SAAB

Saab Systems Pty Ltd
ABN 88 008 643 212

31 January 2012

Our Ref. 000ZIM041

Senate Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6100
Parliament House
Canberra ACT 2600

Inquiry into Defence Trade Controls Bill 2011

Dear Sir/Madam

Saab Systems Pty Ltd (**Saab**), on behalf of all Australian Saab Technologies operations, welcomes the Committee's offer and would like to take this opportunity to comment on the Defence Trade Controls Bill 2011 (**Bill**), including its implementation of the Australia/US Defence Trade Cooperation Treaty (**Treaty**).

Saab comments are set out in Attachment A. Our comments seek to help to ensure that the resulting export control regime meets the intent of the Treaty and is as efficient as possible within the Treaty framework.

Broadly our comments fall into two themes:

- the potential failure of the Bill to meet the intent of both the Treaty and the Bill itself; and
- the practical implications of some aspects of the Bill, for example, brokering requirements.

In respect of intent, the benefits of the Treaty itself may have been diminished by the latest changes to US export control rules (specifically the US International Traffic in Arms Regulations, or ITAR), an example being in the treatment of nationality.

Further, Saab is concerned that as the Customs Act has not been addressed, the Bill only benefits 'intangible' exports, whereas Saab understands the intent to be that all Defence exports are treated similarly (which accords with the practical requirements of industry).

I note the Minister's comments in his summing up speech to Parliament on 21 November 2011, that 'many of the important details of this Bill will be included in the Regulations'. A Consultation Draft of the Defence Trade Control Regulations 2012 has recently been released and is undergoing separate review within Saab.

The initial POC on any aspect of our submission is Mr Andrew Giulinn (andrew.giulinn@au.saabgroup.com)

Yours sincerely,

Richard Price
Managing Director,
Saab System Pty Ltd

Saab submission regarding Defence Trade Controls Bill 2011

ATTACHMENT A

Saab Systems Pty Ltd submits the following comments, questions and requests regarding the proposed changes to the Defence Trade Controls Bill 2011, on behalf of Saab Technologies' Australian business.

1. Alignment of new and existing Australian export control rules

The Bill is aiming to achieve an 'international best practice'[1] export control regime. However, this outcome is complicated by the pre-existing Customs Act.

Notwithstanding the Australian Department of Defence's Defence Export Control Office's (**DECO**) goal of a single application process, there is significant scope for inconsistency, duplication and the delay of Australian Defence exports arising from the handing of tangible exports under the Customs Act and intangible exports under this Bill.

Practically, it is unclear why there is a need for two licences/permits to export the same technology via different means, particularly as the two exports may be needed for the same technology for the same program/project, although it has been contended that that the regimes have not been combined for Constitutional reasons.

We suggest that this Bill presents the best opportunity to create a consistent, effective and efficient Defence export control regime that minimises competitive hurdles for Australian Defence exports whilst retaining appropriate controls.

Recommendation 1: that the existing Defence export control rules be removed from the Customs Act and merged into this Bill and its accompanying regulations, thus creating a single Defence export control regime.

2. Overlap of the Treaty and existing Australian export control rules

The Treaty intends the removal of regulatory barriers on the movement of all applicable technology, regardless of form, between Australia and the USA. Saab is concerned that the benefits intended may only flow from the USA to Australia and are not bi-directional because tangible Australian technology is still subject to the export controls under the Customs Act.

Where the Treaty applies, it is unclear how the export of articles currently subject to Australian export control rules (under the Customs Act) is to be made exempt from the requirement to obtain a licence (in the way that the new Australian export control rules regarding intangible exports do not apply to Treaty exports by virtue of s10(3) and s10(4) of the Bill).

For example, if a piece of military equipment is to be exported, the existing export control rules (under the Customs Act) apply and a licence would be required from DECO, even if the item is going to the USA under the Treaty. On the other hand, if an email containing data about a piece of military is going to the USA under the Treaty, s10(3) and s10(4) of the Bill clearly say that no licence will be required.

We recommend the Customs Act be amended to exempt exports made under the Treaty, that is, include an equivalent to s10(3) and s10(4) of this Bill, or otherwise provide for the blanket authorisations required under Article 8 (Australian Community Exports and Transfers) Paragraph 1 of the Treaty.

The US implementation of the Treaty already does this. The US Government has recently published the changes it proposes to make to the US International Traffic in Arms Regulations (ITAR) to implement the Treaty. The existing ITAR covers all exports under one regime (unlike the proposed Australian implementation) – and the Treaty is made an exemption for all relevant exports, regardless of form.

Recommendation 2: that (if Recommendation 1 is not adopted) the Customs Act be amended or (if Recommendation 1 is adopted) the Bill be written so as to exempt from Australian licensing requirements, those tangible exports made under the Treaty. That is, to include in relation to tangible exports an equivalent to s10(3) and s10(4) of this Bill.

---

[1] Second Reading Speech re Defence Trade Controls Bill 2011, Minister for Defence Materiel Jason Clare, 2 November 2011.

3. Potential mismatches with US Treaty implementation

Saab is concerned with the practical implications of the USA and Australia each keeping a list of eligible items, and each identifying the eligible end-uses in its own way.

The Bill indicates that Australia will keep its own list of eligible items (refer the Section 4 definition of the "Defence Trade Cooperation Munitions List" and also for example Section 5(1)(b)), and identifies eligible end-uses simply by reference to the Treaty (refer for example in Section 5(1)(a)).

In the USA, the Treaty is being implemented as an exemption to the usual ITAR rules and the proposed changes to ITAR have recently been released for public comment. Proposed ITAR Section 126.16(a)(2) indicates that (in general) the Treaty exemption will be available in relation to those USML items that are '*not listed in Supplement No. 1 to part 126, for the end-uses specifically identified pursuant to paragraphs (e) and (f) of this section*'. The paragraphs referred to firstly repeat the text regarding eligible end-uses from the Treaty and then explain how it is to be determined which specific end-uses are covered.

The USA and Australia are therefore each keeping a list of eligible items, and each is identifying the eligible end-uses in its own way. As a result, there is a potential for mismatches between the items and end-uses covered by the US Treaty implementation and the Australian Treaty implementation. Differences may also evolve over time.

Recommendation 3: That further work is done between the US and Australian Governments to ensure that there can be no confusion for industry as to which are eligible items and which are eligible end uses. Saab is making the same request of the US Government, through comments to the US Department of State's Directorate of Defense Trade Controls regarding the proposed changes to ITAR.

4. Transitioning to Treaty regime

Saab is concerned with the practical implications of the different requirements of the proposed US and Australian implementations of the Treaty with regard to the transition from existing ITAR export licences to the Treaty exemption to ITAR of US-controlled items already in Australia.

Section 35 of the Bill sets out procedures for transitioning a Defence Article that is already in Australia under a US Government authorisation, to the Treaty.

In relation to Defence Articles in Australia under US Government authorisation, the Treaty is acting as an exemption to US export control rules (ITAR). As a part of the US ITAR exemption, ITAR s126.16(i) will allow either the US exporter or a member of the Australian Community to apply (to the US Government) to transition such articles to the Treaty exemption set out in the remainder of ITAR s126.16.

Section 35 of the Bill appears to be either:

- in conflict with the proposed ITAR s126.16(i) (by suggesting that the Australian Government must be involved in a transition); or
- a duplication of process as it suggests that, even after the US Government approves the transition, the Australian Government must still be approached and the s35 process followed.

We suggest that once the US Government has approved the transition of a US export to the Treaty, the Australian law should apply to the item as if it had always been the subject of the Treaty.

Recommendation 4: that Section 35 of the Bill be removed in its entirety.

5. Brokering

Saab is concerned about the practical implications of the requirement to obtain a permit from DECO before engaging in 'brokering' of Australian export-controlled technology.

The term 'arrange', central to the requirements in relation to brokering in Part 2 of the Bill, is undefined. As a result, Saab is concerned that industry will not have a clear picture of whether the administrative and schedule impact of obtaining 'brokering' permission will need to be considered in particular circumstances. As drafted, Saab understands that the requirement to obtain a permit will apply to situations that Saab does not believe are intended to require a permit, and also to situations for which such regulation is an unnecessary and costly burden on industry.

One general concern is that even a tenuous link to a foreign transfer may be unintentionally caught. As an example of a tenuous link that may be caught, what if an Australian employee is asked by its foreign prime contractor to identify the delivery location for goods at the foreign end user's premises (simply due to circumstances, eg time zones or a greater awareness on the part of the Australian person due to site experience). This is 'arranging' a transfer in one sense so, on its terms, would be subject to the need for a brokering approval, however it is assumed that this is not the intention.

A greater concern for Saab arises in light of the multi-national nature of its operations (and the presence therefore of global management structures and of staff working in different locations). Saab's Australian employees may be involved, while located in Australia, in working on global contracts, with the movement of (for example) Swedish technology located in Sweden but destined for a foreign customer. If the export from Sweden has been approved by the Swedish government (and international anti-proliferation concerns have thereby already been addressed), it is unclear what benefit is gained by adding administrative overhead and schedule impact to the process through the need for an Australian brokering permit. At the least, that impact is likely to build, on the part of Saab's global business, reticence to use Saab's Australian operations as part of its global activities. The proposed rules will also impact Saab's Australian staff when they are working in Sweden and Saab's Swedish staff when they are in Australia and 'arranging' the transfer of technology out of Sweden, even if just visiting (but continuing to do existing work remotely). Again, such international transactions will be subject to Swedish export control.

Recommendation 5: that the Bill or the Regulations be amended to further define 'arrange' in the brokering context, to clarify what activities the brokering controls are intended to regulate. Greater certainty is required and would be achieved by controlling only certain, specified activities initially, with other activities added over time (for example, by regulation) as experience is gained in regulating these sorts of activities. Also, that the exemption in s15(4) regarding Wassenaar Participating States be extended, such that no brokering licence is required if the starting point of a transfer is a Wassenaar Participating State (so appropriate export controls will be applied, regardless of the destination).