Responses to Questions on Notice from the Senate FADT Committee Hearing on the Defence Trade Controls Amendment Bill 2024

Question: First, it is obviously critical that the definitions in these amendments are very clear to participants, whether they be industry or researchers. Are there any definitions in the amendments that you believe are insufficiently clear? Could you identify those and could you make any recommendations as to how they could be improved. Clearly, the fundamental research is one but my understanding from submission says there are others.

Answer: The Tech Council has not identified major issues with the definitions in the Bill. However, if the Government and the Parliament do not amend the use of "absolute liability", we believe further clarity and practical examples are needed for industry around how this provision would be applied. We remain concerned that Australian firms may be faced with lengthy prison sentences and/or financial ruin by unintentionally committing an offence at no fault of their own and with limited opportunity to adequately defend themselves in court.

Question: Secondly, the intent of Defence and, in fact, to the requirement under AUKUS is for us to have a regime that is compatible, similar to, analogous to the US system. The US system is split into ITAR and the EAR systems. Could you come back to the committee with comments as to whether you think that kind of division—EAR tends to deal with a lot of the dual-use cases in the States—would make it easier for the research sector to comply with the requirement. If not that system, or possibly in conjunction, the concept of the de minimus system that has been in use with the EAR system a little bit with ITAR in the states. Would that assist and how would you see that being applied?

Answer: The Tech Council is concerned the Bill does not materially distinguish between how regulatory obligations and criminal offence provisions apply to Part 1 (munitions) and Part 2 (dual-use) of the DSGL, as in the US. This increases the risk of over-regulation if we align our regime for dual-use goods too closely with the US regime for military goods (ITAR).

The US EAR regime for dual-use technologies allows for much greater flexibility than ITAR by allowing for partial country exemptions and, in some cases, removing the requirement for export licences completely depending on the product and country. This means there are examples where certain countries that are not on Australia's Foreign Country List (such as India) are granted an exception for particular products.

It is important to establish appropriate exceptions to the new offences to reduce the risk of over-regulating dual-use technologies. In addition to a Foreign Country List exception, we recommend further exceptions are developed through the DTC Regulations that ensure Australia's export controls for Part 2 of the DSGL are no more onerous than the controls on dual-use technologies in the US under the EAR. It would be a perverse outcome if Australia's reforms resulted in more stringent export control requirements than what applies in the US. We also recommend adopting sunsetting/lapsing provisions through the DTC Regulations for Part 2 of the DSGL, after which the deemed re-supply offence would no longer apply.

The concept of applying a US-style de minimus threshold is worth exploring, but we do not believe this proposal alone would sufficiently address the concerns we have raised in our submission.

Question: Lastly, from the systemic view, you highlight in your submission a key difference between the US and Australian research sectors. The US government funds a range of research, whereas we are reliant on a lot of these international partnerships and fees. Could you identify for the committee if there are other systemic issues where we may align our export controls, but the misalignment in other areas of the system will have a deleterious effect on our research sector compared to how the US research sector works? And if we're going to make this change, what other changes should we be considering—and I will be pursuing this for industry, for example—in our procurement system versus the US procurement system? Obviously it's not part of this bill, but could you tell us, from that systemic point of view, what other changes we should be at least considering if we're going to make the whole system work effectively? That's a long shopping list but given there's a number of you could you come back to the committee with answers on each of those as that would be very useful.

Answer: There are broader policy reform opportunities that can be pursued by the Australian Government to ensure our system works effectively to support the growth of Australian tech companies.

Firstly, we are encouraged by amendments to the US Defence Production Act to add Australia as a "domestic source." This will open up greater market access opportunities for Australian critical and defence technology export firms. However, we need to develop a clear strategy to promote the capabilities of Australian firms and ensure these benefits are realised.

We also encourage reforms to remove barriers to innovative SMEs accessing Australian Government procurement opportunities. SMEs and startups continue to face a number of barriers and disadvantages at various stages of the procurement cycle, including at the project specification stage and the bidding/assessment stage. Young, R&D intensive firms in particular face challenges due to the more experimental nature of their activities and the higher risks this entails. Australia can do better in ensuring procurement is more open, transparent and accessible to all businesses, and we can learn from nations like the US in how to use specialised procurement programs (like the Small Business Innovation and Research Program) to develop strategic capabilities.

Secondly, Australian tech industries rely heavily on foreign investment, but the current Foreign Investment Review regime can create real barriers due to opaque and uncertain processes, costs and time. We encourage reforms and/or administrative improvements that will support greater foreign investment. This could include streamlining arrangements for trusted investors from allied nations (e.g. AUKUS or Five Eyes).

Question: Before you go, Mr Black, you raised the point about overlap between some Department of Home Affairs issues. A question to the rest of the panel, on notice, is: are you aware of that, and does that raise any concerns for you? Mr Black, on notice, can you expand a little bit on the specifics of the overlaps there that you think need to be addressed?

Answer: The Department of Home Affairs recently announced that on 1 April 2024, changes to the Migration Regulations 1994 will be activated that will:

- create a Public Interest Criterion where the Minister for Home Affairs can refuse to grant certain visas if there is an "unreasonable risk of unwanted transfer of critical technology by the visa applicant"
- require Student (subclass 500) visa holders to obtain approval from the Minister for Home Affairs before undertaking a new critical technology-related course in the postgraduate research sector
- provide grounds for the cancellation of a visa where the Minister for Home Affairs is satisfied that there is an unreasonable risk of unwanted transfer of critical technology by the visa holder.

This means the Department of Home Affairs will now proactively consider the risks of unwanted technology transfer in determining whether to grant approval for visas. The types of technologies that will be considered as part of this process have significant overlap with the DSGL, particularly the dual-use list (and in many cases are broader than the DSGL). For example, the Home Affairs process will consider visa applications in areas covering advanced manufacturing and materials technology, advanced information and communication technology, biotechnology, quantum technology, autonomous systems, robotics and positioning, timing and sensing technology.

The Tech Council is concerned that the Defence permit process under offence 10a (deemed supply of DSGL technology to a foreign person in Australia) and this new Home Affairs critical tech visa screening process have similar objectives of reducing the risk of unwanted technology transfer to foreign persons working in Australia, but are being implemented through two separate processes, through two different portfolios, at the same time. This siloed approach may cause further inefficiencies and delays. We recommend reviewing the different regimes for potential overlap/duplication and moving towards a more integrated process as soon as practicable.