Regulation Impact Statement

Defence Trade Controls Bill 2011

October 2011

Author's Drafting Note:
This Regulation Impact Statement (RIS) has been prepared to assist in understanding the impacts of the Bill, therefore the RIS structure and language have been consistent with the Bill. For the benefit of readers who prefer an overview in a more general style, an Executive Summary is provided.

Table of Contents

Executive Summary

Background

The Defence Trade Controls Bill 2011 serves two purposes:

- to strengthen Australia's defence export controls; and
- to implement the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation* (the Treaty).

It is important to understand that a Treaty Post Implementation Revise has been requested within 24 months since the commencement of its implementation. Therefore, a RIS is not required for the Treaty provisions in the Bill. This RIS focuses more on examining proposals to implement a strengthening the existing defence export controls.

The gaps in Australia's existing defence export controls can be categorised into four areas:

- intangible transfer of technology;
- provision of services relating to defence and strategic goods and technology;
- brokering of supply of these goods, technology and related services; and
- exportation of goods intended for a military end use that may prejudice Australia's security, defence or international relations.

These gaps have been recognised for some time. In fact draft legislation was developed in 2006, in which an adequate RIS was prepared. This RIS can therefore be considered an updated version of that RIS that takes into account additional feedback from industry consultations and development of the international standards.

This RIS includes a high level impact analysis of the Treaty for the benefit of readers who have an interest in the Treaty implementation. The Department of Defence will conduct a detailed analysis during the required Treaty Post-Implementation Review.

As the proposals examined in this RIS relate specifically to a Bill, the structure of the RIS has been designed around the same structure as this Bill.

Problem

The existing export control regime has a focus on exports of physical goods, however with the growth of technology, many defence export services can be provided over the internet or through brokers. These are not captured under the existing controls.

Taking an illustrative example, a compact disc that contains information of a military benefit (e.g. aircraft technical guide) is currently controlled and requires a permit or licence to be exported physically from Australia.

However, the Government has no power at the moment to regulate the same information if it was transferred via the internet. Also, the Government has no power

to regulate the brokers, who could arrange this same information being transferred to third parties.

Objective

The Government objective is to close known gaps in the current defence export control regimes which will align these regimes with international best practices.

The Government objective also includes providing a legislative basis to give effect to the Treaty.

Option

To expand the existing defence exports control regime to cover:

- intangible transfer of technology;
- provision of services relating to defence and strategic goods and technology;
- brokering of supply of these goods, technology and related services; and
- exportation of goods intended for a military end use that may prejudice Australia's security, defence or international relations.

The proposals to expand the existing defence exports control regime is embodied in the Defence Trade Controls Bill 2011 (the Bill).

Impacts

The proposed Bill will have impact on the Australian Government, defence industry and individuals who have dealings with the regulated defence and strategic goods, technology and related services.

The impact of the strengthening defence export controls will be similar to that of the existing defence export control regime which involves permit application, registration and reporting requirements.

The impact analysis in this RIS was built on the analysis of a previous RIS from 2006, taking into account feedback from industry consultations and development of the international standards. This analysis has also been enriched by the acquired knowledge and experience of the Defence Export Control Office, particularly the trends that have developed in the past five years.

The impact analysis indicates that strengthening defence export controls will add a regulatory burden to some Australian defence businesses that will include costs and delivery timeframe. This impact could be small depending on whether businesses have sound business processes and whether they are prepared for the procedures associated with the permit applications.

The cost impact of the Treaty will be offsetting benefits that will come from the implementation of the Treaty, including easier access to US defence articles, technology and tenders.

This RIS does not make a conclusion of the overall net-benefit to the Australian Community from the Treaty as that will be informed by the Post Implementation Review.

Conclusion

The RIS concludes that the proposal to strengthen Australia's export controls will impose some additional regulatory burden on the export of defence and strategic goods, technology and related services; however these impacts could be minimised by improving their business processes.

The RIS also concludes that the implementation of this legislation will bring Australia in line with international best practice and enable Australia to meet its international obligations to which Australia is a member.

Implementation

The Department of Defence (Defence) will administer the implementation of these measures, working closely with the Australian Customs and Border Protection Service, the Department of Foreign Affairs and Trade and the Australian Federal Police.

Defence is committed to provide ongoing support to businesses and individuals who will be required to comply with the proposed legislation and conduct extensive outreach activities to improve the awareness and understanding of the proposal legislation.

Review

The required Post Implementation Review will provide retrospective analysis on the merits of the Treaty. Defence will start to collect data once the proposed legislation takes effect.

Defence will also collect data through application forms for both tangible and intangible export and brokering permits to assess the impact of the strengthened export controls and its administrative impact on the Government.

Part 1 Context and Overview of the Regulation Impact Statement

This Regulation Impact Statement (RIS) has been prepared to assist the Australian Government (the Government) in assessing the impact of the Defence Trade Controls Bill 2011 (the Bill).

As the proposals examined in this RIS relate specifically to a Bill, the structure and language of the RIS have been designed around the same structure and language used in the Bill.

The Executive Summary provides a higher-level overview of the proposals using a more traditional RIS structure and headings.

The Bill and the associated Regulations have two aims:

a. to strengthen Australia's Defence export controls; and
b. to implement the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation* (the Treaty).

Strengthening Australia's Defence Export Controls

There are two key elements which will be regulated under the proposed measures to strengthen Australia's Defence export controls:

a. supply of technology and provision of services related to items listed in the Defence and Strategic Goods List (DSGL); and
b. brokering of goods, technology and services related to items listed in the DSGL.

Military End-Use

In addition, another control to be added to the suite of Australia's Defence Export controls, is the provision of a new provision to address the export of non-controlled goods for a military end-use (MEU). However, as this provision can more conveniently be contained in the existing powers over the physical export of goods that are contained in the *Customs Act 1901*, they are not included in this Bill but are dealt with under separate amending legislation.

The purpose of that separate legislation would be to provide the Minister for Defence with a 'catch-all' power to issue a notice to prohibit the export of goods that are not otherwise regulated to a particular place or person when the Minister considers the export could prejudice Australia's security, defence or international relations.

It is anticipated that this power would be used in exceptional circumstances and likely have negligible impact on industry and trade. Therefore it will not be a subject of a separate Regulation Impact Statement (RIS).

Consultation undertaken with industry as part of the development of the legislation to strengthen export controls, included discussion on the proposed MEU provisions and

industry indicated no concerns with the proposed military end-use arrangements.

The Treaty

The Bill creates provisions for the establishment and management of an Australian Community to meet the requirements of the Treaty and its Implementing Arrangement (the IA). For members of the Australian Community, the Bill places obligations on Australian Community members in relation to defence articles traded under the Treaty (Treaty articles) in exchange for the removal of the requirement for export control licences or permits to be obtained for each transaction.

The Treaty implementation is subject to a Post Implementation Review as requested by the Parliament's Joint Standing Committee on Treaties (JSCOT). The Review will assess the actual costs and other impacts of the Treaty elements of the Bill within 24 months of the Treaty entering into force.

Structure of the RIS

This document is organised into four parts:

Part 1 identifies issues, analyses different options that have been considered and recommends the proposed option. It covers why and how Australia currently maintains Defence export controls and why new controls are required through Government legislation.

Parts 2 and 3 focus on the two proposed controls:

- Part 2 - supply of technology and provision of services related to items listed in the DSGL, and
- Part 3 - brokering.

Part 4 addresses how Treaty implementation will operate, the specific impacts on Government, industry and the broad community regarding trade, competition and costs.

Why defence export controls?

The Government's 2009 Defence White Paper, *Defending Australia in the Pacific Century – Force 2030*, identified the proliferation of weapons of mass destruction (WMD)[1] as a major, long-term security challenge for Australia and the international community. The availability and trade of certain defence related goods presents challenges for Australia because of their use in supporting or developing WMD, which can then be used to threaten Australia or otherwise undermine regional and international security.

[1] A WMD program is defined as a 'plan or program for the development, production, acquisition or stockpiling of nuclear, biological or chemical weapons or missiles capable of delivering such weapons.' This includes goods and technologies developed specifically for defence purposes, or for civil applications but that can be adapted for use in arms programs (dual use items).

Other than WMD-related goods, the export of arms and related technology that are controlled for export may be contrary to a number of Australia's national interests and international obligations. These national interests may engage:

- Australia's international obligations,
- Human rights,
- Regional security,
- National security, or
- Foreign policy.

Australia is a member of all the major arms and dual use export control regimes[2] that include like-minded states from North America, Europe and Asia and collectively develop control lists of goods, the export of which should be subject to responsible controls, and promulgate best-practice guidelines on export policies.

International experience shows that no export control regime is foolproof. However, if more countries participate in an export control regime and consistently enforce stringent regulations on the export of defence and WMD-related goods, the risk that such goods, technology and related services will be exported irresponsibly will be lessened.

Australia has a clear role to play in developing, implementing and enforcing strict export controls. Australia's current controls for defence and strategic goods were developed in the early-mid 1990s and the legislation has not been altered since then (the most significant legislative change has been the recent centralisation of controls on sanctioned countries and goods in the Department of Foreign Affairs and Trade). Since the mid-1990s, Australia has continued to adopt all changes to lists of controlled goods, ensuring that Australia controls the physical export of same goods as other members of the export control regimes.

But Australia has not adopted additional controls over other types of transaction that have been devised by like-minded countries in the Wassenaar Arrangement, notably arms brokering (adopted in 2003) and intangible transfers of technology (adopted in 2006). Australia supported the development of these controls when they were debated in international forums. It is now time to implement them in our own domestic legislation.

Australia's export control system

Australia's national export control system meets our national interests and upholds our international obligations under treaties and international regimes. The purpose of the controls is not to impede trade but to provide sufficient scrutiny to ensure that Australia exports arms and strategic goods responsibly.

The current export control regime is enabled through government legislation[3] that includes:

---

[2] Outlined at Annex A.
[3] This is further described at Annex B.

a. the *Customs Act 1901*, in which Paragraph 112(2A)(aa) provides for the publication of the Defence and Strategic Goods List (DSGL) and relates to regulation 13E of the Customs (Prohibited Exports) Regulations 1958 which makes it prohibited to export items on the DSGL without having permission from the Minister for Defence to do so; and
b. the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (WMD Act) which provides a 'catch-all' control on the supply or export of non-regulated goods and supply of services that will or may be used in a WMD program.

The Department of Defence, the Australian Customs and Border Protection Service (Customs and Border Protection), the Department of Foreign Affairs and Trade (DFAT) and the Australian Federal Police (AFP) are the key players in the enforcement of Australia's export control systems.

- the Department of Defence issues permits and licences for the export of defence and dual-use goods which are regulated goods; facilitates third country transfers of foreign sourced goods and technologies, administers the WMD Act and raise awareness of export control through industry Outreach program;
- Customs and Border Protection is responsible for the security and integrity of Australia's borders which includes facilitating of legitimate trade while enforcing Australia's export laws;
- DFAT is responsible for the application of United Nations-imposed and autonomous sanctions, provides policy advice on individual export proposals, and leads representation at international fora on export controls; and
- The AFP is engaged in investigation and prosecution of export violations.

Australia's system of export controls is essentially similar to systems in like-minded countries. Although export controls are an exercise of national sovereignty, in practice there is a large degree of commonality in export control systems in countries comparable to Australia due to use of the same control lists and standards. Commonality is desirable because of the ability of states and entities in a globalised trading world to acquire defence and strategic technology by 'shopping around.'

Issues – why changes are required

Defence has identified the following gaps in Australia's export controls on defence and strategic goods:

a. intangible transfer of technology listed in the DSGL;
b. provision of services related to goods and technology listed in the DSGL;
c. brokers arranging supply of DSGL goods, technology and services to States or criminal organisations and armed groups, including those believed to be engaged in terrorism, through an Australian resident or entity; and
d. export of non-regulated goods that may contribute to a military end-use that may prejudice Australia's security, defence or international relations.

These gaps were recognised some years ago and preparations were made to close them with amending legislation – the enhanced export controls described in Parts 2 and 3. Eliminating these gaps will align Australia with the accepted best practice of current export control regimes to which Australia is a member. It will also prepare Australia to give effect to the United Nations Arms Trade Treaty, which it is anticipated will be negotiated in 2012. It is proposed that the Arms Trade Treaty will establish the highest possible common international standards for the export of conventional arms and require State parties to control, inter alia, brokering actives and technology transfer.

The US has explicitly recognised the intention of Australia to close the gaps in our current export controls in order to ensure a safe haven for US defence technology that might be exported to Australia under the liberalised terms of the Treaty. The Implementing Legislation passed by the US Congress on 28 October 2010 to provide the basis for the US to ratify the Treaty with Australia requires the US President to certify, before the Treaty can come into effect, that Australia has 'enacted legislation to strengthen generally its controls over defence and dual-use goods, including controls over intangible transfers of controlled technology and brokering of controlled goods, technology, and services'.

The Bill also includes provisions – the Treaty implementing measures described in Part 4 - that will enable Australia to implement the Treaty and its subsidiary arrangements. Australia has a national interest in maintaining favourable terms of access to defence technology of US-origin. Because of the advanced nature of much US defence technology, the quantity of US defence technology already in the inventory of the Australian Defence Force, and the benefits of interoperability with the US as our defence ally, this access is a critical enabler of our long-term defence capability plans and national security in the future.

The Treaty implementing provisions provide the basis to establish an Approved Community of government and private sector entities in Australia that will be qualified to participate in license-free trade in defence technology under the Treaty. The Bill includes provisions for the Government to prescribe conditions for entry into the Approved Community and to establish an assurance framework to enable it to determine whether Approved community members have complied with Treaty obligations. The Bill, when passed, is one of the pre-conditions for ratification of the Treaty and its entry into effect in Australia.

Principles applicable to assessment of proposed new controls

The same set of policy criteria will be used to assess applications under the proposed new powers as are currently applied to assess applications under the existing export control powers. The Minister (or delegate) will assess cases against the following broad criteria, which have been agreed by ministers:

a. international obligations – including United Nations Security Council (UNSC) sanctions;
b. human rights;
c. regional security;
d. national security; and

e. foreign policy[4].

Administrative arrangements, delegation and review of decisions

Current administrative arrangements

The export of goods and technologies designed or adapted for use by armed forces, or that can be used in the production of defence related goods and services are subject to control under regulation 13E of Customs (Prohibited Export) Regulations 1958 (the Customs Regulations). These items are listed in the DSGL, which is Australia's control list for defence and strategic goods. The DSGL is based on the control lists of the four principal export control regimes, and is a legislative instrument approved by the Minister for Defence, updated regularly, and published on the DECO website. Goods listed on the DSGL require a permission to export from Australia. Defence is responsible for issuing export permits and licences for goods listed on the DSGL.

Within Defence, these roles are carried out by officers in the Defence Export Control Office (DECO). Under the current instrument of delegation, the Minister has delegated his powers to grant licences or permissions under the Customs Regulations to Assistant Directors and Directors in DECO. The Minister has not delegated the power to refuse a licence or permission under the Customs Regulations.

Defence is also responsible for administering the WMD Act which covers the export of goods, technology and services not otherwise regulated. Under the current instrument of delegation, the Minister has delegated his power to grant permits and respond to requests for information under the WMD Act to Directors in DECO. The Minister is unable to delegate his power to prohibit the export of goods or services that might assist a WMD program.

Delegations under the Bill

Under the Bill, the Minister (or Secretary for Part 4-6) will have the power to delegate certain powers to certain officers in Defence. The Minister or Secretary may issue directions to a delegate who will be limited by these directions when exercising the delegated powers and functions.

It is proposed that officers in DECO will act as the Minister's or Secretary's delegates in the implementation of the proposed enhanced export controls and the Treaty implementation provisions, as they are under existing administrative arrangements for current export controls.

[4] Australia's export control policies reflect the Government's commitment to ensure the export of defence and dual-use goods is consistent with Australia's national interests and international obligations and commitments. Our export control system is the means by which this consistency is ensured. Australia's export control policies and procedures are reviewed regularly to take account of changes in strategic circumstances and priorities.

Throughout this Statement, where the power cannot be delegated, this Statement will refer to 'the Minister' or 'the Secretary'. Where the power can be delegated, this Statement will refer to 'the Minister (or delegate)' or 'the Secretary (or delegate)'.

Review of decisions

Under the Bill, the Government is proposing to establish a formal review mechanism for most of the decisions made under the Bill. For these reviewable decisions, industry will be able to first seek a Ministerial review of a decision made by the Minister's delegate and, if unsatisfied, seek formal review by the Administrative Appeals Tribunal (AAT).

Options considered

Because of the national interests and international obligations outlined above, doing nothing to fill the gaps in Australia's export control system and failure to take advantage of the Defence Trade Cooperation Treaty would not be in Australia's interests.

Allowing industry to self-regulate, or self-administer is not a recommended option, given the potentially severe consequences of a breach of responsible export standards for Australia's defence, security and international relations. Such options would also be inconsistent with the approach taken by Australia's like-minded counterparts.

Current Australian export controls and international best practice have both demonstrated that legislation is the most appropriate and effective way of implementing significant aspects of national security, defence and foreign policies.

To avoid duplication, the do-nothing or self-regulating options are not discussed further in this Statement.

Impacts on industry and Government

The new export controls are expected to impact the defence industry (approximately 3000 businesses) and dual-use goods manufacturing base. These sectors represent a small segment of the whole business community (as of August 2010, there were nearly 1.8 million companies registered in Australia).[5]

Existing export control statistics indicates that an effective export control system prohibits very few exports. In the four financial years from 2007/08-2010/11, DECO processed over 9312 applications from businesses to obtain permission to export DSGL listed items[6]. The Minister for Defence has denied only 18 during this period.[7]

---

[5] The actual number is 1 778 933. This data is taken from Australian Securities and Investment Commission statistics, accessed on 5 November 2010, at http://www.asic.gov.au/asic/asic.nsf/byheadline/2010-company-registration-statistics?openDocument.

[6] The words, 'permission' and 'approval', used in this Statement refer to export 'licences' and 'permits' for defence and dual-use goods.

[7] DECO also assesses 'in principle' applications for permission to export, which are submitted by potential exporters to gain a view as to whether an actual application is likely to be supported. This

This means that less than 0.2 per cent of applications under Regulation 13E of the Customs Regulations have been denied since the beginning of the 2007/08 financial year[8]. Defence has no reason to expect that the percentage of denied applications will change significantly following the implementation of the new controls outlined in this Statement.

Defence recognises that it is difficult to quantify the direct impact on industry of enforcing compliance, as the costs will vary depending on many factors such as the size of the business, the extent of their existing exports of controlled goods, services or technology and/or the maturity of their business practices, including records management.

The Australian Government will need to meet costs that arise from the implementation of the compliance and enforcement regime for the new powers, including training and education provided free to industry by DECO. For cases where severe breaches of the export control laws occur, Defence will engage the AFP who will be authorised to investigate and enforce the controls. In assessing applications for the proposed controls, Defence will consult other Government agencies as necessary, including with the Standing Interdepartmental Committee on Defence Exports.

Further analysis of the impact on industry and Government is provided in the following sections.

Industry consultation

Defence has undertaken several phases of consultation:

- Awareness - a treaty awareness 'road show' in 2008,
- Phase 1 – legislation consultation in 2010, and
- Phase 2 - legislation consultation in 2011.

Awareness Road Show

Defence conducted an initial Treaty awareness 'road show' in 2008, after the signing of the Implementing Arrangement. Public meetings were held in Canberra, Melbourne, Sydney, Adelaide, Brisbane and Perth, with between 40 and 65 persons attending each meeting. At the time, companies generally supported the aims of the Treaty, but were uncertain and, in a number of instances, sceptical about the potential

---

enables companies to avoid wasting time and money on pursuing export opportunities that are unlikely to be approved. DECO statistics indicate that in the 2010-11 financial year, out of xx in-principle applications, only five have not been supported.

[8] DECO statistics indicate that only nine prohibition notices have been issued under the *WMD Act* since it was passed by Parliament in 1995, though six of these notices have been issued since the beginning of 2009. Five of the recent Notices were to prohibit the supply and/or export of goods and in two cases also prohibited the provision of services, specifically training and technical assistance. The sixth notice was specifically for the provision of services. A further thirteen applications have been withdrawn by the applicant once they were advised of concerns that the goods or services might contribute to a WMD program.

Treaty benefits. Most were concerned about a range of practical Treaty implementation issues, and principally about the feasibility and cost of security measures driven by the classifying of all US Defence Articles under the Treaty at the RESTRICTED level.

Legislation Consultation

Consultation on the proposed changes began in earnest in late 2010. Defence appointed a well-known former Defence industry executive, Mr Ken Peacock AM, to support the consultation process. Mr Peacock chairs a Defence Industry Advisory Panel consisting of a small group of representatives drawn from defence primes and small-to-medium enterprises that has met on a number of occasions to consider the proposed changes. Mr Peacock has also chaired public information sessions that have been held in capitals and regional centres. The purpose of this consultation was to assist Defence to understand the views of Defence industry and was able to reflect these views and comments raised through the consultation process, in the draft legislation and their administrative arrangements. The consultations were held in two main phases.

Phase 1 - 2010

Phase 1 occurred primarily from 1–9 December 2010. It was preceded by a media advertising campaign to inform industry of the forthcoming consultation process.

To publicise the industry consultation meetings, Defence distributed a letter (via e-mail) to businesses who had made recent export applications to DECO, and to internal Defence agencies who will be affected by the proposed changes, alerting them to the consultation process and inviting them to attend the consultation meetings. Defence also engaged industry representative bodies, such as the Australian Industry Group (AIG) and the Australian Industry and Defence Network, to assist with the distribution of messages advising industry of the proposed consultations. Defence also placed advertisements in the relevant newspapers of the cities being visited during the consultation process. Consultation meetings took place in Perth, Canberra, Sydney, Newcastle, Melbourne, Brisbane, Adelaide, Darwin, Townsville and Hobart from 1–9 December 2010.

In order to consult with industry representatives in as many cities as possible, Defence established two consultation teams. The first team, of which Mr Peacock was a member, attended the meetings in Canberra, Sydney, Melbourne, Adelaide and Perth. These were the meetings with the largest anticipated attendances. The second consultation team attended the meetings in Newcastle, Darwin, Townsville, Brisbane and Hobart. More than 350 people attended the consultation sessions.

Each consultation session began with a presentation from Defence that outlined each of the proposed new controls and provided an update on the implementation of the Treaty. Following this presentation, participants had an opportunity to engage in a question-and-answer session on relevant issues with the Defence officials.

Further consultation with industry and other affected stakeholders occurred in early 2011:

a. DECO representatives addressed an AIG forum in Canberra in February 2011;
b. DECO representatives attended a South Australia – Defence Teaming Centre forum in Adelaide on 11 March 2011; and
c. the Defence Industry Advisory Panel (DIAP) met for the first time at Parliament House in Canberra on 19 May 2011 to gauge industry views on the draft legislation. The DIAP has met periodically since May to provide feedback to Defence on the development of the draft legislation.

Defence also provided DECO's contact details to industry and other Treaty stakeholders who wanted further advice on specific aspects of the Treaty implementation and the Bill.

Consultation with the academic and research communities on Intangible Transfer of Technology occurred through outreach to Universities Australia (UA), the peak Australian universities representative body. Defence sent a letter to UA in May 2011 and again invited them to the industry consultation session on 5 August 2011. Defence will continue to consult UA for their insights on the practical impacts of the upcoming changes to Australian export controls on the university sector. The letter included DECO contact details for further information. Additional outreach activities to academia will be undertaken if required.

Phase Two - 2011

Phase Two commenced with the Defence and Industry Conference in Adelaide from 28 – 30 June where Defence provided information on the progress of the draft legislation.

The Minister for Defence released the draft legislation for industry consultation on 15 July 2011. The outreach strategy for this industry consultation included:

a. DECO website containing the exposure drafts and invited email comment to the DECO inbox;
b. consultative workshops from 5 – 12 August 2011 in Canberra, Perth, Adelaide, Melbourne, Brisbane and Sydney;
c. email notification to peak industry groups – the Australian Industry Group, the Defence Industry Advisory Panel (including Mr Ken Peacock), and Australian Industry & Defence Network;
d. email notification to approximately 380 industry members and government representatives who attended the Treaty Road Show event in December 2010 or registered their interest with DECO;
e. distribution of a flyer notifying the exposure to all industry members who are provided with export permits or licences during the exposure period;
f. Defence Materiel Organisation's (DMO) E-portal banner redirects industry to the DECO website;
g. DMO distribution via the Business Access Office network; and

h. DECO 1800 number with a Treaty hotline option for industry to seek further information.

These consultative workshops were well attended by 145 industry and 57 Defence representatives.

Industry feedback

The Bill was open to public comment from 15 July to 26 August 2011. At the end of the consultation period, two comments had been received by industry by email. These, and the industry comments from the consultative workshops, indicated four main themes:

- the Bill's provisions raised no major concerns although Defence needs to revisit the Bill's compliance measures;
- more detail is required in the explanatory material to provide further depth and illustrative scenarios;
- industry is interested in the implementation details of Treaty, feeling that the Bill clearly conveys 'what' the Bill will achieve and are keen to see 'how' this will be achieved; and
- Defence will need to provide a level of support and outreach to small to medium enterprises that want to become Approved Community Members.

Defence has further refined the Bill in the light of the consultations and comment received from industry and Defence personnel.

Part 2 Dealings in Items in the Defence and Strategic Goods List

In the Bill, Part 2 covers dealings in items listed in the DSGL and encapsulates:

a. supplying technology relating to goods where that technology is listed in the DSGL, and
b. providing services related DSGL goods or DSGL technology.

The controls relating to supplying technology and providing services are expected to have similar impact on the broader community and will be implemented and reviewed in one administrative process. Accordingly, their impact on the broader community and implementation and review process are discussed jointly in this Part.

Problem

The Bill captures all tangible and intangible transfers of technology and services. The term 'intangible transfers' refers the flow of knowledge and information in intangible ways such as email, web-based network, fax and/or voice[9]. It includes software, information and services relating to design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of items listed in the DSGL.

Technology listed in the DSGL is currently controlled by the *Customs Act 1901* if the technology is exported in tangible form (for example, on paper or a computer disk), but identical information is not controlled when transferred by intangible means. The only exception is if the technology is related to a WMD program[10] or is covered by UNSC sanctions, implemented domestically under the *Charter of the United Nations Act 1945* (the Sanctions Act).

In the past, it was relatively easy to track and examine technology transfers in the form of goods, services or written information as they were exported by passing through a Customs barrier. Today, a significant and growing proportion of communications occurs electronically, therefore providing an intangible way to transfer controlled DSGL technology. This has raised challenges in monitoring and controlling transfers of controlled technology and information across national borders. For example, if the physical export of a controlled technology is denied by Defence, the exporter may currently circumvent export control laws by intangibly transferring the technology via email, fax, phone or voice, without committing an offence.[11]

---

[9] Controlled technology may be transferred via face-to-face conversations. With the ease of international travel, it is very easy for controlled technology to be transferred via conferences, discussion or other oral communications.

[10] In which case, it will be regulated under the *WMD Act 1995*, the *Nuclear Non-Proliferation (Safeguards) Act 1987* or the *Chemical Weapons (Prohibition) Act 1994*, all of which cover intangible transfer of technology (ITT) related to WMD.

[11] The Wassenaar Arrangement Best Practice Guide for Implementing Intangible Technology (adopted in 2006) noted that exercising controls over intangible transfers of dual-use and conventional weapons technology is recognised by Participating States as 'critical to the credibility and effectiveness' of domestic export control regimes.

It is concerning that intangible transfers may occur in situations where the recipient may employ the technology or services for a purpose which conflicts with Australia's national interest. Intangible transfers of technology (ITT) and provision of services have as much potential as the export of tangible goods to contribute to the development and proliferation of weapons by countries, groups and individuals of concern. Therefore, it is important to control intangible transfers that could assist the development, production or use of controlled items as an element of an effective export control system. [12]

Intangible transfers of technology might include the intangible transfer of research results, papers, seminars, conferences, and instructions written or recorded, working knowledge, design drawings, models, operational manuals, skills training, potentially including the content of some post-graduate courses and catalogues.[13] The Bill provides the ability for the Minister to specify information for the purposes of defining technology and it is intended that information in the public domain and basic scientific research will be specified as not being included in the technology definition.

Proposed control option

To maintain Australia's national security and international obligations and meet the requirements of the Treaty and the IA, Defence considers the only viable option is to regulate transfers of technology and services in the same manner as the existing controls over the physical transfers of information and supply of DSGL items.

This will eliminate the shortfall between Australia's control mechanisms and the international best practice which is the key to the efficacy of international arms control measures. This option will avoid any confusion in industry's interpretation of formal Government controls over technology transfers and service provision as prescribed above.

This control option proposes a process to regulate:

[12] As ITT is not controlled, DECO has only recently begun collecting data on the number of requests it has received for export approval where ITT is involved. Since December 2009, DECO has recorded 21 different cases (involving 19 separate companies) where ITT is involved.

[13] Defence services is defined in the Bill and means, in relation to goods or in relation to technology relating to goods, means the giving of assistance (including training) in relation to the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing or use of goods or technology. Provision of defence services refers to transactions in relation to controlled defence goods that involve actions above and beyond the simple transfer of technology, whether that is in tangible or intangible form, but less than the actual export of a controlled good.

a. supply of technology relating to goods, where the technology is listed in the DSGL (including when the supply is via intangible means) if the supply is from an Australian person to a foreign person regardless of their geographical location, or the supply is from a foreign person located in Australia to a foreign person located outside Australia; and
b. provision of services in relation to DSGL goods and technology (including when supply is via intangible means) if the provision occurs at a place outside Australia from an Australian person to a foreign person or the provision occurs in Australia to a foreign person.

The Bill allows the Minister (or delegate) to permit the supply of DSGL technology or the provision of services related to DSGL items where he or she is satisfied the activity is not contrary to the security, defence or international relations of Australia.

If satisfied that the activity, or continuation of the activity, is contrary to the security, defence and international relations of Australia, the Minister (or delegate) will have the power to refuse to grant a permit or the Minister may revoke a permit. The Minister must provide the applicant or a permit holder, with a notice outlining the reasons for the refusal or revocation. Where the reasons for the decision are not disclosed, the notice must state that the non-disclosure is because disclosure would prejudice the security, defence or international relations of Australia.

Administration process

Similar to the existing permit process for physical export of DSGL items, the Minister (or delegate) will assess an application based on the nature of the DSGL-related technology and/or services, risks associated with the technology supply or service provision, country that it would be transferred to and/or end-user of that technology and/or services.

In keeping with current standards, Defence will aim to consider standard applications within 15 working days and more sensitive applications within 35 working days.

The Minister (or delegate) may determine overall level of risk and whether an approval would be for one or more transfers. Based on this risk assessment, Defence may also implement export approvals that would be valid for a period of time, *i.e.* longer for lower risk transfers and shorter for higher risk transfers, to minimise the burden on industry and the academic and research community in applying for permits.

Where a supply of technology or provision of services occurs under an export approval, the supplier or provider will be required to make a record of that activity within seven days and retain that record for at least five years. Failure to comply with these provisions will be an offence.

Exemptions

The purpose of these controls is to prevent the misuse of specialised and sensitive technology or services without imposing unnecessary restriction on general marketing

information or scientific research publications and exchange. Consequently, the Government will exempt a range of technology and services from the proposed controls. For instance, the proposed control over intangible technology transfers will not apply to information that is 'in the public domain'[14], 'basic scientific research'[15] [16], or information required for patent applications. These exemptions should significantly reduce the risk of unintended impact of these controls on the academic, research and business communities.

The Bill provides the Minister the power to make a legislative instrument, for the purpose of the definition of technology, to specify information which will prescribe those exemptions.

Impact analysis

Who will be affected by the proposed changes?

The DSGL includes defence, military and dual-use goods and technologies, which are goods or technologies that are designed or can be adapted for military use or goods that are inherently lethal.[17] However, it also covers commercial items with a legitimate civil application that can also be adapted for military use or could be used in WMD programs (known as 'dual-use' goods). The controls over dual-use goods cover items in the following categories: nuclear materials, facilities and equipment, materials, chemicals, micro-organisms and toxins, materials processing, electronics, computers, marine, sensors and lasers, navigation and avionics, telecommunications and information security, and aerospace and propulsion.

On that basis, any Australian business and individuals will be affected if they intangibly supply technology listed on the DSGL or provide services related to the DSGL goods.[18] However, many such businesses dealing in this technology would be unfamiliar with the requirement to apply for a permission to export such goods physically. Costs incurred may include:

a. direct costs of time and resources required to submit an application for a permit;
b. if any conditions are attached to the granting permission, there may also be

[14] 'In the public domain' refers to information, technology or software that has been made available without restrictions upon its further dissemination (though copyright restrictions do not remove information, technology or software from being in the public domain for the purposes of these regulations). If information, technology or software is transferred to the public domain in order to undermine this legislation, this exception will not apply...

[15] 'Basic scientific research' refers to experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective.

[16] Defence anticipates that the specific exemptions will be promulgated by the Minister for Defence through the publication of a specific legislative instrument once the *DTC Bill* is passed.

[17] Defence technology includes, software or information relating to the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of the goods (including information in the form of blueprints, drawings, photographs, plans, instructions, specifications, algorithms or documentation).

[18] Noting, of course, such companies' goods would already be controlled on the export of tangible items listed on the DSGL.

some costs in complying with those conditions; and

c. legal costs if businesses and individuals challenge a denial of an application or conditions imposed as part of the granting of a permit.

As the transfers in these cases take place in an intangible form, there are no costs associated with transport or storage which result from denials of export applications or delays in the granting of such an approval.

There may be some financial and employment related implications should businesses or individuals be discouraged from participating in business that involves the prescribed activities. Defence is unable to quantify the extent of this impact; however; considering the exemption outlined at above, the five policy criteria for application assessment stated in Part 1 and extensive awareness and education campaigns, Defence considers that the controls are unlikely to dissuade businesses, institutions or individuals from participating in the industry.

Defence also estimates that for businesses which currently apply for permits to tangibly transfer technology, the additional cost for intangible transfer permits will be negligible and these businesses should not be deterred from staying in the defence industry sector. Defence will minimise application costs for industry by implementing procedures to allow industry to apply for tangible and intangible technology permits as part of the same process.

For businesses that provide services related to DSGL items, Defence considers that a significant proportion of these businesses will currently be applying for permits to export the DSGL goods or technologies for which they will be providing services. As for ITT permits, Defence will minimise application costs for industry by implementing procedures to allow industry to apply for service provision permits as a part of the same permit application process to export the DSGL goods and technology. Defence does not believe that the additional costs for service provision permits will deter business from remaining in or entering the defence industry sector.

Academic institutions

The proposed control will apply to any university, tertiary, research institution, or consulting services that engages with an overseas business or counterpart relating to items in the DSGL; for example, through research partnerships, consulting or providing training and know-how, or transferring related information to a foreign person.

There is no statistical data available to Defence in terms of the number of such research programs that relate to items on the DSGL nor the number of foreign researchers or students that are participating in these programs. However, this provision should have minimal impact on university courses or research programs as these controls will not apply to broad discussions of research projects or experiments that do not discuss or transfer technology listed in the DSGL.

Defence understands that these controls may affect research and tertiary institutions and their faculties that focus on science, engineering and computing, particularly due

to the nature of some research partnerships undertaken with other organisations and the provision of specified services through consultancies, contracts and training. With the exemptions outlined in paragraph 2.25, Defence anticipates that these controls will apply only to very specialised and high-end research conducted by these entities.

Many Australian universities and tertiary institutions are expanding rapidly and becoming large entities with overseas campuses. Consequently, the likelihood of countries of proliferation concern and terrorist organisations attempting to access Australian expertise is increasing. Not only is the intangible transfer of WMD and DSGL technology through research, training and conferences a concern, but many universities and tertiary institutions are conducting cutting-edge research, which could potentially be exploited for use in conventional weapons and WMD programs.

The new controls are likely to apply to situations where an Australian person intangibly transfers technology to a non-Australian who does not possess an Australian citizenship or permanent residency status. The new controls will also apply to situations where a non-Australian person located in Australia intangibly transfers technology to another non-Australian person outside Australia.

Depending on the subject matter and course content, the proposed control may affect some post-graduate courses taught at overseas campuses of Australian universities. In these cases, should some of the course content be controlled or highly sensitive (such as nuclear-related technology), the university may be required to seek a permit to transfer that information to each student in the course.[19]

As this could potentially impose a significant burden on Australian tertiary institutions, the Minister (or delegate) may also consider issuing permit for entire units of study in appropriate circumstances.

To obtain a permit for supplying technology or providing services related to DSGL items, a tertiary or research institution will need to follow the same process as that described for industry earlier in this section and therefore are likely to face similar level of cost as the business sector.

Costs may also include those for record-keeping required to comply with audit and compliance requirements under the legislation, staff training, and/or costs associated with determining whether a permit is required under the legislation.

To minimise the extent of the impact, Defence will make training available to institutions who consider that they will be affected.

Finally, should a permit be denied or limit the course content, the institution will lose potential business gains it anticipated from that activity and investment it had incurred in business negotiation and promotion of that activity. These costs will be minimised if institutions engage with Defence in the planning stages of their business processes to avoid promoting potentially untenable services overseas.

[19] It should be noted that the *WMD Act* already controls ITT related or linked to WMD or their means of delivery.

Costs of a permit application

Defence estimates that a business or institution will invest no more than two hours to complete an application form (to supply technology or provide a service), and up to two additional hours to gather the required information. In processing permit applications, Defence will seek to apply current standards; that is, 15 working days for normal applications and 35 working days for more sensitive applications. Potential exporters will also be able to apply for approval to export tangible goods and intangible items (technology and services) at the same time which will reduce costs and resources.

The UK Experience[20]

Recent UK experiences illustrate the potential impacts of implementing controls on intangible technology transfer. The UK introduced similar controls to those proposed above in 2004. A UK post-implementation review of these controls, conducted in 2007, found that the total number of individual license applications over the three-year post implementation period was 1684, which was lower than pre-implementation estimates by approximately 2400-2700 applications for the same period. The UK also found that only a very small number of these applications involved transferring technology electronically without an associated physical transfer of goods or technology, which would have required a licence under the previous controls.

The UK review discovered that the introduction of this control had the effect of increasing awareness of the issue of the export of technology generally. Transfers of technology by physical means were controlled before 2004, but following the extension to electronic transfers, industry approached UK regulators with more detailed questions about the nature and definition of technology. This increased awareness of the issue was a flow-on effect of the introduction of new controls.

At the time of publishing the review (June 2007), the UK Government had refused 31 of 1684 licence applications under the new controls on electronic transfers.[21] The UK also considers that it is possible – though they are not able to establish this in retrospect – that this extension of the controls prevented exporters who had been refused licences for transfers by traditional means from circumventing that decision by transferring the same technology electronically. On these bases, the UK therefore concluded that these controls had assisted in preventing undesirable transfers, and hence had enhanced the effectiveness of controls on the export of technology for military goods.

In the period leading up to the introduction of these controls, the academic community in the UK had expressed serious concerns about the potential impact of the new controls on the tertiary sector. The UK Government's view is that the relatively small practical impact of these controls suggests that these concerns have not been borne out.

[20] This discussion of the recent UK experiences is based on a review of similar controls introduced by the UK in 2004. For further details, see UK Department of Trade and Industry, *2007 Review of Export Control Legislation – A Consultative Document*, June 2007, especially pp. 11–14.

[21] This represents a refusal rate of less than two per cent of applications over a three year period.

Government

Defence expects that the overall cost of implementing the control will be able to be absorbed. The supply of technology is already controlled in tangible form through current export controls and it is anticipated that intangible technology permits will not significantly increase the number of technology permits that will need to be processed. Some new costs will be incurred as a result of the new requirement to process applications for permits to provide services related to DSGL items, but as this too will be part of the same application process for the tangible goods, the number of applications should not significantly increase.

In order to avoid unnecessary and time-consuming duplication of applications and approvals, Defence plans to integrate the existing export licensing processes with the new legislative requirements into a streamlined application and approval process. This is expected to minimise any increase in administrative processing costs.

The AFP will face costs involved in conducting investigations and training officers to enforce the legislation, including the cost of developing training materials and training manuals.

Trade impact assessment

It is anticipated that these controls will have a minimal impact on the level of Australia's trade.

One possible effect would be if a foreign buyer did not receive technology or services as a result of being denied an Australian permit and consequently sought an alternative non-Australian source for that technology or services, resulting in a lost trade opportunity for Australia. But such considerations will not necessarily outweigh Australia's own national interests or international obligations to deny a clearly illicit export. This impact should be minimised when the alternative source country has a similar export control system to Australia. .

Another potential impact could be experienced by Australia's education export sector, where the ITT regulation may be applicable to the content of some courses taught at overseas campuses of Australian universities. In most circumstances, the minimal cost of the application process should not deter universities from undertaking overseas ventures.

Competition assessment

The controls are on the supply, transfer or provision of technology, information or services, regardless of the potential provider. It will not affect domestic competition as the proposed legislation will impact all Australian businesses equally and not affect the competitiveness of any affected Australian businesses, individual or institution.

Conclusion

Australian businesses and individuals that supply technology listed on the DSGL or provide services related to the DSGL goods and technology will be impacted by the proposal. However, this impact can be minimised to mostly costs relate to registration and reporting requirements, which while adding to regulatory burden will be a relatively low order costs for these businesses.

Overall the Australian community will benefit from the introduction of this regulation, as it will serve Australia's national interests and comply with Australia's international obligations. The proposed changes aim to strengthen the existing export control regime. This will provide the broad community with confidence that the Government is enforcing the laws it has enacted and that Australia is complying with its international obligations.

As the controls are focused on ensuring certain exports comply with Australia's security, defence and international relations, the new controls are not expected to have any impact on domestic commodity markets.

The overall community impact is expected to be low and is unlikely to significantly affect any particular region of Australia.

Implementation and review

Defence will be responsible for assessing permit applications and monitoring the implementation of these controls. In consultation with affected parties, Defence will conduct periodic reviews of the new regulations to consider their impact on industry, whether they are working as intended, and whether any changes can be made to lighten the regulatory burden on industry or to make the controls more effective.

As is currently the case for the consideration of applications to export controlled goods to sensitive destinations, Defence will refer sensitive applications to transfer or supply controlled technology, information or services to the Standing Interdepartmental Committee on Defence Exports to ensure broad inter-agency consultation on applications.

In addition, Defence will also be responsible for undertaking outreach and education to inform those affected by the regulation of its implications for their business or institution.

Part 3 Brokering of Controlled Goods, Technology and Services

Problem

Brokers of defence goods, technology and services arrange transfers of the DSGL listed items or provisions of services related to those items. They do not necessarily acquire those items, nor do the arranged transfers need to pass through the country from which a broker operates. Brokers who have access to, or are already in possession of, defence goods, technology or related services in foreign countries may arrange for their transfer to another foreign country.

Brokers have occasionally been involved in the unauthorised or illegal delivery of military equipment to embargoed countries, criminal organisations and armed groups, including those believed to be engaged in terrorism. In a significant number of situations, arms are brokered and transported where laws and regulations are ill-defined or not enforced.

Establishing a clear legal framework for lawful arms brokering activities is generally accepted as part of effective export control systems. This is because it is anomalous to not regulate transactions performed by nationals or entities within one's jurisdiction concerning conventional arms and dual-use goods that would be controlled if performed from one's national territory.

The Wassenaar Arrangement adopted a best practice guide[22] in 2003 on effective legislation for arms brokering. Australia supported this statement but has not implemented the control under its own domestic legislation, (although since 1995 it has had a control over brokering activities for WMD and missile delivery systems).[23] This means that an Australian citizen or an Australia-based person can arrange the supply of arms and other military-related items, services, equipment and technology that are DSGL listed items to a country or entity of concern that could be contrary to Australia's national interests or international obligations.[24]

There is no definitive data to confirm the level of brokering activities in Australia, but over the last few years, a small number of Australian residents who were dealing with overseas arms companies have requested a certificate from Defence that would certify them as authorised arms brokers. At the time, these applications were not processed, as Australia had no legislative basis to provide such certificates.[25]

---

[22] 'Elements for Effective Legislation on Arms Brokering (Agreed at the 2003 Plenary)', available on http://www.wassenaar.org/publicdocuments/2003/2003_effectivelegislation.html ti

[23] Through the *WMD Act 1995*, Australia does control the supply of goods; export of goods that are not controlled by regulation 13E of the Customs (Prohibited Exports) Regulations 1958; and provision of services by one person to another person if the first person 'believes or suspects, on reasonable grounds, that the goods [or services] will or may be used in a WMD program.'

[24] In addition, UNSCR 1718 on sanctions against North Korea requires States to implement export controls against that State, some of which Australia cannot implement under current legislation, such as controls on brokering. Consequently, failing to enact such provisions could lead to Australia breaching its international obligations through the UN.

[25] DECO has anecdotal evidence that a small number of Australian entities are brokering the supply of suspected DSGL-listed items. However, as there is no current requirement to obtain approval for such activities the specifics and volume of activity they conduct is not fully known.

Proposed option – legislation-controlled broker register

A legislative provision to provide power to register brokers and brokering transactions involving controlled goods is an appropriate solution to remove this anomaly from Australia's export control system. The proposed legislation will allow the Minister (or delegate) to register an individual or company as a broker if the Minister (or delegate) assesses that they are a fit and proper person. This process will allow Defence to keep a record of persons and entities involved in the trade of defence and dual-use goods and will acknowledge registered brokers as legitimate and authorised by the Australian Government. Further, the ability to cancel the registration of a broker, and thus prevent them from trading as a broker, will be a useful additional tool in the Government's enforcement armoury.

The option involves the implementation of registration to regulate brokers who arrange:

a. another person to supply DSGL listed goods or technology from a place outside Australia to another place outside Australia, or
b. the provision of services in relation to DSGL items when the services are received at a place outside Australia.

The control will apply to Australians and all people located in Australia. It will also have extraterritorial application and apply to Australian citizens and residents who broker these materials from a location outside Australia. Only a registered broker will be able to obtain a permit to deal with DSGL items and related services.

3.1 The Bill includes an exception that a permit is not required to facilitate a supply of goods or technology related to goods from one place to another place in the same country and that country is a Participating State for the purposes of the Wassenaar Agreement.

Exceptions also apply to certain people who act in an official capacity or duties as a member of the Australian Defence Force (ADF), AFP or State/Territory police force or Australian Public Service employee.

Registration

The Minister (or delegate) will assess whether an applicant is a fit and proper person. The applicant will need to supply information about their offence history, brokering compliance history, and financial position.

A registration will be valid for five years. A registered broker may apply for their registration to be renewed after the five year period. When considering an application to renew a broker's registration, the Minister (or delegate) must again assess an applicant against the fit and proper person criteria. A renewal of registration will also be valid for five years.

A registration can contain conditions as determined by the Minister (or delegate) who may also impose a new condition or remove or vary a condition on a registration by

notifying the registered broker in writing of the new or changed condition.

Denying an application or cancelling a registration

The Minister (or delegate) will have the authority to deny an application for registration or cancel a registration if he or she is satisfied that the applicant is not a fit and proper person.

If the Minister (or delegate) refuses to grant a registration application or cancels a registration, the Minister (or delegate) must provide the applicant with a notice outlining the reasons. Where the reasons for the decision are not disclosed because disclosure would prejudice the security, defence or international relations of Australia, the notice must state that the non-disclosure is for this reason.

If a broker's registration is cancelled by the Minister, any permits (to broker a transaction) held by that person will be deemed to be revoked when the cancellation takes effect.

Permit to broker

Once registered, a broker may apply to the Minister (or delegate) for a permit to arrange a supply of DSGL-listed goods or technology or provide services related to DSGL items.

The Minister (or delegate) will be able to grant a permit if they are satisfied that the activity would not prejudice the security, defence or international relations or Australia.

The Minister (or delegate) will also have the authority to deny a permit if he or she is satisfied that the activity would prejudice the security, defence or international relations or Australia. Only the Minister can revoke a permit once it has been issued.

Reasons for refusal

If the Minister (or delegate) refuses a permit or the Minister revokes a permit, the decision maker must provide the broker with a notice in writing and state the reasons for the refusal or revocation. Where the reasons for the decision are not disclosed because disclosure would prejudice the security, defence or international relations of Australia, the notice must state that the non-disclosure is for this reason.

Impact analysis

Who will be affected by the proposed changes?

There is little data available to conduct impact analysis of this new control. Defence currently has no visibility of the number of people in Australia or Australians

overseas who engage in brokering arms. The following examples[26] illustrate circumstances in which the proposed power over brokering would operate.

Example 1. An Australian manufacturer of goods, some of which are listed in the DSGL, has established an offshore manufacturing facility in a country where the export control environment is not as strong as in Australia. It is possible that some companies may have established their facilities overseas to avoid Australian export controls. If the Australian office receives orders for DSGL-listed items and then directs the overseas manufacturing facility to supply them to the end user, the company will need to apply to be registered as a broker and apply for a permit for the activity.

In this instance, the proposed controls on brokering will assist Defence to ensure that the company's activities are not contrary to Australia's interests or our international obligations.

Example 2. An Australian company manufactures goods which contain DSGL-listed components and applies for, and receives, approval from Defence to export the goods. If the exported goods subsequently malfunction and require a new component, the Australian company may arrange for the supply of a replacement DSGL-listed component from a third country to the country to which the original export was made. In this case, the company will need to be registered as a broker and apply for a permit to arrange the transfer of the component. Alternatively, if the replacement component is exported from Australia to the country to which the original goods were exported, an approval will be required under existing Australian export controls.

Defence proposes that some Australian entities which form a part of multinational companies are likely to require registration as brokers, as a result of the multinational structure of the company and how their business is conducted.

Example 3. A company's Australian office receives an order from an overseas entity for a DSGL-listed item but it is unable to fulfil the order. The Australian office may pass the order to another part of the organisation, located overseas. By passing the request to an overseas office of the company, the Australian office would be arranging a transfer of DSGL-listed items and must be registered as a broker and apply for a permit to arrange the transaction.

Example 4. An individual Australian lives outside Australia and engages, as an employee of an overseas company, in the supply of DSGL items between foreign parties. The proposed control will apply in this situation as it intends to apply to any Australian citizens who facilitate transactions of the DSGL-listed goods, technology and services, regardless where they are located and who they may represent.

Defence is aware of the implication of these provisions to Australians living and working overseas. To minimise the impact, we will discuss with individuals in this situation on a case by case basis, how the legislation will apply. For example, subject to the relevant brokering registration and permit requirements, a person could be registered as a broker for five years and a permit could be issued for more than one

[26] The examples discussed below are drawn from actual examples of which DECO has become aware.

arrangement and/or for a specified arrangement, where the activity covered by the arrangement is for a period specified in, or worked out in accordance with, the permit.

Industry/business/individuals

Under this proposal there will be two separate activities required before a broker can legally arrange a deal:

a. Registration application, and
b. Permit application.

Costs for applications

Based on current practices, Defence estimates that it will take a business or individual two hours to complete an application form to register as a broker. It may take up to an additional two hours to gather the information required for the form.

As this application is a new process for Defence and is not materially similar to any existing processes, Defence is unable to predict the processing time for broker registration applications. Defence is aware that delays in the registration process may have potential impacts for industry and the operational needs of Australian deployed units. Defence will seek to assess applications as quickly as practicable.

When a registered broker applies for a permit for a transaction, they will need to complete a permit application. Defence estimates that a broker will require no more than two hours to fill in a permit application and up to an additional two hours to gather the required information. In processing permit applications, Defence will seek to apply current standards; that is, 15 working day for a processing normal applications or 35 working days for more sensitive applications.

Businesses or individuals may incur some legal costs to determine how the new legislation applies to their business activities and to incorporate the legislative provisions into their standard business contracts.

Companies will face initial compliance costs. These will include the costs of familiarising staff in the new controls and administrative costs associated with applying for, and complying with, the conditions of a registration or permit approval and record-keeping and filing costs. DECO will provide materials concerning the new power. DECO provides free training and outreach to members of the Australian export community. As a company's costs will vary according to the size and complexity of the business involved, it is not possible for Defence to quantify these costs for each company. However, Defence anticipates that as companies become more familiar with the application processes, it will become easier for them to manage.

Other costs

Defence considers that it is likely additional costs may arise if there are any delays in approving a brokering permit. Delays will be more likely when Defence receives an application to broker sensitive goods, technology or services. These costs will vary depending on the circumstances of the application, but may include costs associated with gathering additional information and/or delays in receiving payment for the arranged delivery of goods, technology or services.

There may be potential loss of income to a broker should their application, to become a broker or an application for a transaction permit, be denied. Further, should the applicants wish to have these denials reviewed legally, they may face a range of legal and administrative costs associated with such reviews. Defence is unable to quantify the costs.

Trade impact assessment

Defence does not expect the brokering provisions will have a noticeable impact on Australia's trade as only transactions between two overseas locations will be affected and the process will have no impact on domestic competition. If the new controls dissuade any potential brokers from entering the industry, this will implicitly reduce competition in the brokering sector. However, the interests already demonstrated by some individuals in obtaining registration as a broker suggest that there is value seen by some businesses in being registered as evidence of bona fides.

Conclusion

While there is little detail on the number of Australian businesses or individuals that broker the prescribed services, the impact on them from the regulation can be minimised to mostly costs for registration/permit application and reporting requirements, which while adding to regulatory burden, will be a relatively low order costs for these businesses or individuals.

The Australian community will benefit from the introduction of this regulation, as it will ultimately improve Australia's national security. The proposed changes aim to strengthen the existing export control regime. This will provide the broad community with confidence that the Government is enforcing the laws it has enacted and that Australia is complying with its international obligations.

As the controls are focused on ensuring certain exports comply with Australia's security, defence and international relations, the new controls are not expected to have any impact on domestic commodity markets.

The overall community impact is expected to be low and is unlikely to significantly affect any particular region of Australia.

Part 4 Implementing the Defence Trade Cooperation Treaty

Australia and the US signed the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation* (the Treaty) on 5 September 2007 and the subsequent Implementing Arrangement (IA) on 14 March 2008.

The Treaty was negotiated and signed without a Regulation Impact Statement (RIS) being produced. The Joint Standing Committee on Treaties supported taking binding action on the Treaty but included the recommendation that a Post Implementation Review be conducted within 12-24 months after its entry into force. The Review will assess the impacts, including actual costs, of complying with the new regulations associated with the Treaty. This Part of the Statement is intended to provide broad guidance as to the anticipated costs and benefits of the Treaty.

Treaty Background

The Bill implements the Treaty and IA by creating a framework for two-way trade between Australia and the US in certain defence articles without the need for US or Australian government approvals. This will be achieved by establishing a US and Australian Approved Community of government employees and government facilities and approved non-governmental entities, their employees as required, and approved facilities. The Treaty will allow licence-free movement of eligible defence articles within the Approved Community.

In exchange for the relative freedom of trading US and Australian defence technology without requiring export permissions, the Approved Community members will be required to comply with obligations that will ensure appropriate security and protections are maintained.

The Treaty covers classified and unclassified-but-controlled defence articles (equipment, spare parts and technology) and defence services that currently require US or Australian export licences, that are intended for use in combined US and Australian military or counter-terrorism operations, mutually agreed research and development, production and support programs, or mutually agreed security and defence projects where the Australian and/or US Government are end-users.

Some sensitive defence articles will be excluded from the Treaty and these excluded goods and technology will continue to require standard Australian and US export approvals before they can be exported. The US and Australian export permissions will continue to be required for transfer of defence articles acquired under the Treaty to entities outside the Approved Community.

Defence articles and services controlled under the Treaty will be promulgated in the Defense Trade Cooperation Munitions List (DTCML).

The Treaty will improve the opportunities for Australian companies to participate in US defence projects eligible under the Treaty, and expedite the exchange of

controlled defence technology between US companies and their Australian subsidiaries.[27]

Once they are a member of the Australian Community, the company will need to meet the standards for record-keeping outlined in the legislative framework.

The Bill establishes an assurance framework to enable the Government to determine whether Australian Community members have complied with the Treaty requirements and obligations.

Industry participation in the Australian Community will be voluntary. Companies that choose not to participate can continue to use the existing US and Australian licensing systems.

Operation of the Treaty

Under the Treaty, Australian companies will apply to the Minister (or delegate) for membership of the Australian Community, who will assess the information provided by the applicant.

The Minister (or delegate) will assess the Australian company's ability to meet set standards that will include those for physical and information security, extent of foreign ownership, relevant offence history, whether there would be any prejudice to Australia's security, defence or international relations, or any other appropriate matters.

For a company to operate in the Australian Community they must:

a. be assessed for Foreign Ownership Control and Influence (FOCI) and agree to execute any relevant mitigations that minimise the risk of diversion of defence articles;
b. have or have access to a facility accredited by the Government of Australia for Treaty purposes[28];
c. if required, have their information technology systems accredited by the Government of Australia[28]; and
d. have their contractors and employees obtain a minimum BASELINE Australian Government security clearance that includes assessment for significant ties to countries proscribed by the US Government. (This assessment seeks to establish whether indicators exist of an allegiance or relationship to the proscribed country that presents a risk of diversion of the Defence articles.)

[27] It is also important to note that certain items, such as sensitive technologies – including missile and nuclear technology – are excluded from the Treaty, which also contains restrictions on the end-uses for which Treaty items can be used. Consequently, some controlled goods will continue to fall outside of the Treaty's coverage, and will remain subject to existing export controls. This means that most companies will also need to continue to operate with existing export control arrangements for non-Treaty eligible goods.

[28] The assessment process may involve Defence officials visiting sites to verify security standards. Verification of security standards may involve Defence officials requiring access to a company's computer or other information storage or communications systems or facilities.

The Minister (or delegate) will make a decision as to whether a company may be eligible for Australian Community membership. However, the Minister must not approve membership until the US Government has agreed to the company becoming a member.[29] [30]

In accordance with usual administrative registration practices, the Minister (or delegate) will be able to suspend or cancel an Australian Community membership in accordance with factors outlined in section 29 and section 30. Once subjected to suspension or cancellation, a company can continue to do business by complying with the export control laws of Australia and the US. The company would not then be able to receive or send US defence articles under the Treaty but would have to use the existing permissions of both the Australian and US Governments for its transactions involving controlled goods.

Proposed Option

As Australia has signed a Treaty with the US, and the Parliament's Joint Standing Committee on Treaties (JSCOT) has recommended that Australia take binding treaty action on this issue, formal legislation is required for Australia to take binding action and provide the US with the required assurances about the security of technology and goods transferred under the Treaty.

Post Implementation Review

Defence is required to conduct a Post Implementation Review within 12 – 24 months of implementing the Treaty. This Review will provide industry and the Government with a greater understanding of the actual costs and other operational impacts of the legislation.

Impact Analysis

Industry/Business

Defence attempts to estimate the cost and benefit of the Treaty based on past experience and knowledge of industry operations at a time when the quantum of cost and benefit is uncertain.

In making the voluntary commercial decision to become an Australian Community member, a company will need to consider the impacts that such a membership will entail:

---

[29] This means that an Australian company whose application for membership is denied by the Minister (or delegate) would have the option for an internal review to the Minister and if still unsuccessful, to the Administrative Appeals Tribunal. However, should an application be denied by the US Department of State, the affected company would have no avenues of review under Australian law.

[30] The merits review provisions outlined earlier in this Statement would apply to decisions on this issue made by the Minister or their delegate.

a. the time and resources required to complete the application form and provide necessary supporting information (the application form will require information to satisfy the requirements of section 27);
b. an allowance for the length of time for the Minister (or delegate) to assess and consider the membership noting that this is a once-off requirement and negates future need for export permissions that must be applied for regularly under Australian and US current export control systems;
c. the costs associated with ensuring and maintaining facilities to meet the requirements to hold, store and protect Treaty articles - these costs will vary depending on the company's extant arrangements – these costs will be significantly less for companies that already participate in the Defence Industry Security Program (the DISP);
d. where appropriate, costs associated with ensuring and maintaining information technology infrastructure to satisfy the requirements to store or transmit Treaty-related information electronically - these costs will vary depending on the company's extant arrangements – these costs will be significantly less for companies that already participate in the DISP;
e. costs associated with the time required by company employees to complete application forms and undertake training provided by the Government of Australia to meet all membership requirements – these costs will be significantly less for companies that already participate in the DISP; and
f. costs associated with complying with membership conditions:
    - costs of company developing or amending existing policies and procedures to ensure authorised access to Treaty articles;
    - costs of facilitating internal audits to assure compliance with the Treaty membership obligations;
    - costs associated with assisting Authorised Officers undertaking assurance processes where required;
    - costs to make and retain records of prescribed activities (e.g. supply of goods, action taken to comply with notices, detection of loss, theft or destruction of defence articles) – although it is anticipated that these costs will be reduced for companies that have sound business processes and accordingly, these costs should be minimal; and
    - costs associated with reporting to government on business conducted under the Treaty framework, including Treaty article transfer and results of internal compliance processes.[31]

The above listed costs may vary depending on the standard of the Australian entity's existing facility, whether they are involved in the DISP, and their existing ability to manage access and handling of US defence articles. Companies that do not have this existing background will need to invest more to make themselves Treaty-compliant.

The assurance of industry compliance with Treaty requirements will follow a compliance model that promotes cooperation between government and industry, voluntary compliance by industry, and the government providing training and advice

[31] The compliance model emphasises educating industry to export responsibly, promoting collaboration between government and industry in the regulation of defence and dual-use exports. Penalties for non-compliance proposed under the new regulations are consistent with current penalties for breach of existing export control laws.

to industry to assist them meeting their obligations under the Bill.

To balance these costs, there will be potential cost-savings for industry. The extent of the benefits will depend on the number of companies, both in Australia and the US, that choose to participate in the Treaty arrangements. This number will be largely dependent upon the scope of the end-uses and Treaty articles that are included in the Treaty framework. A company will need to assess whether a sufficient portion of its business falls or will fall within the Treaty's scope to warrant their becoming an Australian Community member.

It is anticipated that as the number of participating companies increases, there will be a concomitant increase in the number of Treaty transactions and consequently, increased savings for companies that are Australian Community Members.

Currently, an exclusions list for sensitive treaty articles has been identified. As the Treaty implementation progresses, industry will gain better understanding of the operation of the Treaty arrangements and will improve its capability to meet the requirements. As this occurs, the US will gain confidence in Australian defence industry's ability to protect the US defence technology and it is expected that the number of exclusions will diminish. This will increase the scope of the end-uses and increase the potential benefits for the industry.

By enabling transfers of controlled technology and goods without the need for specific licences as currently required, the Treaty arrangements will eliminate the delay an Australian Community member would previously need to allow to obtain relevant export approvals. This should offer a reduction in overall costs incurred under the current processes.

Given the initial scope of the Treaty being limited by mutually agreed end-uses and the articles excluded from the Treaty, it is possible that Australian companies will be required to still operate under the existing US and Australian export control systems.

Under the Treaty framework, Australian companies who are members of the Australian Community will have the opportunity to obtain technical data for Treaty eligible end-uses without the need for the US company to apply for a US export licence. This will allow Australian Community members to bid for US solicitations where those solicitations are identified as being Treaty eligible.[32] This will be an advantage for those Australian companies who become Australian Community members as currently, the US licensing process to release International Traffic in Arms Regulations (ITAR) controlled tender information can often take longer than the tender solicitation period. This effectively means Australian companies will be able to compete more effectively for US government and associated industry tenders.

Government

There are both costs and benefits to the Government from the implementation of the

[32] Australian Approved Community members will still need to consider whether articles are exempted from the Treaty even though the end-use may be Treaty eligible. In this situation a US export licence will still be required to enable transfer of the technical data.

Treaty. As there will be a reduction in the number of applications for transactional export permissions (due to items being exported to the US under Treaty arrangements), there will be a potential reduction in the Defence Export Control Office's export transaction caseload. However, this saving will be offset by the need to process and assess applications from companies that apply to become Australian Community members and the additional obligations to assess compliance by the Australian Community with the obligations articulated by the Treaty.

The benefits to the Government also include more accurate and reduced project schedules as delays from unpredictable US export licensing times are removed, particularly in support of establishing sustainment capabilities in Australia industry. This will improve the ADF's ability to respond to tasks set by Government, and will in turn, support Australia's national security, including interoperability with the US.

Implementation impacts for Government will include:

e. costs to provide outreach to companies to inform them of the implementation requirements;
f. costs to assess membership applications;
g. costs associated with security assessments for industry and government employees, facilities and ICT systems;
h. assurance activities which includes analysis of information provided by Approved Community members on their internal compliance activities as well as our own independent assurance processes to validate compliance levels; and
i. bilateral management overheads with the United States.

Provision has been made in the Defence Budget for Defence's costs on implementing the Treaty.

Trade Impact Assessment

Industry Impact

The Treaty should provide greater opportunities for Australian Community members to bid into US programs and associated global supply chain activities. Removing a regulatory constraint on movement of a significant number of defence articles between the US and Australia and encouraging the scope for Australian companies to bid into US contracts should have a positive effect on bilateral trade. At this stage, it is difficult to quantify the Treaty's impact and the Post Implementation Review will be the opportune time to assess it.

Government Impact

Government will experience a positive impact due to more reliable scheduling for Defence projects that involve US-origin technology. There will also be more effective sustainment of US-origin weapons systems and other systems involving US-origin equipment. This will improve Australia's ability to achieve its defence

capability plans, and also improve the ADF's ability to interoperate with the US.

Competition Assessment

It is difficult to quantify the Treaty's likely impact on competition in Australia, as this depends on the extent of domestic (and US) participation in the new arrangements.

It may improve the competitiveness of those defence companies who choose to participate in the new arrangements. It is anticipated that US Government and industry will consider participation by Australian companies in the Australian Community as reflecting positively on the Australian company's internal processes and procedures and making them better able to tender for US defence industry work. Even though participating companies may face initial costs, over time, Treaty arrangements are likely to lower the costs of trading with the US.

For companies that choose not to participate, they will avoid costs of complying with Treaty obligations but will still continue to incur the costs of applying for transactional permits under the existing Defence export and import controls. Over time, this may reduce their competitiveness in relation to the companies that participate in the Treaty arrangements.

Considering the voluntary nature of the Treaty, it is at the businesses' discretion to decide whether to participate in the Treaty arrangements. Defence expects that industry will monitor the impact of the Treaty on their competitiveness and business operations and adjust their approach accordingly.

Companies that have more extensive defence engagement with the US, such as defence industry primes and other Australian companies who have US parent companies, are likely to benefit from the Treaty as a result of the number of transaction they have with their parent in the US. These companies are more likely to be early participants. In turn, this may generate pressure for smaller businesses and sub-contractors to participate in the Treaty arrangements.

Conclusion and recommended option

The then Prime Minister signed the Treaty in September 2007. The Treaty was subsequently considered by JSCOT in 2008 and it recommended taking Treaty binding action. Defence is now implementing this recommendation by the proposed legislation to implement the agreed Treaty framework.

Implementation and Review

As noted above, Defence is required to undertake a Post Implementation Review within 12 to 24 months of the Treaty coming into force. Defence will use this process to review the implementation of the Treaty arrangements and detail the costs and other impacts on business and Government. The Review will also consider the trade and competition impacts of the Treaty.

Annex A: International Export Control Regimes

Wassenaar Arrangement (WA)

The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies was established in 1996 to promote transparency, exchange of information on, and greater responsibility in transfers of conventional arms and defence dual-use goods and technologies, thus preventing destabilising accumulations. It seeks to complement controls over WMD goods by focusing on threats to international and regional peace and security from transfers of armaments and sensitive dual-use goods and technologies where the risks are judged greatest. It aims to enhance cooperation to prevent the acquisition of these items for military end-users if the situation in a region, or the behaviour of a state, is or becomes cause for serious concern. Since December 2001, the WA has also pursued the prevention of weapons proliferation to terrorist groups.

Australia was an original participating state.

A principal task of the Wassenaar Arrangement is to compile, update and publish a Munitions List and List of Dual-Use Goods and Technologies. These Lists are the basis for the export control regimes of the 40 Participating States and, with some alterations, are adopted by Australia in its Defence and Strategic Goods List that forms the basis for the export controls exercised by Defence under the Customs Act.

Australia draws on Wassenaar documents as the best-practice model for aspects of its export control system, including in the proposals for brokering and intangible technology transfers that are included in the Defence Trade Controls Bill.

The Wassenaar Arrangement publishes a compendium, of its Basic Documents, which is updated regularly.[33]

The Zangger Committee

The Zangger Committee was established in 1971 when major nuclear suppliers, including Australia, came together to reach a common understanding on how to implement their obligation under the Nuclear Non-Proliferation Treaty (NPT) not to supply nuclear material and equipment to non-nuclear weapon states outside the NPT unless International Atomic Energy Agency (IAEA) safeguards were in place. In 1974, the Committee published a list of items – known as the 'Trigger List' – that could be transferred to non-nuclear-weapon states outside the NPT only on condition of certain safeguards and assurances. The Committee established three conditions for supply; an assurance of non-explosive use, a requirement that the item be placed under IAEA safeguards, and an assurance that the receiving state would apply the same conditions when transferring the items to other states. The Committee currently has 35 members.

[33] www.wassenaar.org

Australia Group (AG)

The Australia Group (AG) is an informal arrangement of 40 participating states and was formed in 1985 in response to evidence that Western countries had inadvertently supplied Iraq with dual-use chemicals which Iraq had diverted to its chemical weapons program.

In 1990, the Group expanded its scrutiny to biological materials as information revealed that Iraq had also been pursuing a biological weapons program. The AG aims to allow exporting or transhipping countries to minimise the diversion risk of dual-use chemicals and equipment that could be used in chemical and biological weapon (CBW) proliferation.

Coordination of national export control measures assists Australia Group participants to fulfil their obligations under the Chemical Weapons Convention and the Biological Weapons Convention to the maximum extent possible. Indeed, in the absence of a verification body for the Biological Weapons Convention, the AG's development of control lists covering biological materials and technologies is the only form of internationally harmonised control over such items. All states participating in the Australia Group are parties to the Chemical Weapons Convention and the Biological Weapons Convention, and strongly support efforts under those Conventions to rid the world of CBW.

Nuclear Suppliers Group (NSG)

The NSG, created in 1974, aims to prevent civilian nuclear trade from contributing to nuclear weapons programs in non-nuclear weapon states. Whereas the Zangger Committee focuses on controlling transfers to states outside the non-proliferation treaty, the NSG's guidelines deal with the transfer of nuclear-related items to all non-nuclear weapon states regardless of their non-proliferation treaty status.

These guidelines require recipient governments to provide formal assurances that transferred items will not be diverted to unsafeguarded nuclear facilities or nuclear explosive activities. The guidelines also set out strengthened re-transfer provisions and requirements for the physical protection of nuclear material and facilities. They require particular restraint with respect to trade in facilities, technology or equipment that may be used for uranium enrichment or plutonium reprocessing – the two key paths to the manufacture of nuclear weapons.

In 1992, additional guidelines were established for transfers of nuclear equipment, material and technology with both civil and military applications. The NSG also amended its guidelines to require non-nuclear weapon states to accept the application of IAEA safeguards on all their current and future nuclear activities as a condition of nuclear supply.

Missile Technology Control Regime (MTCR)

The then seven major Western suppliers of missile technology (US, Japan, UK, West Germany, Italy, France and Canada) established the MTCR in 1987. The MTCR aims to limit nuclear weapons proliferation by controlling the transfer of missile equipment, complete rocket systems, unmanned air vehicles, and related technology for those systems capable of carrying a 500 kilogram payload at least 300 kilometres, as well as systems intended for the delivery of WMD. In 1992 the MTCR was extended to cover missile or related systems capable of carrying smaller chemical and biological payloads. Importantly, MTCR controls are not intended to hinder cooperation in civil space projects.

United Nations Conventional Arms Register (UNCAR)

The UN Register of Conventional Arms is a voluntary arrangement established in 1992 under General Assembly resolution 46/36L titled 'Transparency in Armaments.' The resolution called upon all member states to provide to the Secretary-General annually relevant data on imports and exports of conventional arms as a measure designed to prevent the excessive and destabilising accumulation of arms. Under UNCAR, states (including Australia) report on seven major weapons categories. Australia supports the Register as part of its transparency in export controls.

United Nations Security Council Resolution (UNSCR) 1540

UN Security Council Resolution 1540 was adopted unanimously in 2004. The purpose of UNSCR 1540 is to require states to criminalise the proliferation of WMD, enact strict export controls and secure sensitive materials. Importantly, UNSCR 1540 applies to all UN member states thereby bringing into the non-proliferation regime states which have remained outside the WMD treaties and other instruments. Specifically the resolution requires all states to:

- refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;
- adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities;
- take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:
    - develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport;
    - develop and maintain appropriate effective physical protection measures;

- develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law; and
- establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulation.

United Nations Security Resolution 1673

This Resolution extends the mandate of the 1540 Committee, which was established by Resolution 1540 on non-state actors and WMD, which was adopted in April 2004.

The Treaty on the Non-Proliferation of Nuclear Weapons

The NPT is designed to prevent the spread of nuclear weapons and weapons technology, to promote co-operation in the peaceful uses of nuclear energy and to further the goal of achieving nuclear disarmament and general and complete disarmament. The Treaty represents the only binding commitment in a multilateral treaty to the goal of disarmament by the nuclear-weapon States. Opened for signature in 1968, the Treaty entered into force in 1970. A total of 187 parties have joined the Treaty. More countries have ratified the NPT than any other arms limitation and disarmament agreement, a testament to the Treaty's significance. The aim of the NPT is to prevent the proliferation of nuclear weapons to states other than the five recognised as nuclear weapons states in 1968, that is the US, USSR (Russia succeeded to these obligations), UK, France and China.

Chemical Weapons Convention (CWC)

The Convention prohibits all development, production, acquisition, stockpiling, transfer, and use of chemical weapons. It requires each State Party to destroy chemical weapons and chemical weapons production facilities it possesses, as well as any chemical weapons it may have abandoned on the territory of another State Party. The verification provisions of the CWC not only affect the military sector but also the civilian chemical industry world-wide, through certain restrictions and obligations regarding the production, processing and consumption of chemicals that are considered relevant to the objectives of the Convention. They will be verified through a combination of reporting requirements, routine on-site inspections of declared sites and short-notice challenge inspections. The Convention also contains provisions on assistance in case a State Party is attacked or threatened with attack by chemical

weapons and on promoting the trade in chemicals and related equipment among States Parties.

The Biological Weapons Convention (BWC)

The BWC was the first major multilateral treaty to outlaw an entire class of weapons, prohibiting parties developing, producing, stockpiling or otherwise acquiring or retaining biological weapons and their means of delivery. The BWC does not explicitly ban the use of biological weapons, which are already banned by the Geneva Protocol, but the prohibitions it contains and the requirement that states parties destroy any stockpiles accumulated before accession, amount to an *effective ban on use. The BWC also prohibits states parties from assisting other countries* to acquire biological weapons, directly or indirectly. Further, it requires states parties to facilitate technical and scientific cooperation in the use of biotechnology for peaceful purposes.

Annex B: Australia's Export Control Legislation

The Customs Act 1901

The *Customs Act 1901(the Customs Act)* provides the legislative authority for the Minister of Defence to list items subject to control under *Regulation 13E* of the *Customs (Prohibited Exports) Regulations 1958*. Export controls are applied to military and dual-use goods, including parts and components thereof and related materials, equipment and technologies transported to an external territory or nation.

The Defence and Strategic Goods List (DSGL)[34] incorporates the control lists of the multilateral export control regimes in which Australia participates and takes account of international arms control obligations imposed by a range of arms control treaties and the United Nations Security Council (UNSC). Exports of goods listed in the DSGL require approval from the Minister for Defence, or an authorised person. However, only the Minister for Defence has the authority to deny an application to export goods listed on the DSGL. Exports of goods listed in the DSGL that occur without approval from the Minister, or their delegate, may be prohibited exports.

The Weapons of Mass Destruction (Prevention of Proliferation) Act 1995

Goods, services and technologies that are not controlled under the *Customs Act* but which have the potential to contribute to a WMD program are controlled for export or supply under the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (the *WMD Act*)[35].

The *WMD Act* gives authority to the Minister for Defence, or a delegated official, to license or prohibit transactions which *would* or *might* contribute to a WMD program. The *WMD Act* only covers the export of goods which are not prohibited exports under the Customs Act. Effectively, if a good is listed in the *Customs (Prohibited Exports) Regulations 1958*, the *WMD Act* is not intended to be the mechanism to control that export.

The *WMD Act* may also be used to license or prohibit the supply of goods either within Australia, or overseas; and to control brokering activities from one country to another. Additionally, the *WMD Act* controls the provision of services that *will* or *may* assist a WMD program. Examples of the types of activities that may be

---

[34] The DSGL includes descriptions of equipment, assemblies and components, associated test, inspection and production equipment, materials, software and technology. The DSGL is divided into two parts: Part 1 relates to defence and related goods, which are goods or technologies designed or adapted for military use or goods that are inherently lethal, while Part 2 covers those goods that have a dual-use. Dual-use goods are commercial items with a legitimate civil application that can also be adapted for military use or in weapons of mass destruction programs. This part is further subdivided into the following categories: nuclear materials, facilities and equipment; materials, chemicals, micro-organisms and toxins; materials processing; electronics; computers; marine; sensors and lasers; navigation and avionics; telecommunications and information security; and aerospace and propulsion.

[35] The *WMD Act 1995* prohibits the supply or export of goods that will or may be used in, and the provision of services that will or may assist, the development, production, acquisition or stockpiling of weapons capable of causing mass destruction or missiles capable of delivering such weapons.

controlled (where those activities will or may assist in a WMD Program) are:

- working as an employee, consultant or adviser;
- providing training;
- providing technological information or know-how; or
- procuring another to supply or export goods or provide services.

The Charter of the United Nations Act 1945

The *Charter of the United Nations Act 1945* (the *Sanctions Act*) both supplements and supplants other export controls laws so that Australia can meet its obligations to UNSC Resolutions that require the implementation of sanctions against certain countries. The export or supply of goods, or the provision of services, to a sanctioned country may be subject to control under both the *Sanctions Act* and either the *Customs Act* or *WMD Act*. The Department of Foreign Affairs and Trade (DFAT) is responsible for administering this Act.

Annex C: How Australia Implements Export Controls

The Department of Defence is responsible for issuing permits and licences for the export of defence and dual-use goods. Within Defence, this role is undertaken by the Defence Export Control Office (DECO).

Businesses that wish to export goods on the DSGL from Australia are required to submit an application to DECO for consideration. Separate provisions apply under the WMD Act to non-listed goods that would or may contribute to a Weapons of Mass Destruction program. Applications to export defence and dual-use goods are considered on a case-by-case basis. DECO assesses export applications, according to Australia's:

- international obligations;
- human rights;
- regional security;
- national security; and
- foreign policy.

The Standing Inter-Department Committee on Defence Exports (SIDCDE)[36] coordinates advice within Defence and from other agencies on sensitive export applications and export policy matters. In considering export applications, SIDCDE members take into account the possible impacts on Australia's security, political, other trade interests, as well as the effects on global and regional stability.

A more senior body is the Advisory Panel on Prohibited Exports (APPE). The purpose of the APPE is to coordinate agency advice at a more senior level on the most complex cases subject to Regulation 13E of the *Customs Regulations* or the *WMD Act*. The Panel facilitates senior level interagency oversight on complex or contentious export cases which require striking a balance between competing policy criteria, or raise concerns about Australia's national interest. The panel also considers cases where denial would have a significant impact on industry or foreign relations.[37]

Once an export application has been assessed, the applicant is advised of the outcome – successful applicants are granted a license allowing the export of the item, which the exporter is required to provide to the Australian Customs and Border Protection Service as part of the broader export process. However, should an export application be denied – only the Minister has the authority to deny an application – the exporter will be advised of the reasons that the export cannot proceed.

[36] SIDCDE is chaired by Defence and includes representatives from the following Australian Government Departments: Prime Minister and Cabinet; Foreign Affairs and Trade and Austrade; Attorney-General's Department; and the Australian Customs and Border Protection Service.

[37] The APPE is chaired by Defence and includes representatives from the Department of Prime Minister and Cabinet, the Department of Foreign Affairs and Trade and the Australian Customs and Border Protection Service.