

Regulation Impact Statement – Amendments to the *Defence Trade Controls Act 2012* to reduce regulatory burden

Introduction

Australia's export control system aims to stop goods and technologies that can be used in the development of chemical, biological or nuclear weapons, or military goods and technologies, from being supplied to other states or groups that would be detrimental to Australia's national security or other interests, or in contravention of Australia's international counter-proliferation obligations and commitments.

As a member of the Wassenaar Arrangement, the Missile Technology Control Regime, the Australia Group and the Nuclear Suppliers Group, Australia has committed to regulate the export of items listed by these regimes.

This Regulation Impact Statement will refer to items listed by the above-mentioned regimes as being 'controlled'. These include military items, but also equipment and technologies developed to meet legitimate commercial business needs that can also be used either as military components or for the development or production of military systems or weapons of mass destruction (WMD), these items are referred to as 'dual-use' items. Examples of dual-use items are, certain chemicals, toxins, electronic equipment, marine and avionics equipment. One example of a 'dual-use' item is a magnetometer that could be used for geophysical surveys or physics research but it is controlled because it also has a military application as it can be used to detect submarines.

As a participating State in these regimes, Australia must seek, through our national policies, to ensure that supplies of these controlled items do not contribute to the development or enhancement of military or WMD capabilities.

The participating States of the Wassenaar Arrangement are:

Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

The list of controlled items is available online at www.defence.gov.au/deco/DSGL.asp.

In accordance with these obligations, Australia already regulates the physical export of controlled items, but these controls are not broad enough to meet the full extent of our international obligations and counter proliferation; for example:

- If an Australian organisation physically exports a controlled virus, export permission is required, but if they email instructions on how to produce or enhance that virus, no permission is required. Therefore, the Australian Government has no visibility or control over the non-physical export of this information, including whether it is potentially destined for diversion to a biological weapons program.

- If an Australian, or a person located in Australia, were to arrange for controlled weapons to be sent from one destination outside Australia to another destination outside Australia, no brokering permit is required. Therefore, the Australian Government has no visibility or control over this brokering activity, including whether it is potentially destined for use in human rights abuses.

In 2003 and 2006, member states of the Wassenaar Arrangement agreed that, in addition to regulating the physical export of controlled items, member states should also regulate the brokering and non-physical export (i.e. by electronic means) of these controlled items¹.

The *Defence Trade Controls Act 2012* ('the Act') is the means by which Australia is implementing this obligation.

The Act was passed by Parliament and received Royal Assent on 13 November 2012. The Act introduced:

1. *Regulation of the intangible 'supply' of controlled technologies.*

'Supply' is where a person inside Australia sends controlled technology to a person outside Australia by non-physical means, such as sending a blueprint by email rather than in hardcopy. It is the electronic equivalent of a physical export.

2. *Regulation of the brokering of controlled goods or technologies.*

Brokering is where a person does not handle the controlled items themselves, but rather arranges for someone outside Australia to supply controlled goods or technology to a third party, also outside of Australia.

3. *Prohibition of the publication of controlled technology.*

It was considered necessary to prohibit the publication of controlled technology, because once that technology is released into the public domain, it can no longer be effectively controlled.

What problems need to be solved?

Problem 1: Australia's export controls do not address the non-physical export (referred to in the Act as 'supply') of controlled technologies or the brokering of controlled goods and technology.

Currently, a person can send, via non-physical means, controlled technology to someone overseas and the Australian Government would have no visibility of this supply. Also, the Australian Government has no visibility of brokering arrangements that would result in the movement of controlled goods or technology from one place overseas to another

¹ The Wassenaar Arrangement's public documents on Elements for Effective Legislation on Arms Brokering (2003) and Best Practice for Implementing Intangible Transfer of Technology controls (2006) are available at <http://www.wassenaar.org/guidelines/index.html>

place overseas. Australia has agreed to regulate these activities through its membership of the Wassenaar Arrangement.

Australians supply controlled technology overseas for various reasons. With many Australian companies choosing to manufacture their sensitive goods overseas due to more affordable manufacturing costs, Australian companies are sending their sensitive technology overseas to facilitate the manufacturing process. Further, Defence projects to acquire military materiel will involve international commercial collaborative arrangements that will involve supply of controlled military technology. Australia's relatively small university and research sector relies heavily on international research collaborations and will supply sensitive controlled technology in the course of that collaboration. Multinational companies with business operations in many countries will supply technology overseas as part of their normal business activities.

Leaving this activity unregulated would undermine Australia's international reputation as a credible contributor to global counter-proliferation efforts. Australian companies and researchers would find it more difficult to gain access to sensitive controlled technology from other countries because those countries would have diminished confidence in Australia's ability to regulate the further supply of that technology.

The Department of Defence does not consider that it would be possible to implement export controls by non-regulatory means, because it is the permit-based regulatory system that gives the Australian Government visibility and control over the legal movements of these sensitive items. Australian companies and institutions are not in a position to know whether an overseas recipient has direct or indirect links to proliferators, or whether there is a risk of diversion to proliferators. Every year the Minister for Defence denies a small number of exports because there is credible, often highly classified, evidence that such goods or technologies are at significant risk of being supplied to states or groups of proliferation concern. Such decisions are made based on all of the available information, always balanced against the inherent benefits of enabling Australian individuals, companies or institutions to earn export income.

Problem 2: The Act as written imposes a heavy regulatory burden on large numbers of organisations, including defence industry, dual-use industries, universities, and other research organisations.

These new forms of export controls are by their nature more challenging to regulate than physical exports, and stakeholders raised significant concerns about the potential impact of this regulation. Stakeholder concerns about the Act included:

1. the difficulty of regulating intangible means of supply (such as emails and other electronic communications) compared with regulating physical exports across Australia's physical borders, without significantly impeding business and international research collaboration.
2. the unintended capture of legitimate business and international research collaboration in the brokering controls, because of the way the brokering controls are worded in the Act, and the application of the brokering controls in the Act to both military and dual-use controlled items.

3. the impact of prohibiting publications that contain controlled material, particularly on the university and research sectors, because the Act prohibits the publication of both military and dual-use controlled technology, even though in some other countries there are exclusions in place for dual-use publications.

Stakeholders who will be affected by the changes in the Act are:

- Australia's defence industry;
- universities and other research organisations; and
- industry sectors that export controlled dual-use items with military or WMD applications (including sectors that deal with the following broad categories: nuclear materials; materials, chemicals, microorganisms and toxins; materials processing; electronics; computers; telecommunications and information security; sensors and lasers; navigation and avionics; marine; and aerospace and propulsion).

Difficulty of regulating intangible means of supply:

Three sectors – defence industry, dual-use industry, and the university and research sector – will be affected by regulating intangible supplies. Compared to the current regulation where physical goods pass a border, it will be more difficult to regulate activities occurring intangibly, instantly and often. Stakeholders are particularly concerned that they would need to obtain permission to cover the verbal supply of controlled technology (e.g. telephone conversations with colleagues located overseas).

To comply with the regulation of intangible supplies, organisations or individuals would need to understand that their technology is controlled and apply for a permit. They would need to keep records of the supplies that they make under the permit.

Throughout the transition period, stakeholders have voiced their concerns that if the Act is not changed, it would create significant resource implications for these organisations and business to submit applications for permits to the Defence Export Control Office. Based on the way the Act is currently drafted the volume of applications is anticipated to be high and could potentially result in delays for these businesses and organisations while they wait for the permits to be processed and approved.

Unintended capture of legitimate business and international research collaboration in the brokering controls:

Three sectors – defence industry, dual-use industry and the universities and research sector – have expressed concerns about the brokering regulations which will apply to the brokering of military and dual-use goods and technology. The sectors submit that the brokering controls could impede defence industry primes and other multi-national corporations' dealings with their overseas parent companies and researchers undertaking international research collaborations.

The Department of Defence will not impede legitimate multinational business or international research collaboration by these controls. Areas where the regulation would not need to apply include:

- Brokering dual-use controlled items where there is no military or WMD end use.
- Brokering for Government business.

- Brokering out of countries that have comparable export controls to Australia.
- Where the only benefit gained is a research benefit.

To comply with the regulation of brokering, organisations or individuals would need to understand that the goods or technology are controlled, register as a broker and apply for permits to cover their brokering activities. They would also need to keep records of the activities conducted under the permit.

The impact of prohibiting publications that contain controlled material:

One sector – the university and research sector – expressed concern about the details of the publication controls. There were concerns expressed that universities and researchers would need to seek approval to publish dual-use controlled technology, which would disadvantage them in comparison to their US and UK counterparts. But while universities and researchers would need to examine their publications dealing with controlled technology, pilot program investigations confirmed that the incidence of publication of controlled technology was low.

To comply with the regulation of publications, organisations or individuals would need to understand that their published technology is controlled and apply for an approval for the publication to proceed. If the approval was not granted, the controlled technology would need to be removed from the publication.

Costs and benefits

Under the Act, the following sectors would need to develop additional compliance mechanisms to deal with the regulation:

| | Supply permit compliance | Publication approvals compliance | Brokering permit compliance |
|--|--------------------------|----------------------------------|-----------------------------|
| Defence Industry | Yes | Yes | Yes |
| Dual-use Industry | Yes | Yes | Yes |
| Universities and research institutions | Yes | Yes | Possible |

Sectors would incur costs to implement compliance frameworks to comply with the legislation and avoid penalties. These costs would include costs associated with increased staffing, communication of compliance measures, legal oversight, training and education, systems upgrade and in-kind contribution from existing staff.

Costs are difficult to quantify in advance of implementation, however, organisations that have been participating in the pilot program have informed the estimate in this Regulatory Impact Statement. The estimated costs vary across sectors as defence and some dual-use industry already have compliance mechanisms in place to obtain permits for physical exports, and there is also variance in cost according to the nature of the organisation, its size, structure, and governance arrangements:

- Defence and dual-use industry - \$236k start up, \$116k ongoing per year
- University and research sector - \$473k start up, \$232k ongoing per year

Steering Group's investigation of the problems

Due to these significant concerns and the inability to implement export controls by non-regulatory means, a transition period was established under the Act, during which offence provisions do not apply. A Strengthened Export Controls Steering Group (the Steering Group) was established in December 2012 to test the legislation and to advise government on legislative amendments during the transition period.

The Steering Group is comprised of representatives from industry, research, and government sectors and is chaired by Australia's Chief Scientist, Professor Ian Chubb, AC.

The Steering Group established a pilot program to test the regulatory impact of the *Act* across different types of organisations, including universities, defence industry, government research agencies, small to medium enterprises, cooperative research centres, and medical research institutes.

From May to September 2013, the pilot program identified issues with the Act as written, using examples from their own organisations. This was augmented by feedback from broader stakeholders. It found that the regulation needed to:

- **More closely target those who are likely to be supplying controlled technology, and explicitly exclude others.** The Steering Group has asked the Department of Defence to develop an online self-assessment tool, so that companies and institutions can more easily determine whether their activities are subject to export controls.
- **Reduce the burden on those who are supplying controlled technology through appropriate exclusions commensurate with international practice.** For example, exporters in the US, UK and EU have access to streamlined export licences for lower-risk export activities.
- **Adopt a more balanced approach to managing publications.** The US and UK both have arrangements in place to ensure that academic imperatives to publish are not unduly hampered by export controls. The Steering Group also investigated the incidence of controlled technology in Australian publications, and found that it was low - an assessment of 278 Australian publications considered most likely to contain controlled technology based on their topics, found only 9 instances.
- **Reduce the scope of the brokering control to better reflect the policy intent and avoid unintended capture.** For example multinational companies considered that their employees could be captured by the brokering controls during the course of their business, contrary to the intent of the brokering control.

In September 2013 the Steering Group agreed to test a number of proposed solutions to address these problems, through the pilot program. The results of this pilot program testing justified that these risk-based solutions would achieve the aim of reducing

regulatory burden without compromising national security. To build on the evidence gathered through the pilot program, Professor Chubb also invited all Australian universities to submit case studies for testing, and a Defence Industry Experts' Group was established to provide feedback from a defence industry perspective, including their practical experience with export control implementation in Australia and internationally.

The Steering Group will make its final recommendations to the Minister for Defence and the Minister for Industry and Science based on the outcomes of pilot testing and broader stakeholder engagement, including public consultation.

Why is government action needed?

TO ADDRESS PROBLEM 1: Government action is required to ensure that Australia's export controls adequately address Australia's international obligations to regulate the non-physical supply of controlled technology and the brokering of controlled goods and technology.

TO ADDRESS PROBLEM 2: Government needs to take steps to reduce the regulatory burden on stakeholders, including defence industry, dual-use industries, universities, and other research organisations that will be affected by the higher levels of regulation when the Act comes into force.

Noting that these stakeholders represent significant industries within the Australian economy it is important that the regulation balances the regulatory burden while meeting Australia's international obligations and national security interests. For example, current figures estimate that the Australian university and research sector generates \$25.2 billion² in revenue and that Australian defence industry, consisting of several large defence primes and many small and medium enterprises, generates approximately \$6.5 billion in revenue³.

Australia relies heavily on access to sensitive controlled goods and technologies produced by other like-minded counterparts and allies, particularly the United States. Such access is reliant on the US's and others' assessments that Australia will protect these sensitive controlled goods and technologies, including through a robust export control system. An international perception that Australia's export controls are not sufficiently robust could limit Australia's access to such goods and technologies, and have significant security and economic implications for Australia, as well as implications for Australian research and industry. Therefore, it is important that adjustments to Australia's export control system remain consistent with the international norms practised by our like-minded counterparts and are consistent with the government's commitment to counter-proliferation.

² Department of Education, Finance 2012, Financial Reports of Higher Education Providers, December 2013, page 3, <http://docs.education.gov.au/system/files/doc/other/finance2012.pdf>

³ Australian Strategic Policy Institute, The Cost of Defence, ASPI Budget Brief 2013-2014, page 176, <https://www.aspi.org.au/publications/the-cost-of-defence-aspi-defence-budget-brief-2013-2014/ASPI-CostDefence2013.pdf>

What policy options are being considered?

The Department of Defence has considered three options to address these issues:

Option 1 – Maintain the Act as currently written

The first option would be to maintain the Act as currently written. In practice, this would mean that, at the end of the transition period the controls will take effect, stakeholders would need to comply with the higher levels or regulation in the Act as it is currently written.

This would impose an estimated \$87.035 million per year in ongoing regulatory burden on affected stakeholders. This is not considered a viable option as it does not address the problem of the heavy regulatory burden.

Option 2 – Remove the new export controls from the Act

The second option would be to remove the export controls on intangible supply, brokering and publications from the Act. In practice, this would mean that Australia's export controls would remain limited to physical exports, and stakeholders would not be required to seek permission for the intangible supply, publication or brokering of controlled technology.

This is not considered a viable option as it does not address the problem of Australia's obligations to regulate the non-physical supply of controlled technology and the brokering of controlled goods and technology, consistent with international best practice.

It would also not be viable to introduce offences for intangible supplies, brokering and publications without a permit scheme as this would mean that none of these activities could occur. Under the permit arrangements, these activities can occur unless risks associated with the specific items going to the specific end user are of sufficient concern to warrant prohibition of the activity by the Minister for Defence. It is the permit-based regulatory system that gives the Australian Government visibility and control over the legal movements of these sensitive items. Australian companies and institutions are not in a position to know whether an overseas recipient has direct or indirect links to proliferators, or whether there is a risk of diversion to proliferators. Every year the Minister for Defence denies a small number of exports because there is credible, often highly classified, evidence that such goods or technologies are at significant risk of being supplied to states or groups of proliferation concern.

Option 3 – Implement legislative and policy changes, consistent with international practice

The third option aims to strike the appropriate balance between ensuring Australia is able to comply with its counter-proliferation objectives and the promotion and advancement of innovation and economic objectives. To facilitate this, the Department of Defence would adopt a number of risk-based legislative amendments and policy changes to streamline export controls and reduce regulation while maintaining national security and complying with Australia's internationally-agreed regime obligations.

There is always a tension for responsible countries, between facilitating exports but without damaging their own national security interests or contravening their international security obligations. The Department of Defence has been working with stakeholders through the Steering Group to achieve a balanced outcome that meets these imperatives without compromising the counter-proliferation objectives of the Act.

It is widely recognised that export controls work best in an environment where stakeholders are willing to comply because they understand the need for the regulation, and are able to comply because the regulation is workable and strikes an appropriate balance by weighing counter-proliferation objectives – which underpin national and international security – with the promotion and advancement of innovation, research and economic objectives.

These risk-based proposals have been developed and tested with stakeholders through the Steering Group and pilot program process:

Remove controls on verbal supply of controlled technology (e.g. telephone conversations, video conferences)

This would remove the higher regulatory burden on stakeholders by enabling them to continue to verbally supply controlled technology. It would be impractical to regulate verbal supply and would impose a high regulatory burden. Although stakeholders could be discussing controlled technology, it is unlikely that they would be supplying the technology with enough detail to reach the regulatory threshold.

Although the control on verbal supply would be removed, providing access to controlled technology is still controlled if it occurs verbally; for example, one person verbally giving another person the password to a database with controlled technology. It is likely that controlled technology would be supplied by providing access to detailed records. Further the supply of DSGT technology verbally for a military end-use or WMD program remains controlled and a permit would be required for such a supply.

Exempt supply to, or from, Australian Public Service, Australian Defence Force, Australian Federal Police and State and Territory Police, and the Australian Intelligence Community

This would allow contractors directly supporting Australian Government business (including defence contractors supporting military operations) to supply controlled technology directly to, or receive controlled technology directly from, these Australian Government representatives without needing to seek a permit.

Limit the requirement for brokering permits to controlled military items. Brokers of controlled dual-use items will only be required to seek permits if approached by the regulator or they are brokering for a WMD or military end use

It is proposed that the regulation of brokering activities through permits focus on controlled military items, and exclude controlled dual-use items, unless the brokering is for a WMD or military end-use. Additionally, the regulator could direct a broker to obtain a permit if a dual-use brokering activity would prejudice Australia's security or international obligations.

Exclude brokering from (as well as within) states that are listed members of the four main export control regimes (Wassenaar Arrangement, Missile Technology Control Regime, Nuclear Suppliers Group, Australia Group). Also exclude Australian citizens who are brokering while located in these states.

Noting that member states of the export control regimes are required to have established adequate export controls, there is scope for Australia to acknowledge these controls and provide exceptions where brokering activities are occurring in, or are from, listed regime partners.

Limit the requirement to seek approval for publications to controlled military technology.

Noting that the pilot program demonstrated that the incidence of controlled technology in Australian publications is low, there is scope to deregulate publications of dual-use research and to manage the risk by using a prohibition power if a particular dual-use publication is of concern. The publication of controlled military technology will be regulated as this technology is more sensitive.

In addition to the above measures that would require legislative amendment, Defence has worked with stakeholders through the Steering Group process to develop complementary non-legislative changes:

- Extending maximum licence duration from the current two years to five years or the life of a project;
- Introducing streamlined licences for lower-risk activities, commensurate with international practice;
- Introducing project-based licences to cover the range of identified activities within a project.

This option would limit the application of the controls as follows:

| | Supply permit compliance | Publication approvals compliance | Brokering permit compliance |
|--|--------------------------|----------------------------------|-----------------------------|
| Defence Industry | Yes | Yes | Yes |
| Dual-use Industry | Yes | No | No |
| Universities and research institutions | Yes | No | No |

Impact Analysis

Option 1:

Option 1 delivers the highest levels of controls to meet international export control regime commitments and counter-proliferation objectives.

Option 1 does not address regulatory burden. If the Act remains unchanged, university and research sector and dual-use industry stakeholders, will face higher levels of compliance burden, resource costs, education costs, legal costs, training costs and system upgrade expenses - potentially stifling innovation and adversely impacting trade and economic prosperity.

Option 2:

The impact of this option is that Australia would not be complying with its internationally-agreed regime obligations and the significant gaps (identified earlier) would remain. In turn, this would mean that Australian companies and institutions could increasingly be targeted by proliferators seeking to obtain military or WMD technology. In effect, Australia would be defaulting on its international regime obligations, as well as its autonomous commitment to counter-proliferation.

Australia would be demonstrably out of step with the US, UK, EU, Canada and other like-minded regime partners that have already implemented export controls for intangible supply and brokering. These countries have adopted risk-based approaches comparable with those outlined at Option 3 below, and their export control systems have been a valuable source of comparison and of lessons learned in the practical implementation of such approaches.

Stakeholders recognise the importance of the new export controls, but are concerned that the controls must strike the appropriate balance between managing national security and international obligations, while ensuring that Australian industry and research remain internationally competitive.

This option also risks jeopardising Australian access to sensitive technology from the US and other countries, as such access is reliant on their assessment that Australia will protect these sensitive technologies, including through a robust export control system.

This option would also jeopardise the Defense Trade Cooperation Treaty between Australia and the US, as a consideration for that Treaty was that Australia was implementing legislation to implement effective export controls on intangible supply and brokering.

Option 3:

Option 3 will reduce the impact of the regulatory controls while meeting Australia's national security requirements and internationally-agreed obligations. The policy measures have been carefully considered by the Department of Defence and the Steering Group to ensure that the appropriate balance is achieved.

The problems of regulatory burden and not complying with Australia's internationally-agreed regime obligations have both been addressed by this option; most importantly:

- Stakeholders will not need permits for verbal supplies of controlled technology, except where they are verbally providing access to controlled technology (e.g. by providing a password to a file containing controlled technology) or verbally supplying controlled technology to a WMD program or military end-use;
- Stakeholders will not need to obtain permits for brokering dual-use controlled goods or technology, except where the brokered activity is for a military or WMD end use or they are approached by the regulator;
- Stakeholders will not need to obtain permits when the brokered activity from (as well as within) lower-risk listed regime country; and
- Stakeholders would not need to seek approval to publish research containing dual-use controlled technology.

What is the likely net benefit of each option?

The net benefit of the three options is based on indicative costing provided through the pilot program.

It is important to note that this costing is speculative as the Act is still in a transition period where its provisions have not come into force, which means that stakeholders are unable to definitively state the costs involved in each proposal. Key assumptions inherent in these include predicted labour costs, the availability of labour, the cost of legal fees and foreseen operational expenses. The pilot program participants were asked to measure costs that would be incurred in addition to current operating costs. Two pilots responded to this request for costs and their feedback formed the basis of the costs outlined in Annex A.

The Department of Defence welcomed feedback on this indicative costing through the public consultation process which released the Early Assessment Regulation Impact Statement. Of the 37 submissions received, three offered specific comment on the RIS to note that the RIS did not detail the financial impact of the regulatory burden, in particular, for individual researchers and smaller universities. The public consultation submissions did not provide any further quantitative feedback on costing.

Option 1

The Department of Defence expect that this measure will create extensive compliance costs. Costs will vary based on whether an organisation has compliance mechanisms to deal with existing export controls on tangible exports, the nature of its business, and on the size, structure and governance arrangements of the organisation. It is expected that defence industry and some dual-use industry would already have export control compliance mechanisms in place but most university and research organisations would not.

Noting these differences, the proposed costs have been considered by sector.

Defence and Dual-Use Industry

| | Cost per business | Total cost for all businesses (600) |
|--|--------------------------|--|
| Average ongoing compliance cost per year | \$116,047 | \$69,628,140 |

University and Research Organisations

| | Cost per business | Total cost for all businesses (75) |
|--|--------------------------|---|
| Average ongoing compliance cost per year | \$232,094 | \$17,407,028 |

More detailed breakdown of these costs can be found at [Appendix A](#).

Benefits

Compared to other options, Option 1 delivers the strongest export controls by regulating more activities.

Australia relies heavily on access to sensitive technologies produced by other like-minded counterparts and allies, particularly the United States. Such access is reliant on the United States' and others' assessments that Australia will protect these sensitive technologies, including through a robust export control system. Option 1 would deliver the highest international perception that Australia's export controls are sufficiently robust to regulate access to such goods and technologies.

Costs

Option 1 does not address regulatory burden. If the Act remains unchanged, all stakeholders will face higher levels of compliance burden, resource costs, education costs, legal costs, training costs and system upgrade expenses – potentially stifling innovation and negatively impacting trade and economic prosperity.

Cost-benefit comparison

The costs of the regulatory burden of Option 1 outweigh the benefits of the increased levels of export control. This conclusion is supported by the work that has been conducted through the Steering Group process across industry, university and research stakeholders.

Option 2

| | Cost per business | Total cost for all businesses |
|--|--------------------------|--------------------------------------|
| Average ongoing compliance cost per year | \$0 | \$0 |

Benefits

Option 2 would deliver the least regulatory burden for domestic stakeholders. Industry, universities, and the research sectors would not need to adopt new compliance measures to meet the increased levels of regulation inherent in the other options.

Costs

Australia's credibility as a responsible contributor to international counter-proliferation efforts would suffer, because we would continue to operate an export control system with significant gaps, while other like-minded partners have addressed these gaps by regulating the intangible supply and brokering of controlled goods and technologies. The potential repercussions for our international reputation from failing to meet these obligations would likely be exacerbated given Australia's strong international leadership in counter-proliferation matters, including as permanent chair of one of the main export control regimes, the Australia Group.

Cost-benefit comparison

The costs of this option cannot be measured in terms of regulatory burden. But there would be significant impact in terms of Australia losing access to sensitive technologies from the United States of America and elsewhere on the basis that such access is reliant on their assessment that Australia will protect these sensitive technologies, including through a robust export control system that includes controls on intangible technology supplies and brokering. This option would thereby risk losing a portion of the approximately \$6.5 billion in revenue generated by Australian defence industry, consisting of several large defence primes and many small and medium enterprises. It would also create significant but unquantifiable difficulties for the defence-related Australian university and research sector.

Option 3

As with Option 1, costs would also be affected by whether an organisation already has compliance mechanisms to deal with existing export controls on tangible exports, the nature of the organisation's business, its size, structure, and governance arrangements. It is anticipated that defence industry and dual-use industry would have export control compliance mechanisms but university and research organisations would not.

Noting these differences, the proposed costs have been considered by sector.

Defence Industry

| | Cost per business | Total cost for all businesses (500) |
|--|--------------------------|--|
| Average ongoing compliance cost per year | \$98,844 | \$49,421,900 |

Dual-use Industry

| | Cost per business | Total cost for all businesses (100) |
|--|--------------------------|--|
| Average ongoing compliance cost per year | \$78,407 | \$7,840,650 |

University and Research Organisations

| | Cost per business | Total cost for all businesses (75) |
|--|--------------------------|---|
| Average ongoing compliance cost per year | \$196,688 | \$14,751,563 |

Detailed breakdown of these costs can be found at [Appendix A](#).

Benefits

Option 3 reduces regulatory burden by introducing risk-based approaches to address issues identified by stakeholders through the Steering Group process.

Although the level of regulation will be decreased through adopting a risk-based approach, Australia would still meet its international export control regime obligations by regulating the intangible supply of controlled technology and brokering of controlled goods and technology.

Of the 37 public consultation comments received, seven submissions welcomed the policy measures in the Amendment Bill as reducing regulatory burden, and one university specifically supported Option 3 above Options 1 and 2.

The provision for regular legislative review two years after the Act commences operation, and then in five-yearly cycles, will provide scope for stakeholders to advise the financial impact of the regulation to enable further refinement of the regulation as required.

Costs

The costs for this option are the best estimates available through the pilot program in advance of implementation. Defence welcomed feedback on these estimates through the public consultation process. Although one public submission indicated that the costing data does not contain sufficient detail to provide reliable estimates of financial impact, no additional data was provided. Once the regulation is implemented, analysis of actual costs will be useful to determine how regulatory burden might be further reduced when the legislation is reviewed after two years of operation.

During public consultation, one university commented that compliance costs for smaller universities may be just as high as for larger universities that carry out more research. Another public consultation submission noted that there should be more explicit consideration of the implications for individuals and researchers because the legislation imposes individual criminal culpability. Comment was also made that the level of costs will be influenced by the scope of the final controls, and the level of Defence's provision of compliance support and education. Although these submissions did not provide costing data to assist further cost analysis, once the regulation is implemented, Defence will seek, on a voluntary basis, actual cost information to examine regulatory burden on smaller universities and individuals and researchers when the legislation is reviewed after two years of operation which is a requirement of the Amendment Bill.

Cost-benefit comparison

Option 3 addresses the cost of regulatory burden. By amending the Act, stakeholders will face more moderate levels of compliance burden, resource costs, education costs, legal costs, training costs, and system upgrade expenses. This will assist to ensure that innovation, research, trade and economic prosperity are not unduly stifled and international export control regime obligations are met.

Regulatory Burden and Cost Offset (RBCO) Estimate Table

| Average Annual Compliance Costs (from business as usual)* | | | | |
|--|-----------------|--------------------------------|--------------------|-------------------|
| Costs (\$m) | Business | Community Organisations | Individuals | Total Cost |
| Total by Sector | (35.43) | N/A | N/A | (35.43) |
| Cost Offset | Business | Community Organisations | Individuals | Total Cost |
| Agency | N/A | N/A | N/A | N/A |
| Within Portfolio | N/A | N/A | N/A | N/A |
| Outside Portfolio | N/A | N/A | N/A | N/A |
| Total by Sector | N/A | N/A | N/A | N/A |
| Proposal is cost neutral – no | | | | |
| Proposal is deregulatory – yes | | | | |
| Balance of cost offsets \$ N/A | | | | |

Who has been consulted on the options and how did this happen?

In partnership with the Steering Group and the Department of Industry, the Department of Defence has conducted extensive consultation on the potential impacts of the Act and proposed measures to reduce these impacts throughout the transition period. These consultations will continue after the Amendment Bill is tabled in Parliament to facilitate implementation.

Throughout the process, outcomes of the Steering Group's quarterly meetings and its six-monthly reports to Government and the Senate have been published on the Steering Group's website at www.exportcontrols.govspace.gov.au to facilitate public access, transparency and engagement. The Steering Group website also includes a stakeholder engagement plan and calendar of stakeholder engagement activities undertaken to date in 2013 and 2014.

Public consultation on the draft legislation to inform the Steering Group and the Department of Defence, included:

- On 17 December 2014 Defence posted an announcement on the Defence Export Control Office (DECO) website regarding the official dates of public consultation, commencing on 17 December, with final submissions by the public being accepted until 30 January 2015. This announcement on the DECO website provided:
 - the Bill;
 - a tracked-changes version of the *Defence Trade Controls Act 2012*;
 - the Explanatory Memorandum, including the Human Rights Compatibility Statement;
 - the Early Assessment Regulatory Impact Statement (RIS);
 - a plain-English guide to the proposed changes to the Act; and
 - the Public Consultation PowerPoint slides.
- A Departmental media release was distributed on 17 December 2014.
- Face-to-face public consultation sessions in the capital cities between 19–30 January 2015.
- Tailored legal sessions in Sydney and Melbourne on 27 and 29 January 2015.
- All existing DECO clients (approx. 4500 clients) were sent an email through the export licensing system announcing the start of public consultation and providing links to all relevant websites.
- An email was sent to all points of contact obtained during the two-year transition period of the Act (approx 1130 contacts).
- An email was sent to peak bodies across the university and research sectors; industry and SME sectors (Universities Australia, Australian Industry Group, Australian Industry Defence Network, National Tertiary Education Union, Association of Australian Medical Research Institutes, National Health and Medical Research Council, Australian Research Council, Export Council of Australia, Australian Institute of Marine Science, Communicable Disease Network Australia, Geoscience Australia, Academy of Technological Sciences and Engineering, Australian Academy of Science, Science and Technology Australia, Cooperative Research Centres Association, Australian Information Industry Association, AusBiotech, Australian Bureau of Agricultural and Resource Economics and Sciences, Royal Australian Chemical Institute, Minerals Council of Australia, Defence Teaming Centre, Group of Eight Australia, Innovative Research Universities and Regional Universities Network).
- Defence undertook a two-week road show, beginning on 19 January and concluding on 30 January. These sessions were held in the capital cities of Brisbane; Darwin; Perth; Canberra; Sydney; Adelaide; Melbourne and Hobart, and were hosted by the following institutions, respectively: the University of Queensland; Charles Darwin University; Curtin University; Australia National University; Sydney University; The University of Southern Australia; Melbourne University and the University of

- Tasmania. These consultation sessions were open to all members of the public, with specific outreach being made through stakeholder engagement, peak body engagement and existing Defence export clientele, for university/research sector, defence industry, dual-use industry and small and medium enterprise attendance, as these are the stakeholders primarily impacted by the proposed legislation.
- Given the complex nature of the legislation, there were also two legal sessions in Sydney and Melbourne which provided additional granularity from a legal perspective. These sessions were held in tandem with the more general sessions in Sydney and Melbourne.

Results of public consultation

Overall attendance at each of the consultation sessions hovered around 20-30 participants, with the exception of Darwin where there were substantially fewer participants. The sessions included a formal presentation on the Bill and work undertaken by the Department of Defence, Steering Group and the Department of Industry and Science during the transition period.

The formal briefing was followed by a period of questions and answer, which in almost all sessions lasted for about an hour and a half. The primary focus of the questions generated during the sessions was related to the need to ensure that an adequate implementation period be established, so as not to create a difficult transition period for stakeholders. This was a matter of particular concern noting the current offence provisions in the Act will commence operation on 16 May 2015, unless otherwise amended. Many attendees observed that the original legislation is unduly burdensome for stakeholders, and unwieldy and impractical to implement from a regulatory standpoint.

An additional area of comment at the sessions related to measures that, while not legislative in nature, can be addressed by Defence through either the creation or clarification of policy guidance. There was also noticeable concern in the face-to-face sessions as to what sort of assistance, be it in outreach, education or the formulation of tools, Defence could provide to stakeholders to aid in their implementation of the Bill.

When the public consultation finished on 30 January 2015, 37 submissions had been received from across the university, research and industry sectors. The majority of the 37 submissions commended the consultative process conducted over the past two years and largely welcomed the Bill's measures to reduce regulatory burden. Several submissions criticised the public consultation as being too short and for being conducted through December and January when the academic community was largely on leave. A few submissions opined that the legislation is misdirected and will disadvantage Australian researchers in comparison to their counterparts in the United States of America and the United Kingdom. The main themes of the consultation comments are set out below.

Although Government has provided for implementation by approving a six-month delay to the commencement of the offence provisions from the date of Royal Assent for the Bill, approximately ten university and research sector submissions asked for a 12-month implementation period.

Three submissions requested the insertion of legislative declaratory statement to acknowledge that academic and university researchers, in the exercise of their academic integrity, will be able to intangibly share and publish research.

Several submissions requested broader exceptions to the supply offence for researchers to cover various situations; including, when researchers are undertaking public benefit research, when research collaborators travel overseas, for proprietary research that is not published, and for dedicated teaching purposes. Submitters were also concerned that the oral exception for the supply offence will not assist defence industry because the oral supply exception will no longer be available for supplies that are for a military end-use.

A number of submissions requested the inclusion of a due diligence defence to the supply, brokering and publication offences to protect researchers who exercise due diligence by complying with organisational compliance programs but unwittingly commit offences.

Concerns were raised in several submissions that the exception to the supply offence for pre-publication activities related to dual-use technology is not clear, and it was suggested that 'pre-publication activity' should be defined or further guidance on what constitutes such an activity be provided.

A number of submissions also recommended that an ongoing advisory board with representation from higher education, research, Government, industry and other key stakeholders, be established to oversee the implementation of the new regulations.

Mechanisms for regular review of legislation and permanent stakeholder consultation arrangements

Noting the challenging nature of this new regulation, a mechanism has been included to provide for review of the operation of the Act at two years of commencement of the strengthened export control provisions, and subsequently at intervals of not longer than five years. This review process will involve continuing engagement with stakeholders from higher education, research, industry, government and other key stakeholders.

Building on the work of the Steering Group, there is an opportunity to develop greater stakeholder engagement at the strategic level. Mechanisms for permanent strategic engagement between the Defence Export Control Office and its industry, research and government stakeholders will be mutually beneficial and integrated with the legislative review cycle.

What is the best option?

The Department of Defence endorses Option 3 as the preferred option. It is based on significant stakeholder input through the Steering Group process, and reduces regulatory burden without compromising Australia's national security or contravening existing international obligations and commitments.

Option 1 presents a solution where the costs of the regulatory burden outweigh the benefits of the increased levels of export control. This conclusion is supported by the work that has been conducted through the Steering Group process across industry, university and research stakeholders.

Option 2 presents significant and unacceptable costs in terms of Australia losing access to sensitive technologies from the United States of America and elsewhere on the basis that such access is reliant on their assessment that Australia will protect these sensitive technologies, including through a robust export control system that includes controls on intangible technology supplies. Adopting this option risks losing a portion of the approximately \$6.5 billion in revenue generated by Australian defence industry. It would also create significant but unquantifiable difficulties for the defence-related Australian university and research sector.

Option 3 strikes an appropriate balance between the costs of regulatory burden that will ensure from moderate levels of compliance costs, resource costs, education costs, legal costs, training costs and system upgrade expenses with the benefits of ensuring that innovation, trade and economic prosperity are not unduly stifled and international export control regime obligations are met.

While Option 3 necessarily increases regulatory burden compared to Option 2 due to the introduction of the new controls, it does so at a much lower level than Option 1 by adopting risk-based approaches commensurate with international practice, and by recognising the different risk profiles associated with military and dual-use controlled items. Higher-risk activities would still require case-by-case assessment by the regulator, but lower-risk activities would be streamlined, and this risk-based approach would also flow through to the treatment of physical exports that are currently all considered on a case-by-case basis, regardless of their risk profile.

How will the Department of Defence implement and evaluate the chosen option?

Once the legislation is settled, the Department of Defence will work with stakeholders to help them prepare for the commencement of the offence provisions. The Government has approved a six-month implementation period to run from Royal Assent of the Amendment Bill to allow sufficient time for stakeholders to implement appropriate compliance and licensing arrangements prior to the offence provisions coming into force. During this period, Defence will provide assistance through face-to-face and online training, detailed guidance, and compliance tools, including an online self-assessment tool. Defence is developing these aids in collaboration with the Steering Group and its pilot program to ensure that they meet stakeholders' needs.

Throughout the transition process, organisations in the pilot program and broader stakeholders are contributed evidence on the implementation requirements of the controls including the institutional arrangements required to successfully implement the Act, compliance and resourcing requirements. The pilot program also assisted with implementation aspects, including the development of guidance, tools, training and internal compliance frameworks.

Once the offence provisions come into force, Defence will continue to provide strong stakeholder support through continuing face-to-face and online training, and ongoing refinement of guidance and tools.

Defence will work with the Steering Group to establish permanent stakeholder consultation arrangements to ensure that effective stakeholder engagement continues beyond the Steering Group's tenure.

Regular legislative review will provide a mechanism for stakeholders to provide feedback on the operation of the Act and suggest ways in which the operation and administration of the Act can continue to evolve and be refined over time.

After the legislation is passed, there will be an initial review of the legislation at the two year mark and at five yearly intervals thereafter. This review will be conducted with close interaction with the relevant stakeholders, including representatives from industry, university and research sectors and relevant government agencies. The review will result in a report to the defence and research ministers, to be tabled in Parliament, on the adequacy of the regulation and whether any amendments to the Act, regulations or policy are recommended.

Appendix A

Option 1

Start up costs for FY14/15

| | Uni/Research sector costs per org | Defence/Dual-use industry costs per org |
|----------------------|--|--|
| Resources | \$312,500 | \$156,250 |
| Communications | \$50,000 | \$25,000 |
| Legal | \$70,000 | \$35,000 |
| Training | \$20,000 | \$10,000 |
| Systems | \$20,000 | \$10,000 |
| Total per org | \$472,500 | \$236,250 |

Total per sector (x 75 orgs)

\$35,437,500 (x 600 orgs)

\$141,750,000

Ongoing compliance costs for FY15/16

| | | |
|----------------|------------------|------------------|
| Resources | \$234,375 | \$117,188 |
| Communications | \$25,000 | \$12,500 |
| Legal | \$50,000 | \$25,000 |
| Training | \$10,000 | \$5,000 |
| Total | \$319,375 | \$159,688 |

Total per sector (x 75 orgs)

\$23,953,125 (x 600 orgs)

\$95,812,800

Ongoing compliance costs for FY16/17

| | | |
|----------------|------------------|------------------|
| Resources | \$195,313 | \$97,656 |
| Communications | \$5,000 | \$2,500 |
| Legal | \$20,000 | \$10,000 |
| Training | \$5,000 | \$2,500 |
| Total | \$225,313 | \$112,656 |

Total per sector (x 75 orgs)

\$16,898,475 (x 600 orgs)

\$67,593,600

Ongoing for following 7 years

| | | |
|----------------|------------------|-----------------|
| Resources | \$156,250 | \$78,125 |
| Communications | \$5,000 | \$2,500 |
| Legal | \$20,000 | \$10,000 |
| Training | \$5,000 | \$2,500 |
| Total | \$186,250 | \$93,125 |

Total per sector (x 75 orgs)

\$13,968,750 (x 600 orgs)

\$55,875,000

Average Yearly compliance costs for Option 1:

For university/research sector:

$\$472,500 + 319,375 + 225,313 + 186,250 \times 7 = \$2,320,938$ for 10 years per org
Average ongoing compliance cost per year = $\$2,320,937/10 = \$232,094$ per org
Total across sector (x by number of organisations)
 $\$2,320,937 \times 75$ orgs = $\$174,070,275$ for 10 years for the sector
For yearly average compliance cost, divide by 10:
 $\$17,407,028$ per year for the sector

For defence/dual-use sector:

$\$236,250 + 159,688 + 112,656 + 93,125 \times 7 = \$1,160,469$ for 10 years per org
Average ongoing compliance cost per year = $\$1,160,469/10 = \$116,047$ per org
Total across sector (x by number of businesses)
 $\$1,160,469 \times 600$ orgs = $\$696,281,400$ for 10 years for the sector
For yearly average compliance cost, divide by 10:
 $\$69,628,140$ per year for the sector

Total average annual cost for Option 1:

$\$17,407,028 + \$69,628,140 = \$87,035,168$ per year for all sectors

Option 3

Option 3 requires three separate calculations as sectors would be subject to different levels of regulation (see table page 11).

| | Uni/Research sector costs per org | Dual-use industry costs per org | Defence industry costs per org |
|-------------------------|------------------------------------|-------------------------------------|-------------------------------------|
| Resources | \$312,500 | \$117,188 | \$156,250 |
| Communications | \$20,000 | \$10,000 | \$10,000 |
| Legal | \$10,000 | \$5,000 | \$5,000 |
| Training | \$20,000 | \$10,000 | \$10,000 |
| Systems | \$20,000 | \$10,000 | \$10,000 |
| Total per org | <u>\$382,500</u> | <u>\$152,188</u> | <u>\$191,250</u> |
| Total per sector | (x 75 orgs) \$28,687,500 | (x 100 orgs) \$15,218,800 | (x 500 orgs) \$95,625,000 |

Ongoing compliance costs for FY15/16

| | | | |
|-------------------------|------------------------------------|------------------------------------|-------------------------------------|
| Resources | \$234,375 | \$78,125 | \$117,188 |
| Communications | \$10,000 | \$5,000 | \$5,000 |
| Training | \$10,000 | \$5,000 | \$5,000 |
| Total | <u>\$254,375</u> | <u>\$88,125</u> | <u>\$127,188</u> |
| Total per sector | (x 75 orgs) \$23,953,125 | (x 100 orgs) \$8,812,500 | (x 500 orgs) \$63,594,800 |

Ongoing compliance costs for 16/17

| | | | |
|-------------------------|---|---|--|
| Resources | \$156,250 | \$58,594 | \$78,125 |
| Communications | \$5,000 | \$2,500 | \$2,500 |
| Training | \$5,000 | \$2,500 | \$2,500 |
| Total | \$166,250 | \$63,594 | \$83,125 |
| Total per sector | (x 75 orgs) \$12,468,750 | (x 100 orgs) \$6,359,400 | (x 500 orgs) \$41,562,500 |

Ongoing compliance costs for following 7 years

| | | | |
|-------------------------|--|---|--|
| Resources | \$78,125 | \$29,531 | \$39,062.50 |
| Communications | \$5,000 | \$2,500 | \$2,500 |
| Training | \$5,000 | \$2,500 | \$2,500 |
| Total | \$88,125 | \$34,531 | \$44,063 |
| Total per sector | (x 75 orgs) \$6,609,375 | (x 100 orgs) \$3,453,100 | (x 500 orgs) \$22,031,250 |

Average yearly compliance costs for Option 3

For university/research sector

$\$382,500 + 254,375 + 166,250 + 88125 \times 7 = \$1,420,000$ for 10 years per org
 Average ongoing compliance cost per year = $\$1,420,000/10 = \$142,000$ per org
 Total across sector (x by number of organisations)
 $\$1,420,000 \times 75$ orgs = $\$106,500,000$ over 10 years for the sector
 For yearly average compliance cost, divide by 10:
 $\$10,650,000$ per year for the sector

For dual-use sector per year

$\$152,188 + 88,125 + 63,594 + 34531 \times 7 = \$545,624$ for 10 years per org
 Average ongoing compliance cost per year = $\$545,624/10 = \$54,562$ per org
 Total across sector (x by number of businesses)
 $\$545,624 \times 100$ orgs = $\$54,562,400$ for 10 years for the sector
 For yearly average compliance cost, divide by 10:
 $\$5,456,240$ per year for the sector

For defence industry sector per year:

$\$191,250 + 127,188 + 83,125 + 44063 \times 7 = \$710,004$ for 10 years per org
 Average ongoing compliance cost per year = $\$710,004/10 = \$71,000$ per org
 Total across sector (x by number of businesses)
 $\$710,004 \times 500$ orgs = $\$355,002,000$ for 10 years for the sector
 For yearly average compliance cost, divide by 10:
 $\$35,500,200$ per year for the sector

Total average annual cost for Option 3:

$\$10,650,000 + \$5,456,240 + \$35,500,200 = \$51,606,440$ per year for all sectors

Total savings of Option 3 over Option 1:

$\$87,035,168 - \$51,606,440 = \$35,428,728$ ($\$35.43m$)