Submission to the Defence Trade Controls Amendment Bill 2023

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1 February 2024

Introduction

The Australian Industry Group (Ai Group) welcomes the opportunity to provide a submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report on the Defence Trade Controls Amendment 2023.

The Ai Group Defence Council is the peak national representative body for the Australian defence industry. We bring Government, Defence and defence industry together for the benefit of national security and the development of the defence industry, as well as providing trusted advice to a wide range of Defence and industry stakeholders.

To inform this submission, Ai Group consulted member companies as well as a broader set of stakeholders. The insights gathered build upon the responses from an Ai Group questionnaire submitted to the Australian Government in late 2023, which outlined initial issues and concerns raised by our members regarding the Bill.

Ai Group Defence Council members commend the draft Bill's positive intent, especially the potential for the licence-free arrangement with AUKUS partners. We appreciate the efforts the Government and Defence have made in relation to development of the AUKUS framework and for export control reform more broadly.

Ai Group understands the surrounding context for the Bill, including:

- The critical nature of the passage of the US 2024 *National Defense Authorization Act* (NDAA), which includes substantial enabling provisions for Australia's AUKUS nuclear-powered submarine program.
- The NDAA will establish a national exemption for Australia and the United Kingdom from US defence export control licensing, and adds Australia and the United Kingdom to the US Defense Production Act.
- The United States must make a determination of the "comparability" of Australian and U.K. export control systems to the U.S. system.

Ai Group Defence Council members also fully recognise the importance of protecting sensitive technologies to meet export control requirements under the AUKUS partnership. We are keenly aware of the complexities and sensitivities associated with this task.

In that context, a range of industry concerns have been raised. These include the limited timeframe provided to stakeholders to review a complex piece of legislation without a full understanding of the associated regulations; potential consequences for Australian companies and Australia's trade and export opportunities; the impact on non-Defence specific companies and supply chains; the capacity and capability of Defence to manage additional administrative burdens; and the potential cost and burden of compliance.

Key issues

Requirement for a comprehensive industry consultation process to ensure full understanding of the consequences

Member feedback has demonstrated that this is a complex and sensitive piece of legislation that has the potential to impact Australian businesses and our trading position. Members raised a range of scenarios they felt could adversely affect business (several of which are documented in Appendix A).

Understanding the legislation and its impact requires skills and expertise in defence trade control legislation and policy, both in Australia and internationally. We urge the Government and broader parliament to take the necessary time to consult with trade control experts to fully understand the implications of this legislation before it is implemented.

In that context, Ai Group recommends a comprehensive consultation process be undertaken involving a targeted, multi-disciplinary consultative panel of Government, Defence and industry (and other key stakeholders including import/export and legal experts) drawn from across Defence and various manufacturing sectors.

The purpose of the panel would be to develop and test various scenarios to genuinely understand the impacts of this legislation, and understand any other options that have been considered. We understand the urgency of the legislation, but in our view this panel could be brought together quickly over a series of intensive sessions and kept within a defined timeframe for effectiveness.

In endorsing this proposal, it will be crucial to adopt a co-regulatory model, mirroring the approach taken in the initial DTC legislation. This involves active participation from both industry and academia, contributing collaboratively to ensure the success of the legislation.

Balancing AUKUS, US requirements, national security and trade

The objective of this Bill is to enhance Australia's export control framework, aligning it with the established export control regime administered by the US. Ai Group fully supports and commends the Government for the intent of the legislation in pursuit of AUKUS outcomes. However, it is critical that the legislation strikes the appropriate balance between achieving AUKUS outcomes as well as Australia's trading position. Some members have raised concerns about the implementation of a 'US/ITAR-like' system, particularly its adverse impact on enhanced technology co-operation. Uncertainty also remains over possible exemptions the Government might propose via the regulations.

Key issues and concerns raised in this area include:

- The impact on supply chains, including on existing contracts.
- Potential for a possible increase in 'ITAR-like' taint on a range of co-mingled technologies.
- Inadvertent exposure of international and Australian-based personnel to potential criminal liabilities.
- Criminalisation as a disincentive for rapid commercial development and innovation as companies may take a risk-averse approach.
- Easier access to the US and UK markets at the potential cost of greater difficultly in accessing major markets elsewhere.

Again, these concerns and scenarios need to be worked through via the consultation process recommended above.

The potential impact on non-traditional defence companies

Australian companies outside the defence sector may not be fully aware that their products or technologies, even when used domestically, could be deemed dual-use. While defence firms have robust export control systems, there's an elevated risk for other entities in the broader civilian economy that may be affected by the legislation.

If the legislation proceeds in current or amended form, additional support for SMEs is recommended, including guidance, resources, and potentially streamlined processes, recognising their challenges and capacities.

a. **Clear and Comprehensive Guidelines:** The Government should provide clear and comprehensive guidelines explaining the specific changes introduced by the amendment.

b. **Accessible and Timely Information:** Regular and timely updates regarding the implementation of the changes, including any amendments or additional clarifications.

c. **Training and Educational Programs:** The Government could offer training and educational programs to assist businesses in understanding the nuances of the new regulations. These should be specifically targeted at businesses in the broader defence supply chain.

d. **Online Resources and Tools:** Providing online resources and tools, such as interactive compliance checklists, FAQs, and decision trees, would assist Members in self-assessment and compliance planning.

Compliance costs

While obtaining an export licence or permit can be time-consuming and costly, it is often a relatively small cost compared to the overall cost of compliantly managing controlled items received from multiple jurisdictions.

The amendment is likely to increase compliance costs, involving additional exchange of controlled items, added requirements, technological investments, legal and consulting expenses, and changes to internal processes. Increasing compliance costs for defence industry companies managing controlled items will directly result in increased overhead expenses, which could contribute to heightened financial burdens on Defence operations.

It is important that burden of compliance costs – across all required supply chain compliance activities, not solely licence/permit access – are clearly understood and accounted for.

Defence resourcing to meet the rise in administrative responsibilities

Ai Group Defence Council members have expressed concern regarding the feasibility of Defence effectively managing the proposed framework unless it has hired and trained enough individuals across the entire DSGL spectrum. While some administrative obligations are expected to reduce, it is likely that others will increase.

The imposition of potential criminal penalties may also drive individuals to seek permits in cases where the need for a permit is ambiguous, resulting in a substantial influx of new applications for permits to

Defence. The anticipated surge in permit applications would strain Defence and incur significant costs for both government and industry.

A defined mechanism is necessary to restrict the time required for decision-making on an application and allow applicants to challenge through independent review. This mechanism should adhere to the following criteria:

- Resolves applications promptly, maintaining a balance between expediency and the correctness or preferability of the decision.
- Is accessible and responsive to the diverse needs of involved parties.
- Enhances the transparency and quality of government decision-making.

The mechanism also requires the preservation of institutionalised knowledge of export control laws and regulations within the regulatory body to ensure consistency. This entails a robust and sizable staffing requirement for subject matter experts who are dedicated to building a career in this field.

Appendix A

This appendix includes more detailed feedback regarding specific issues within the proposed legislation.

Proposed exceptions in dual-use technology legislation

There is continued member uncertainty around any proposed exceptions and how they might be applied. The broad nature of the DSGL complicates the issue. This is especially the case with the ML22 category, as some data which would be considered extremely low risk within that category will now have the same restrictions imposed on it as higher risk data that warrants higher protections.

Clarification is sought whether this applies to both Part 1 and Part 2 DSGL as well (except for defence services).

At certain points, the Bill mentions regulating the supply of 'certain' dual-use technology. However, the term 'certain' is later omitted. This raises the question of whether, by default, the regulation now encompasses everything on the list, or if there exists a specific subset, such as crucial items like nuclear-powered submarines.

Specific concerns on the three proposed changes received from members include:

- **US-termed Deemed Reexports**: Companies face challenges if similar ITAR 126.18(c)(2) exemption provisions are not implemented. Further clarity is needed if permits would be broad enough to cover programs, or would need to be sought for each specific occurrence (such as holding meetings with subcontractors or sending low risk information to another entity for quoting purposes).

  Who is responsible for verifying whether Foreign Persons are accessing DSGL technology? For instance, if a company shares a DSGL controlled drawing with a supplier, should the company perform due diligence to determine if their employees may be considered foreign persons accessing the drawing?

- **Defence Services**: Some companies utilise a global pool of engineering and maintenance talent. Global mobility allows these personnel to relocate and provide these services to different locations within global supply chains as operational needs require. Without clarity around proposed exemptions, there is a likelihood Australian personnel would be seen as a compliance risk and would not be able to be utilised in these roles. The expectation again is that a permission would need to be in place similar to the US licensing requirement for US Persons. However, it needs to be clear how this will be applied and what restrictions would be in place with any resultant data.

- **Retransfer of data**: Some companies provide engineering services to their wider global group in both civil and military spheres. While the defence services issue would also impact this work, the second impact is the retransfer restrictions which will come into place.

While assurances have been extended that permits and exceptions will allow most situations, the increased compliance burden could potentially negatively impact companies whose supply chains and personnel pools extend beyond the AUKUS group, both financially and with threatened criminal penalties.

Section 9A and the impact on Australian-origin products

The Bill primarily centres on regulating the supply of specific DSGL items and technology between foreign countries, with detailed exemptions and exceptions outlined. A notable addition is a new offense (Section 9A) targeting the supply chain, focusing on DSGL goods or technology initially exported from Australia to one foreign country and subsequently forwarded to another or within the same foreign country.

In the context of components, if the original supply from Australia involves parts or components for a system developed and sold by the foreign recipient, it becomes an offense for them to sell their product to other foreign entities without government authorisation, particularly as part of the initial export. Long-term contracts, involving multiple shipments, raise concerns in this regard. The government's oversight is crucial to restrict the marketing and sale of systems by the foreign recipient, including the Australian component, to entities identified during the initial export.

Members seek assurances that such an approach will not diminish the attractiveness of Australian-origin products and impede the growth of international export markets for Australian innovations. Furthermore, there are concerns that the existing Commonwealth resources may be inadequate for handling domestic compliance, and additional efforts required for managing international contraventions might strain the Commonwealth's capacity for effective compliance management.

As part of the consultation process recommended above, Defence should conduct a review and applicable strengthening of the export assessment process in the first instance. This could include looking at a more nuanced approach to restrictions on on-selling by foreign recipients, clearer guidelines for long-term supply contracts, and a reassessment of the assessment process for DSGL goods and technology recipients to ensure trustworthiness.

Additionally, the government should consider increased resources for managing compliance, both domestically and internationally.

Further information and guidance on how the amendment is intended to operate at a practical level

The legislation covers the provision of DSGL services related to Part 1 of the DSGL to foreign nationals, with exemptions for certain categories and conditions.

The definitions within the amendment already stipulate that the term 'DSGL Services' relates strictly to Part 1 of the DSGL, which should avoid any confusion with the dual-use and sensitive commercial goods and technology listed in Part 2. Per Section 5C(2)(c), DSGL Services related to excluded goods or technology under Section 5C(3) would not be 'relevant DSGL services' and therefore not included in related offence provisions.

Whilst the intention is relatively basic in intent, we recommend that the drafting, interpretation, and implementation of this regulation be examined closely with intensive consultation across industry and affected parties to ensure a workable solution can be achieved. Implementation and enforcement of similar US requirements under the ITAR for 'defence services' has caused significant administrative, operational, and financial burden to Australian industry.

Further information and guidance are sought on how the amendment is intended to operate at a practical level, as while it can easily be included and applied on basic supply permits for corporate entities, the effect on Australian persons domestically and abroad needs to be clear and understood.

Management of access to exported Australian technology

Clarification is sought regarding the recent addition of "permanent resident of Australia" to the definition of "Australian Person." There is uncertainty about whether defence industry organisations are now allowed to employ permanent residents. If affirmative, members seek insight into whether the Australian Government Security Vetting Agency (AGSVA) plans to extend security clearance eligibility to permanent residents, given the current practice limited to Australian citizens.

Inter-relationship between US/Australia/UK trade control legislation

Australian, US and UK controls have very different approaches to export approval and control. For example, a dual use item exported from the US under EAR, may have been exported without a licence because it was going to Australia. In Australia it is then incorporated into a next higher assembly and shipped back to the US for military end use. That is now a DSGL controlled item and the US entities are required to manage the compliance to the Australian regulations. There is no *de minimis* rule with the Australian regulations, so, for example, now if that US entity was to incorporate this co-mingled product into a much larger platform, the larger platform (military or otherwise), carries with it the Australian control requirements.

There is a question as to where ITAR information is initially received in Australia and subsequently re-exported to the UK, does the UK now need to adhere to both ITAR re-export/transfer requirements and the new Australian re-export/transfer requirements? Or is compliance limited to the original jurisdiction it originated from (i.e., the US)?

There may be an opportunity to manage this situation through individual sovereign efforts. For example, if the US exports ITAR controlled technology to Australia, then it assumes that Australia will manage its compliance with international obligations and the US will relinquish its exterritoriality control. The same being true of Australian controlled items going to the US or the UK. This avoids the challenges and costs of comingled technology.

Implication of the Export Administration Regulations

The amendment's focus on approval rather than addressing compliance costs may introduce complexities for the Australian importers of US technology. It could allow US entities to utilise ITAR mechanisms and exemptions when delivering Export Administration Regulations (EAR) technology in combination with ITAR solutions, and in effect avoid the dual process of EAR. Consequently, Australian businesses may experience an influx of ITAR-marked goods and technology that otherwise would have been exported under EAR licensing regime. This would not be a problem if the importer receives supplemental information on accurate classification and commodity jurisdictions for the goods received, but US entities may not clarify this. This poses a risk of encountering additional "ITAR taint" challenges with Australian technology and intellectual property.

Again, these complexities will only be solved by an intensive consultation process on the draft legislation by working through the various scenarios, as recommended in this submission.

About the Australian Industry Group

The Australian Industry Group (Ai Group) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation, and in 2023 we celebrate our 150th year supporting Australian businesses.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders, we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance members need to run their businesses.

Our deep experience of industrial relations and workplace law, positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.


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