Appendix 4

Answers to questions on notice from Department of Defence received 20 June 2012

Australian Government

Department of Defence
Strategy Executive

Strategic Policy Division
Department of Defence
R1-1-A005
CANBERRA ACT 2600

Tel: 02 6265 1883
Fax: 02 6265 3091

Senator Ursula Stephens
Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Stephens

I am writing in response to your request for Defence to provide a response in relation to the Defence Trade Controls Bill 2011 (the Bill). My response will address the issues raised during the Senate Foreign Affairs, Defence and Trade Legislation Committee (the Committee) public hearings on 2 March 2012 and 21 March 2012, and answer the questions on notice received by Defence on 9 March 2012 and 5 April 2012.

This response will provide answers in the context of the current version of the Bill. At the Committee's request, Defence has been consulting with the university and research sectors. The Principles and Options document that forms the basis of this consultation is attached. I anticipate that this process will be complete by the end of June 2012 and Defence will be able to advise you of the results, including possible amendments to the Bill, by the end of July 2012.

Questions on notice – 09 March 2012

1. **Regulatory requirements for Approved Community.** *What is Defence's view on the proposition that the Bill may act as a disincentive to the establishment of the Approved Community as it may impose significant regulatory requirements and penalties (including strict liability offences).*

The Bill sets up a framework that allows the Treaty to be implemented into Australian domestic legislation. The Treaty enables licence-free trade between Australian and US members of an 'Approved Community'. The Approved Community will include government facilities and companies in both countries. Australia and the US will mutually determine the defence articles and the specified end-uses that define the scope of the Treaty.

The Treaty framework will remove the administrative delays associated with the existing Australian and US export licensing systems. This is expected to:

- Reduce delivery times for new projects and improve program schedules and sustainment processes by permitting transfers within the Approved Community without further US approvals.
- Increase opportunities for Australian companies to bid on eligible US contracts without the need to wait for US access approval.
- Reduce obstacles for improved cooperation between US and Australian companies to benefit Australia's defence capability.

Membership of the Approved Community is voluntary and those Australian companies that choose not to apply for membership will continue to operate within existing Australian and US export control systems.

In removing the licence requirement there need to be appropriate mechanisms in place to prevent and deter defence articles being moved outside the Approved Community or used for purposes other than those specified under the Treaty.

As the Treaty is an exemption under the US International Traffic in Arms Regulations (ITAR) framework, its compliance obligations have been aligned with existing compliance obligations for companies who currently trade in US ITAR controlled technology.

The maximum penalty for the criminal offences related to an Australian Community member is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for exporting tangible goods and technology listed on the Defence and Strategic Goods List (DSGL) without a ministerial permission. It is also consistent with the penalties under sections 10, 14 and 15 of the Bill.

2. **Education and training.** *The Australian Manufacturing Workers' Union highlighted the importance of education and outreach services explaining the changes to industry. Could Defence detail the education training programs that will be undertaken?*

Defence has undertaken extensive industry consultation during the development of this Bill. The Bill's consultation was conducted over two major phases during December 2010 and August 2011. Consultation on the Regulations was conducted from December 2011 to February 2012.

Additionally, there have been wide-ranging and continuing conversations with key stakeholders and industry. Defence established a small group of representative figures from defence industry to enable more detailed discussion of key provisions. These Defence Trade Cooperation Treaty Industry Advisory Panel (DIAP) sessions were moderated by Mr Ken Peacock AM, a former CEO from a major defence prime. The feedback from the consultation has been taken into account when developing the Bill. As a result of the consultation, the Bill and Explanatory Memorandum were amended. Defence is now in the process of considering the comments received on the Regulations.

The Defence Export Control Office (DECO) is developing a comprehensive communications plan to raise awareness of strengthened export control aspects of the Bill and its implications for government agencies, academic institutions and industry.

DECO will provide information and guidance on how the Bill aligns Australia with international best practice by closing legislative gaps relating to the:

a. intangible transfer of technology listed in the DSGL (e.g. emailing blueprints of military vehicles or performance data for night vision equipment);

b. provision of defence services related to goods and technology listed in the DSGL (e.g. providing assistance in the design of a military vehicle or the maintenance of night vision equipment); and

c. brokers arranging the supply of DSGL goods, technology or defence services.

The communications plan will include public awareness raising through the DECO Newsletter, information flyers and targeted mail-outs, media releases, advertising, editorials in industry publications, presentations and outreach activities at related conferences and trade shows.

DECO will also specifically target developing and emerging dual-use industries by using advice from industry groups and defence networks to identify areas and opportunities for outreach in these sectors.

DECO will undertake Export Control Awareness Training (ECAT) in Canberra, Adelaide, Melbourne, Sydney, Perth and Brisbane before and after the commencement of the Bill. The free ECAT training sessions will provide specific guidance on both the strengthened export control and Treaty aspects of the Bill, along with an overview of the wider export controls including the permit application process.

Defence is aware that additional tailored outreach will need to be provided to the academic sector which unlike defence industry, to date, has had limited exposure to current controls for tangible defence exports Additional measures will include working with key personnel in universities to assist them to become familiar with the Bill provisions and the Defence and Strategic Goods List and to jointly identify activities that may be subject to permit requirements. The Wassenaar Arrangement Best Practice guidelines encourage industry and academic institutions to appoint export control officers to assist the institutions to self-regulate by designing and implementing internal compliance programs. Defence will be able to provide advice to institutions, should they choose to appoint an export control officer. This outreach will build on consultation now underway with the university sector.

For Part 3 of the Bill relating to the Treaty, Defence is drafting guidance to assist industry to understand the requirements of the Bill and the new administrative implementation processes. The Treaty Pathfinder program will assist Defence to identify training needs and formulate appropriate and relevant guidance for industry and Defence participants.

Defence continues to consult with industry through the DIAP, peak industry bodies such as the Australia Industry Group and the Australian Industry & Defence Network, and through other outreach activities such as industry conferences and trade shows to ensure industry concerns are identified and considered in implementation planning processes.

Direct support will be available to companies through a combination of web-site information, email and free-call telephone enquiry lines. Targeted training for specific companies and organisations will be considered upon request where it provides significant reach and value for money.

3. **Record keeping.** *A number of submitters referred to the record keeping requirements which they regard as 'significant' and which would add to the administrative costs of Defence industry.*

The detailed provisions prescribing the record-keeping requirements are contained in Regulation 31 of the draft regulations. The public consultation period for the Regulations closed on 17 February 2012. Defence has considered the comments received and is working towards making the record-keeping requirements as practical as possible.

In answer to the three specific questions raised by the Committee:

3.1 *How has Defence responded to concerns about what industry regard as onerous record keeping requirements?*

Defence is committed to ensuring that the record-keeping obligations are as practical as possible. Defence recognises the common theme of industry's comments about the record-keeping requirements for strengthened export controls and Treaty activities. Defence is currently exploring options to amend the Regulations to prescribe a minimum level of record keeping, and when the risk of the activity warrants further measures, Defence will impose additional record-keeping conditions on the permit (for strengthened export controls) or membership approval (for Treaty).

While Defence is able to vary the record-keeping requirements for strengthened export controls, the record-keeping requirements in the Bill and the Regulations for Treaty activities have some flexibility but need to reflect Australia's commitments under the Treaty.

Defence is also exploring avenues to amend the Regulations to provide a simpler mechanism for industry and universities to record a series of related activities over a period of time.

3.2 *Has Defence considered taking a risk based approach to record keeping, requiring more in relation to items of high risk and less in respect of more mundane activities?*

Yes. This is reflected in the approach described in subparagraph 3.1

above. If this approach is adopted, it will also provide greater consistency with the current requirements for tangible export controls which impose record-keeping requirements by way of permit conditions.

3.3 *In consultation with industry and universities, does Defence intend to clarify and simplify the record keeping requirements?*

Defence is considering simplified record-keeping requirements in consultation with industry and universities.

Questions on notice – 05 April 2012

4. **Definitions in the EM.** *Concerns have been raised by submitters in regards to Defence's decisions around clauses being placed in the Bill, the EM, or the draft Regulations. Could you outline the rationale for placing definitions in the EM and not the Bill or the draft Regulations*

The preference of submitters to have key terms defined in the Bill rather than in the regulations or EM 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.

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.

5. **Scrutiny of Bills – definitions in the EM and regulations**. *In 2011 and 2012, the Scrutiny of Bills Committee raised concerns that 'important matters' including defences for offences that have been left to the regulations be included in the primary legislation. The committee also sought the Minister's advice as to why matters in the EM or left to the regulations were not included in the primary legislation. The Minister for Defence responded in February 2012 providing explanation for the proposed approach. Can you outline action that has been taken to alleviate the concerns of the Scrutiny Committee regarding these matters?*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee:

> *In delegating exceptions to the regulations, appropriate safeguards have been considered and put in place to ensure that the offence provisions are clear and the scope and effect of the offences are plain and unambiguous. The content of the*

offences in the Bill and the exceptions contained in the regulations are cross-referenced to ensure seamless navigation between the Bill and its regulations. Drafting notes, which serve as additional navigational markers, have also been included to assist in legislative interpretation.

Where an exception makes reference to a separate legislative instrument, as is the case in subparagraph 11(2) of the draft regulations which refers to regulation 13E of the Customs (Prohibited Exports) Regulations 1958, it is justified in the circumstances that the exception be delegated to the regulations to allow the reference to that legislative instrument to be amended in a timely manner.

Further, in circumstances where the content of an exception to an offence involves a necessary level of detail, it is appropriate that the exception be delegated to the regulations. Draft regulation 12 creates an exception to the offences for the supply of technology and provision of defence services in relation to Australian Defence Articles. This exception introduces the concept of Australian Defence Articles which is a concept that is particularly detailed and is dealt with exclusively in the regulations.

Prior to commencement of the Bill and regulations, the Defence Export Control Office (DECO) will extend its outreach programs to individuals and companies to attempt to ensure that these parties are made aware of the operation of the offence provisions. In addition to these outreach programs DECO maintains, a dedicated website with links to relevant legislation and legislative instruments and alerts on changes to export controls laws.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the Explanatory Memorandum (EM). On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

6. **Scrutiny of Bills – discretionary powers.** *The Scrutiny of Bills Committee raised concerns regarding the discretionary powers conferred on the Minister under Clause 10 to grant or refuse a permit to supply technology or provide services related to DSGL goods. The committee suggested that the criteria listed as permissible considerations in the EM in the primary legislation to provide guidance for the exercise of power. Further to the Minister's response, the committee requested that key information in this regard be included in the EM. Can you establish for the committee the rationale for such discretionary powers and outline what action has been taken to alleviate the Scrutiny Committee's concerns?*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee:

Clauses 11, 14 and 16 confer a discretionary power in circumstances where I am required to grant or revoke a permit or to issue a prohibition notice for the supply of technology or provision of defence services. In exercising the powers to grant a permit under clauses 11 and 16, I must be satisfied that the activity for which the licence is sought would not prejudice the security, defence or international relations

of Australia. In revoking a permit and issuing a prohibition notice I must be satisfied that the activity would prejudice the security, defence or international relations of Australia.

The Government's policy is to encourage the export of defence and dual-use goods where it is consistent with Australia's broad national interests. Australia's export control system is the means by which this consistency is ensured. Applications to export defence and dual-use goods are considered on a case-by-case basis. The assessment of these applications take into account the considerations listed on page 48 of the Explanatory Memorandum. These considerations were developed in line with the policy criteria (page 11 of the Explanatory Memorandum) agreed by the Prime Minister and the Ministers of involved key portfolios including the Department of Foreign Affairs and Trade and the Australian Customs and Border Protection Service.

The listed considerations outlined in the Explanatory Memorandum are able to be accessed by the public through the DECO website. To further assist industry in understanding the application processes and any significant changes in export control policies, additional guidance is available to industry through ongoing outreach activities provided by DECO and a dedicated telephone support line.

Australia's export control policies and procedures need to be flexible in order to take into account changes in defence and dual use technology, use and delivery of that technology, Australia's strategic priorities and threats to regional and international security. Due to the changing nature of the export control environment, wide discretionary powers are necessary and it would not be appropriate for a set of fixed considerations to be included in the Bill.

I consider this discretion is appropriate and necessary to support Australia's capacity to protect its national interests and contribute to reducing the threat to regional and international security by working with like-minded countries. This discretion is consistent with the powers that I hold under existing legislation; including, Regulation 13E of the Customs (Prohibited Exports) Regulations 1958 and the Weapons of Mass Destruction (Preventions of Proliferation) Act 1995.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the EM. On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

7. **Scrutiny of Bills – reversed evidentiary burden.** *The Scrutiny Committee was also concerned with Clause 31 regarding the reversed evidentiary burden of onus of proof and sought further information regarding exceptions and whether they could be outlined in the primary legislation. Can you explain the rationale for this course of action and outline any action taken to address the Scrutiny Committee's concerns.*

The Minister for Defence responded to this concern by advising the Scrutiny of Bills Committee that:

The draft regulations (regulation 25) set out the circumstances in which all or some of the main Treaty offences in subsections 31(1) to (6) will not apply. Currently the regulations as drafted create the following two exceptions:

- *in circumstances where an Australian Community member supplies goods, technology or defence services and holds a valid licence or other authorisation granted by the Government of the United States of America that permits the supply; and*
- *in circumstances where an Australian Community member supplies goods or technology to an approved intermediate consignee for the purpose of transporting the US Defence Articles.*

These two provisions include a level of detail that should not be included in the primary legislation and for this reason, these exceptions have been delegated to the regulations. The exceptions will be subject to parliamentary scrutiny as the regulations are a disallowable instrument.

The reversed evidentiary burden of the onus of proof in cases where the applicability of the exception is peculiarly within the defendant's personal knowledge is consistent with Commonwealth criminal law policy. The exceptions included in the draft regulations have been drafted with the defendant bearing the evidential burden. This shift in the onus of proof recognises that the applicability of the exception to a particular Australian Community member will be within the member's personal knowledge. For example, the Australian Government would be unlikely to know whether an Australian Community member holds a valid licence or other authorisation granted by the United States Government. In such circumstances it would be significantly more resource intensive and costly for the Australian Government to disprove the existence of the authorisation than for the Australian Community member to prove its existence.

I consider it appropriate that the exceptions outlined above are delegated to the regulations and that Commonwealth criminal law policy has been applied appropriately in reversing the evidential burden of the onus of proof.

The First Report of 2012 of the Scrutiny of Bills Committee thanked the Minister for his detailed response and requested that key information is included in the EM. On 26 March 2012, the Minister for Defence wrote to the Chair of the Scrutiny of Bills Committee to advise that he proposed to delay making these amendments to the EM until it became apparent whether any further amendments would arise from the consideration by the Senate Foreign Affairs, Defence and Trade Legislation Committee.

8. **Differences in exposure drafts.** *Can you outline for the committee what the primary differences are between the February 2012 exposure draft of the regulations and the draft December 2011 version?*

The primary difference between the December 2011 and February 2012 versions of the draft Regulations is the inclusion of merits review provisions in the February 2012 version, for an adverse decision by the Minister regarding approval of an intermediate consignee. The review provisions in Regulation 28 apply to both applications for approval of an intermediate consignee and the cancellation of an approval. The December 2011 version contained a note following subregulation 26(10) that a further version would be released to detail these merit review provisions and the February

2012 release fulfilled this commitment. There were also some minor changes to provision numbering.

9. **Consultation on draft Regulations.** *During the 2 March hearing Defence noted that it had begun to collate the responses to the draft Regulation consultation process. Could Defence outline the main concerns which have been received in regards to the draft regulations?*

Defence received five submissions which expressed the following concerns about the Regulations. Defence's response to these concerns is noted in *italics* below:

- Marking requirements for Treaty articles were seen to be onerous and unclear – *Defence has raised this issue with the US and the common understanding is that marking of items is only required where it is practicable to do so – more specific implementation guidance will be developed;*

- Bilateral trade under the Treaty provisions without export licenses might have potential inconsistencies with the transparency required by the Arms Trade Treaty – *consistent with current export controls, all Treaty-related exports will be declared to the Australian Customs and Border Protection Service*;

- Administrative requirements to apply for Approved Community membership were seen as burdensome on universities – *unless universities are accessing US defence technology which falls within the scope of the Treaty, it is unlikely that they would apply to become Approved Community members*;

- Assessment of Approved Community membership was perceived as potentially leading to delays - *the processes will be similar to the process for dealing with ITAR items but would be a one-off application, as compared to the multiple applications under the current Australian and US export control regulations*;

- There was a perceived lack of guidance on the handling of articles that are transferred between the Treaty regime and regular export control – *see the discussion on Pathfinder program in paragraph 10 and paragraphs 16 and 17*;

- In the significant ties assessment process in Part 1 of the Regulations , a suggestion was made that the referral to US should be deferred until the procedural fairness procedure has been completed – *procedural fairness is a core element of the process, including merits review, and the referral to the US happens at the end of the process and only if the applicant seeks to have the referral proceed*;

- Details of what information will be required on the Annual Compliance Report for Approved Community members were requested – *this will be provided by administrative guidance*; and

- Record keeping for each activity was seen as unnecessary – *see paragraphs 3 and 15.*

10. **Additional issues in relation to draft DTC Regulations.** *The committee has received evidence suggesting that additional issues (such as IT matters, cost implications and arrangements for the Pathfinder Program) have arisen in relation to the draft regulations which were not necessarily foreshadowed in the bill. How do you respond to these concerns?*

The Australian and US Governments are jointly developing a Pathfinder program to test the Treaty's scope, policies and procedures. The Pathfinder program is a preparatory exercise, not an activity that will be regulated through the Bill and the Regulations. The objective is to identify where improvements to administrative and operational processes can be made prior to the Treaty entering into force. Pathfinder participation is completely voluntary. Defence will select appropriate test projects and programs and then invite related companies that meet eligibility criteria to participate. There is no requirement for companies to participate. Defence will keep the costs of participating in Pathfinder to a minimum.

To keep costs down for industry, Defence will absorb the costs involved in processing Approved Community applications and security clearances. Other costs for individual companies that choose to join the Approved Community will vary, however those companies already engaged in defence business will have many of the required processes in place.

The new IT system under contract to replace the current DECO system is a business system in Defence and is not regulated by the Bill or Regulations.

11. **Concerns raised by Universities.** *Universities Australia is concerned that it is 'not adequate' to rely on regulations as secondary instruments to deliver the legislative intent of the bill and that there is a need to ensure that the intention set out in the EM is enshrined in the legislation thereby ensuring that institutions have full statutory protection. What is your response to these concerns? Universities Australia suggest that the Bill should include an exemption modelled on Section 8 of the UK Act. In evidence to the Committee, Defence noted that a similar exemption will be created in a legislative instrument. Could you expand upon the verbal evidence provided to the Committee? Was insertion of the exemption into the Bill considered during drafting? Could you outline how the consultations with Universities Australia will fit into the proposed timeline for implementation of the export controls and how long you have allowed for the consultations?*

The legislative intent of the Bill is clear in that the intangible supply of technology will be controlled. There will be exemptions for certain technology in the 'public domain' and for 'basic scientific research'. It is important these concepts are fully defined in secondary instruments so that the definitions can stay abreast of changes in the way that technology may be supplied.

Defence did not consider including a provision similar to section 8 of the UK Act while the Bill was drafted as it was considered that the definitions for 'public domain' and 'basic scientific research' were best defined in secondary instruments. Defence's continuing consultation with the university sector is contemplating a model which refers to 'public domain' and 'scientific research' in the Bill and fully defines the concepts in the Regulations.

At the Committee's request, Defence has been conducting consultation with the university and research sectors. The Principles and Options document that has formed the basis of this consultation to date is attached. When that consultation is finalised and decisions on the way forward have been taken by Government, I will be able to advise you of the proposed approach. I anticipate that this consultation will be

complete by the end of June 2012 and Defence will be able to provide you with an update by the end of July 2012.

12. **Timetable.** *What are the necessary steps that must be undertaken before September including in relation to the regulations? What is your timetable in the lead-up to proclamation of the bill?*

The Regulations will need to be amended in light of the comments received during the public consultation and to include any consequential amendments to the Regulations that flow from any changes to the Bill.

Defence is continuing to work on the domestic implementation processes for the Treaty in collaboration with other government parties, industry and academia. The implementation timetable in the lead-up to the proclamation of the Bill will focus primarily on the operation of the Pathfinder Program from May-July 2012. After Pathfinder testing is finalised, Defence will analyse the results, conduct further consultation with industry as appropriate and finalise processes.

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. This will give Defence, industry and universities time to prepare to meet the requirements of the Bill, with Defence providing outreach support.

Once the Pathfinder Program is complete, how will findings from the program be used?

The Pathfinder Program is designed to test the policies and processes required to implement the Treaty. Participants will be requested to provide comment on the results and opinion on improvement opportunities. The results will be made available to peak industry and consultative groups and through a network of established Defence contacts. Defence will use Pathfinder to identify any opportunities to improve the processes with the intent of making them more effective and practical for industry and government. The objective is to settle processes and provide assurance and confidence to both government and industry before the Treaty enters into force.

13. **Facility accreditation.** *Article 4 of the Treaty appears to allow arrangements for a single facility as an Approved Community. Defence's evidence at the last hearing suggested that specific divisions within a company can be accredited. According to Boeing, the US and UK concept of an Approved Community appears to be 'facility specific'. Submitters are concerned that the concept of an Approved Community as 'facility specific' has not been captured in Sections 27-30 of the bill concerning an Approved Community. Is there a risk that the bill will not meet the intention of the Treaty if such a concept is not captured in the bill? Can Defence supply references to the relevant parts of the Bill and Regulations which provides that specific facilities can be registered?*

The Treaties, while similar, differ slightly in their approach to suit the domestic requirements of the participants. For Australia, the Approved Community will comprise bodies corporate that, after gaining approval from the Minister, are Approved Community members in their own right. However, a body corporate only needs to have those facilities accredited that it intends to use for the movement, storage and handling of US Defence Articles.

This approach provides more flexibility to industry in how companies conduct the aspects of their business involving trade in Treaty articles. There is no requirement for a company to accredit all of its facilities if Treaty trade is only a small part of its business and this trade can be confined to a single facility. Defence's evidence at the last hearing is accurate, insofar that different divisions of a company may be located in separate premises and these premises can be accredited separately for Treaty trade as befits the company's commercial interests.

Section 27(3)(a) of the Bill provides that one of the criteria that the Minister must have regard to in assessing an application for membership of the Approved Community is whether the body corporate 'has access to a facility that is included, or that is capable of being included, on a list, managed by the Department, of facilities accredited for storing and handling classified information and material.' The legislative requirement is that a potential member must have access to at least one facility – it is not required that the potential member own that nominated facility. The Department will manage administratively the list of accredited facilities, to which Approved Community members can apply to add facilities according to their business requirements.

14. **US approval for community membership.** *Membership of the Australian Approved Community requires US Government approval whereas membership of the US Community is based on registration with the Directorate of Defence Trade Controls. Given the level of due diligence needed to become a member of the Australian Community, why is US approval required? Could you explain why the US Government retains the right of veto for Australian industry when the Australian Government has no input into the Directorate of Defence Trade Controls registration process?*

The Treaty exists within the broader ITAR framework, and is an exemption within ITAR. The majority of trade that is expected to be conducted under the Treaty regime is in US defence articles, and the Treaty reflects the US position to retain control and monitor access to its technology. As with the ITAR framework, the Treaty reflects the US position to retain control and monitor access to its technology. Gaining US approval will remove the need for companies in the Australian Community to continually seek licences from the US for trade in Treaty-eligible US defence articles. Admission to the Australian Community constitutes a permission to trade in US Defence Articles that would ordinarily be controlled under the existing ITAR framework. The US retains the right to deny such applications.

Article 4(c) of the Treaty requires that Australia and the US mutually determine the eligibility requirements for the inclusion of bodies corporate on the list of Australian Community members. The provision in s27(4) of the Bill that the Minister must not approve an application unless the US Government has also approved the application

fulfils this requirement for mutual agreement. The Treaty does not have the same requirement for the US Community as US exporters must undergo a similar application and approval process to become registered with the US Government as an exporter of controlled goods. Given they must already comply with ITAR under their registration, The Government did not want to add additional compliance requirements for US companies to meet in order to trade with Australian companies under the Treaty.

Subsections 11(3)-(5) of the Treaty's Implementing Arrangement allows for bilateral consultation and Australian Government action if concerns are raised about a US Community member's ability to protect Australian defence articles. Following these consultations, the Minister may decide to issue directions to the Australian Community in accordance with s33(1) of the Bill preventing future dealings with that US Community member. Although Australian input has not been incorporated into the US registration process, the Bill provides the Minister with an appropriate measure of domestic control over trade conducted under the Treaty.

15. **Record keeping.** *Submitters have raised concerns regarding record keeping. Saab noted that companies will have to keep track of things they didn't have to before and make a distinction between the bill's implementation of the treaty and the two other aspects of the bill – intangible and brokering controls. Others are concerned about individualised record keeping. Please outline for the committee:*

- *How Defence has responded to these concerns; and*

Paragraph 3 of this Response outlines Defence's consideration and intentions for record keeping for strengthened export controls and Treaty activities.

The Bill contains record-keeping requirements for strengthened export controls and movements of defence articles under the Treaty. While Defence is able to vary the record-keeping requirements for strengthened export controls, the record-keeping requirements in the Bill and the Regulations for Treaty activities have some flexibility but need to reflect Australia's commitments under the Treaty. As the Regulations are currently drafted, the record-keeping requirements for the strengthened export controls and those implementing the Treaty provisions have a high level of consistency. Any changes to the record-keeping requirements for strengthened export controls and Treaty activities may be different for each area and may introduce inconsistency between the Treaty and the strengthened export control record-keeping requirements.

For the Treaty provisions of the Bill, in exchange for the licence-free movement of US Defence articles within the Approved Community record keeping requirements are necessary to ensure that those articles are being transferred and safeguarded in accordance with obligations under the Treaty. The requirements imposed are sufficient to ensure an appropriate level of accountability and traceability. Companies trading in US technology should already be familiar with meeting requirements under ITAR and will therefore likely have many of the required processes already in place.

- *The record keeping requirements set out in the regulations.*

The record keeping requirements for both strengthened export controls and Treaty activities are set out in regulation 31. If a record is required to be made (pursuant to section 58 of the Bill), the record should contain:

- a description of the goods or technology supplied, or the defence service provided
- the permit, licence or authorisation under which the person does the activity, and any unique identifier given to the permit or authorisation
- the name of the person receiving a supply of goods, technology or defence services, and the time and date of supply
- the name of any intermediate consignee involved in the activity, and the date the goods or technology are supplied to the intermediate consignee
- the date and time at which, and the place from which, goods or technology were provided
- the place at which goods, technology or defence services were received and the date and time of receipt
- the method by which the goods or technology were supplied, or the defence services were provided, to the recipient
- if the activity involves the electronic transfer of defence services, details sufficient to identify the transfer
- the marking applied to an Article 3(1) US Defence Article or an Article 3(3) US Defence Article supplied by the person, or that is included in the accompanying documentation
- the marking applied to an item of technology provided by the person, or that is included in the accompanying documentation
- the marking given to a defence service, included in accompanying documentation
- the security classification (if any) given to an Article 3(1) US Defence Articles, an Australian Defence Article, or an item of technology included in accompanying documentation
- the marking applied to an Australian Defence Article supplied by the person, or that is included in the accompanying documentation

Further, has Defence considered the addition of an example of activities on which records should be kept to the Bill or the EM? Please provide examples of how the record keeping requirements would work in practice.

For strengthened export controls, as the Regulations are currently drafted, an example of record keeping would be: if a researcher sent an email to a foreign researcher explaining how to produce a toxin controlled under the DSGL (e.g. cholera toxin under DSGL 1C351) which was authorised by a permit, then the researcher could include a reference to a permit number in the email and the email itself would be a sufficient record of the supply.

Noting the comments from industry about record-keeping for strengthened export controls, the Government is considering options to amend the record-keeping requirements in the Regulations to include a minimum of information. An example of how this might work is if a defence industry member wanted to market their DSGL-controlled technology in a low-risk overseas location, a record of the permit number, the technology marketed and the country involved may be sufficient. If the same technology were to be marketed in a higher-risk destination, the permit may impose a condition that each person who attended the marketing sessions and the location and date of the marketing sessions would also need to be recorded.

The Regulations are not prescriptive about the method of making these records and it could vary from a diary note, to the ability to access the required data from the company's business systems, to a full database record of the marketing session, noting the locations, dates and attendees. Where corporate business and information systems record such information, the intent is to use existing good business practice and not require separate information and record-keeping systems to be created.

For the Treaty provisions, the Explanatory Memorandum provides an overview of the record-keeping provisions required to be imposed on Approved Community members under the Bill. Defence is working with industry on Treaty implementation to ensure that the record-keeping requirements are practical, but also recognises that existing good business practices and processes are expected to meet much of the compliance obligation.

When these provisions are settled, Defence will include more examples in the Regulations' explanatory statement.

16. **Re-export limitations.** *Submitters have raised concerns regarding an inability to re-export goods under the bill to a third country (Sub 1, p.[2]). Please explain the limitations on the re-export of goods and of the underlying rationale?*

The provisions of the Bill relevant to the Treaty reflect the intent of the Treaty itself, and are designed to enable simpler trade in defence goods between Australia and the US. Trade within the Treaty framework is confined to mutually agreed scope lists on which the included activities contain elements of eligible bilateral trade. The scope lists include - Australian Government End-Use Projects, Australia-US Combined Programs, Australia-US Combined Operations, Exercises and Counter-Terrorism Operations and US Government End-Use Projects. As a bilateral Treaty, there was no intention to provide exemptions from existing controls for re-exports to other countries. Exports to countries other than the US will still require the authorisations they currently require under existing controls. As a result, the Bill does not change arrangements for re-exports to third countries – this type of activity will remain subject to the existing export controls.

17. **Transfer outside community needing US approval.** *Please clarify whether articles imported into the Australian Approved Community cannot be transferred outside the Approved Community without further approvals whilst articles exported to the US are not subject to the same controls as they are deemed to be controlled under the ITAR. If this is correct, please explain the reasons for the discrepancy.*

The intent of the Treaty is to provide less restrictive access for Australian industry to US controlled technology. All articles imported into the Australian Approved Community will continue to be controlled under ITAR; the benefit of the Treaty is that individual authorisations will not be required for each article. Trade within the Treaty framework is permitted through a licence exemption under ITAR – so if US-origin goods are transitioned out of the scope of the Treaty they will need appropriate authorisations under ITAR.

Australian articles exported to the US under the Treaty will be subject to the same controls as currently exist for US ITAR technology. The US has access restrictions in place under ITAR that are commensurate with those that Australian industry will be subject to. Seeking to add specific retransfer controls on Australian origin non-ITAR technology would create a greater level of regulation than exists under current Australian export controls.

18. **TAAs for re-export.** *NewSat raised concern that the bill is silent on the re-export of ITAR controlled items and questioned whether Technical Assistance Agreements were still required for re-export. Please respond.*

The Bill strengthens Australian export controls and gives effect to the Treaty. It has no effect on obligations under ITAR outside the scope of the Treaty. ITAR Authorisations, including Technical Assistance Agreements, will still be required to re-export ITAR-controlled items outside of the US and Australian Approved Communities.

19. **Monitoring powers.** *A number of submitters raised the issue of monitoring powers, which seem excessively broad. Could you explain to the committee the exercise and intention of this power? Are they limited to compliance or do they extend into other areas? (see Boeing sub 6, p. [5].)*

Part 4 of the Bill sets out the monitoring powers which will be exercised by Authorised Officers to ensure the protection of controlled articles and encourage industry compliance with their Treaty obligations. These powers only extend to the monitoring of bodies corporate that hold a section 27 approval, that is, Approved Community members. It is a condition of this approval that Approved Community members allow Authorised Officers to enter their premises for the purpose of ensuring that they are complying with their obligations set out in the legislation and satisfying any conditions of their approval. It is not intended that Authorised Officers will use these powers to investigate offences, as this activity is more appropriately conducted by the Australian Federal Police.

Monitoring powers are limited by the requirements of the Bill and the Regulations. The monitoring powers exercised by Authorised Officers are limited to holders of a

section 27 approval, that is, body corporate members of the Approved Community. An authorised officer must give at least 24 hours' notice before they can enter premises. The monitoring powers do not extend to the strengthened export controls detailed in Part 2 of the Bill

20. **Right of entry.** *The right of entry provisions also seem unnecessarily broad and excessive without the appropriate judicial oversight mechanisms evident in other legislation. Could you explain any limitations placed on this right to enter without judicial oversight? Does the right to enter extend to when the occupier is not present even in instances where a breach is not suspected?*

The powers of Authorised Officers to enter premises under section 41 can only be exercised for the purposes of monitoring the compliance of Approved Community members with Treaty and record keeping provisions of the Bill and compliance with conditions of an approval. Section 41(2) requires Authorised Officers to give 24 hours notice of an intention to enter premises. Entry is limited to those premises identified on the application for Approved Community membership, any other premises identified by a body corporate and any premises used for business operations. Entry does not extend to places of residence.

The purpose of empowering an Authorised Officer under the Act is to facilitate entry to premises for the purposes of conducting monitoring activities, not to conduct investigations for suspected breaches. There is no scope for an Authorised Officer to enter premises in circumstances where the occupier (or a representative of an occupier) is not present. In providing a notice of entry at least 24 hours in advance, Defence expects that arrangements would be made by the body corporate to ensure that a representative is present to facilitate and assist with Defence's monitoring activities.

21. **Need for parallel licensing.** *Mr Hyland of US Trade & Export Control Services submitted comments that go to the issue of exemptions which will still require parallel licensing activity/cost on the part of Australian industry. We have not had a comprehensive answer from Defence as to what these exemptions are and what percentage of Australian defence contracts would be affected by them.*

The Exempted Defense Articles list is currently available on the US Directorate of Defense Trade Controls website. These exemptions include such categories as nuclear propulsion, missile technology, hot-gas turbine technology and related source code. The list has been agreed bilaterally. Australia did not add any exemptions to the list and it is expected that as confidence grows in Treaty process the list will be reduced.

There is nothing in the Bill that will require parallel licensing. For a particular defence article, industry members will either operate under the ITAR exemptions for the Treaty, or under the standard ITAR provisions. Defence recognises that some defence projects will need to operate under both systems for different articles and this will be tested under the Pathfinder program.

Membership of the Approved Community is a voluntary decision and those companies that trade in both exempt and eligible articles must make the decision on whether to join the Approved Community based on the benefits expected for their

individual situation. If an Australian company is primarily trading articles exempt from the scope of the Treaty, it is unlikely they would join the Approved Community.

The Treaty is a further exemption which may be applied within broader ITAR controls. Consistent with current processes, there are certain sensitive technologies the US has retained the right to licence for export.

Issues from evidence - strengthened export controls

22. **Explanation of brokering arrangements and ITAR amendments.**

It is an offence under Section 15 of the Bill for a person to arrange the supply of DSGL goods, technology or the provision of defence services outside Australia without a permit or in contravention of a permit condition. As outlined in paragraph 5 above, 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 which states:

> *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.*

Industry has commented that the use of the phrase 'but is not limited to' in paragraph 63 of the EM does not assist industry to clearly identify what activities would fall within the scope of 'arranging'. The Government is considering deleting this phrase from the EM.

The scope of brokering controlled under the US ITAR is broader and therefore, more highly regulated, than under the Bill. The Bill's brokering controls have been drafted to satisfy the measures agreed by Wassenaar Arrangement participating states for Arms Brokering in 2003. While Defence is alert to the US ITAR brokering amendments, the intention is to align the Bill's brokering provisions with the Wassenaar Arrangement obligations.

23. **Implementation of the strengthened export controls and the role of the Australian Customs and Border Protection Service.**

Existing export control legislation requires exporters of tangible goods or technology that is listed on the DSGL to obtain permission from the Minister for Defence (administered by DECO) prior to making an export declaration to the Australian Customs and Border Protection Service (Customs and Border Protection). This

process will remain for tangible goods and technology despite the introduction of the strengthened export controls as it enables Defence, as the policy agency, to decide whether the export of the goods and technology should be permitted in accordance with our international obligations and domestic policy. Secondly, it satisfies the requirements for Customs and Border Protection, as the administrator of the *Customs Act 1901*, to assess an export against the full range of obligations contained in that Act.

Under the Bill, in the circumstance where a person will be exporting an intangible good, or providing a defence service, as with tangible exports, permission will be required from DECO, but, unlike tangible exports, no declaration will need to be made to Customs and Border Protection as the technology or services will not pass through a physical border. DECO will assess an application against the criteria outlined in the EM at paragraph 73.

To facilitate the introduction of the strengthened export controls, DECO will be rolling out a replacement permit issuing system. This new system, which is intended to be in place before the Bill is enacted, will allow industry to lodge a single application to obtain permission to comply with the existing export controls and the new strengthened export controls. The system will also allow industry to lodge separate applications to register as brokers and obtain permission to conduct brokering activities. DECO will assess each application holistically, looking at the intended activities and grant the relevant permission, where appropriate, to best balance the needs of industry against the level of risk.

The administrative arrangements for issuing the new permissions are still being considered but the intent, as expressed by the Defence witnesses before the Committee, will be to facilitate a simple 'one input - one output' approach to ensure the process is simple for both exporters and Government agencies to administer. It may still be that, under law, two permits will be required in some circumstances but this will be facilitated through the single approach described.

24. **Definition of intangible export.** Concern was raised by a Committee member as to whether the definition of an 'intangible export' is clear enough for working purposes and whether information going backwards and forwards would create difficulties for industry.

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 exports', 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.

25. **Multinational company and intangibles.** An example was given to the Committee to indicate that foreign employees of multinational companies will have to apply for a permit when they are supplying DSGL technology out of Australia,

regardless of the fact that they may be dealing with foreign-origin technology while in transit or visiting temporarily.

This is a correct interpretation of the Bill. The Bill was drafted to apply to any supply of DSGL technology by a foreign person from within Australia or by an Australian person operating overseas. Defence envisages that a broad permit could be obtained by multinational companies to provide coverage for this scenario over a period of time.

26. **Wassenaar exemptions for brokering activities.** The Committee has received evidence arguing that the Wassenaar exemption for brokering under the Bill should be broadened.

The exemption in section 15(4) of the Bill covers transfer of goods and technology from one place within a Wassenaar Arrangement participating state to another place within the same Wassenaar Arrangement participating state. Further broadening the Wassenaar exemption would be a matter of further policy consideration by Government and the Parliament.

27. **Transition period.** The Committee queried several witnesses on the absence of transition periods and grandfathering provisions in the Bill.

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.

Transition will not be an issue for the Treaty provisions of the Bill because industry members will not be subject to the Treaty offence provisions of the Bill until they are Approved Community members and choose to transition goods or technology to the Treaty.

28. **Universities Australia's (UA's) nine requested amendments.** As requested by the Committee, Defence has considered UA's nine requested amendments (in italics) and responds as follows:

28.1 *Include in the Bill an objects clause that expressly recognises the importance of education and research industry, and the need to protect and preserve its integrity and continuation for the benefit of the Australian community while also complying with international obligations to prevent proliferation of weapons.*

Defence does not believe that such a provision is warranted. The Bill has not included an objects clause for any sector of Australian industry to expressly recognise the importance of their particular industry and their industry's contribution to the Australian economy and community. Defence is equally committed to ensuring minimal impact on all sectors of the economy while complying with Australia's international obligations.

28.2 *Include in the Bill exceptions to the application of its prohibition on the transfer of knowledge to allow the continuation of university education and research activities, drawing on the UK situation as an example of a possible approach.*

The United Kingdom (UK) legislative framework is different to the Australian framework. The UK's section 8 of the Export Control Act 2002 (UK) limits the UK Secretary of State's power to make 'control orders' regulating activities that communicate ordinary scientific research or publicly available information unless the control order is necessary. In this way the UK Secretary of State can limit activities that fall within ordinary scientific research and publicly available information when it 'is necessary' to do so.

The UK Guidance on Export Control Legislation for academics and researchers in the UK, states that any person wishing to transfer technology by electronic means out of the UK or EU will need a permit.

28.3 *Including in the Regulations an exemption for all teaching as part of an accredited course and for all research except where it assists with a weapons program or weapons proliferation.*

All technology that is already in the 'public domain' will not require a permit. The definition of 'public domain' information will include course work taught in schools or higher education institutions. The draft definitions for 'public domain' and 'scientific research' are attached to this Response and will be released for public consultation.

28.4 *Set out explicit provision defining exempt research, which is sufficiently broad to enable continuation of university teaching and research activity.*

Response is under 28.5 below.

28.5 *Set out explicit provision defining exempt public domain information, which is sufficiently broad to enable continuation of university teaching and research activity.*

As the Bill is currently drafted, technology is defined in section 4 of the Bill. Section 4 provides that the Minister can specify information that does not fall within the scope of technology for the purposes of the

Bill. This will be done by a legislative instrument. The legislative instrument will exclude information that is in the public domain and basic scientific research. This instrument will result in the controls being more likely to apply to post-graduate courses and high-end research. Where DECO determines that a permit is required, the permit system will be flexible enough to provide coverage for a range of activities over a period of time.

As a result of the consultation with the university and research sectors, it is possible that this model will change to include reference to the exemptions for 'public domain' and 'scientific research' in the Bill with full definitions of the terms in the Regulations.

It is important that this exclusion is fully defined in an instrument or the Regulations so that it is flexible and responsive to changes in the domestic and international technology environments and related policy development. The DSGL is an example of a legislative instrument that must be flexible and capable of timely amendment. This includes both the addition of new and emerging technology, and the removal of technology no longer considered at risk. The DSGL allows the Government to comply with changes in international best practice as to which goods and services are controlled. At the same time it is not a volatile list but provides a clear basis around which businesses and universities can plan their business decisions and teaching and research activity. Under existing arrangements, DECO consults with industry members it identifies as being potentially affected by new controls before Australia provides international commitments to implement those controls.

28.6 *Make provision for a new power for the authority to issue binding guidance to the university (and other) sector, drawing on the example of ATO Guidelines.*

It is not necessary for the Bill to include the power to issue binding guidance as the DSGL identifies which goods and technology are subject to export controls. The Wassenaar Arrangement Best Practices for Implementing Intangible Transfer of Technology Controls of 2006 encourage Wassenaar Arrangement participating states to support 'self-regulation by industry and academic institutions that possess controlled technology, including by assisting them in designing and implementing internal compliance programs and encouraging them to appoint export control officers'. Universities will be responsible for identifying those technologies or services that may require a permit under the Bill and DECO will provide assistance in this regard. Any person who supplies technology or provides defence services has this same responsibility.

Applications lodged with DECO will result in an assessment of whether the goods, technology or services are controlled by reference to controlled items listed on the DSGL. On the basis of DECO's

assessment, the Minister may issue a permit to allow the supply of technology or provision of services. In some cases the assessment will be that the technology or services are not controlled. Based on the UK experience of implementing intangible controls, only 1.8% of applications for intangible permits were refused. DECO will issue policy guidance to assist with the understanding of and compliance with the Bill.

28.7 *Amend the record-keeping obligations where a permit is issued to have regard to compliance in a university context, which they currently do not contemplate.*

In light of comments received during the consultation period on the Regulations, Defence recognises there is a need to consider the record-keeping requirements for strengthened export controls across all sectors. Defence is currently exploring options to amend the Regulations to prescribe a minimum level of record keeping for all intangible transfers and impose additional permit conditions when the risk warrants it. Defence is also exploring options to change the Regulations to enable a simpler way for industry and universities to record a series of related transactions over a period of time. To assist universities to understand these requirements, the Regulations' Explanatory Statement will include examples to demonstrate the record-keeping requirements in the university context.

28.8 *Include a defence to the offence under the Bill where due diligence can be demonstrated.*

The offence provisions in Part 2 of the Bill are consistent with export control provisions in the Customs (Prohibited Exports) Regulations 1958 and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*. The provisions will apply to any person supplying technology listed on the DSGL or providing defence services relating to technology or goods listed on the DSGL, including defence industry, universities and academia.

A defence of due diligence is more appropriate for strict liability offences. There are a limited number of strict liability offences, all of which relate to permit conditions and record keeping; being, subsections 13(1), 18(1), 28(5) and 58(6).

As the main offences contained in Part 2 of the Bill are not strict liability offences, they require a higher burden of proof than strict liability offences and the defence of due diligence has not been included. With these, as is the case under other legislation, the prosecution will need to prove fault by demonstrating that the person intended or was reckless to the circumstances of the offence.

Although the Bill does not contain a due diligence defence, Defence would certainly consider any due diligence conducted by the alleged

offender in deciding the most appropriate compliance response. Defence would consider a range of factors; including, what efforts were made to prevent the alleged offence from occurring (e.g. training, policy, procedures, legal advice) and what action has been taken to prevent a re-occurrence.

28.9 *Include in the Bill the touted approach to compliance to provide certainty.*

Defence does not support including its compliance approach in the legislation and will provide administrative guidance on the DECO website.

DECO will continue to adopt a compliance approach that promotes industry's self-assessment. A key element of Defence's approach to compliance is providing education and support to industry so they understand their obligations. This compliance approach encourages voluntary disclosure of breaches.

The compliance model means that DECO will continue to support all industry participants who attempt to comply with the regulatory measures but do not always succeed. More stringent compliance measures will be taken for industry members that either do not want to comply or have actively decided not to comply.

Compliance responses will include client education, comprehensive audits and prosecution.

Further guidance will be provided administratively and the DECO website will be updated to reflect this compliance approach.

29. **Human Papilloma virus example.** One witness used the human papilloma virus as an illustrative example to say that the research would have been controlled and required a permit.

Defence notes that the human papilloma virus is not controlled by the current DSGL amendment. The utility of the human papilloma virus as a biological weapon is too low to warrant its inclusion among the controlled viruses that are currently listed in the DSGL (under item 1C351). Accordingly, there would be no need for a university to apply for a permit to conduct research which supplies technology relating to the virus.

30. **Continuing consultation.** To date, Defence has conducted extensive outreach activities with Universities Australia (UA), including:

- 9 May 2011 – letter (copy enclosed) to UA including two page explanation of the implication for academic sector - no response received;
- 15 July - 26 August 2011 - draft Bill released for public consultation - no submission received from UA;

- 5 August 2011 - invited UA to attend Canberra industry consultation session – UA representative attended;
- 2 November 2011 – Bill entered Parliament;
- early December 2011 - DECO became aware that UA response to the Autonomous Sanctions Bill included UA comment on the Bill;
- 12 December 2011 - DECO officer followed up with UA to ascertain whether UA wanted to supply feedback on the Bill;
- 13 December 2011 - teleconference between DECO officers and UA;
- 22 December 2011 - 17 Feb 12 - public consultation period on draft DTC Regulations;
- 3 February 2012 – teleconference with DECO officers and UA officers;
- 9 February 2012 - UA submission to the Senate on the Bill;
- 17 February 2012 - UA submission on the draft DTC Regulations;
- 1 March 2012 - DECO sent letter to UA addressing concerns raised in teleconference (copy enclosed);
- 1 March 2012 – Michael Shoebridge telephone conversation with Dr Kinnear;
- 13 March 2012 – Angus Kirkwood telephone conversation with Dr Kinnear;
- 13 March 2012 – Michael Shoebridge telephone conversation Dr Kinnear;
- 29 March 2012 – consultation between Defence and Universities Australia;
- 13 April 2012 – Defence distributed Principles and Options document (version 1) to relevant Government agencies, industry, and research and academic sectors;
- 20 April 2012 – Defence distributed Principles and Options document (version 2) to relevant Government agencies, industry, and research and academic sectors;
- 24 April 2012 – consultation between Defence and Universities Australia;
- 27 April 2012 – Defence distributed Principles and Options document (version 4) to relevant Government agencies, industry, and research and academic sectors;
- 10 May 2012 – Universities Australia provided formal response to Principles and Options document distributed on 27 April 2012; and
- 04 - 17 May 2012 – comments received from various members of industry and research sectors.

Defence has also conducted consultations with the research sector and sought comment from the following individuals and organisations on the Principles and Options document:

- Australia's Chief Scientist;
- Australian Academy of Science;
- Academy of Technological Sciences and Engineering;
- Australian Radiation Protection and Nuclear Safety Agency;
- through Department of Industry, Innovation, Science, Research and Tertiary Education: Commonwealth Scientific and Industrial Research Organisation, Australian Research Council, Australian Nuclear Science and Technology Organisation and Australian Institute of Marine Science; and
- through Department of Health and Ageing: National Health and Medical Research Council and public health laboratories.

Noting that any changes that result from Government consideration of these consultations with the academic and research sectors will also affect the industry sector, Defence has also sought comment from the industry members who had provided comment to the Committee on the strengthened export control aspects of the Bill and from the members of the Defence Industry Advisory Panel that has been involved throughout the development of the Bill.

Defence is continuing the consultation process and expects to adjust or increase the options as part of that iterative process. Defence expects feedback from the university, research and industry sectors on further options by the end of June 2012.

Issues from evidence - Australian-US Trade Treaty

31. **Costs to join the Approved Community.** The cost to companies and tertiary institutions to become compliant with the requirements in the Bill will vary depending on existing security arrangements and business practices. The security principles for Australian Approved Community members will be the same as the principles currently employed for the protection of ITAR 'controlled unclassified' articles accessed by Australian companies under existing licence arrangements. For classified items, the security measures currently required will remain unchanged.

Compliance costs and impacts are key issues that have been raised by companies and peak bodies during Defence's consultation program concerning Treaty implementation. Approved Community members will be obliged to meet Treaty standards in terms of ensuring physical security, information technology protection, personnel security clearances and compliance. The way Australia is implementing the Treaty is to work with companies so that existing good business practices and processes will meet much of the compliance obligations.

To minimise overheads, the Government has decided not to charge applicants for the

costs involved in processing applications and Approved Community personnel security clearances. Only relevant areas of nominated facilities will undergo assessment and accreditation, however companies will be responsible for meeting the costs for implementation of any required security controls for those facilities. The entire company does not have to implement controls and those companies currently engaged in defence business will already have many of the required controls in place.

Any initial administrative overheads to become an Approved Community member will have long term effect and should override the continued administrative burden required to obtain individual licences.

Companies will have the option of continuing to operate within the existing Australian and US export control systems.

32. **Extension of Approved Community membership to subsidiaries and contract companies.** Membership of the Approved Community is a voluntary business decision for each individual company to make. Regardless of size, companies must apply separately for Approved Community membership. The assessment of suitability for membership is conducted for the applicant only and does not extend to subsidiaries or support companies. Each company must individually meet requisite conditions and agree to the obligations of membership. Application for membership is a once only activity which, if approved, will enable continuing licence-free trade in eligible goods, technology and services.

The Bill defines an Approved Community member as a body corporate that holds an approval under section 27, or a person who is employed or is engaged under a contract for services by a body corporate that holds an approval under section 27 and who satisfies the requirement prescribed by the Regulations. Employees or contractors who meet these requirements will be approved to access Treaty articles.

A body corporate with section 27 approval could nominate a person who is contracted to them to deliver services, for access to Treaty articles at their approved facilities. This would remove the need for the contractor to become an Approved Community member in their own right, yet still allow them to participate in Treaty activities.

33. **The International Traffic in Arms Regulations (ITAR).** The Committee queried how membership of the Approved Community would remain beneficial as ITAR undergoes reform and what the current and proposed amendments to the ITAR were.

33.1 **Treaty benefit over ITAR reforms.** The ITAR is being reformed according to a set of guiding principles based on four singularities:

- a single export control licensing agency,
- a single control list,
- a single enforcement coordination agency, and
- a single integrated IT system.

Australia and the US are committed to ensuring that joining the Approved Community and operating within the Treaty framework will continue to provide benefit to Community members and remain attractive over existing export control authorisations, including in the context of the reforms underway. We are working closely with our US colleagues in the Treaty Management Board to ensure that the Treaty incorporates the benefits of US export control reform and have received a commitment from the Department of State that the Treaty will always remain beneficial over the ITAR licence regime.

As outlined to Australian companies recently by a senior US Department of State official, the key benefits of the Treaty exemption over standard ITAR are:

- the Treaty is here now, whereas many of the ITAR reforms under consideration may take considerable time to come into effect;
- Approved Community members can use the Treaty exemption without a need to apply and wait for approval – this is important when it comes to bidding on contracts;
- Approved Community members will know the scope and all the conditions upfront, so they can better structure bids/contracts;
- Treaty conditions do not change so compliance procedures are predictable; and,
- membership is valid indefinitely.

The obvious continuing benefit is that applying to join the Approved Community is a once only process, and membership removes the need to continually obtain individual export licences for technology related to projects within the scope of the Treaty; thus saving time and money.

Membership to the Approved Community will also reduce the need for Australian companies to seek individual approvals, such as Technical Assistance Agreements. As indicated in the key points, membership will allow timely access to controlled information which will enable members to bid on eligible US contracts, therefore increasing business opportunities for Australian companies because it removes the need to wait for US access approval.

33.2 **ITAR Amendments**. Amendments to the ITAR are published annually on 1 April. Since 1 April 2011 there have been six amendments to the ITAR;

1. Final Rule on Additional Method of Electronic Payment of Registration Fees

2. Final Rule on Sudan

3. Final Rule on Filing, Retention, and Return of Export Licenses and Filing of Export Information

4. Update on the policy regarding Libya to reflect the United Nations Security Council arms embargoes

5. Final Rule on Dual Nationals and Third-Country Nationals Employed by End-Users

6. Final Rule on Electronic Payment of Registration Fees

33.3 **ITAR Proposed Rules.** The proposed rules to amend the ITAR are enclosed.

Issues from evidence - common to strengthened export control and Treaty provisions

34. **Greater role for the Defence Materiel Organisation (DMO).** One witness encouraged a greater role for the DMO in the development of the Bill.

The DMO has been actively consulted throughout the development of the Bill and is represented at the regular Defence Trade Cooperation Treaty (SES Band 2 level) Meetings, the DTCT Industry Advisory Panel (DIAP) Meetings and the US-Australian Treaty Management Board Meetings. Further, the DMO has chaired a roundtable meeting which brought DMO and Strategic Policy Division representatives together with CEOs of defence prime contractors, several of whom have representatives on the DIAP.

DMO is actively engaged in the procurement of Defence equipment. It is appropriate that the responsibility for developing and implementing the Bill lie with Strategic Policy Division as the current administrators for controls on the export of defence and dual-use goods. Input from the DMO has been valuable in guiding the development of both the legislation and implementing policies. DMO will use the Treaty provisions and will be an important part of the practical operation.

35. **Review of current DECO decisions.** The Committee made mention of the lack of appeal rights in relation to exports that have been prohibited.

Currently the Minister may only prohibit the supply or export of goods or services (that are not regulated by Customs legislation) under the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (the WMD Act) where the Minister has reason to believe or suspect that the goods or services would or might be used or assist in a WMD program. While the WMD Act does not include specific review mechanisms, the Minister's decision to issue a prohibition notice may be

reviewed under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act). Mr Bill Blick AM PSM is currently conducting a review into the WMD Act and is due to report to the Minister in the middle of this year. The Terms of Reference of review include consideration of whether a process to review decisions made under the WMD Act or regulations should be established.

While there is no scope under Customs legislation for the Minister to prohibit an export of tangible goods or technology listed on the DSGL, a decision to not issue a permit for an export may also be subject to review under the ADJR Act.

The Bill introduces merits review for a number of decisions made under the Bill to ensure a level of accountability and openness in decision making. These decisions will be subject to review of the facts, law and policy considerations of the original decision. There are a limited a number of decisions under the Bill which have specific factors that justify excluding them from merit review. These factors include decisions that are personally vested in the Minister (non-delegable decisions) due to their highly sensitive content and the fact that they involve issues of the highest consequence to Government.

It is important to note that rights of review under the ADJR Act for all decisions made under the Bill are retained.

Yours sincerely

Michael Shoebridge
First Assistant Secretary
Strategic Policy Division
Encl