ELECTRO OPTIC SYSTEMS HOLDINGS LIMITED
ABN 95 092 708 364
18 Wormald Street
Symonston, ACT 2609, Australia
+61 2 6222 7900
www.eos-aus.com

5 March 2024

Mr. Mark Fitt
Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation
PO Box 6100
Parliament House Canberra
ACT 2600
Via email: fadt.sen@aph.gov.au

Dear Mr. Fitt,

RE: Questions on Notice from Defence Trade Controls Amendment Bill 2023 (*Defence Trade Controls Act 2012 (Cth)* ('Act')) hearing on 1 March 2024 – Response by Electro Optic Systems Holdings Limited (ABN: 95 092 708 364)

The following response is made on behalf of Electro Optic Systems Holdings Limited ('**EOS**'). EOS appreciates the opportunity to make further comments on, and respond to, questions raised at the hearing on 1 March 2024, in relation to the *Defence Trade Controls Amendment Bill 2023* (the '**Bill**') (the '**Hearing**'), in the context of the Australia's domestic defence industry ('**Industry**').

QUESTIONS AND RESPONSES

1. *QUESTION*

   What is the impact of absolute liability proposed by the Bill and the absence of the usual defences of good faith?

   ANSWER

   EOS is concerned that unintended consequences could arise from the Bill imposing absolute liability, including in sections 10(1A), 10A, 10B and 10C. Indeed, EOS echoes a number of the matters raised at the Hearing, including suggestions that the Bill:

   - widens the scope for compliance breaches, particularly inadvertent ones; and
   - goes beyond what is necessarily required to uphold the national security framework and the overall policy objectives of the Bill.

   Further, as mentioned during the Hearing, the community in Australia – in particular the Industry – already appreciates the significance of penalties associated with noncompliance. EOS, for example, employs across a Legal and Export Compliance Team, three personnel dedicated to Australian Defence Export Controls and US International Traffic in Arms Regulations compliance, with about fifty per cent of another individual's time (a lawyer) also assisting with that compliance.

   EOS notes that in the absence of defences around intent, good faith, and reasonable steps, the Industry is likely to suffer negative consequences, including:

   - increased operational and compliance costs;
   - disruption in the supply chain;
   - inadvertent impacts on Industry's competitiveness and foreign market access;
   - disproportionate penalties, including criminal penalties, and reputational damage; and

- unnecessary, increased utilization of Defence Export Controls,

with these issues together causing Industry to become less competitive with its international competitors from the perspectives of cost and timeliness of response to opportunities.

EOS considers that the Bill should be modified so that the offences set out in the Bill, including in sections 10(1A), 10A, 10B and 10C are not absolute liability offences. Defences including, for example, the defence of good faith and reasonable steps ought to be included in the Bill.

2. *QUESTION*

...[W]ould any of you like to make comments about whether you think this [taking an ITAR-type approach across everything, with strict liability and criminal offences] is workable or whether we actually need to make it more comparable to the US system [deliberately segregating dual-use and creating the EAR with different thresholds and penalties et cetera] by having those two distinct streams to make it quite clear for industry participants about who's in and who's out of the criminal penalties versus civil?

ANSWER

Following on from our response to Question 1, EOS is of the view that dual-use and military-use DSGL goods and technology should be segregated under the Bill, so that only civil penalties are imposed for breaches concerning dual-use DSGL goods and technology.

Again, this separation will:

- allow the Industry to continue to explore, research, manufacture, and sell goods and technologies without needing to change behaviors and business models to avoid the significant – indeed criminal – repercussions from an inadvertent breach;
- more closely align Australia to the model utilized by the United States; and
- allow the Industry to focus on ensuring existing matters that need enhanced controls and oversight receive adequate resources.

EOS considers that separate streams are required under the Bill, so that both the Industry and the Defence Export Control branch within the Department of Defence are not unduly impacted. To avoid wholesale amendments to the language of the Bill, the regulations should include – in relation to any offences, including for example, offences under sections 10(1A), 10A, 10B and 10C of the Bill – words to the effect that, to the extent that any offence under the Act relates to DSGL goods or DSGL technology under Part 2 of the *Defence and Strategic Goods List 2021* (Cth), it will constitute a civil offence (and incur a civil penalty) only.

3. *QUESTION*

...[A]re there any definitions within the legislation that you think are so broad that they create uncertainty and result in all the impacts you've talked about?

ANSWER

Annexure A sets out the definitions and terms used in the Bill that EOS considers problematic. EOS also outlines the reasons for its views, and where possible, the proposed amendments which are necessary to achieve the outcomes sought by EOS.

Should the Committee require any additional information in relation to the above answers, EOS would be happy to assist. Again, EOS thanks the Committee for its time and consideration.

Kind regards,

Raymond Quinn, Senior Legal Counsel, on behalf of

Joern Schimmelfeder
Chief Legal Officer
Electro Optic Systems Pty Limited

18 Wormald Street | Symonston ACT 2609 | Australia

ANNEXURE A

Reference in the Bill	Definition/Term	Issue	Proposed Solution
4(1)	'Australian person'	The definition is not broad enough to capture individuals that are lawful non-citizens, which have an entitlement to work in Australia, but do not meet the criteria of the exceptions set out in the Bill. For example, an entity would be liable for the offence set out in section 10A of the Bill, if a foreign national employee, with a visa to work in Australia, was supplied with DSGL technology and a relevant exception did not apply. This ultimately limits the Industry's access to skilled talent.	The definition proposed by the Bill should be modified as follows: '***Australian person*** *means:* *(a) the Commonwealth, a State or a Territory; or* *(b) an authority of the Commonwealth, a State or a Territory; or* *(c) an individual who is an Australian citizen; or* *(d) an individual who is a permanent resident of Australia; ~~or~~* *(e) a body corporate incorporated by or under a law of the 25 Commonwealth or of a State or Territory~~.~~; or* *(f) any other individual prescribed by the regulations for the purposes of this definition.'* The draft regulations should include a list of prescribed individuals, including any '*lawful non-citizen'* as that term is defined in section 13 of the *Migration Act 1958* (Cth), or in the alternative, by setting out a list of prescribed visa categories.
10B	'current supply'	It is presently unclear what would amount to such a supply. Supplies that have been supplied, or have been agreed to be supplied, prior to the commencement of the Bill, should be exempt from the scope of these provisions.	Provisions such as 10B(8) and (9) allow for regulations concerning specific purposes or circumstances. Given that, EOS proposes the following provision be included in the regulations: *'A supply is not a current supply if:* *(a) the supply is to a related body corporate in accordance with section 50 of the Corporations Act 2001; or* *(b) prior to the Commencement date of the Amendment Act:* *(i) the supply has been supplied; or* *(ii) there is an agreement in place to supply the supply.'*
10B	'earlier export or supply'	It is presently unclear what would amount to such a supply. Supplies that have been supplied, prior to the commencement of the Bill, should be exempt from the scope of these provisions.	EOS suggests the following provision be included in the regulations: '*A supply is not an earlier export or supply if made prior to the commencement date of the Amendment Act.'*

10B(1)(e) and 14(1B)(b)	'indirect result'	The term 'indirect' in the present context is ambiguous and invites various interpretations. Accordingly, it is difficult to ascertain the exposure that the Industry may encounter and how it can mitigate this risk.	The words '*or indirect',* where they appear in sections 10B(1)(e) and 14(1B)(b), should be removed from the Bill.
5C(1) and (2)	'relevant supply' and 'relevant DSGL services'	Given the nature of Australian supply chains for Industry, EOS recommends that a de minimis principle is applied to relevant supply and relevant DSGL services. EOS suggests that the de minimis principle refers to a 30 percent threshold for the DSGL physical components comprising the supply, as well as a 30 percent monetary threshold for the overall value of the supply.	Sections 5C(1)(d) and (2)(d) of the Bill stipulate that a supply or service is a relevant supply or relevant DSGL service unless, amongst other things, '*any other requirements prescribed by the regulations for the purposes of this paragraph are satisfied*.' Accordingly, the following should be included in the regulations: 1) for relevant supply: '*A supply of DSGL Goods or DSGL Technology is not a **relevant supply** if the DSGL Goods and/or DSGL Technology:* a. *makes up equal to or less than 30 percent of the main elements and components of the supply that it comprises; or* b. *makes up equal to or less than 30 percent of the value of the supply that it comprises*.' 2) For relevant DSGL services: *DSGL services are not **relevant DSGL services** if the services relate to DSGL Goods and/or DSGL Technology that is not a **relevant supply**.*
Various, including but not limited to 10A(3) and 10B(2)	references to 'officers and employees'	As it is not a defined term, the scope of 'employee' and 'officer' is unclear, and it is therefore unclear whether the relevant provisions in the Bill extend to contractors and agents for example.	Unlike other legislation (for example the *Corporations Act 2001* (Cth)), the term '*officer*', as well as (for example *Fair Work Act 2009* (Cth)) the term '*employees*' is not defined. The terminology should be defined to provide sufficient clarity, as it may impact how certain information is disseminated to certain individuals, including contractors, agents or secondees.