Chapter 2

Strengthened export controls

2.1 The bill has two key purposes and its parts can be divided up accordingly: to give effect to the treaty (Parts 3 to 8) and to strengthen Australia's defence export controls (Part 2). The explanatory memorandum states that the bill will:

> ...give effect to the *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*. The Bill will also strengthen Australia's export controls to align them with international best practice.[1]

2.2 In this chapter, the committee examines Part 2 of the bill—dealings in items in the Defence Strategic Goods List (DSGL). It considers the provisions dealing with implementing the Defense Trade Cooperation Treaty in the following chapter.

2.3 Part 2 of the bill is intended to strengthen Australia's control over activities involving defence and dual-use goods. The bill includes provisions covering:

- intangible transfer of technology relating to defence and strategic goods, such as transfer by electronic means;
- provision of services related to defence and strategic goods and technology, such as training and maintenance services; and
- brokering the supply of defence and strategic goods, technology and services.

Changes to current defence export control regime–strengthening export controls

2.4 Australia is a member of several export control regimes, including: the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies; Australia Group; Nuclear Suppliers Group, and Missile Technology Control Regime.[2] Defence notes in the explanatory memorandum that the measures proposed in the bill introduce the controls developed by other countries in the Wassenaar Arrangement, including arms brokering and intangible transfers of technology.[3]

2.5 The bill regulates dealings in items listed in the DSGL, as well as items covered under the treaty. The bill also creates offences relating to brokering or transfer of items listed in the DSGL.

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1 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 4.

2 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 4.

3 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 4.

Current trade framework[4]

2.6 Currently, before a person can trade in defence goods, technology and related services between Australia and the US, they need to obtain relevant authorisation from the appropriate government authorities. In Australia, the requirements for such authorisations are set out in section 112 of the *Customs Act 1901* and regulation 13E of the *Customs (Prohibited Export) Regulations 1958* and Part 2 of the bill.

2.7 Submitters recognised the importance of the purpose of the legislation. While they welcome the intention that sits behind the legislation and are looking to secure a robust regime, they also want unnecessary barriers or impediments to exporting controlled articles removed.

2.8 Although operating in different sectors—research and industry—submitters' concerns about the strengthened export controls were similar. They argued that the regulation of the transfer of intangibles and strengthened controls around brokering would create a substantial compliance burden and affect research and international collaboration.

Regulation of transfer of intangibles

2.9 The explanatory memorandum notes in relation to Part 2 of the bill, that:

> At present, technology listed in the DSGL requires permission from the Minister for Defence for it to be exported in the form of a tangible good (for example, on paper or a computer drive). This Bill introduces provisions to control identical technology when transferred via intangible means, for instance via email, facsimile or internet.[5]

2.10 Under the bill, control over transfer of technology through intangible means would be overseen by Defence. For example, a person seeking to transfer technology via an email would require a permit under clause 11 of the bill. Under this clause, the Minister for Defence approves permits. If a permit is refused, the Minister must provide the person notice of the refusal and reasons for the refusal.[6]

2.11 Subclause 11(4) allows the Minister to 'give the person a permit to do a specified activity if the Minister is satisfied that the activity would not prejudice the security, defence or international relations of Australia'. Neither the bill nor the regulations elaborate on the issues the Minister may consider in determining whether the activity would prejudice the security, defence or international relations of Australia—only the explanatory memorandum provides a list of issues, and notes that 'these criteria are consistent with the considerations made in assessing an application

4 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 61.

5 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 46.

6 *Defence Trade Controls Bill 2011*, ss. 11(6).

for the export of DSGL tangible goods or technology under the *Customs (Prohibited Export) Regulations 1958'*.[7]

2.12 Companies, research organisations, universities or other organisations who work with DSGL technologies will require the permits described in clause 11. It is therefore important for the criteria used in determining the success of an applicant be outlined in legislation. The committee notes that the criteria for approval of an application to become a member of the Approved Community have been listed in the bill at subclause 27(3). Further, the *Customs (Prohibited Export) Regulations 1958* lists conditions for assessing applications for the export of DSGL goods or technology.

Recommendation 1

2.13 The committee recommends that the government consider including in the bill the criteria provided in the explanatory memorandum in relation to permits issued under clause 11 so that the Parliament can scrutinise them properly and potential applicants can be clear as to the criteria that will be used to assess their applications.

2.14 The bill creates offences as part of its regulation of transfer of intangibles. A person commits an offence if he/she supplies DSGL technology to a foreign person and does so without a permit or in breach of the condition of the permit. Also, under similar conditions, the bill creates an offence relating to the provision of defence services.[8]

2.15 'Foreign person' is defined in clause 4 as being a person who is not an Australian person. 'Australian person' is defined:

> Australian person means:
>
> (a) the Commonwealth, a State or a Territory or an authority of the Commonwealth, a State or a Territory; or
>
> (b) an individual who is an Australian citizen; or
>
> (c) an individual who is, within the meaning of the *Migration Act 1958*, the holder of a permanent visa; or
>
> (d) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

2.16 Subclause 10(3) provides exceptions to the offences in relation to the supply of technology under the treaty, for example in an Approved Community.

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7 *Defence Trade Controls Bill 2011*, Explanatory Memorandum, p. 49.

8 *Defence Trade Controls Bill 2011*, ss. 10(2).

Regulation of transfer of intangibles–issues raised by submissions

2.17 Several submitters noted that controls on intangible goods would create a significant compliance burden on industry. The Defence Teaming Centre broadly canvassed its membership and summarised these concerns in its submission:

> The decision to place controls on non-tangible goods, whilst logical, will add a significant overhead to many members, especially those who deal with training, systems engineering and consultancy. This will mean that the cost and time needed to tender for overseas opportunities for these companies is likely to be too great. Unless the export approval process is significantly accelerated, this could lead to companies in this space losing significant market share. Concern was also expressed that the way that export applications are currently implemented is inadequate to cover the wide range of intangible that will now be covered, which will only lead to delays in the approval process.[9]

2.18 Mr Andrew Giulinn of Saab Systems Pty Ltd (Saab) observed that some definitional issues would need to be resolved in order to assist compliance with the regulation of intangibles. He explained:

> There are cost of compliance issues with this arrangement and, obviously, initially some definitional issues to try and work out what it is that is covered and what we need to have in place to be able to meet the requirements. That is probably the biggest concern for us once the bill is sorted out in terms of the detail of it: what do we need to do internally to try and deal with this? So, while we might get a licence now to make sure we are covered for tangible exports even if we are expecting most of them to be intangible exports, there is a lot behind this bill in terms of record-keeping and that sort of thing that we need to be conscious of. That is probably where the biggest cost of compliance will come for us.[10]

2.19 Submitters from the university sector noted the effect that these controls would have on research and development in Australian universities. Professor Graham Mann summed up the concerns at the 21 March public hearing:

> Think about the fact that the extension of this legislation to intangible transfers is really the critical issue here. The goods themselves are easy to regulate. When you talk about the intangible aspects of research such as: communication among researchers; forming of teams to address the problems proposed by academic influenza [an example of collaboration: the problems associated with influenza used for research purposes]; the way people talk to each other; design projects; seek funding for those projects; disclose what they intend to do to get the money for those projects; the implementation and management of them; the results; the analysis; and the reporting of those results in an open research community to get the best and

9 Defence Teaming Centre, *Submission 1*, p. 2.

10 Mr Andrew Giulinn, Contracts Manager, Saab Systems Pty Ltd, *Committee Hansard*, 2 March 2012, p. 12.

> most effective research actually happening and delivering the intangibles are everything in this.[11]

2.20 Professor Mann's evidence also indicated that the scope of the term 'intangibles' could be quite broad. In questions taken on notice, the committee asked Defence to address specifically this matter. In its response, Defence advised that:

> Customs legislation only applies to the export of tangible goods and technology. The new strengthened export control provisions in the Bill will close the existing gap in Australian export controls by regulating the intangible supply of technology and provision of defence services. The Bill does not specifically refer to 'intangible transfers' or 'intangible export', however, the Wassenaar Arrangement state parties use the term and throughout a period of extensive consultation, Defence has found 'intangible transfers' to be a commonly-used expression that is understood by industry.[12]

Recommendation 2

2.21 In consultation with all relevant sectors, the committee recommends that Defence provide examples to illustrate the scope of the definition of 'intangibles' and 'intangible transfer' in the explanatory memorandum.

Brokering

2.22 Brokering forms another part of the bill's framework for strengthening export controls. The explanatory memorandum notes in relation to Division 2—Brokering:

> Currently, Australian persons, and foreign persons in Australia, can arrange the supply of DSGL goods and technology or the provision of services associated with those items from a place outside Australia to another place outside Australia without Government authorisation.
>
> The international export control regimes to which Australia belongs have long recognised that brokers have been involved in the delivery of military equipment to countries under arms embargoes, and to criminal organisations and armed groups, including those believed to be engaged in terrorism.
>
> The purpose of this Division is to allow the Australian Government to regulate the brokering of controlled goods or technology and the provision of services in relation to such goods or technology when that transaction is arranged by an Australian or the arranging occurs wholly or partly in Australia. This will be achieved through a power to register brokers and

11 Professor Graham Mann, Associate Dean, Research, Sydney Medical School, University of Sydney, *Committee Hansard*, 21 March 2012, p. 20.

12 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 20.

> issue permits to engage in brokering activities involving DSGL goods, technologies and services.[13]

2.23 Subclause 15(1) creates an offence in regard to arranging supplies and provision of defence services in relation to the DSGL, in the instance where the arranging occurs without appropriate permits. 'Arrange' is not defined in the bill; however, the explanatory memorandum provides this information:

> The term 'arranges' is intended to include, but is not limited to, circumstances where for a fee, commission or other benefit, a person acts as an agent or intermediary between two or more parties in negotiating transactions, contracts or commercial arrangements for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology.
>
> The term 'arranges' is not intended to cover situations where a first person provides a second person with a point of contact for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology and there is no fee, commission or other benefit obtained by the first person.[14]

2.24 Persons may apply for registration as a broker under the conditions set out in Division 3. A registered broker may apply for a permit under clause 16. The Minister for Defence may approve a person's registration as a broker (Division 3) and may approve the granting of permits (clause 16).

Brokering–issues raised by submissions

2.25 Boeing Australia and South Pacific (Boeing) and Saab both raised concerns regarding elements of the brokering regulation. Boeing submitted that the scope of the registration and oversight requirements for brokers was too broad and that as a result it captured persons and activities which were not necessary for the intent of the bill—that is to protect national security interests. Boeing provided a specific example:

> Freight Forwarders—The term "supply", which is defined in section 4 as including supply by way of "sale, exchange, gift, lease, hire or hire-purchase", is broadly used together with the term "arrange" throughout Section 15, which establishes brokering offences. Under this definition, a freight forwarder delivering goods to one customer on behalf of another customer could be construed as "arranging to supply" the goods, therefore offering a brokering service and becoming subject to Section 15. In order to avoid possible confusion, we recommend defining the term "arrange" in the Section 4 definitions in such a way as to make clear that although a freight forwarder may "supply" Defence and Strategic Goods List items, in the

13 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, p. 52.

14 Defence Trade Controls Bill 2011, *Explanatory Memorandum*, pp. 53-54.

> normal course of business a freight forwarder does not "arrange" that supply.[15]

2.26 Saab too was concerned about the scope of the brokering requirements. Mr Giulinn explained:

> Saab notes the reference on page 53 of the explanatory memorandum to a fee commission or other benefit. Saab accepts this would reduce the scope of the brokering rule and align more closely with intent, which is, in our view, to stop uncontrolled movement of technology and where it is being arranged by somebody who is getting some sort of fee for it and therefore there might be a potential for them to prefer to ignore export control regimes around the world. Saab's concern remains, however, firstly because the explanatory memorandum says the term 'arranged' includes but is not limited to circumstances where a fee, commission or other benefit is involved, so it is not only those but also leaves things that do not require a fee.
>
> ...
>
> Saab is also concerned as to when during the business development process the activity becomes controlled brokering. The issue here is that early activities to develop business, which might include arranging the movement of items between overseas locations, often requires speed and flexibility. It would be impractical to be required to apply for a licence in that situation and it could be years before that initial contact results in a contract and subsequently the actual transfer. The department has indicated that the need for a licence would start from the point of sale. Saab awaits further information as to how this might work.[16]

2.27 It is clear from evidence received by the committee that while the intention of the brokering regulation is clear, the requirements under the bill require further definition to take into account the practicalities of conducting business. Defence has responded to these concerns, noting:

> The preference of submitters to have key terms defined in the Bill rather than in the regulations or EM [explanatory memorandum] has been noted by Defence. It is acknowledged that this particular concern was raised in the context of the Bill's reference to the term 'arranges' in the brokering offences contained in Part 2, Division 2 of the Bill.
>
> The term 'arranges' is intended to be read using the ordinary meaning of the term in conjunction with the additional guidance provided by the explanation given in the EM at pages 53-54. The EM provides clear examples of situations that 'arranges' is intended to cover, as well as situations that are to be regarded as outside the scope of the term.

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15 Boeing Australia and South Pacific, *Submission 6*, p. 2.

16 Mr Andrew Giulinn, Contracts Manager, Saab Systems Pty Ltd, *Committee Hansard*, 2 March 2012, p. 11.

> Defence has considered the submissions made in relation to this point, in addition to the comments made by the Committee, and would be prepared to include a definition of the term 'arranges' in the Bill that is consistent with the guidance in the EM, if recommended by the Committee.[17]

2.28 The committee explored the reasons for having key terms defined in the explanatory memorandum at both public hearings. Defence's explanation for not including definitions of key terms in the bill was not convincing. The committee, however, is encouraged by Defence's new willingness to do so.

Recommendation 3

2.29 The committee recommends that Defence include the definition of 'arrange' in the bill, and that in defining the term Defence consult with submitters who have raised issues regarding the scope of the term.

2.30 For future drafting, the committee draws Defence's attention to the *Acts Interpretation Act 1901*, in particular the use of extrinsic material in the interpretation of an act, and notes that clarity of definitions greatly assists the efforts of those who have to comply with the legislation.

Lack of transition arrangements in the bill

2.31 Four submitters, including Saab, registered concerns regarding transition arrangements: specifically that no arrangements had been outlined in the bill or the regulations for the transition to the new strengthened export controls.[18] The government has noted in the explanatory memorandum; in the Second Reading Speech; and in its response to the Scrutiny of Bills Committee, that implementation of the measures in the bill will include education and consultation with industry. However, while submitters such as the Defence Teaming Centre and the AMWU note that industry education is required, most industry submitters were concerned about:

- when new measures would take effect,
- whether there would be a gradual process, and
- the status of in-train projects.

2.32 Universities Australia also argued for transition arrangements noting that:

> Universities require a very substantial transition period before the Bill is enforced against universities, so that they and the authority have sufficient time to intelligently deal with the administrative and technical challenges contained in the Bill. Due to the de-centralised nature of universities, it will take considerable time to train staff to a level that is sufficient, as well as

17 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 5.

18 Division 5 of the bill provides for transition to the Defense Trade Cooperation Treaty.

> provide that training across entire campuses, including overseas campuses where impacted.[19]

2.33 Defence responded to submitters' concerns in an answer to a question on notice:

> The Bill's commencement provisions provide that the Bill will not commence operation until the Treaty comes into force. Once the Bill has passed through the Australian Parliament, the Treaty will not come into force until the US President has ratified the Treaty, the Attorney-General has sent correspondence to the Federal Executive Council and there has been a bilateral exchange of notes to agree upon a Treaty commencement date.
>
> In light of continuing consultations with the university and research sectors, the strengthened export control provisions of the Bill and Regulations may need some changes, and may delay the Bill's passage through Parliament. This, combined with the process above, will give Defence, industry and universities a period of time to prepare to meet the requirements of the Bill.[20]

2.34 It should be noted that the period of time needed to ratify the treaty cannot be defined. The committee is concerned that the approach outlined by Defence does not provide certainty for the industry, research and university sectors affected by the strengthened export controls. Further, Defence suggested that the time taken for the bill to pass Parliament should be sufficient for organisations to prepare for the regulatory changes—this assumes that there would be no substantial changes to the bill made by Parliament.

Recommendation 4

2.35 The committee recommends that Defence, in consultation with the industry, research and university sectors, establish a timeline for the gradual transition to the strengthened export controls regulated by the bill.

19 Universities Australia, *Submission 11*, p. 7.

20 Defence, answers to questions on notice from public hearings, 2 and 21 March 2012 (received 20 June 2012), p. 21.