Defence Trade Controls Amendment Bill 2023 – Submission

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4. Which sector, country, organisation, or other group do your views represent?

Public

5. How will the proposed Defence Trace Controls Amendment Bill 2023 affect you/your organisation?

N/A

6. What additional guidance or support from the Australian Government would assist you/your organisation to meet the proposed changes?

N/A

7. What other comments do you have on the draft Bill?

ASPI continues to support the need for strong Australian export control regulations and applauds ongoing efforts to align them with international norms. We note that supporting a seamless transition must remain a key focus in implementing any changes. We recognise the incorporation of our previous recommendations into Defence's impact assessment and welcome ongoing dialogue as implementation proceeds.

ASPI reiterates our concern that previous efforts at reform have foundered at the regulatory phase. Importance of the work to come is equal to or greater than that which has gone into the implementing legislation. It is critical that the overarching goal of reform must be simplification of export control regulation. To the degree that exceptions, carve-outs, and special cases complicate compliance for Australian small and medium enterprises (SMEs), benefits from the reform will rapidly diminish. Implementing legislation must above all contain governance mechanisms and resource consideration that explicitly account for the challenging work to come and establish strong, and skilled, oversight authorities aligned with the overall strategy of regulatory simplification.

ASPI recommends the following modifications to the amendment as proposed:

1. **Transition period assistance**: One of ASPI's central concerns remains the level of support provided to Australian SMEs. Impact assessment methodologies appear to assume that up-front costs of clearing foreign national staff for the new deemed-export requirements will be the preponderance of effort demanded of these businesses. ASPI does not concur with this assessment. Experiences of both Australian and US businesses in complying with International Traffic in Arms Regulations (ITAR) suggest that significant ongoing costs are incurred to maintain compliance over time. ASPI surveys of affected Australian businesses over the past several months have garnered the following insights:

   a. Technical and administrative support services within Defence Export Controls (DEC) and the Australian Border Force (ABF) are likely to be overwhelmed by requests for support following implementation of the new rules. Expertise necessary to increase this level of support does not exist at adequate levels within the Australian economy, and efforts to hire and train staff must begin immediately. Confusion and frustration with self-assessment mechanisms are common. And the rules are set to become stricter and more complicated. The problem can be compounded with a lack of coordination between DEC and ABF. Both organisations can expect dramatically increased demand for services from businesses fearful of increased criminal penalties and new to the export-controlled environment.
   b. ASPI reiterates our concern that the 12-month transition period is inadequate. Large numbers of SMEs will be newly exposed to export control requirements, many of whom have never had to concern themselves with such rules. If Australia is to realise defence and strategic advantages from its dual-use technology sector it must not deter new businesses from entering the defence market. Many defence and technology SMEs are not following the debate and remain unaware that they will be affected. The Australian economy is grossly undersupplied with consulting services equipped with the required expertise to help SMEs through the transition. The ability of SMEs to pay for the required support—a subject which has dominated the debate thus far—will be immaterial if that expertise is unavailable at any price. Today, even prime contractors struggle to hire Australian staff with the level of expertise required to navigate the complex international trade environment. We continue to recommend an extended interim period of civil rather than criminal penalties as SMEs learn to operate under the new rules and wait through the extended queues that those seeking help are likely to face.
   c. A far broader effort at economy-wide strategic communications must precede implementation. Past efforts at government-industry consultation have focused on defence-oriented businesses. ASPI's wide-ranging discussions with companies across the spectrum suggest that even these were often caught off guard by the timeline and scope of legislative changes. We have consistently heard that the most profound impact will be on those businesses who have never participated in defence markets, have never exported products, and likely do not even realise that they will soon be pulled into this

environment by deemed-export regulations. Proactive efforts to prepare and assure these businesses should begin immediately.

2. **Governance**: ASPI remains concerned that too little consideration has been given to export control governance mechanisms. History has shown that implementing legislation is only the beginning of the extensive effort required to build a well-functioning export control regime. That legislation must explicitly account for the long process to come by establishing interagency oversight mechanisms to ensure implementation remains aligned with overall goals. ASPI research has identified three critical areas in which problems are likely to arise:

a. The self-assessment portal lacks guidance clear enough for Australian SMEs faced with criminal penalties to comfortably rely upon it. DEC can expect a large volume of requests for in-person support following the change. Much of this demand will come from areas of the economy not previously affected by export control rules. Extensive updates to the self-service portal will likely be required to accommodate both the higher volume and lower level of understanding among those using it. These must begin immediately, and oversight mechanisms must be in place to manage unanticipated problems that will arise during the transition.
b. ASPI's evaluation of Defence's impact assessment raises concern that levels of demand for in-person services will exceed planned DEC capacity. This includes both baseline staffing levels and the technical expertise required to evaluate license requests from large sectors of the economy that have not previously been affected by export control rules. Dual-use technologies are often the most difficult to evaluate, and these requests are likely to rise substantially due to deemed-export license requirements. Not only must workforce size and skill levels account for this, but oversight mechanisms must be in place with necessary authorities to rapidly adjust to unforeseen circumstances. As noted above, Defence will face similar challenges in hiring staff that industry participants experience today. The two sectors will be in competition for scarce resources.
c. The interface between DEC and ABF administrative functions is likely to be a critical bottleneck as demand for their services increases. Overall numbers of affected transactions will rise substantially. Governing bodies must be equipped and authorised to facilitate interagency coordination between DEC and ABF to address the 'grey zone' wherein each agency believes that responsibility for a particular issue lies with the other and businesses are left with no one to help. This existing problem will grow in importance under the new rules.

3. **Reform of the Defence and Strategic Goods List (DSGL) Part 2**: There is a sharp distinction in US export control regulations between military-specific goods and services (ITAR), and dual-use goods and services (Export Administration Regulations - EAR). Australian export control law contains no such distinction. Items controlled in Part 1 and Part 2 of the DSGL require businesses to engage in similar assessment and approval processes with only minor Part 2 exceptions for transfer of information and services. Substantial efforts at reform in the US have

focused on moving goods and services requiring lower levels of scrutiny from ITAR to EAR and loosening the latter set of rules to align more closely with national security requirements. Australian businesses currently working with EAR-controlled items risk being abruptly drawn back into an ITAR-like environment. One example is the EAR de minimis rules. Australian law as proposed contains no such exception. The proposed DTC amendments should therefore distinguish more clearly between military-specific and dual-use goods and contain explicit mechanisms for treating the latter in a manner comparable to the US's EAR.

4. **Clarification of AUKUS and non-AUKUS application**: ASPI is also of the view that exports outside the AUKUS partnership need more careful consideration and explanation. ASPI recognises the attempt to enable and grow defence trade with countries on the Foreign Countries List, but one of the key concerns for Australian defence businesses now is to avoid ITAR taint because it makes it hard to do business with third-country partners. Our research strongly suggests that this tendency is unlikely to change under the new rules. The legislation as written could turbocharge the problem. If cooperation increases as envisioned, there is greater potential for IP controlled by Australia, the UK and the US to get mixed up in the same system.

a. A key question arises from a situation in which the IP owner then wants to export outside the bloc. Would they need to understand and comply with all three countries' export control rules? Does origin-of-export take precedence over IP ownership? If so, inefficiencies will be introduced in dual-use exports as Australian businesses seek US re-export partners to circumvent the lack of EAR-equivalent rules in Australia. If not, could US re-exporters face criminal penalties for violations of Australian law (e.g. de minimis exemptions)?
b. Lack of coordination between US and Australian law on control of dual-use technology will introduce confusion and inefficiency that must be explicitly addressed in implementing legislation.