

# Chapter 2

## Submissions and issues

### Issues identified during committee's original inquiry

2.1 The main issue arising from the committee's inquiry into the Defence Trade Controls Bill 2011 was the desperate need for Defence to consult with those sectors that would be affected by the bill. Through the committee's recommendations, Defence undertook consultation, a series of roundtables, and finally amendments to the bill in order to establish an implementation period of two years. During this time, the Strengthened Export Controls Steering Group (Steering Group) would provide a mechanism through which Defence and stakeholders could resolve concerns about the effect of the Act.

2.2 The university sector also had outstanding concerns, which were not resolved through amendments to the bill. These included:

- the scope of the legislation which imposes greater restrictions on research activity than similar legislation in the US;
- the effect of the bill on 'Freedom of inquiry';
- development of self-assessment processes;
- publication of research and criminal penalties in the bill;
- additional risks and costs incurred as the new regime is implemented; and
- effect on Australia's ongoing engagement in international research.<sup>1</sup>

2.3 The committee understands from submissions attempts to resolve these concerns are being made through the work of the Steering Group and the pilot programs. At the time of writing the Steering Group had not yet presented its first report and so the information the committee has on the work of the Steering Group is taken from its website and from submissions.

2.4 The committee has received a number of submissions since the tabling of its final report on the bill in October 2012. While some of the submissions are positive in regards to the work underway, many still express reservations about the implementation process. In this chapter the committee examines the actions taken by Defence so far in implementing the Act and notes the concerns raised by submitters.

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1 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Defence Trade Controls Bill 2011 [Provisions], Final Report*, p. 13.

## **Defence's actions**

2.5 The Defence Export Controls Office (DECO) has taken a number of actions in relation to implementing the Act.

### ***Strengthened Export Controls Steering Group***

2.6 As defined in section 74A of the Act, the Steering Group functions are to advise the Minister and Research Minister on:

- (a) the adequacy of the organisational and governmental arrangements, and the identification, assessment and management of risks, costs and administrative burden, associated with intangible transfers of DSGL technologies; and
- (b) the oversight, design and delivery of a pilot program to identify the adequacy of this Act, the regulations, the implementation arrangements and the resources for regulating intangible transfers of DSGL technologies; and
- (c) recommendations for amendments to this Act, the regulations and the implementation arrangements in view of the pilot program; and
- (d) whether this Act, the regulations and the implementation arrangements are not more restrictive than United States export control regulations in relation to university activities.

The Group also has any other functions determined, in writing, by the Minister.<sup>2</sup>

2.7 The Steering Group is chaired by Professor Ian Chubb, AC, Chief Scientist of Australia and its members are:

- Professor Peter Høj, co-Deputy Chair (university);
- Mr Ken Peacock AM, co-Deputy Chair (industry);
- Professor Warwick Anderson, CEO National Health and Medical Research Council;
- Professor Aidan Byrne, CEO Australian Research Council;
- Professor Mike Calford, university representative;
- Mr David Gillard (BAEs), industry representative;
- Mr Michael Edwards (Boeing), industry representative;
- Mr Ohad Katz (Raytheon), industry representative; and
- Dr Alex Zelinsky, Defence representative;
- A Department of Innovation, Science, Research and Tertiary Education (DIISRTE) representative.<sup>3</sup>

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2 *Defence Trade Controls Act 2012*, section 74A.

3 Strengthened Export Controls Steering Group website, 'Steering Group', <http://exportcontrols.govspace.gov.au/steering-group/>, (accessed 20 June 2013).

2.8 Appointed by the Minister for Defence, the Steering Group 'provide advice, oversight and review of the Act's operation and implementation over a 24-month period' and report in writing to the Minister for Defence and the Minister for Tertiary Education, Skills, Science and Research.<sup>4</sup>

2.9 Professor Chubb advised the committee that the Steering Group had met on three occasions, including:

...including a recent meeting with representatives from the United States to progress investigation of whether the Act and its implementation arrangements are more restrictive than the United States export control regulations on university activities.<sup>5</sup>

2.10 The Steering Group is also conducting eight pilot programs over the two year implementation period which will test the impact of the Act on the research and industry sectors, 'specifically the strengthened export controls provisions covering the intangible supply and brokering of controlled goods and technology.'<sup>6</sup> Accompanying the pilot programs is the provision of training. The committee notes that DECO has made a number of export controls brochures written specifically for the research and tertiary sectors available on its website.<sup>7</sup>

2.11 Professor Chubb advised the committee that the Steering Group had established a Revised Legislation and Regulation Amendments Sub-Group which considers legal issues relating to the implementation of the Act. The sub-group will also advise the Steering Group on any 'appropriate modifications to the Act should issues be identified throughout the transition period.'<sup>8</sup> The sub-group has met once to date (it will meet quarterly) and the outcomes of the meetings are published online.<sup>9</sup>

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4 Strengthened Export Controls Steering Group website, 'Frequently Asked Questions', <http://exportcontrols.govspace.gov.au/faq/>, (accessed 20 June 2013).

5 *Submission 9*, p. 1.

6 Strengthened Export Controls Steering Group website, 'Pilot Program', <http://exportcontrols.govspace.gov.au/pilot-program/>, (accessed 20 June 2013).

7 Department of Defence website, 'DECO Booklets and Brochures', <http://www.defence.gov.au/deco/publications/booklets/default.htm>, (accessed 20 June 2013).

8 *Submission 9*, p. 1.

9 Strengthened Export Controls Steering Group website, 'Legislation Sub-Group', <http://exportcontrols.govspace.gov.au/publications/legislation-sub-group/>, (accessed 20 June 2013) and Strengthened Export Controls Steering Group website, 'Legislation Sub-Group Meetings', <http://exportcontrols.govspace.gov.au/publications/legislation-sub-group/legislation-sub-group-meetings/>, (accessed 20 June 2013).

*Issues from submissions—Steering Group*

2.12 Submitters such as Universities Australia<sup>10</sup> and the University of Sydney<sup>11</sup> have representatives on the Steering Group and believe that the work of the Steering Group has been positive.

2.13 However, Universities Australia raised some issues regarding the Steering Group in their submission. These issues go to:

- confidentiality conditions imposed on Steering Group members; and
- the type and amount of information made publicly available on the Steering Group's website.

2.14 Universities Australia cited as an example the meeting of the Steering Group with representatives from the United States, noted above at paragraph 2.9. Universities Australia argued that while the meeting was made public, there was little information about the meeting released publicly and Steering Group members were not given permission to share the details of discussions with their stakeholders.<sup>12</sup>

2.15 Universities Australia was concerned that the confidentiality conditions imposed on Steering Group members limited the information that could be shared across the sector. While it appreciated the need for confidentiality around sensitive aspects of the Act, Universities Australia believed that it was 'not obvious that this level of confidentiality is necessary and it is serving to generate suspicion within a sector where the level of interest in the issue is very high.'<sup>13</sup>

2.16 The University of Sydney raised similar issues around the confidentiality undertakings for members of the Steering Group. It noted that clear and open communication between the Steering Group and the research community throughout the implementation period would be vital in raising awareness of the implications of the Act. It advised the committee that:

In this regard we note that the university sector's representatives on the SECSG have been unable to provide much information to their constituencies about the work of the SECSG because of confidentiality undertakings they have been required to sign by Defence.<sup>14</sup>

2.17 In fact, the University of Sydney claims that the communication from the Steering Group and Defence has not been sufficient to raise awareness of the Act in the research community:

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10 *Submission 13*, pp. 1—2.

11 *Submission 12*, p. 2—3.

12 *Submission 13*, p. 2.

13 *Submission 13*, p. 2.

14 *Submission 12*, p. 2.

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Levels of awareness about the reforms and the implementation process remain low across the research sector. Among those researchers who are aware of the passage of the legislation there remains considerable confusion about what will be required of them once this section enters into force following the commencement of the U.S. and Australia *'Defense Trade Cooperation Treaty'*, and when this will occur.<sup>15</sup>

2.18 The National Tertiary Education Union raised questions in its submission regarding the work of the Steering Group and its consultation mechanisms as well as the progress of the eight pilot programs.<sup>16</sup> The committee understands from Professor Chubb's submission that the Steering Group will meet on 20 June 2013 and a report will be produced shortly after that meeting.<sup>17</sup>

### *New IT system—Defence Export Controls Office*

2.19 From late April 2013, Defence has commenced using a new IT system to process applications for various export control permits. The information available from the DECO website describes the gradual rollout of the system:

Initially a small group of regular applicants will be invited to commence registering as clients and submitting online applications. In the following weeks other applicants will be contacted with information about how to commence registering as clients and then submitting online applications.<sup>18</sup>

2.20 The DECO website noted that the system will be used 'to conduct the assessment of applications arising from the Defence Trade Controls Act 2012. Defence will be able to register Brokers and issue permits for the Supply of Technology and for Brokering Arrangements.'<sup>19</sup>

### **Defence Trade Controls Regulations 2013**

2.21 Accompanying the Act are a set of regulations which provide requirements in relation to the permits, offences and obligations under the Act. After the amendments made to the Defence Trade Controls Bill 2011, Defence undertook a second round of consultation on the draft regulations. The committee wrote to Defence seeking information on the consultation process, including the organisations with whom Defence consulted—Defence's response is listed at Appendix 3.

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15 *Submission 12*, p. 2.

16 *Submission 11*, pp. 1—2.

17 *Submission 9*, p. 1.

18 Department of Defence website, 'New Defence Export Controls System', <http://www.defence.gov.au/deco/DECS.htm>, (accessed 20 June 2013).

19 Department of Defence website, 'New Defence Export Controls System', <http://www.defence.gov.au/deco/DECS.htm>, (accessed 20 June 2013).

2.22 The Australian Industry Group raised a number of concerns regarding the regulations in its submission. Specifically it was concerned that there had been delay in the publishing of the final regulations and that this was creating uncertainty for the industry.<sup>20</sup> With the publication of the final regulations, the committee expects that some of the Australian Industry Group's concerns may have been allayed; particularly as the regulations do not commence until the relevant sections of the Act commence.

2.23 However, the committee notes the Australian Industry Group's comments regarding potential lack of awareness in the industry:

Australia's export control system now captures three key elements of trade controls: defence services, brokering and intangible technology transfers. Neither the legislation nor the draft regulations provide sufficient clarity with respect to the requirements that would be attached to these new controls. These concepts may be new to many Australian companies, particularly small and medium enterprises (SMEs). Therefore, it would be helpful to issue regulations soon. Additionally, the new controls reflect Wassenaar Arrangement commitments that have been in place for several years and, for that reason, it may be appropriate to introduce industry at-large to these requirements as soon as possible.<sup>21</sup>

2.24 The committee acknowledges these concerns and urges Defence to ensure that interaction with the industry, particularly SMEs, is both appropriate and effective in conveying all necessary information during the implementation period.

2.25 During Budget Estimates, the committee raised the matter of delays in the processing of applications, with one member noting that the main problem appears to be 'cost-effective time in dealing with applications'.<sup>22</sup> Mr Brendan Sargeant explained that this was something that the Steering Group was also looking at:

We are looking to simplify and streamline as much as possible. But that is something that we want to do through the steering group as part of our consultation process. It is a balance between assurance and not stopping things from happening.<sup>23</sup>

2.26 Mr Sargeant undertook to report to the committee—through the minister—on whether there are applications 'banked up' given the time taken to put in place administrative arrangements prior to the treaty entering into force on 6 June 2013.<sup>24</sup>

2.27 Another committee member sought information from Defence in relation to the targets set by Defence in processing applications. He provided the example of a

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20 *Submission 10*, pp. 1—2.

21 *Submission 10*, p. 2.

22 *Committee Hansard*, Budget Estimates, 3 June 2013, p. 57.

23 *Committee Hansard*, Budget Estimates, 3 June 2013, p. 57.

24 *Committee Hansard*, Budget Estimates, 3 June 2013, p. 56.

case in which it took eight months for a company to obtain a permit. Mr Sargeant explained that while each case is different, Defence does aim to manage expectations and work with those making applications to ensure that the process is as smooth as possible.<sup>25</sup>

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25 *Committee Hansard*, Budget Estimates, 3 June 2013, p. 57.



