bill. Defence will consult with industry, universities and the broader community on the draft instrument. Defence values universities' input through the office of UA and will continue working proactively with UA on the development of the legislation, regulations and associated legislative instruments.

I trust this information informs and alleviates many of UA's concerns.

Yours sincerely

Angus Kirkwood
Assistant Secretary
Export and Arms Control

/ March 2012

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ASEAC/OUT/2011/ 45

Pamela Kinnear
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1 Geils Court
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Dear Pamela

I write to inform you of some Australian export control initiatives that will be of interest to your stakeholders, and to invite your comments on the proposed developments.

The Department of Defence, in consultation with other government agencies, is currently drafting legislation to strengthen Australia's controls on the export of sensitive goods, technologies and services.

The new controls will cover the:

- brokering of regulated goods or technology and brokering of services associated with regulated goods or technology;
- intangible transfers (such as email or fax) of regulated technology;
- provision of services (such as giving of assistance in relation to training or development) related to regulated goods; and
- goods destined for a military end-use contrary to Australia's national interests.

Additionally, the Obama Administration is proposing changes to the US export control system that may have implications for Australian universities that undertake work on US-controlled technology.

Further information on these proposals is provided in the attached document.

Australian academic institutions have a stake in the trade of controlled goods, including trade between Australia and the United States. As a representative of Australian academia, we are seeking your views on our policy approaches before we release an exposure draft of the *Defence Trade Controls Bill 2011* in the coming months. Your insights will allow Defence to consider the practical impacts of these proposals on the university sector. We would also be happy to discuss developments in the US export control system.

Should you wish to discuss these proposals, please contact Mr Andrew Garland on 02 6265 4144 to arrange a time and place to meet.

Yours sincerely

Murray Perks Assistant Secretary Export and Arms Control
Strategic Policy Division
9 May 2011

ADVICE FOR ACADEMIA ON CHANGES TO AUSTRALIAN EXPORT CONTROLS AND US EXPORT CONTROL REFORM

The Defence Export Control Office and Current Legislative Framework

Australia is a strong supporter of international efforts to prevent the proliferation of conventional weapons and weapons of mass destruction. We are an active member of international arms control treaties and multilateral export control regimes, such as the Wassenaar Arrangement, that seek to harmonise controls on defence and dual-use goods, technologies and services across member states.

Export controls play an important role in preventing illegitimate activity as a result of either deliberate actions on the part of exporters or unwitting actions as a result of clandestine approaches by proliferation networks. The Defence Export Control Office (DECO) in the Department of Defence contributes to Australia's arms control and counter proliferation efforts by administering the controls on the export of defence and dual-use goods, technologies and services, and granting authorisations to export in the form of permits and licences.

Defence and dual-use goods are controlled under the *Customs (Prohibited Exports) Regulations 1958, Regulation 13E*. This regulation allows the Minister for Defence, or an authorised person, to grant a permission to export goods listed in the Defence and Strategic Goods List (DSGL). The DSGL contains all defence and dual-use goods that are controlled for export.

Strengthened Export Controls

Ensuring that Australia's export control system remains consistent with like-minded countries is important for Australia's counter proliferation efforts. Our export control system reflects our commitments to the international export control regimes to which Australia is a party. Australian criteria for export of defence and dual-use goods (described on our website www.defence.gov.au/strategy/deco) incorporates international best practice and includes such things as avoidance of destabilising arms build-ups or commitment of human rights abuses.

The Department of Defence, in consultation with other government agencies, is currently drafting legislation to close recognised gaps in our export control regime and strengthen Australia's controls on regulated goods, technologies and services. These enhancements will ensure Australia remains at the forefront of international best-practice in export controls.

The proposed *Defence Trade Controls Bill 2011* will introduce new controls over export activities not currently regulated. The new controls will cover the:

- brokering of goods listed in the DSGL and technology and services associated with these goods;
- intangible transfer (such as email or fax) of technology listed in the DSGL, or technology related to goods listed in the DSGL;
- provision of services (such as the giving of assistance in relation to training or development) related to goods listed in the DSGL; and
- goods not listed in the DSGL that may be destined for a military end-use that would be contrary to Australia's national interests.

Under the proposed legislation, institutions that are involved in research and development relating to DSGL goods and technology will, in certain circumstances, be required to apply for permission to transfer technology or provide services to foreign nationals. Our current policy position notes that this requirement will not apply to circumstances where foreign nationals hold Australian residency (including temporary residency) or Australian citizenship.

In accordance with its international obligations, the Government is seeking to prevent the misuse of specialised and sensitive technology. It does not seek to restrict or vet the publication of scientific

papers or research. Only a very small number of Australian academics who deal with DSGL goods or technology are expected to be affected by these new controls.

Exemptions to the Strengthened Export Controls

Exemptions will apply to these proposed controls. For example, information that is available in the public domain is not currently controlled through the *Customs Act 1901* and will not be controlled for export under the new legislation.

'In the public domain' is expected to be defined as technology or software listed in the DSGL which has been made available without restrictions on its further dissemination. Copyright restrictions will not prevent technology or software from being in the public domain.

We expect 'in the public domain' will include 'basic scientific research' that will likely be described as 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, where the resulting information is ordinarily shared broadly within the scientific community.

However, we also expect that if technology is deliberately transferred to the public domain in order to circumvent the controls, the technology will not be considered to be 'in the public domain'.

A specific example where Australian academia will potentially be affected by the proposed controls is: a lecturer from an Australian geophysics department travels overseas to discuss the development of a gravity gradiometer with research partners. These items are regulated under the DSGL as they can have military utility. Related software and technology for the development of gravity gradiometers is also regulated under the DSGL. Therefore, discussions and lectures on these topics delivered by the lecturer would be considered a provision of a service. If the lecturer was to email technology for the development of gravity gradiometers to the research partners, this would be considered to be an intangible transfer of technology.

United States Export Control Reform

The Obama Administration is proposing changes to the US export control system. Of particular interest to Australian academia is the proposed change to the 'dual-national' rule. Under the United States' export regulations, the International Traffic in Arms Regulations (ITAR), recipients of US technology are required to provide the US Government with information about their nationality and place of birth. Further, the US Government denies citizens of proscribed countries access to ITAR-controlled technology.

These rules have the potential to infringe Australian anti-discrimination laws. The Obama Administration has recently announced a forthcoming amendment to its 'dual-national' policy that will make access to US technology dependent on an assessment of risk of diversion from its intended destination, rather than solely on place of birth. This holds the prospect of providing relief to those working on US-controlled technologies, and also to members of the tertiary sector who were not born in Australia or the US and who might wish to access US-controlled technology.

Principles and Options for Strengthened Export Controls - after May 2012 feedback from University, Research and Defence Industry Sectors

The Defence Trade Controls Bill 2011 (the Bill) introduces new measures to strengthen Australia's export controls. These strengthened export controls are essential to eliminate identified gaps in Australia's export control system and align Australia's export controls with the accepted best practice of the export control regimes to which Australia belongs. The Wassenaar Arrangement countries agreed measures for Arms Brokering in 2003 and intangible technology controls in 2006.

As currently drafted, the Bill will strengthen export controls in three areas:

- intangible transfer of technology listed in the Defence and Strategic Goods List (DSGL) (e.g. blueprints of military vehicles ML22 & ML6) or (e.g. performance data for night vision equipment 6A002.a.2 & 6E101);
- provision of defence services related to goods and technology listed in the DSGL (e.g. providing assistance in the design of a military vehicle) or (e.g. maintaining night vision equipment); and
- brokers arranging supply of DSGL goods, technology and defence services.

The Bill is currently before the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee) which has asked Defence and the academic sector to undertake further consultation with a view to resolving the university sector's concerns.

As a result, Defence has met with Universities Australia and agreed to develop principles and options for further consultation and discussion with the university and research sectors. Noting that any changes that result from these consultations with the academic and research sectors will also affect the industry sector, Defence has also sought comment on the options from the industry members who had provided comment to the Committee on the strengthened export control aspects of the Bill and from the members of the Defence Industry Advisory Panel that has been involved throughout the development of the Bill.

The consultations have emphasised that acceptance of any options is a matter for Government consideration following this consultative process.

In Defence's previous round of consultation, Defence had formulated three options (Options 1 – 3) and had circulated these options to the university, research and defence industry sectors. The feedback from this previous round along with further policy consideration of the risks associated with the Options 1 – 3, have been considered by Defence and this paper poses a further option, Option 4, for consideration by the three sectors.

Principles

1. Australia has an obligation to implement the Wassenaar Arrangement guidelines for Best Practices for Implementing Intangible Transfer of Technology Controls of 2006.

2. In April 2004, UN Security Council Resolution 1540 established binding obligations on all UN Member States to take and enforce effective measures against the proliferation of weapons of mass destruction, their means of delivery and related materials.[1]

3. Universities and research institutions need to be able to conduct teaching and research with foreign students and foreign researchers.

4. Universities do not want regulation to put them at a strategic disadvantage when providing educational services to foreign students in Australia or overseas.

5. The levels of controls on intangible technology transfers should be consistent with controls on tangible transfers and proportionate to the requirement to protect Australia's security, defence and international relations.

Options

Four options have been developed and all four options remove the specific controls currently in the Bill for provision of defence services. Instead, Defence proposes that it is sufficient for defence services to be controlled by reference to DSGL 'technology' controls which include controls on 'technical assistance' or 'use' for certain goods/items. It is proposed that there is no need to impose additional controls on other defence services beyond the controls contained in the DSGL.

It is anticipated that the exceptions for 'scientific research', 'basic scientific research' and 'public domain' would be outlined in the Bill and defined in the Regulations. These definitions will form part of the consultation process. Different options refer to 'scientific research' differently and may refer to 'pure basic research', 'basic strategic research', 'applied research' and 'experimental development' as defined by the ABS definitions (Chapter 2 Australian and New Zealand Standard Research Classification, 2008).[2] It is important to recognise that under the DSGL, all supplies of technology for 'basic scientific research' will be exempt.

Consultation to date

To date, the majority of feedback from the University, Research and Industry sectors indicated a preference for Option 3 but for different reasons:

- Defence has received diverse comments from defence industry:
    - Although exemptions for supplies of technology in the course of research would also apply to defence industry, they would be of little

[1] This obligation is fulfilled by Australia requiring permits for dual-use goods on Part 2 of the DSGL and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* –see Annex B. The introduction of intangible controls for supply of dual-use DSGL technology will further strengthen these existing controls.

[2] See Annex A.

benefit to defence industry who conduct little basic or applied research.

- From a risk of diversion perspective, defence industry commented that if these exemptions were granted, the risk of diversion of Australian controlled technology to unknown entities would seemingly increase and this may impact on Australia's international standing.

- While none of the Options make defence industry worse off than under the Bill's current provisions, the options do not benefit industry to the same extent as university and research sectors.

- Defence industry supports a model that aligns as closely as possible with the tangible export system arguing that it would be difficult to structure an internal compliance framework to support different regulatory models for the export of the tangible good and the supply of its associated technology. Of the current options, Option 3 is more closely aligned than Options 1 and 2.

- University sector feedback indicates support for Option 3 which provides the broadest exemptions for scientific research and recognises that the bulk of university teaching and research would be exempt under this option. While noting that Option 3 most closely addresses the concerns raised by universities during the consultation, the university sector asks for further exemptions if the technology is supplied to citizens of Wassenaar countries or if the research is conducted for the 'public good' as demonstrated by an intention to publish.

- Research sector feedback indicates a preference for Option 3 as it is 'most conducive to minimising any adverse impacts on the sector'. Discussions with the research sector also indicate that research can be difficult to categorise as basic, basic strategic, applied or experimental development. Further, research is fluid and can quickly change in scope and move from one category to another.

Other feedback argues that it would be difficult for universities, researchers and industry members to create an internal compliance framework if there are different levels of regulation for domestic and international supplies.

Feedback also indicates there is misunderstanding around the breadth of the technology controls in the DSGL and these will be further explained in the next section.

Concern continues to be expressed in all sectors about the challenge of implementing new regulation. Regardless of whatever form the legislation may finally take, Defence reaffirms its commitment to work with those affected by providing training, awareness-raising materials, advice on establishing an internal compliance framework and being available to answer any questions. Implementing arrangements will be designed to be as simple and practicable as possible, and Defence will consult further with the defence industry, university and research sectors to establish mutually acceptable arrangements.

Policy considerations

The DSGL does not control all technology associated with DSGL goods; rather, the DSGL only controls certain types of information (technologies) associated with DSGL goods. For many DSGL goods, the technology will only be controlled if the technology will enable the 'production' or 'development' of the DSGL good. For fewer, more sensitive DSGL goods, the technology will be controlled if the technology will enable the 'production', 'manufacture' or 'use' of the DSGL good.

Therefore, research that involves DSGL goods or technologies may not necessarily require a permit even if the research involves collaboration with foreign persons. Asking, 'Does your research involve DSGL goods and foreign persons?' only gets you part of the way. The more relevant questions are 'Will the technology that is supplied, enable the foreign person to produce or develop the DSGL good?' and for more sensitive DSGL goods, 'Will the technology that is supplied, enable the foreign person to produce, develop or use the DSGL good?'

Defence has analysed in greater detail how the research exemptions in Options 1 to 3 would work in practice and identified that providing exemptions for a broad range of research allows DSGL technology to be supplied to foreign persons without an assessment of the supply and the risk it presents. This would present a significant risk to Australia's defence, security and international relations.

Regardless of the type of research that is being conducted, DSGL technology can only be protected if supplies of that technology are assessed. Put another way, it is not relevant to consider the type of research or what is being researched, it is only important to consider what technology is being supplied in the course of that research and to whom. Therefore, a researcher could conduct highly sensitive research into improving the performance of sensitive DSGL good and that researcher would not need to apply for permit unless there is a supply of DSGL technology to a foreign person in the course of the research. Conversely, a researcher could conduct public-good research in a field unrelated to the DSGL but if the research includes the supply of DSGL technology to a foreign person in the course of that research (e.g. a cancer researcher supplying instructions to a foreign researcher on how to produce or develop cholera toxin), that researcher would need to apply for a permit. Annex D provides examples that distinguish the conduct of research from the supply of technology in the course of research and explore the risks posed by supply of technology in the course of research

Noting comments received from all sectors regarding the US and UK regulatory models, Defence has consulted with the US and the UK to better understand the scope of their intangible controls relating to research. Defence understands that the US regulates all transfers of technical data to foreign persons inside and outside the US with few exemptions that are relevant to the research or university sectors. While there is a public domain exemption for the results of fundamental research [fundamental research includes basic and applied research] conducted by accredited institutions, transfers of controlled technical data to foreign persons in the course of that research are regulated. There is also a narrow exemption for transfers to most foreign employees of higher learning institutions.

Consultation with the US Department of State has established that although they see it as a matter for the Australian Government, and noting that these controls are separate to the US ITAR framework, exemptions for all transfers of controlled technology that

occur in the course of research could increase the risk of diversion of controlled technology.

The UK's Export Control Organisation reports that they do not apply any restrictions to intangible supplies of controlled technology inside the UK but all intangible supplies of technology to a person or place outside the UK, are subject to controls, except for those that occur in the course of 'basic scientific research' or for information already in the 'public domain'. Specifically the UK notes that, 'Transfers of controlled technology or software by academics to destinations outside the UK/EU, e.g. in the course of collaborative research, are licensable in the same way as any other [tangible] transfer of controlled technology/software.' These controls apply regardless of whether the person outside the UK is a foreign person or a UK citizen.

These international models make a clear distinction between the conduct of research and the supply of controlled (i.e. DSGL) technology in the course of research. Although the US and UK differ in their approach to regulating the conduct of research, both the US and UK systems regulate the transfer of controlled technology in the course of research and do not provide any exemption for supplies in the course of research other than for supplies in the course of 'basic scientific research' or for information in the 'public domain'.

How will permits work?

The consultation has shown an interest in the practicalities of how permits for supply of technology will work in practice. When a permit is required, subsection 11(5) of the Bill allows for the permits to cover more than one activity or to be for a specified period. The Government envisages that for some activities, it will be able to issue very broad permits that cover a series of activities; for example, for a lower-risk activity, the permit may cover supplies to foreign researchers in specified destinations during the course of research, conference presentations and publishing the research results; or a permit may cover activities for the life of a Defence acquisition project. For other more sensitive supplies, permits may need to be tightly framed to allow the supply of a specified technology to a specified foreign person.

Option 1 – approximates Australia's existing tangible export model and the UK intangible control model

This option would provide for a relatively free transfer of DSGL-listed technology within Australia. More controls would apply to technology transfers to foreign persons outside Australia.

1. Supplies within Australian territory:

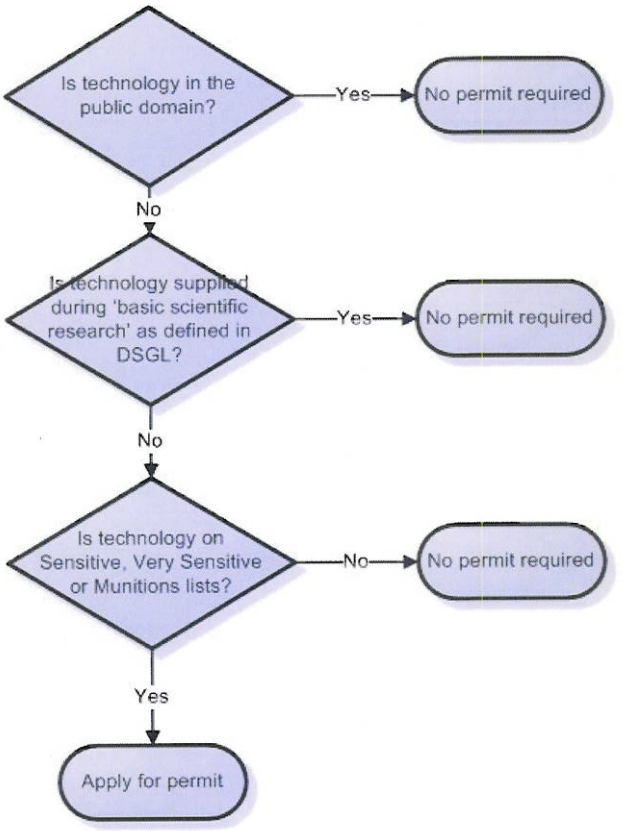
   Permit required for a supply of technology to a foreign person if the technology is **not** in the 'public domain' and it is listed on:

   - the Sensitive or Very Sensitive Lists of Dual-use Goods and Technology of DSGL (DSGL pp253-274); or
   - Munitions List 22 (DSGL p51) – specific military weapons and associated equipment agreed to be controlled under the Wassenaar Arrangement.

Under the DSGL, all supplies of technology for 'basic scientific research' are exempt.

Option 1

Supply **within** Australia – Australian person → Foreign person



2. Supplies outside Australian territory:

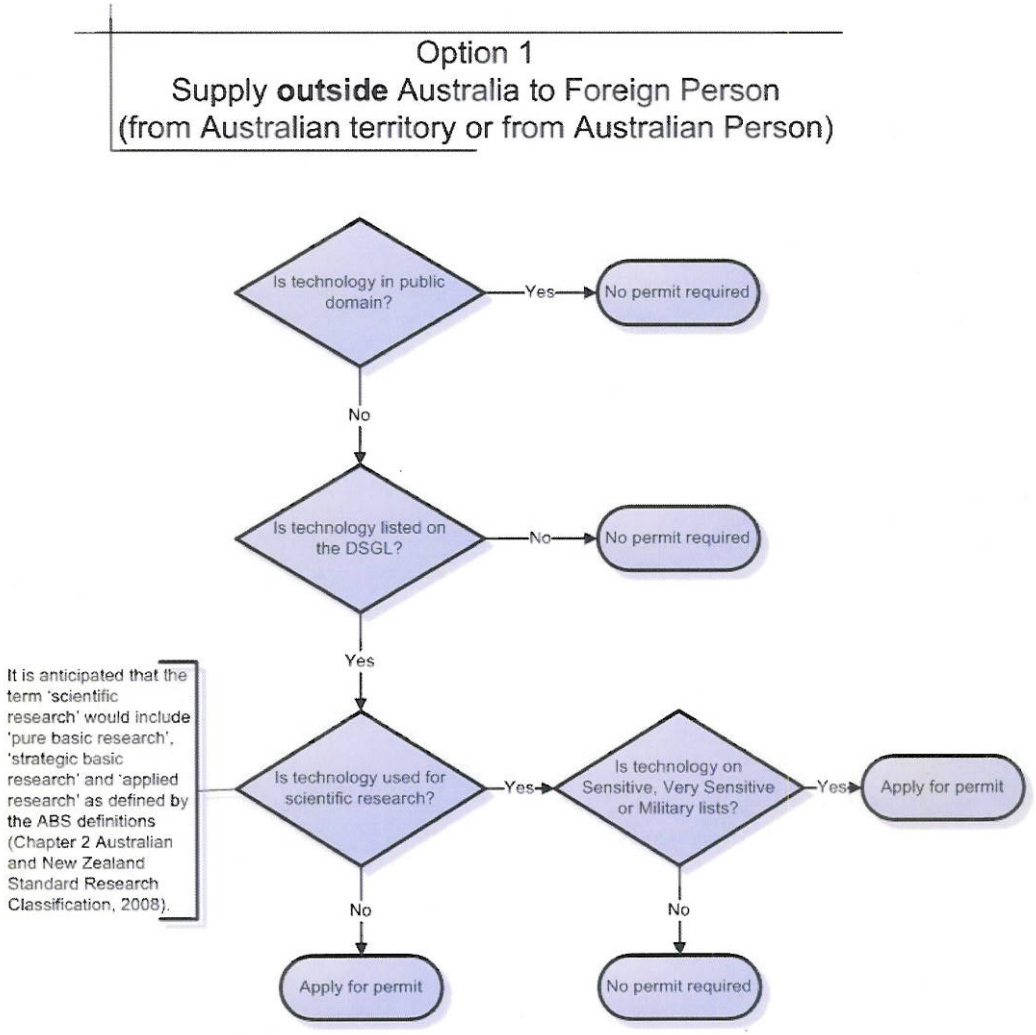
   - Permit would be required for supply of technology to foreign persons outside Australia either from Australian territory or by an Australian person unless:

     - the technology is in the 'public domain'; or

     - the supply is in the course of 'scientific research' provided the technology is not listed on:

       - the Sensitive or Very Sensitive Lists of Dual-use Goods and Technology of DSGL (DSGL pp253-274); or

       - Munitions List 22 (DSGL p51) – technology related to specific military weapons and associated equipment agreed to be controlled under the Wassenaar Arrangement.



Option 1 advantages:

- Lowers controls within Australia where the supplies occur in a lower risk environment but recognises that even within the lower-risk Australian environment, there are sensitive and munitions technologies that need to be regulated.

- Except for some limited controls within Australia for sensitive and munitions technologies, this option largely follows Australia's tangible export system and exercises controls when the technology is supplied outside Australia and accordingly industry will not need to re-align its business practices.

- Similar to the application of intangible controls in the UK which creates greater consistency of approach in the international environment.

- Recognises that research will be conducted in collaboration with foreign researchers located overseas and only seeks to control DSGL technology that is not in the 'public domain', supplied for experimental research, or relates to sensitive DSGL goods.

- Includes reference in the Bill to the exclusions for 'scientific research' and 'public domain' information. These terms will be fully defined in the Defence Trade Controls Regulations.

- Recognises Australia's international obligations to place a higher level of controls on sensitive DSGL technologies.

- Allowing relatively permit-free supply of DSGL technology within Australia, recognises the important role that will be performed by universities and research institutions in promoting self-compliance and awareness of responsibilities; functions that will be supported by the development of an industry code of conduct and appointed export control officers within institutions in line with Wassenaar Arrangement expectations.[3]

- Higher level of control than Option 3 as it increases the Government's visibility of supplies of DSGL technology that occur in the course of 'strategic basic research' and 'applied research'.

Option 1 disadvantages:

- Foreign person visiting Australia dealing with DSGL-listed technology would need to apply for permit to supply the technology to a foreign person outside Australia regardless of whether the technology is obtained from an Australian source.[4]

- Different control levels for within and outside Australia, require the supplier to consider where the supply is taking place.

Option 2 – Non-territorial controls but stronger controls around an Australian person

This option provides for controls to be exercised when an Australian person supplies DSGL-listed technology to a foreign person regardless of the location of the foreign person. Once a foreign person has possession of the DSGL-controlled technology, they do not require a permit to transfer the DSGL-listed technology further.

1. Permit would be required for all supplies of DSGL-listed technology from an Australian person to a foreign person unless:

    - the technology is already in the public domain; or

    - the supply is in the course of scientific research or except if the technology is listed on:

        - the Sensitive or Very Sensitive List of Dual-use Goods and Technology of DSGL (DSGL pp253-274); or

[3] Wassenaar Arrangement Best Practices of Implementing Intangible Transfer of Technology Controls, p2, para B.3.

[4] See SAAB evidence to Foreign Affairs, Defence and Trade Legislation Committee on 2 March 2012, p9. Defence envisages a broad permit could be obtained by multinational companies to provide for this scenario over a period of time.

- Munitions List 22 (DSGL p51) – specific military weapons and associated equipment agreed to be controlled under the Wassenaar Arrangement.

Option 2 advantages:

- Higher protection for all DSGL-listed technology regardless of location of the supply.
- Consistent approach where permits required from all Australian persons regardless of whether the foreign recipient is in Australia or overseas. If the technology is subsequently supplied overseas, there would be no requirement for a further permit.
- Foreign person visiting Australia dealing with DSGL-listed technology would **not** need to apply for permit to supply technology to a foreign person outside Australia.
- Does not require the supplier to consider where the supply is taking place.

Option 2 disadvantages:

- Diverges from Australia's tangible export system and industry would need to re-align its business practices.
- Permits would be required for all supplies to foreign employees, foreign students and foreign researchers in Australia.
- Higher level of regulations will result in increased compliance burden for Government, industry, research and academic sectors.

Option 3 – approximates Option 1 but applies main filters at the start and broadens exemptions for 'scientific research'

This option changes the orders of the decisions to ensure that the main filters are earlier in the decision-making process. In doing so, this option recognises the complexity of the DSGL and by excluding 'public domain' information and most 'scientific research' up front, it requires fewer staff members of industry, universities and research institutions to become familiar with the provisions of the DSGL.

1. Supplies to foreign persons within Australian territory:

   Unless the technology is in the 'public domain' or the supply occurs in the course of 'scientific research', a permit will be required for a supply of technology if the technology is listed on:

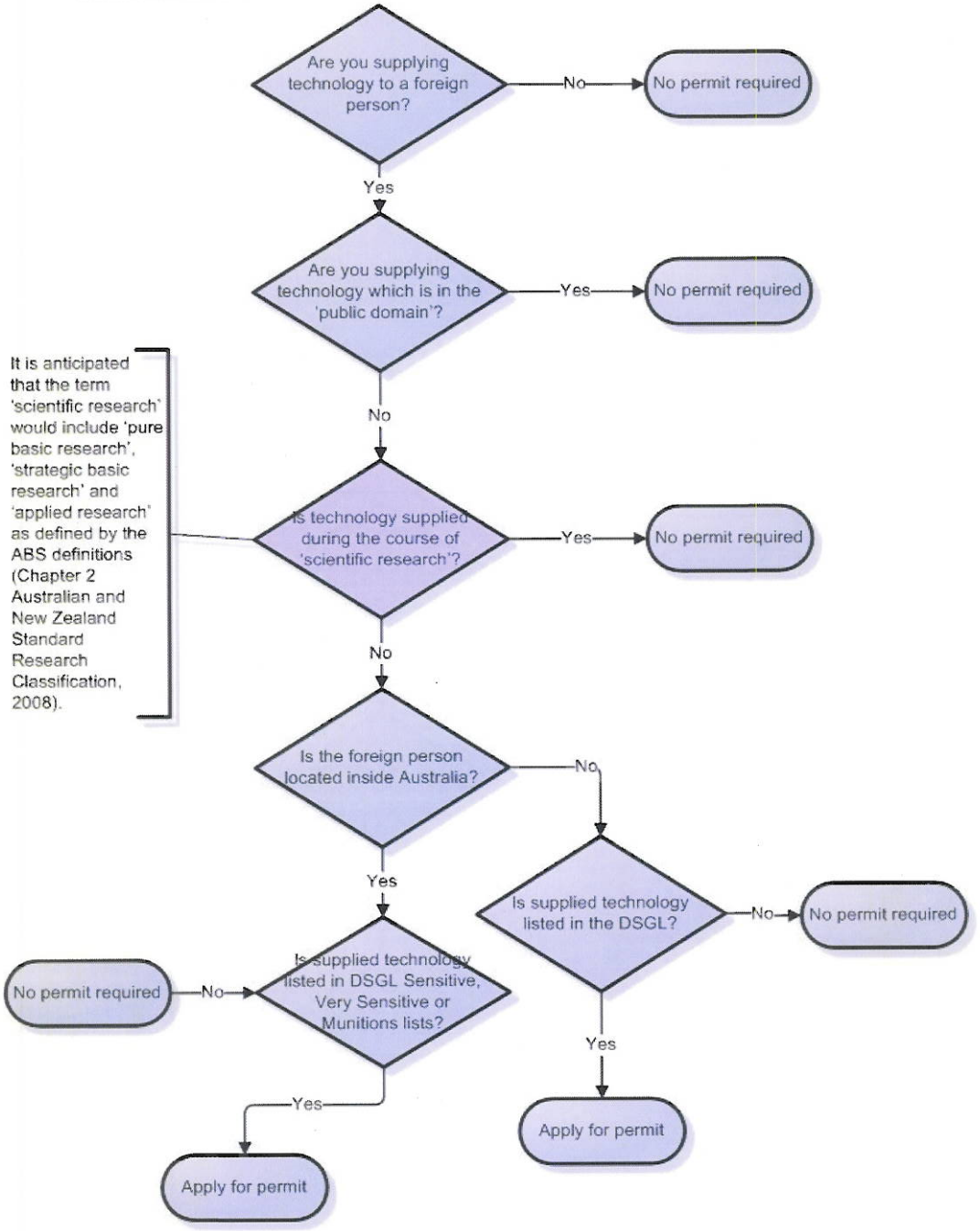
   - Sensitive or Very Sensitive Lists of Dual-use Goods and Technology of DSGL (DSGL pp253-274); or

- Munitions List 22 (DSGL p51) – specific military weapons and associated equipment agreed to be controlled under the Wassenaar Arrangement.

2. Supplies to foreign persons outside Australian territory either from Australian territory or by an Australian person:

Unless the technology is in the 'public domain' or the supply occurs in the course of 'scientific research', a permit will be required if the technology is listed on the DSGL.

Option 3 – combined flowchart for supplies within Australia and outside Australia



Option 3 advantages:

- Applies the main filters at the start of the process which will ensure that fewer people will need to become familiar with the DSGL.

- Excludes more 'scientific research' from regulation as it removes the need to apply for a permit for supplies of technology that occur in the course of 'pure basic research', 'strategic basic research' or 'applied research', irrespective of whether the research is being conducted inside or outside Australia.

- Lowers controls within Australia where the supplies occur in a lower risk environment but recognises that even within the lower-risk Australian environment, there are sensitive and munitions technologies that need to be regulated.

- Except for some limited controls within Australia for sensitive and munitions technologies, this option largely follows Australia's tangible export system and exercises controls when the technology is supplied outside Australia and accordingly industry will not need to re-align its business practices.

- Similar to the application of intangible controls in the UK which creates greater consistency of approach in the international environment.

- Recognises that research will be conducted in collaboration with foreign researchers located overseas and only seeks to control DSGL technology that is neither in the 'public domain' nor supplied in the course of 'scientific research'.

- Includes reference in the Bill to the exclusions for 'scientific research' and 'public domain' information. These terms will be fully defined in the Defence Trade Controls Regulations.

- Recognises Australia's international obligations to place a higher level of controls on sensitive DSGL technologies.

- Allowing relatively permit-free supply of DSGL technology within Australia, recognises the important role that will be performed by universities and research institutions in promoting self-compliance and awareness of responsibilities; functions that will be supported by the development of an industry code of conduct and appointed export control officers within institutions in line with Wassenaar Arrangement expectations.[5]

Option 3 disadvantages:

- Foreign person visiting Australia dealing with DSGL-listed technology would need to apply for permit to supply the technology to a foreign

[5] Wassenaar Arrangement Best Practices of Implementing Intangible Transfer of Technology Controls, p2, para B.3.

person outside Australia regardless of whether the technology is obtained from an Australian source.[6]

- Lesser level of control than Option 1 and decreases the Government's ability to assess supplies of DSGL technology that occur in the course of 'strategic basic research' and 'applied research'.

- Different control levels for within and outside Australia will require the supplier to consider where the supply is taking place.

- Requires researchers and Defence to agree on the research category.

Option 4 – matches Australia's existing tangible export model and mirrors the UK intangible control model

For the policy reasons outlined on pages 3 and 4 of this paper, Option 4 does not include the broader research exemptions that are included in the other options. To remove differing levels of controls inside and outside Australia, Option 4 proposes a model that does not apply any levels of control inside Australia and focuses the controls on supplies of technology to foreign persons outside Australia. Defence has assessed that there is a manageable level of risk posed by unregulated supplies of technology within Australia where all foreign persons have been subject to border control processes and other security-related domestic legislation applies.

Option 4 would regulate supplies of DSGL technology outside Australian territory:

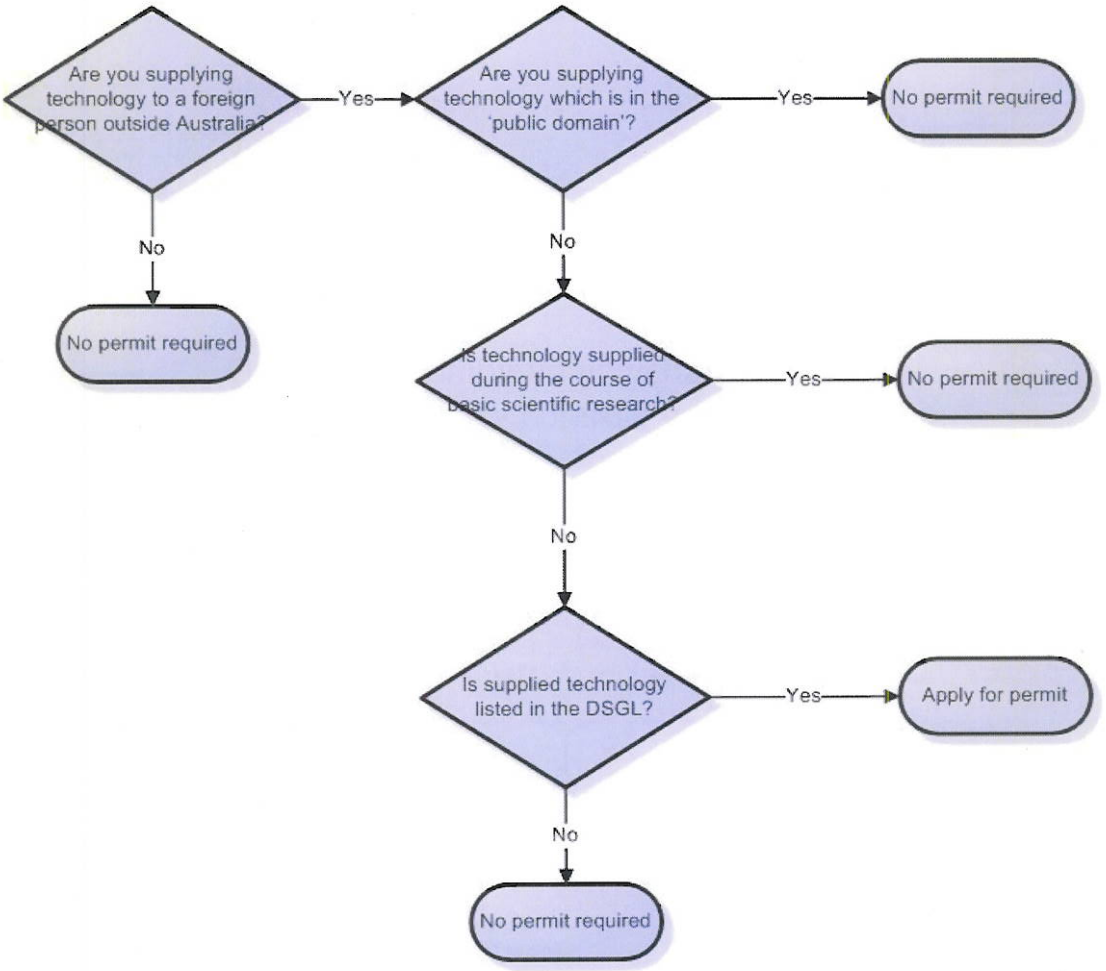
- Permit would be required for supply of technology to foreign persons outside Australia either from Australian territory or by an Australian person unless:

    - the technology is in the 'public domain'; or

    - the supply is during the course of 'basic scientific research'.

[6] See SAAB evidence to Foreign Affairs, Defence and Trade Legislation Committee on 2 March 2012, p9. Defence envisages a broad permit could be obtained by multinational companies to provide for this scenario over a period of time.

Option 4 – combined flowchart - No controls within Australia - controls outside Australia Mirrors tangible controls and UK system



Option 4 advantages:

- Aligns closely with Australia's existing tangible export controls.
- Emulates UK's control system by only regulating technology being supplied outside Australia.
- Implements Australia's obligations under the Wassenaar Arrangement to regulate intangible transfers of DSGL technology unless the technology is in the 'public domain' or being supplied in the course of 'basic scientific research'. This will give the international community confidence in Australia's levels of export control.
- Removes differing levels of control inside and outside Australia as controls within Australia are totally removed.
- No additional regulation for teaching, research and business activities conducted inside Australia.

- All Australian researchers, lecturers and defence industry employees will be able to supply DSGL technology to foreign persons located within Australia without the need to apply for permits.

- Consistent level of regulation across teaching, research and business sectors when transferring DSGL technology outside Australia.

- Removes some of the difficulties presented by categorising research, although some supplies will be exempt if research is classified as 'basic scientific research'.

- Includes reference in the Bill to the exclusions for 'basic scientific research' and 'public domain' information. These terms will be fully defined in the Defence Trade Controls Regulations.

Option 4 disadvantages:

- Higher level of regulation than other options for research when supplying DSGL technology to foreign persons overseas, noting that controls only apply where the technology enables the production, manufacture (or use) of DSGL goods.

Australian Bureau of Statistics Definitions - levels of Scientific Research[7]

Pure basic research

Experimental and theoretical work undertaken to acquire new knowledge without looking for long term benefits other than the advancement of knowledge.

Strategic basic research

Experimental and theoretical work undertaken to acquire new knowledge directed into specified broad areas in the expectation of useful discoveries. It provides the broad base of knowledge for the solution of recognised practical problems

Applied research

Original work undertaken primarily to acquire new knowledge with a specific application in view. It is undertaken either to determine possible uses for the findings of basic research or to determine new methods or ways of achieving some specific and predetermined objectives.

Experimental development

Systematic work, using existing knowledge gained from research or practical experience, which is directed to producing new materials, products, devices, policies, behaviours or outlooks; to installing new processes, systems and services; or to improving substantially those already produced or installed.

[7] Chapter 2 Australian and New Zealand Standard Research Classification, 2008

Annex B

The Weapons of Mass Destruction (Prevention of Proliferation) Act 1995

The WMD Act operates in a similar manner to the UK's catch-all WMD controls. Where a person (university, lecturer, researcher) believes or suspects that through the supply of goods, or the provision of services (which includes providing training, or providing technological information or know-how) an activity will or may contribute to a WMD program, then the person commits an offence under the Act unless a permit has been granted by the Minister or the Minister has given a written notice stating that the Minister has no reason to believe or suspect that the goods or services will or may be used in a WMD program.

BEST PRACTICES FOR IMPLEMENTING INTANGIBLE TRANSFER OF TECHNOLOGY CONTROLS

(Agreed at the 2006 Plenary)

Ensuring that control is exercised over intangible transfers of both dual-use and conventional weapons technology[1] (ITT) and is recognized by Participating States of the Wassenaar Arrangement as critical to the credibility and effectiveness of their domestic export control regime. As clear and precise control requirements facilitate effective export control implementation, the Participating States have adopted the following "best practices" for the implementation of export controls over intangible transfers of WAcontrolled technology[8].

A. Recognizing the inherent complexities of export control regulation for ITT, Participating States of the Wassenaar Arrangement support:

1. Designing national laws and regulations with clear definitions of ITT via both oral and electronic means of transmission; including,

a) Determination of what constitutes an ITT export; and,

b) Determination of when an ITT export occurs;

2. Specifying in national laws and regulations the intangible technology transfers which are subject to export control;

3. Specifying in national laws and regulations that controls on transfers do not apply to information in the public domain or to basic scientific research; and,

B. Recognizing that national export control authorities benefit from the cooperation of industry, academia, and individuals in the regulation of ITT, Participating States of the Wassenaar Arrangement support:

1. Promoting awareness of ITT controls by such means as publication of regulatory handbooks and other guidance material, posting such items on the internet, and by arranging or taking part in seminars to inform industry and academia;

2. Identifying industry, academic institutions, and individuals in possession of controlled technology for targeted outreach efforts and,

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[8] [1] "Technology"
Specific information necessary for the "development," "production" or "use" of a product. The information takes the form of technical data or technical assistance. Controlled "technology" for the Dual-Use List is defined in the General Technology Note and in the Dual-Use List. Controlled "technology" for the Munitions List is specified in ML22.
Technical Notes
1. 'Technical data' may take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disk, tape, read-only memories.
2. 'Technical assistance' may take forms such as instruction, skills, training, working knowledge, consulting services. 'Technical assistance' may involved transfer of 'technical data.'

3. Promoting self-regulation by industry and academic institutions that possess controlled technology, including by assisting them in designing and implementing internal compliance programs and encouraging them to appoint export control officers.

C. Recognizing the importance of post-export monitoring and proportionate and dissuasive penalties to deter non-compliance with national ITT laws and regulations, Participating States support:

1. The imposition of a requirement on industry, academia, and individuals to keep records, for an appropriate period of time, that clearly identify all controlled technology transferred, the dates between which it was transferred, and the identity of the end-user of all intangible transfers of technology for which licenses have been issued that may be inspected by, or otherwise provided to, export control authorities upon request;

2. Regular compliance checks of those that transfer controlled technology by intangible means and,

3. The provision of training to export control enforcement authorities on appropriate investigative techniques to uncover violations of national controls on ITT exports or access to such specialist expertise;

4. Appropriate surveillance or monitoring, pursuant to national laws and regulations, of entities that are suspected by national export control or other relevant national government authorities of making unauthorized intangible transfers of controlled technology.

5. The sanctioning by national authorities of those under their jurisdiction that have transferred controlled technology by intangible means in violation of export controls.

D. Participating States also support:

1. The exchange of information on a voluntary basis concerning suspicious attempts to acquire controlled technologies, with appropriate authorities in other Participating States.

Scientific Research Examples

Example 1 – Infectious diseases research

Research in microbiology and infectious disease medicine involves certain DSGL-controlled goods in the form of biological materials including human pathogens, animal pathogens and plant pathogens (DSGL 1C351 to 1C354 – pp 98-102) (e.g. Clostridium botulinum (botulinum toxin), dengue fever virus, Newcastle disease virus, cholera toxin etc). The research into these pathogens is important to stop the spread of infectious disease and to develop vaccines to combat the diseases. The technologies associated with these pathogens need to be controlled because if the pathogen can be produced or developed, it could be used as a biological weapon.

The technologies associated with the production and development of these pathogens are controlled in the DSGL because they can be used to produce biological weapons (DSGL 1E001 - p105). There is no requirement for a permit to conduct the infectious diseases medical research. There would only be a requirement to apply for a permit if the DSGL controlled technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply the technology to enable a foreign researcher or PhD student employed in the lab in Australia to produce or develop the pathogen for the purposes of the research and this will not be controlled because the supply occurs in Australia. If the Australian researcher wanted to supply that same technology to a foreign researcher located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use the pathogen safely, this would not be controlled because the DSGL only controls technology associated with production of the pathogen and does not control technology associated with using the pathogen.

Under Option 3, because the research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher to show them how to produce or develop the pathogen. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Example 2 – Cancer research

Garner's aldehyde is a useful building block in research that will hopefully lead to advancements in cancer treatments.

The main chemical used to make Garner's Aldehyde is Oxalyl Chloride (DSGL 1C350.65 – p97). Oxalyl Chloride is listed on the DSGL because it can also be used to create phosgene gas, a chemical weapon. Any technology that would enable a person to produce or develop Oxalyl Chloride would also be controlled (DSGL 1E001 – p105). The DSGL technology controls for Oxalyl Chloride do not extend to 'use', so supplying technology to a person to enable them to use Oxalyl

Chloride would not be controlled. None of the options would require a permit to conduct the cancer research just because that research involves Oxalyl Chloride.

There would only be a requirement to apply for a permit if 'production' or 'development' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a foreign researcher or PhD student employed in the lab in Australia to develop or produce Oxalyl Chloride and this will not be controlled because the technology supply occurs in Australia. If the Australian researcher wanted to supply that same technology to a foreign researcher located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use Oxalyl Chloride safely, this would not be controlled because the DSGL only controls technology associated with production or development of the chemical and does not control technology associated with use of the chemical.

Under Option 3, because the cancer research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher to show them how to produce Oxalyl Chloride. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Example 3 – Quantum science research

Quantum science research involves developing advanced precision measurement systems based on quantum technology that will assist to develop new sensors for the mining industry, new atomic clocks for astronomy, and quantum computers (computers that store and process data by manipulating light (i.e. photons) instead of using electrical devices (i.e. transistors).

Advanced precision measurement systems are not controlled in the DSGL; however, the research involves high performance magnetometers for precise measurement of magnetic fields during experiments. Magnetometers are listed on the DSGL (6A006.a – pp 206-7) because they are used in submarines, UAVs and missile navigation systems. The DSGL also controls technology that is required for production or development of a magnetometer (DSGL 6E001 and 6E002 – p216). The DSGL technology controls for magnetometers do not extend to 'use', so supplying technology to a person to enable them to use a magnetometer would not be controlled. None of the options would require a permit to conduct the quantum research just because that research involves magnetometers.

There would only be a requirement to apply for a permit if 'production' or 'development' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a foreign researcher or PhD student employed in the lab in Australia to develop or produce a magnetometer and this will not be controlled because the technology supply occurs in Australia. If the Australian researcher wanted to supply that same technology to a foreign researcher located overseas, under Option 4, the

researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use a magnetometer, this would not be controlled because the DSGL only controls technology associated with production or development of magnetometers and does not control technology associated with use of magnetometers.

Under Option 3, because the quantum science research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher to show them how to develop or produce a magnetometer. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Analysis of selected case study examples in Universities Australia's response to questions on notice to the Committee

Example 2 – Research into bowel related diseases. The research involves several human pathogen bacteria listed in DSGL 1C351.c (e.g. clamydia sittaci) because these bacteria can be used in biological weapons. The DSGL also controls technology that is required for production or development of these pathogen bacteria (DSGL 1E001 – p105). The DSGL technology controls for these pathogen bacteria do not extend to 'use', so supplying technology to a person to enable them to use human pathogen bacteria safely would not be controlled. None of the options would require a permit to conduct the bowel related disease research simply because that research involves DSGL-listed human pathogen bacteria.

There would only be a requirement to apply for a permit if 'production' or 'development' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a foreign researcher employed in the lab in Australia to develop or produce a human pathogen bacteria and this will not be controlled because the technology supply occurs in Australia. If the Australian researcher wanted to supply that same technology to a foreign researcher located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use the human pathogen bacteria safely, this would not be controlled because the DSGL only controls technology associated with production or development of the human pathogen bacteria and does not control technology associated with use of the human pathogen bacteria. Similarly the DSGL would not control the general outcomes

Under Option 3, because the bowel disease research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher to show them how to develop or produce the human pathogen bacteria. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Example 3 – Research involving a Hot Isostatic Press that will be used by a consortium of universities to research aerospace materials. The example states

that non-Australian Research Fellow and PhD students are likely to use the equipment and the research will be undertaken in collaboration with international firms.

Depending on the performance levels, the hot isostatic presses may be controlled (DSGL 2B004; 2B104 and 2B204) because they are used to manufacture aero-engine turbine blades, and other high-temperature components of engines, missiles and rockets. The DSGL also controls technology that is required for production, development or use of the hot isostatic press (DSGL 2E001, 2E002, 2E003.b.2, 2E101, 2E201 – pp130-131). None of the options would require a permit to conduct the aerospace materials research simply because that research involves a DSGL-listed hot isostatic press and foreign researchers or students. There would only be a requirement to apply for a permit if 'production', 'development' or 'use' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a non-Australian Research Fellow or PhD student employed in the lab in Australia to develop, produce or use the hot isostatic press and this will not be controlled because the technology supply occurs in Australia. If the Australian researcher wanted to supply that same technology to a foreign researcher or industry member located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk.

Under Option 3, because the aerospace materials research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher or industry member to show them how to develop, produce or use the hot isostatic press. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Example 4 – Green chemistry research – synthesis of terpyridine. The research involves two controlled chemicals, phosphorous pentachloride and phosphorous oxychloride listed in DSGL 1C350.38 and 1C350.2 (DSGL pp95-96) because these chemicals can be used to produce chemical weapons. The DSGL also controls technology that is required for production or development of these chemicals (DSGL 1E001 – p105). The DSGL technology controls for these chemicals do not extend to 'use', so supplying technology to a person to enable them to use phosphorous pentachloride and phosphorous oxychloride safely would not be controlled. None of the options would require a permit to conduct the green chemistry research simply because that research involves phosphorous pentachloride and phosphorous oxychloride and foreign researchers or students.

There would only be a requirement to apply for a permit if 'production' or 'development' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a foreign researcher or PhD student employed in the lab in Australia to develop or produce phosphorous pentachloride and phosphorous oxychloride and this will not be controlled because the technology supply occurs in Australia. If the Australian researcher wanted to supply that same technology to a foreign researcher or student located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk

posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use phosphorous pentachloride and phosphorous oxychloride safely, this would not be controlled because the DSGL only controls technology associated with production or development of phosphorous pentachloride and phosphorous oxychloride and does not control technology associated with use of phosphorous pentachloride and phosphorous oxychloride.

Under Option 3, because the green chemical research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher to show them how to develop or produce phosphorous pentachloride and phosphorous oxychloride. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Case Study 1 – University of Sydney – quantum science. The research undertaken by Dr Biercuk promises to deliver a new class of technologies that will strive to address problems in computation, communications and metrology. The research involves DSGL controlled goods and technologies:

DSGL Good	DSGL Good Ref	DSGL Technology	DSGL Technology Ref	Reason for DSGL control
Beryllium metal or alloys	1C230 p93	production development use	1E001, 1E201 pp 105, 106	Radiation windows (low X ray absorption); components of missiles and satellites, lightweight mirrors
Analogue to digital & digital to analogue converter integrated circuits	3A001.a.5	production development	3E001 p162	Signal processing applications in radars, military communication systems and electronic warfare (EW) systems
Microwave monolithic integrated circuits	3A001.b.2.a-f	production development	3E001 p162	Radar circuits/components
oscillators	3A001.b.10.a-b	production development	3E001 p162	Timing generation for sensitive digital circuits – communications, radars, EW
Atomic frequency standards	3A003.g	development	3E001 + Note 1 p162	Similar as oscillators
Superconducting solenoid electromagnets	3A201.b	Production development use	3E001, 3E201 pp162-3	Uranium enrichment (i.e. electromagnetic separation)
Tunable and other Lasers	6A005.c-d	Production development use (for 6A005.c.2)	6E001, 6E201 pp216-7	Uranium enrichment, weapon control systems, EW systems and

				directed energy weapons

None of the options would require a permit to conduct the quantum science research simply because that research involves controlled goods and foreign researchers or students. There would only be a requirement to apply for a permit if 'production', 'development' or 'use' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a foreign researcher or PhD student employed in the lab in Australia to develop, produce or use the goods listed in the table above and this will not be controlled because the technology supplies occur in Australia. If the Australian researcher wanted to supply that same controlled technology to a foreign researcher or student located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk.

Under Option 3, because the quantum science research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send the technology to an overseas researcher to show them how to develop, produce or use the controlled goods. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Case Study 2 – University of Sydney – melanoma research. The research aims to solve practical challenges in the causes, prevention diagnosis and treatment of melanoma. The research employs human toxins for their signalling properties; one of which is cholera toxin which is listed in DSGL 1C351.d.13 (DSGL p100). This toxin can be used to produce biological weapons. The DSGL also controls technology that is required for production or development of cholera toxin (DSGL 1E001 – p105). The DSGL technology controls for cholera toxin do not extend to 'use', so supplying technology to a person to enable them to use cholera toxin safely would not be controlled. None of the options would require a permit to conduct the melanoma research simply because that research involves cholera toxin and foreign researchers or students.

There would only be a requirement to apply for a permit if 'production' or 'development' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a foreign researcher or PhD student employed in the lab in Australia to develop or produce cholera toxin and this will not be controlled because the technology supply occurs in Australia. If the Australian researcher wanted to supply that same technology to a foreign researcher or student located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use cholera toxin safely, this would not be controlled because the DSGL only controls technology associated with production or development of cholera toxin and does not control technology associated with use of cholera toxin.

Under Option 3, because the melanoma research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher to show them how to develop or produce cholera toxin. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by this proposed overseas supply.

Case Study 3 – University of Sydney – infectious diseases research. The research aims to solve practical challenges in the causes, prevention, diagnosis, treatment, containment and control of emerging and re-emerging infectious diseases such as Salmonella typhi, Bartonella quintana, Hendra virus and SARS. The infectious diseases are classed as human or animal pathogens which are controlled goods (DSGL 1C351,p98 and 1C352, p100) and the research also involves controlled apparatus for containing such biohazards (DSGL 2B352, pp127-8). The DSGL also controls technology that is required for production or development of the pathogens (DSGL 1E001 – p105) and development, production or use of the apparatus (DSGL 2E001, 2E002 and 2E301, pp130-1)). The DSGL technology controls for pathogens do not extend to 'use', so supplying technology to a person to enable them to use the pathogen safely would never be controlled. However, the DSGL technology controls for the apparatus do extend to 'use', so supplying technology to a person to enable them to use the apparatus may be controlled in certain circumstances. None of the options would require a permit to conduct the infectious diseases research simply because that research involves pathogens, controlled apparatus and foreign researchers or students.

There would only be a requirement to apply for a permit if 'production', 'development' or 'use' DSGL technology is supplied in the course of the research. Options 3 and 4 are contrasted below.

Analysis under Options 3 and 4

Under Option 4, an Australian researcher could supply technology to enable a foreign researcher or PhD student employed in the lab in Australia to either develop or produce a pathogen or supply technology for development, production or use of the controlled apparatus. Neither of these technology transfers will be controlled because the technology supply occurs in Australia. If the Australian researcher wanted to supply those same technologies to a foreign researcher or student located overseas, under Option 4, the researcher would need to apply for a permit. In this way, Defence would be able to assess the risk posed by the technology supply and grant a permit in circumstances where there is an acceptable level of risk. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use the pathogen safely, this would not be controlled because the DSGL only controls technology associated with production or development of the pathogen and does not control technology associated with use of the pathogen. If the Australian researcher wanted to send technology to an overseas researcher to show them how to use the controlled apparatus, this would be controlled and the researcher should apply for a permit.

Under Option 3, because the infectious diseases research is likely to be classified as applied research, there would be no requirement to apply for a permit if the Australian researcher wanted to send technology to an overseas researcher to show them how to develop or produce the pathogen or develop, produce or use the controlled apparatus. Under Option 3, Defence would not have the opportunity to assess the level of risk posed by these proposed overseas supplies.

NOTE: The threshold for DSGL technology controls for production/ development/ use is limited only to that portion of technology which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions of the controlled good.

Proposed Rules to amend the ITAR

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category XX

As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category XX (submersible vessels and related articles) of the U.S. Munitions List (USML). Comments are due by February 6, 2012.

To review the Federal Register Notice click here (PDF, 150KB).

To review public comments received click here (PDF, 497KB).

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VI

As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category VI (surface vessels of war and special naval equipment) of the U.S. Munitions List (USML) to describe more precisely the combatant vessels and other naval equipment warranting control on the USML. Comments are due by February 6, 2012.

To review the Federal Register Notice click here (PDF, 149KB).

To review public comments received click here (PDF, 2MB).

Amendment to the International Traffic in Arms Regulations: Registration and Licensing of Brokers, Brokering Activities, and Related Provisions

The Department of State proposes to amend part 129 of the International Traffic in Arms Regulations (ITAR) relating to brokers and brokering activities. Amendments are also to be made to related provisions of the ITAR. The proposed revisions are intended to clarify registration requirements, the scope of brokering activities, prior approval requirements and exemptions, procedures for obtaining prior approval and guidance, and reporting and recordkeeping of such activities. Conforming and technical changes would be made to other parts of the ITAR that affect export as well as brokering activities. Comments are due by February 17, 2012.

To review the Federal Register Notice click here (PDF, 182KB).

To review public comments received click here (PDF, 8.4MB).

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VII

As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category VII (ground vehicles) of the U.S. Munitions List (USML) to describe more precisely the military ground vehicles warranting control on the USML. The Department of State will accept comments on this proposed rule until January 20, 2012.

To review the Federal Register Notice click here (PDF, 152KB).

To review public comments received click here (PDF, 366KB).

Amendment to the International Traffic in Arms Regulations: Establishment of U.S. Munitions List Category XIX for Gas Turbine Engines

As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to establish Category XIX of the U.S. Munitions List (USML) to describe gas turbine engines and associated equipment warranting control on the USML. The Department of State will accept comments on this proposed rule until January 20, 2012.

To review the Federal Register Notice click here (PDF, 154KB).

To review public comments received click here (PDF, 5.5MB).

Implementation of Defense Trade Cooperation Treaties

The Department of State is proposing to amend the International Traffic in Arms Regulations (ITAR) to implement the Defense Trade Cooperation Treaty between the United States and Australia and the Defense Trade Cooperation Treaty between the United States and the United Kingdom, and identify via a supplement the defense articles and defense services that may not be exported pursuant to the Treaties. Additionally, the Department of State proposes to amend the section pertaining to the Canadian exemption to reference the new supplement, and, with regard to Congressional certification, the Department of State proposes to add Israel to the list of countries and entities that have a shorter certification time period and a higher dollar value reporting threshold. Comments will be accepted until December 22, 2011.

To review the Federal Register Notice click here (PDF, 225KB).

To review public comments received click here (PDF, 3.7MB).

Amendment to the International Traffic in Arms Regulations: Revision of U.S. Munitions List Category VIII

As part of the President's Export Control Reform effort, the Department of State proposes to amend the International Traffic in Arms Regulations (ITAR) to revise Category VIII (aircraft and related articles) of the U.S. Munitions List (USML) to describe more precisely the military aircraft and related defense articles warranting control on the USML. The Department of State will accept comments on this proposed rule until December 22, 2011.

To review the Federal Register Notice click here (PDF, 165KB).

To review public comments received click here (PDF, 12MB).

WASSENAAR ARRANGEMENT

Participating States

1. Argentina
2. Australia
3. Austria
4. Belgium
5. Bulgaria
6. Canada
7. Croatia
8. Czech Republic
9. Denmark
10. Estonia
11. Finland
12. France
13. Germany
14. Greece
15. Hungary
16. Ireland
17. Italy
18. Japan
19. Latvia
20. Lithuania
21. Luxembourg
22. Malta
23. Mexico
24. Netherlands
25. New Zealand
26. Norway
27. Poland
28. Portugal
29. Republic of Korea
30. Romania
31. Russian Federation
32. Slovakia
33. Slovenia
34. South Africa
35. Spain
36. Sweden
37. Switzerland
38. Turkey
39. Ukraine
40. United Kingdom
41. United States

Written questions on notice for Department of Defence

Regulatory requirements

1. What is Defence's view on the proposition that the Bill may act as a disincentive to the establishment of the Approved Community as it may impose significant regulatory requirements and penalties (including strict liability offences)?

Education and training

The Australian Manufacturing Workers' Union highlighted the importance of education and outreach services explaining the changes to industry. (sub 4, p. 3)

1. Could Defence detail the education and training programs that will undertaken?

Record keeping

A number of submitters referred to the record keeping requirements which they regarded as 'significant' and which would add to the administrative costs of Defence industry. Boeing cited subsection 51(1) which requires the creation of 'a separate record of each activity that the person does under a permit. Boeing noted that for services and intangible transfers in particular, individualised record-keeping would be difficult to achieve and could amount to many thousand of entries.

1. How has Defence responded to concerns about what industry regard as onerous record keeping requirements?
2. Has Defence considered taking a risk based approach to record keeping, requiring more in relation to items of high risk and less in respect of more mundance activities?
3. In consultation with industry and universities, does Defence intend to clarify and simply the record keeping requirements?