2010 - 2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DEFENCE TRADE CONTROLS BILL 2011

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Defence the Honourable Stephen Smith, MP)

INDEX

GLOSSARY

The following abbreviations and acronyms are used throughout this explanatory material.

Abbreviation	***Term***	***Additional Information***
DECO	Defence Export Control Office	
DSGL	Defence and Strategic Goods List	This is the current legal instrument titled the *Defence and Strategic Goods List Amendment 2010*.
DTCML	Defense Trade Cooperation Munitions List	The list of defence articles eligible under the scope of the Treaty.
FMS	Foreign Military Sales	
ITAR	The US International Traffic in Arms Regulations	
WMD	Weapons of Mass Destruction	
UN	United Nations	
UNSC	United Nations Security Council	
US	United States of America	
	Non-regulated items	Items not listed in the DSGL but may be subject to other legislation (e.g. WMD Act)

GENERAL OUTLINE

The Defence Trade Control Bill 2011 (the Bill) will give effect to the *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation* ('the Treaty'). The Bill will also strengthen Australia's export controls to align them with international best practice.

The Australia-United States Defense Trade Cooperation Treaty

On 5 September 2007 the Australian Government entered into a Treaty with the United States Government that would create a framework for two-way trade between Australia and the United States of America (US) in defence articles between "trusted communities" without the need for export licences. It is anticipated that the Treaty will significantly reduce the administrative delays associated with the export control systems, providing for reduced delivery times for new defence projects and improved business opportunities for Australian companies to participate in US contracts.

The proposed measures in the Bill create provisions for the establishment and management of an Australian Community by outlining membership requirements for the Australian Community, providing offences for individuals and companies who fail to comply with the Treaty obligations, transitioning to the Defence Trade Cooperation Treaty regime and establishing monitoring powers and record keeping requirements.

Strengthening Australia's Defence and Dual-Use Export Controls

Australia is a member of all the major arms and dual use export control regimes[1] 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 an important 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 significantly 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 the same goods as other members of the export control regimes in which it participates.

To date, Australia has not adopted additional controls over other types of transaction devised by like-minded countries in the Wassenaar Arrangement, notably arms brokering (adopted in

[1] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies; Australia Group; Nuclear Suppliers Group; and Missile Technology Control Regime.

2003) and intangible transfers of technology (adopted in 2006). Australia supported the development of these controls when they were debated in international forums.

The measures in the Bill introduce controls on the supply of Defence and Strategic Goods List (DSGL) listed technology and services related to DSGL technology and goods. The Bill also creates a registration and permit regime for the brokering of DSGL goods, technology and related services. The Bill introduces a number of new criminal offences to enforce the new provisions.

General Considerations

Application of the Electronic Transactions Act 1999

This Bill controls a range of electronic transactions that will be subject to the provisions of the *Electronic Transactions Act 1999* and its associated regulations. Consideration will need to be given to whether there is a need to amend the Electronic Transactions Regulations to alter the application of the *Electronic Transactions Act 1999* to particular transactions.

This Bill imposes penalties for offences. It is intended that section 4B of the *Crimes Act 1914* applies and as a result, increased penalties may apply to bodies corporate.

Financial Impact Statement

Funding for the scheme to implement the provisions related to the Treaty has been provided as an administered appropriation to the Department of Defence. There are no additional costs associated with this Bill beyond the costs already included in the current Budget and forward estimates to implement the Treaty.

REGULATION IMPACT STATEMENT

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)[2] 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.

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[3] that include

[2] 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).
[3] Outlined at Annex A.

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[4] that includes:

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;

[4] This is further described at Annex B.

- 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[5].

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

[5] 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.

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.

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).[6]

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[7]. The Minister for Defence has denied only 18 during this period.[8]

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[9]. 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

[6] 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.

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

[8] 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 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.

[9] 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.

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 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[10]. 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[11] 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

[10] 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.

[11] 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.

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.[12]

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. [13]

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.[14] 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:

a. supply of technology relating to goods, where the technology is listed in the DSGL

[12] 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.

[13] 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.

[14] 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.

(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'[15], 'basic scientific research'[16] [17], 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.[18] 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.[19] 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 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

[15] '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...
[16] '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.
[17] 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.
[18] 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).
[19] Noting, of course, such companies' goods would already be controlled on the export of tangible items listed on the DSGL.

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.[20]

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.

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[21]

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

[21] 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.

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.[22] 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.

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.

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

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[23] 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).[24] 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.[25]

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

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

[24] 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.'

[25] 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.

authorised arms brokers. At the time, these applications were not processed, as Australia had no legislative basis to provide such certificates.[26]

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

[26] 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.

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[27] 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

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

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 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.[28]

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

[28] 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.

Treaty purposes[29];

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.)

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.[30] [31]

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]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.

[30] 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.

[31] 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.[32]

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 to industry to assist them meeting

[32] 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.

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.[33] 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 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

[33] 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.

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.[34]

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.

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

[34] www.wassenaar.org

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)[35] 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*)[36].

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.

---

[35] 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.

[36] 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.

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 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)[37] 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

[37] 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.

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.[38]

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.

[38] 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.

DEFENCE TRADE CONTROLS BILL 2011

Part 1 – Preliminary

Section 1 – Short title

1. This provides for the citation of the Act as the *Defence Trade Controls Act 2011*.

Section 2 – Commencement

2. Each provision of this Bill specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table. It also provides that any other statement in column 2 of the table has effect according to its terms.

3. Item 1 of the table provides that sections 1 and 2 and anything else in the Bill not covered in the Table commences on the day on which the Bill receives the Royal Assent.

4. Item 2 of the table provides that the remaining provisions commence on the later of either the day after the Bill receives the Royal Assent or the day on which the Treaty enters into force. However, the provisions do not commence at all if the Treaty does not enter into force. The Minister must notify in the Gazette the day on which the Treaty enters into force.

5. Subsection 2 provides that column 3 of the table contains additional information that is not part of the Bill.

Section 3 – Simplified outline

6. This provides a simplified outline of the provisions in the Bill.

Section 4 – Definitions

7. This provides the definitions of terms used in the Bill.

8. Many of the definitions established in this section have regard to the obligations agreed by the Australian Government under the Treaty. The Treaty requires Australia to protect US Defence Articles to a standard equivalent to the protections afforded under the US International Traffic in Arms Regulations (ITAR). To align with these obligations, the definitions of 'defence services' and 'technology' are intended to have similar effect to the equivalent definitions under the US ITAR.

Section 5 – US Defence Articles

9. Section 5 sets out definitions that are specific to the parts of the Bill that implement the Treaty.

10. A '3(1) US Defence Article' is an article listed in the Defense Trade Cooperation Munitions List (DTCML) and initially moved from the US Community to the Australian

Community. A '3(3) US Defence Article' is an article listed in the DTCML acquired by Australia through the Foreign Military Sales (FMS) program which fall within the scope of the Treaty.

11. For the purposes of this section, a US Defence Article can be either a 3(1) or a 3(3) US Defence Article (original good) or a good that contains a 3(1) or 3(3) US Defence Article (incorporated good).

The following are examples of an incorporated good and a modified US Defence Article.

1. Incorporated Good

If communications software, which is a US Defence Article, is incorporated into a military training simulation device, which is not a US Defence Article, then the military training simulation device while ever it contains the incorporated communications software will be considered a US Defence Article and will be subject to the Treaty requirements. This will apply even if the communications software, when incorporated into the military training simulation device, makes up only a small component of the overall combined product.

2. Modification of a US Defence Article

If a military training simulation device, being a US Defence Article, is modified by having updated software loaded onto it, then the military training simulation device remains a US Defence Article and subject to the Treaty obligations.

Conversely, if the military training simulation device (US Defence Article) with incorporated software (not of itself a US Defence Article) is modified by having the simulation software removed, then the military training simulation device will remain a US Defence Article and the software can return to its non-Treaty status.

Section 6 – Crown to be bound

12. The Crown must abide by the provisions of the Bill, but the Crown is not liable to be prosecuted for an offence under the Bill.

Section 7 – Extension to external Territories

13. The provisions of the Bill have effect in Australia's external Territories.

Section 8 – Extension to things outside Australia

14. The provisions of the Bill apply to acts, omissions, matters and things outside Australia, except where the Bill specifically states otherwise.

Section 9 – Severability-additional effect of Bill

15. Section 9 provides for the continued operation of the Bill (or provisions of the Bill) in the event of a successful constitutional challenge. It sets out the various constitutional heads of power upon which the Bill can draw if its operation is expressly confined to acts or omissions under those constitutional powers.

Part 2 – Dealings in items in the Defence and Strategic Goods List

Division 1 – Primary offences

16. Australia is a member of the Wassenaar Arrangement which is an arrangement between participating nations to establish best practice control of international exports of defence goods, services and technologies. To bring its export controls into line with international best practice, Australia is updating its legislation to introduce additional controls over technology and services related to defence and dual-use goods.

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

> For example, under the current export requirements relating to goods on the DSGL, a person must obtain a permit under Regulation 13E of the Customs (Prohibited Exports) Regulations to export a good listed on the DSGL. For example, this would include a CD containing technology listed on the DSGL. If the person was to email that same technology to a foreign end-user overseas, the Customs Regulations would not apply. Instead, the transfer would be regulated by the Bill and the person would need to obtain a permit under section 11 which would allow them to email technology related to a DSGL good to a foreign end-user overseas.

18. The objective of these additional controls is to ensure that the supply of technology listed in the DSGL and the provision of services related to goods and technology listed in the DSGL is regulated regardless of the way in which technology is supplied or the services are provided.

Section 10 Offences – supplies and provision of defence services in relation to the Defence and Strategic Goods List

19. Section 10 provides offences in relation to the supply of technology listed in the DSGL and the provision of services related to goods and technology listed in the DSGL.

Supplies

20. Subsection 10(1) creates an offence where a person:
    - supplies technology listed in the DSGL; and
    - the supply is either from:
        - a foreign person in Australia to a foreign person outside of Australia; or
        - an Australian person to a foreign person; and

- the supplier either:
  - does not hold a permit under section 11; or
  - contravenes a condition of their permit.

Provision of defence services

21. Subsection 10(2) creates an offence where a person:

- provides services in relation to DSGL goods or technology; and
- the services are either:
  - provided outside Australia by an Australian person to a foreign person; or
  - received in Australia by a foreign person; and
- the provider either:
  - does not hold a permit under section 11; or
  - contravenes a condition of a permit.

22. The maximum penalty for offences under subsections 10(1) and 10(2) is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for exporting goods listed in the DSGL without authorisation.

An Australian exporter must apply for a permit under Regulation 13E of the Customs (Prohibited Exports) Regulations to export a good listed on the DSGL. The Australian Customs and Border Protection Service, at the time of export, would verify that the appropriate export permission had been provided before allowing the export of the DSGL good to proceed. For example, a military radio containing encryption software is listed on the DSGL, therefore an exporter must obtain a permit under Regulation 13 E of the Customs (Prohibited Exports) Regulations to lawfully export that radio containing the encryption software.
The offence provision at subsection 10(1) provides that should encryption software, which is listed on the DSGL, be sent by an Australian person to a foreign person via email without the transaction being authorised by a permit under section 11, an offence may have been committed.

Exception – Defence Trade Cooperation Treaty

23. Subsections 10(3) and 10(4) exempt members of the Australian and United States Approved Communities (a trusted community under the framework of the Treaty) from the offences under this section if the activity is conducted in accordance with the provisions set out in Part 3 of this Bill.

Exception – Australian Defence Force members or APS employees and members of the police

24. Subsections 10(5) and 10(6) exempt members of the Australian Defence Force, employees of the Australian Public Service and members of Australian police forces from the offences in subsections 10(1) and 10(2) when they are supplying the technology or providing the services in the course of their duties. The purpose of the exception is to prevent the legislation from hindering ADF operations, training, exercises and other government-related activities.

Exception – regulations

25. Subsection 10(7) provides for regulations to the Bill to prescribe circumstances in which the offences do not apply. The Government intends to propose regulations to cover circumstances, including where:

- the export of a good incorporates technology that is already the subject of an existing valid permit or licence under the Customs (Prohibited Exports) Regulations;
- the supplied technology is an Australian Defence Article and it is supplied in accordance with the Part 3 Treaty provisions;
- the provided services are in relation to an Australian Defence Article and they are supplied in accordance with the Part 3 Treaty provisions; or
- technology is supplied by an employee of, or engaged under contract by, an Australian High Commission or embassy in the course of their duties and that person holds a Commonwealth Government security clearance.

26. The notes in subsection 10(3)-(7) make clear that a defendant bears an evidential burden in relation to the matter in the subsection. The term 'evidential burden' is defined in subsection 13.3(6) of the *Criminal Code Act 1995* as the burden of adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not exist.

27. Where a defendant seeks to raise the defence, it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge.

Geographical jurisdiction

28. Subsection 10(8) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsections 10(1) and 10(2). This means the offences will apply to:

- Australian citizens, residents and bodies corporate for conduct in or outside of Australia;

- conduct by any person that occurs wholly or partly in Australia; or

- conduct by any person outside Australia where the result of the conduct occurs wholly or partly in Australia.

Definition

29. Subsection 10(9) provides a definition of 'place' for the purposes of section 10.

Section 11 Permits for purposes of section 10

30. Subsection 11(1) provides that a person may apply for a permit to:

- supply technology listed on the DSGL where the technology is related to goods, or
- provide services related to DSGL goods; or

- provide services related to technology listed on the DSGL where the technology is related to goods.

31. Subsection 11(2) provides that an application to supply technology or supply services made under subsection 11(1) may cover more than one activity or a particular activity for a period described in the application.

Decision

32. The Minister may give the applicant a permit if he or she is satisfied that the activity would not prejudice the security, defence or international relations of Australia. In determining whether to issue a permit, the Minister may consider, among other things, including, but not limited to:

- the risk of whether the technology or services may go to countries upon which the United Nations Security Council has imposed sanctions restricting the sale, supply or transfer of defence or dual-use technology or services;
- the risk of whether the technology or services may go to countries where they might be used in a manner contrary to Australia's international obligations or commitments;
- whether the technology or services pose a clearly identifiable risk that the technology or services may be used to commit or facilitate serious human rights abuses;
- whether the technology or services may contribute to instability in the region or aggravate a threat to international and regional peace and security or aggravate the situation in a region which becomes a cause of serious concern;
- whether the technology or services may be used in internal or external conflict or that could further militarise the situation in the destination country;
- whether the technology or services may compromise Australia's wider security interests, its obligations to its allies and friends and its broader international responsibilities;
- the risk of whether the technology or services may go to countries with policies or interests which are inimical to the strategic interests of Australia or its friends and allies;
- whether the technology or services may adversely affect Australia's military capability or substantially compromise its operational capabilities or enhance the power projection capabilities of our potential adversaries;
- the risk of whether the technology or services may go to countries developing (or suspected of developing) weapons of mass destruction or the means for their delivery, or supporting terrorism, or whose behaviour or foreign policies risk major disruption to global or regional stability;
- whether the technology or services may cause adverse reactions by third countries important to Australia, which may affect Australia's interests, in particular, our regional relations; and
- whether the technology or services may be used for mercenary, terrorist or other criminal activities.

33. These criteria are consistent with the considerations made in assessing an application for the export of DSGL tangible goods or technology under the *Customs (Prohibited Export) Regulations 1958*.

34. Subsection 11(6) provides that if the Minister does not give the applicant a permit, the Minister must provide a notice informing the applicant of the decision and the reasons for that decision

Permit conditions

35. Subsection 11(7) provides that a permit issued under this section is subject to any conditions specified in the permit.

Example – permit conditions. A permit that allows multiple activities to occur over a 24 month period may have the condition that the permit holder provides a report to Defence by a stated date on the activities conducted under the authorised permit. The condition may require the report to provide certain information for each activity, such as date and time, end-user and a description of the technology supplied.

Revoking a permit

36. Subsection 11(8) provides that the Minister may revoke a permit issued under subsection 11(4). To revoke a permit, the Minister must be satisfied that the permitted activity would prejudice the security, defence or international relations of Australia.

37. Subsection 11(9) provides that the Minister can revoke a permit by writing to the permit holder informing them of the revocation and the reasons for the revocation except as provided in section 68. The permit is taken to be revoked from the time the permit holder receives the Minister's revocation notice. Section 67 deals with receipt of notices issued under this section.

Section 12 Changing permit conditions

38. Section 12 enables conditions that have been attached to a permit issued under subsection 11(4) to be changed. The Minister can either:
    - impose a new condition, or
    - remove or vary an existing condition.

39. The Minister must issue a notice advising the permit holder of the changed conditions and the reasons for the change except as provided for in section 68. The notice must specify the time at which the new conditions take effect, being at least 7 days after the notice is given unless the Minister is satisfied that the change needs to take effect sooner for reasons of urgency.

40. A notice imposing new permit conditions or varying conditions must include the reasons for the decision, except as provided for in section 68.

Section 13 Breaching permit conditions

41. It is an offence if a person:

    - is a holder of a section 11 permit, and
    - does not comply with a condition of the permit.

42. This is a strict liability offence, however, the defence of honest and reasonable mistake of fact may be raised (*Criminal Code Act 1995* section 9.2). It is considered that breaching a condition of a permit should attract a strict liability offence to provide an adequate deterrent to breaching permit conditions which will attract a minor penalty of a maximum of 60 penalty units. Any permit issued under this section will clearly advise the conditions with which the permit holder will need to comply, including the potential consequences of non-compliance.

43. Subsection 13(3) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsection 13(1). This means the offence will apply to:

- Australian citizens, residents and bodies corporate for conduct in or outside of Australia;
- conduct by any person that occurs wholly or partly in Australia; or
- conduct by any person outside Australia where the result of the conduct occurs wholly or partly in Australia.

Section 14 Notice prohibiting activities

44. Under subsection 14(1) the Minister may issue a prohibition notice prohibiting:

- the supply of technology listed in the DSGL;
- the provision of services related to goods listed in the DSGL; or
- the provision of services related to technology listed in the DSGL;

where the Minister believes or suspects that the activity would prejudice the security, defence or international relations of Australia.

45. The Minister may have regard to the same sorts of considerations that may be considered when deciding whether to give a permit under section 11.

46. A prohibition notice may:

- prevent the activity, or
- limit an activity by setting out certain conditions in the notice.

47. The prohibition notice must include the Minister's reasons for issuing the prohibition notice except as provided for in section 68.

48. Given the nature of intangible technology transfers and the provision of services section 14 is intended to provide a means to act in advance to prevent an intangible transfer from occurring when such a transfer would, if it were to occur, prejudice the security, defence or international relations of Australia.

Period notice in force

49. Subsection 14(3) provides that a notice takes effect at the time that the notice is received. Section 67 deals with the receipt of notices.

50. Subsection 14(4) provides that a notice remains in force for the period specified in the notice unless it is revoked earlier. The specified period can not be longer than 12 months.

Later notices

51. Subsections 14(5) and 14(6) provide that a further notice may be issued before a current notice expires. This additional notice may take effect from the date the current notice expires.

Notice not a legislative Instrument

52. Subsection 14(7) is included to assist readers as a notice made under section 14 is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Revoking a notice

53. Subsections 14(8) and 14(9) provide that the Minister may revoke a notice given under subsection 14(1) informing the notice holder in writing of the revocation. A revocation would take effect at the time that the notice is received. Section 67 deals with the receipt of notices.

Offence

54. Subsection 14(10) creates an offence for a person to conduct an activity specified in a subsection 14(1) or a condition specified in a notice by :

- supplying the technology listed in the DSGL,
- providing the services related to goods listed in the DSGL, or
- providing the services related to technology listed in the DSGL.

55. This offence will attract a maximum penalty of 2,500 penalty units or 10 years imprisonment or both.

56. Subsection 14(11) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsection 14(10). This means the offence will apply to:

- Australian citizens, residents and bodies corporate for conduct in or outside of Australia;
- conduct by any person that occurs wholly or partly in Australia; or
- conduct by any person outside Australia where the result of the conduct occurs wholly or partly in Australia.

Division 2 – Brokering offences

57. Currently, Australian persons, and foreign persons in Australia, can arrange the supply of DSGL goods and technology or the provision of services associated with those items from a place outside Australia to another place outside Australia without Government authorisation. Australian law already controls brokering of non-regulated goods,

technology or services when it is suspected that they will assist a WMD program under the WMD Act. Brokering transactions may also be covered by domestically implemented United Nations (UN) sanctions.

58. The international export control regimes to which Australia belongs have long recognised that brokers have been involved in the delivery of military equipment to countries under arms embargoes, and to criminal organisation and armed groups, including those believed to be engaged in terrorism. In many cases, military items are brokered and transported in countries where laws regarding such items are ill-defined or not enforced. Brokering conducted by front companies and intermediaries can serve to mask the true end-use of items and makes the enforcement of controls over defence and dual-use goods, technologies and services more difficult.

59. The purpose of this Division is to allow the Australian Government to regulate the brokering of controlled goods or technology and the provision of services in relation to such goods or technology when that transaction is arranged by an Australian or the arranging occurs wholly or partly in Australia. This will be achieved through a power to register brokers and issue permits to engage in brokering activities involving DSGL goods, technologies and services.

Section 15 Offence – arranging supplies and provision of defence services in relation to the Defence and Strategic Goods List

60. Subsection 15(1) introduces offences for a person to arrange the supply of DSGL goods or technology :
    - from a place outside Australia; and
    - received outside Australia; and

    the person either:
    - does not hold a section 16 permit; or
    - contravenes a condition of the section 16 permit.

61. Subsection 15(1) introduces offences for a person to arrange the provision of services in relation to DSGL goods or technology where the provision is, or is to be, received outside Australia and the person either:

    - does not hold a section 16 permit, or
    - contravenes a condition of the section 16 permit.

62. The maximum penalty for these offences is 10 years imprisonment or 2,500 penalty units or both.

63. The term ‘arranges’ is intended to include, but is not limited to, circumstances where for a fee, commission or other benefit, a person acts as an agent or intermediary between two or more parties in negotiating transactions, contracts or commercial arrangements for the supply of DSGL goods or technology or provision of services related to DSGL goods or technology.

64. The term ‘arranges’ is not intended to cover situations where a first person provides a second person with a point of contact for the supply of DSGL goods or technology

or provision of services related to DSGL goods or technology and there is no fee, commission or other benefit obtained by the first person.

Exceptions

65. Subsection 15(2) exempts members of the Australian Defence Force, employees of the Australian Public Service and members of Australian police forces from the offences in this section when they are acting in their capacity as ADF or APS employees. The purpose of the exception is to prevent the legislation from hindering ADF operations, training, exercises and other government-related activities.

66. Subsection 15(3) allows regulations to be made provide circumstances where an offence will not be committed under section 15.

67. The notes in subsections 15(2)-(4) make clear that a defendant bears an evidential burden in relation to the matter in the subsection. The term 'evidential burden' is defined in subsection 13.3(6) of the *Criminal Code Act 1995* as the burden of adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not exist. Where a defendant seeks to raise the defence it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge.

68. Subsection 15(4) provides that the offences do not apply if the arrangement is for the supply of technology or goods from a Participating State of the Wassenaar Arrangement on Export Control for Conventional Arms and Dual-Use Goods and Technologies to another Participating State. Participating States have committed to enforce agreed export control laws and therefore any supply and receipt of a DSGL item within a Participating State will be subject to its domestic laws. The Australian Government is satisfied that its regulation of brokering within Participating States would only pose an unnecessary administrative burden on both Government and Australian business.

Geographical jurisdiction

69. Subsection 15(5) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsection 15(1). This means the offence will apply to:

- Australian citizens, residents and bodies corporate for conduct in or outside of Australia;
- conduct by any person that occurs wholly or partly in Australia; or
- conduct by any person outside Australia where the result of the conduct occurs wholly or partly in Australia.

Definitions

70. Subsection 15(6) provides the definitions for 'place' and the 'Wassenaar Arrangement'.

Section 16 Permits for purposes of section 15

71. This section allows a registered broker (Division 3 provides the registration procedure) to apply for a permit to:

- arrange supply of DSGL goods,
- arrange supply of technology related to a DSGL good, or

- arrange the provision of services related to DSGL goods and technology related to goods where the technology is listed in the DSGL.

72. Subsection 16(2) provides that an application made under subsection 16(1) may cover more than one arrangement and be for a particular arrangement for a period described in the application.

Decision

73. Subsection 16(3) provides that if a broker makes an application, the Minister must decide whether to give a permit. Subsection 16(4) provides that the Minister may issue a permit if the Minister is satisfied that the activity would not (i.e. the permit may permit an activity and permit an activity for a specified time period) prejudice the security, defence or international relations of Australia. When considering the activity the Minister may have regard to:

- the risk of whether goods, technology or services may go to countries upon which the United Nations Security Council has imposed sanctions restricting the sale, supply or transfer of defence or dual-use technology or services;
- the risk of whether goods, technology or services may go to countries where they might be used in a manner contrary to Australia's international obligations or commitments;
- whether the activity poses a clearly identifiable risk that the goods, technology or services may be used to commit or facilitate serious human rights abuses;
- whether the goods, technology or services may contribute to instability in the region or aggravate a threat to international and regional peace and security or aggravate the situation in a region which becomes a cause of serious concern;
- whether the goods, technology or services may be used in internal or external conflict or that could further militarise the situation in the destination country;
- whether the activity may compromise Australia's wider security interests, its obligations to its allies and friends and its broader international responsibilities;
- the risk of whether goods, technology or services may go to countries with policies or interests which are inimical to the strategic interests of Australia or its friends and allies;
- whether the goods, technology or services may adversely affect Australia's military capability or substantially compromise its operational capabilities or enhance the power projection capabilities of our potential adversaries;
- the risk of whether goods, technology or services may go to countries developing (or suspected of developing) weapons of mass destruction or the means for their delivery, or supporting terrorism, or whose behaviour or foreign policies risk major disruption to global or regional stability;
- whether the activity may cause adverse reactions by third countries important to Australia, which may affect Australia's interests, in particular, our regional relations; and
- whether the goods, technology or services may be used for mercenary, terrorist or other criminal activities.

74. These criteria are consistent with those that the Minister might consider for an application to export tangible goods or technology listed in the DSGL under the *Customs (Prohibited Export) Regulations 1958*.

75. Subsection 16(5) provides that a permit given under subsection 16(4) may permit an activity or permit an activity to take place over a specified time period.

76. Subsection 16(6) provides that if the Minister does not give the applicant permission, the refusal notice must give reasons for the decision except as provided for in section 68.

Permit conditions

77. Subsection 16(7) provides that a permit is subject to any conditions specified in writing in the permit.

Revoking a permit

78. Subsections 16(8) and 16(9) allow the Minister to revoke a permit if the Minister is satisfied that the authorised arrangement would prejudice the security, defence or international relations of Australia.

79. Subsection 16(10), provides that the Minister must write to a broker informing the broker that a permit ha been revoked and providing the reasons for the revocation except as provided for in section 68. The permit is taken to be revoked from the time the permit holder receives the Minister's revocation notice. Section 67 deals with the receipt of notices.

Section 17 Changing permit conditions

80. Section 17 enables conditions that have been attached to a permit issued under section 16 to be changed. The Minister can either:

- impose a new condition, or
- remove or vary an existing condition.

81. The Minister must issue a notice advising the permit holder of the changed conditions and the notice must specify the time at which the changes take effect and must be at least 7 days after the notice is given unless the Minister is satisfied that the change needs to take effect for reasons of urgency. Section 67 deals with the receipt of notices.

Section 18 Breaching permit conditions

82. Subsection 18(1) creates an offence if a person who holds a section 16 permit to fail to comply with a condition of the permit.

83. This is a strict liability offence, however, the defence of honest and reasonable mistake of fact may be raised for a strict liability offence (*Criminal Code Act 1995* section 9.2). It is considered that breaching a condition of a permit should attract a strict liability offence to provide an adequate deterrent to breaching permit conditions which will attract a minor penalty of a maximum of 60 penalty units. Any permit issued under this

section will clearly advise the conditions with which the permit holder will need to comply, including the consequences of non-compliance.

84. Subsection 18(3) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsection 18(1). This means the offence will apply to:

- Australian citizens, residents and bodies corporate for conduct in or outside of Australia;
- conduct by any person that occurs wholly or partly in Australia; or
- conduct by any person outside Australia where the result of the conduct occurs wholly or partly in Australia.

Division 3 – Registered brokers

85. Registering brokers will allow export control authorities to screen out individuals and companies assessed to be a risk to Australia's defence, security or international relations; for example, because of past violations of Australian or foreign arms control regulations or convictions for other serious criminal offences. It would also allow authorities to keep a record of individuals and companies involved in the trade of brokering defence and dual-use goods, technologies or related services. Registering brokers will also allow the Australian Government to represent to other countries those brokers who are registered as legitimate dealers in defence and dual-use goods, technology and related services. It is anticipated that formal acknowledgement by the Australian Government will assist legitimate brokers to conduct business involving defence and dual-use goods, technology and related services.

Section 19 Applying to be a registered broker

86. Section 19 allows a person to apply to the Minister to be registered as a broker. Once registered, the registered broker may then apply for a permit under section 16.

Section 20 Registering brokers

Minister's decision

87. Subsections 20(1) –(4) provide that if a person applies to be a registered broker, the Minister must consider the person's application and decide whether to register the person as a broker. If the Minister assesses that the applicant is a fit and proper person having regard to the matters set out in subsection 20(3), the Minister must register the applicant as a broker. Section 20 is intended to allow scope for the Minister to consider matters, including but not limited to those relevant to determining a likely risk of diversion in accordance with Australia's prevention of proliferation policies.

Notice of decision

88. Subsection 20(5) requires that the Minister must give the person notice of the decision regarding an application for registration. If the Minister does not register the applicant,

the notice must give reasons for the decision except as provided for in section 68. Section 67 deals with the receipt of notices.

Period of registration

89. Subsection 20(6) provides that if the Minister registers a person as a broker, the notice must specify the date on which the period of registration begins. A registration is valid for five years from the date on the registration notice, unless the registration is cancelled earlier in accordance with section 23.

Conditions of registration

90. Subsection 20(7) provides that a registered broker must comply with any conditions specified in the registration notice.

Section 21 Renewing registration

91. Under subsection 21(1), a registered broker may apply to the Minister to renew their registration. Subsection 21(2) requires that the application must be made within a specified period of time, being at least three months but not more than six months before the current registration expires.

Minister's decision

92. Subsections 21(3)-(5) provide that if the Minister is satisfied that a person is fit and proper in accordance with the specified criteria, the Minister must renew the registration. In making this decision, the Minister must have regard to the factors set out in subsection 21(5). Under subsection 21(6), where the Minister is not satisfied that a person is fit and proper, the Minister must not renew the registration.

Notice of decision

93. Subsection 21(7) provides that the Minister must give the person notice of a decision made under subsection 21(3). If the Minister does not renew a registration, the notice must give reasons for the refusal except as provided for in section 68. Section 67 deals with the receipt of notices.

Minister renews registration before expiry of registration

94. Subsection 21(8) provides that if the Minister renews a registration before a current registration expires, then the renewed registration is valid for 5 years starting from the day after the day the current registration expires.

Minister does not renew registration before expiry of registration

95. Subsection 21(9) provides that if a renewal application has been made in accordance with subsections 21(1) and (2) and a decision has not been made before the current registration expires, the registration will continue, unless it is cancelled earlier, or until the broker receives notice of the decision. If the Minister decides to renew the registration, the renewed registration is valid for five years starting from the day after the expiry date of the current registration. A renewed registration is subject to any conditions on the renewed registration.

Registration may be renewed more than once

96. Subsection 21(10) provides that a registration may be renewed multiple times.

Section 22 Changing conditions of registration

97. Section 22 enables conditions attached to a registration to be changed. The Minister can either:

    - impose a new condition, or
    - remove or vary an existing condition.

98. The Minister must issue a notice advising the registered broker of the changed conditions, including the reasons for the decision except as provided for in section 68. Section 67 deals with the receipt of notices.

Section 23 Cancelling the registration of a broker

99. The Minister may cancel a registration under subsection 23(1) if the Minister is satisfied of any of the criteria set out at paragraphs 23(1) a to e.

100. Subsection 23(2) provides that a cancellation notice must include the Minister's reasons for cancellation except as provided for in section 68. Section 67 deals with the receipt of notices.

Automatic revocation of permits

101. Subsection 23(3) provides that at the time a broker's registration is cancelled, any permits issued under section 16 are automatically revoked.

Section 24 Register of Brokers

102. Subsection 24(1) provides that the Secretary of the Department of Defence must maintain a Register of Brokers which includes the names of all people registered as brokers as well as their registration details, specifically the expiry date of their registrations and whether the registration is subject to any conditions.

103. The register must be maintained electronically and must be published on the Department of Defence's website (www.defence.gov.au/strategy/deco) in accordance with subsections 24(2) and 24(3).

104. To assist readers' understanding, the Register of Brokers made under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 25 Extended meaning of conviction

105. Section 25 extends the reference to a person convicted of an offence in Division 3 to include a person who has had an order made for an offence under section 19B of the *Crimes Act 1914* (or a corresponding provision of a law of a State, Territory or foreign country). A section 19B Crimes Act order is one where the offence is found proved but the Court determines it is inexpedient to impose any punishment taking into account the person's character or the nature of offence or the extenuating circumstances in which the offence was committed. Where a section 19B order is made no conviction is recorded for the offence.

Part 3 – Defense Trade Cooperation Treaty

106. Part 3 of the Bill implements the *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation* (the Treaty). The Treaty was signed in Sydney on 5 September 2007 and the Implementing Arrangement was signed on 14 March 2008.

107. For Australia, the Treaty offers more flexible and ready access to US defence technology by creating a framework that allows for the movement of such technology without requiring prior approval from the US Department of State. In exchange for this more flexible access, Australia needs to ensure that it maintains a level of security and protection equivalent to that required for Australian national security classified information.

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

109. The Treaty removes the requirement for licences or permits to be obtained for each transaction, and instead imposes obligations on Australian Community members in relation to Australian and US Defence Articles traded or transferred under the Treaty.

110. In return for being given this heightened level of flexibility, organisations that are granted Australian Community membership must comply with obligations and conditions intended to maintain a level of security and protection for the US Defence Articles they access within the Treaty framework. As such, this part of the Bill implements the commitments the Australian Government made to the US Government in the Treaty and its Implementing Arrangement to ensure that the Australian Community adequately protects US Defence Articles in the absence of US government-issued licences and other authorisations.

Australian origin articles

111. Australian origin goods, services or technology will be eligible to be moved under the Treaty framework. Exemptions under the *Customs (Prohibited Export) Regulations 1958* and Part 2 of this Bill will provide the mechanism for these items to be transferred between Approved Australian and US Community members without the existing licence requirements. It is intended that the Bill's regulations will require Australian origin technology being transferred under the Treaty to comply with certain marking and handling requirements. This is to ensure that the items are recognised as being Treaty eligible and therefore exempted from normal licensing requirements.

Australian Community

112. Under the Bill, there will be three groups who make up the Australian Community:

- A person who is a body corporate and holds a section 27 approval;

- Employees or persons engaged under a contract for services by a body corporate approved under section 27 can also be a Australian Community member if they meet the requirements to be specified in the regulations under this Bill; and
- Federal, State and Territory Government employees with the required minimum security clearance and a "need to access" US Defence Articles.

Division 1 – Preliminary

Section 26 Simplified outline

113. This section provides a simplified outline of this Part of the Bill.

Division 2 – Membership of the Australian Community

Section 27 Approval of bodies corporate as members of the Australian Community

114. Section 27 allows a person who is a body corporate to apply to the Minister for Defence for approval to be a member of the Australian Community.

115. In completing the Australian Community member application form, an applicant will acknowledge the obligations that they must comply with, including those outlined in section 11 of the Implementing Arrangement.

Minister's decision

116. The Minister must consider an application and decide whether to approve or refuse the application. In assessing the application, the Minister must have regard to the criteria set out in subsection 27(3).

117. Under subsection 27(4), the Minister must not approve an application unless the US Government has agreed to the approval in writing. This gives effect to Article 4(1)(c) of the Treaty.

118. The Minister must give a person who is a body corporate notice of the Australian Community membership decision in accordance with subsection 27(5). Subsection 27(6) requires that if the Minister does not approve the application, the refusal notice must give reasons for the decision except as provided in section 68.

When approval begins

119. Subsection 27(7) requires that the date on which an approval begins must be specified in the approval.

Extended meaning of conviction

120. This subsection extends the reference to a person convicted of an offence in Division 3 to include a person who has had an order made for an offence under section 19B of the *Crimes Act 1914* (or a corresponding provision of a law of a State, Territory or foreign country). A section 19B *Crimes Act 1914* order is one where the offence is found

proved but the Court determines it is inexpedient to impose any punishment taking into account the person's character or the nature of offence or the extenuating circumstances in which the offence was committed. Where a section 19B order is made no conviction is recorded for the offence. This subsection will apply to any convictions of a body corporate manager as mentioned to in subsection 27(3)(f)(i).

Approval not a legislative instrument

121. This provision is included to assist readers as an Australian Community membership approval made under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 28 Approval conditions

Conditions of an approval

122. An approval under section 27 may be subject to the conditions set out in 28(1)(a) - (h).

123. The approval conditions are a key aspect of the new Treaty regime. The approval conditions will give effect to many of the requirements set out in the Treaty and the Implementing Arrangement.

Australian Community members may be subject to the following approval conditions:

- Australian Community members will establish and carry out a self-audit regime to monitor the effectiveness of the relevant controls on Treaty Articles.
- Australian Community members will be subject to compliance activities, including the entering of premises by Authorised Officers, for the purposes of determining compliance with the obligations of the Treaty.
- Information and statements provided by an Australian Community member to the Government of Australia in relation to the movement of a US Defence Article may be provided to the US Government.
- The re-transfer or re-export as defined in the Treaty of a US Defence Article can not occur without prior approvals of the US and Australian Governments.
- All individuals employed within the Australian Community requiring access to US Defence Articles have at least an Australian Government BASELINE security clearance and undergo a check for indicators of significant ties (see Section 6(11)(a) of the Implementing Arrangement).
- US Defence Articles will be marked or identified with a specified standard marking.
- US Defence Articles will be identified, transmitted, stored and handled in accordance with the Treaty and the Implementing Arrangement.
- Australian Community members will apply access controls appropriate to the level of classification to a US Defence Article and its status under the Treaty, including password protection for electronically held Defence Articles and information systems containing such Defence Articles will be accredited in accordance with Australian government standards and guidelines appropriate to the classification of a US Defence Article.
- Australian Community members mark all Australian Defence Articles to be exported to the United States under the Treaty with standard markings as per the Implementing Arrangement.
- Australian Community members withdraw Treaty markings and classifications from Defence Articles when they are re-transferred or re-exported to parties outside the Treaty framework.
- A requirement to provide reports relating to the Australian Community member's compliance with this Bill and any regulations made under it.
- Australian Community members apply access controls appropriate to the level of classification of the Defence Articles and their status under the Treaty, including password protection for electronically held Defence Articles.

Changing approval conditions

124. Subsection 28(1) provides that conditions that have been attached to an approval issued under this section may be changed. The Minister can either:

    - impose a new condition, or
    - remove or vary an existing condition.

125. Subsections 28(2) and (3) require the Minister to advise an Australian Community member who holds an approval under section 27 in writing of the changed conditions and the reasons for the decision, except as provided in section 68. Section 67 deals with receipt of notices issued under this section.

Offences

126. Subsection 28(4) creates an offence for an Australian Community member who holds an approval under section 27 to not comply with a condition specified in the regulations relating to:
    - access by an employee of a person engaged under a contract for services by a person who is a body corporate approved under section 27;
    - investigation and reporting of loss, theft or destruction; or
    - marking, handling or storage of Defence Articles or technology relating to Defence Articles; or
    - the identification of defence services provided in relation to Defence Articles or technology relating to Defence Articles;
    - the provision of reports relating to compliance by an approval holder with the Act or regulations; and
    - Australian Defence Articles

127. This offence attracts a maximum penalty of up to 600 penalty units. Ordinarily the penalty for an offence is set on the basis of an individual and a corporate multiplier applies under section 4B(3) of the *Crimes Act 1914* to determine the maximum penalty for a body corporate. As in this case the offence only applies to a body corporate, the maximum penalty has been set with the corporate multiplier already taken into account. Accordingly, the penalty that has been set for a body corporate is equivalent for a penalty of 2 years imprisonment or 120 penalty units which would have otherwise applied to an individual.

128. Subsections 28(5) creates an offence where an Australian Community member fails to comply with a condition of the approval. This is a strict liability offence, however, the defence of honest and reasonable mistake of fact may be raised (*Criminal Code Act 1995* section 9.2). It is considered that breaching a condition of an approval by a body corporate should attract a strict liability offence.

129. To provide an adequate deterrent to breaching approval conditions the offence attracts a maximum penalty of 300 penalty units. Ordinarily the penalty for an offence is set on the basis of an individual and a corporate multiplier applies under section 4B(3) of the *Crimes Act 1914* to determine the maximum penalty for a body corporate. As in this case the offence only applies to a body corporate, the maximum penalty has been set with the corporate multiplier already taken into account. Accordingly, the penalty that has been set for a body corporate is the equivalent of a penalty of 60 penalty units which would have otherwise applied to an individual. Any approval issued under this section will clearly advise the conditions with which the Australian Community member will need to comply, including the consequences of non-compliance.

130. Subsection 28(7) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsection 28(4). This means the offence will apply to:

    - an Australian person who is a body corporate for conduct in or outside of Australia;
    - conduct by any person who is a body corporate that occurs wholly or partly in Australia; or
    - conduct by any person who is a body corporate outside Australia where the result of the conduct occurs wholly or partly in Australia.

Notice not a legislative instrument

131. This provision is included to assist readers as a notice made under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 29 Suspending an approval

132. Section 29 sets out the circumstances in which an Australian Community membership approval issued under section 27 may be suspended.

133. Section 29(1) enables the Minister to suspend an approval under section 27 if the Minister reasonably believes that:

- a person who is a body corporate has contravened a provision of the Bill;
- a person who is a body corporate has breached a condition of a section 27 approval; or
- the holding of a section 27 approval by a person who is a body corporate prejudices Australia's security, defence or international relations (this is intended to include any concerns raised by the US Government of a risk of diversion of US Defence Articles); or

is satisfied that:

- the section 27 application contained false or misleading information;
- it is appropriate to do so because of a change in any of the circumstances based on which the initial section 27 approval was given; or
- any other circumstance prescribed by the regulations.

134. Subsection 29(2) requires that the Minister must give notice of the suspension including the Minister's reasons for suspension, except as provided in section 68. The notice takes effect at the time the person receives the notice. Section 67 deals with receipt of notices issued under this section.

135. Subsection 29(3) requires that the suspension notice must specify the period of the suspension (which cannot be more than 60 days) and the conditions that must be satisfied before the suspension may be lifted.

Lifting of suspension

136. Subsection 29(4) provides that if the suspension notice specifies two or more conditions that have to be satisfied before a suspension can be lifted, one of those conditions may be that a specified period of time (not more than 60 days) has ended.

137. Subsection 29(5) provides that if the Minister is satisfied that the suspended approval holder has met the conditions specified in the suspension notice, the Minister may give a written notice stating that the suspension is lifted. The suspension is taken to be lifted from the time the approval holder receives the suspension notice. Section 67 deals with receipt of notices issued under this section.

Effect of suspension

138. Subsection 29(6) provides that if an Australian Community member's approval is suspended, the member is taken not to be a member of the Australian Community for the period of the suspension. This means that while approval is suspended, the Australian Community member may not export or transfer US Defence Articles in their custody or control, and may not receive US Defence Articles from other Australian or United States Community members. Suspended Australian Community members may continue to do business by seeking Australian and US export control licences and permits as appropriate.

139. Subsection 29(7) provides that while body corporate's approval under section 27 is suspended the body corporate is taken to continue to hold the approval for the purposes of the application of the conditions of the approval under section 28, the main offences at sections 31, 32 and 33, Part 4 and section 58(3). The body corporate is also taken to continue to hold the approval for the purposes of the application of offences in section 31, 32, and 33 in relation to body corporate employees referred to in definition of Australian Community member in subsection 4(1).

140. As a suspended Australian Community member will still have US Defence Articles in its possession at the time the suspension comes into force and may receive US Defence Articles that were in transit before the suspension came into force, the purpose of this provisions is to ensure that, even though a suspended approval holder may not trade within the framework of the Treaty, it must continue to protect and treat those US Defence Articles in accordance with Treaty provisions and its legislative obligations. To enforce this, the offences must remain in force, despite an approval being suspended.

Non-legislative instruments

141. This provision is included to assist readers as a suspension notice and a suspension lifting notice made under this section are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 30 Cancelling an approval

142. The Minister may cancel an approval under section 27 if the Minister reasonably believes that:

- a person who is a body corporate has contravened a provision of the Bill;
- a person who is a body corporate has breached a condition of a section 27 approval; or

is satisfied that:

- the holding of a section 27 approval by a person who is a body corporate prejudices Australia's security, defence or international relations;
- the section 27 application contained false or misleading information;
- it is appropriate to do so because of a change in any of the circumstances based on which the initial section 27 approval was given; or
- any other circumstance prescribed by the regulations; or
- the approval holder requests for their approval to be cancelled.

143. Subsection 30(2) provides that the Minister must give a cancellation notice providing reasons for the cancellation, except as provided in section 68. The cancellation takes effect at the time the person receives the notice. Section 67 deals with receipt of notices issued under this section.

144. This provision is included to assist readers as a cancellation notice given under subsection 30(2) is not a legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Division 3 – Main offences

Section 31 US Defence Articles listed in the Defence Trade Cooperation Munitions List

145. This section implements Article 9 of the Treaty and section 9 of the Implementing Arrangement, which relate to the handling of US Defence Articles outside the Community or by Community members outside the Treaty. The intent of the Treaty is to allow the transfer and export of Defence Articles pursuant to the Treaty's requirements within the Approved Community (that is, the Australian and US Communities) without the requirement for US or Australian export licences. However, in removing the licence requirement, there needs to be appropriate mechanisms in place to prevent and deter Defence Articles being moved outside the Approved Community or used for purposes other than those specified under the Treaty without prior authorisation by the Minister for Defence.

146. This part creates criminal offences for the following activities:

- an Australian Community member dealing outside of Australian and US territory as set out in subsections 31(1) and 31(2),
- an Australian Community member dealing in Australia or the US outside the Treaty framework as set out in subsections 31(3) and 31(4), and
- an Australian Community member dealing in Australia or the US within the Treaty framework as set out in subsections 31(5) and 31(6).

147. The maximum penalty for these criminal offences is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for tangibly exporting DSGL goods and technology without a ministerial permission. It is also consistent with the penalties under sections 10, 14 and 15 of this Bill.

Exception – regulations

148. Subsection 31(7) provides that the regulations may prescribe circumstances under which the offence provisions do not apply. It is anticipated that the regulations will prescribe circumstances such as where the supply is covered by a US licence or authorisation or where the supply is to an approved intermediate consignee.

149. The notes in subsection 31(7) make clear that a defendant bears an evidential burden in relation to the matter in the subsection. The term 'evidential burden' is defined in subsection 13.3(6) of the *Criminal Code Act 1995* as the burden of adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not exist.

Where a defendant seeks to raise the defence, it is appropriate and practical to require the defendant to adduce or point to evidence that suggests the particular exception applies as these would be matters within the defendant's personal knowledge.

Notice approving supply or provision of defence services

150. Article 9 of the Treaty recognises that there will be exceptions to the restrictions on re-export or retransfer of US Defence Articles outside Australian or US territory for purposes such as the operational use of a Defence Article in direct support of deployed ADF personnel. Subsection 31(8) enables the Minister to issue a notice approving a re-export or retransfer under these circumstances.

Geographical jurisdiction

151. Subsection 31(9) applies section 15.4 (extended geographical jurisdiction - category D) of the *Criminal Code Act 1995* to the offence. This provides the broadest possible jurisdiction under the *Criminal Code Act 1995*. The offence will apply to any conduct by any person whether or not the conduct or the result of the conduct occurs in Australia.

Notice not a legislative instrument

152. This provision is included to assist readers as a notice made under this section is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003. This provision is merely declaratory of the law.

Definition

153. Subsection 31(11) defines the meaning of 'place' in relation to section 11.

Section 32 US Defence Articles exempt from scope of the Defence Trade Cooperation Treaty

154. Article 3(2) of the Treaty and section 4 of the Implementing Arrangement provides for a list of Defence Articles exempt from the scope of the Treaty to be made. This list will be made by the Minister under section 36(4) and will be Part 2 of the Defense Trade Cooperation Munitions List. A Defence Article on the list of exempted Defence Articles must not be treated as a US Defence Article and is subject to existing US and Australian export or other licence requirements.

155. Section 4(7) of the Implementing Arrangement outlines procedures to deal with Defence Articles that are deemed to be exempt from the scope of the Treaty that have previously been included in the scope of the Treaty. The purpose of section 32 is to introduce offences to ensure that Defence Articles that were in the scope of the Treaty and have subsequently become exempt from the scope of the Treaty are adequately protected and handled until an appropriate non-Treaty licence, authorisation or other guidance and direction can be issued by either the Australian Government or US Government.

Dealings in US Defence Articles prior to authorisation

156. Subsections 32(1) and 32(2) create criminal offences for:

- supplying Defence Articles or technology relating to Defence Articles, where the Defence Articles are listed in Part 2 of the Defense Trade Cooperation Munitions list and are exempt from the scope of the Treaty, and

- providing defence services in relation to Defence Articles or in relation to technology relating to Defence Articles, where the Defence Articles are listed in Part 2 of the Defense Trade Cooperation Munitions list and are exempt from the scope of the Treaty.

157. The maximum penalty for offences under subsections 32(1) and (2) is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for tangibly exporting DSGL goods and technology without a ministerial permission. It is also consistent with the penalties under sections 10, 14 and 15 of this Bill.

Control of US Defence Articles after authorisation

158. Subsection 32(3) is intended to cover situations where a Treaty article has been received under the Treaty framework, it is subsequently exempted from the scope of the Treaty and a notice has been issued under subsection 32(4) to the member to specify how the exempted article can be dealt with.

159. It is an offence under subsection 32(3) to not comply with a notice issued under subsection 32(4).

160. The maximum penalty for the offence under subsection 32(3) is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for tangibly exporting DSGL goods and technology without a ministerial permission. It is also consistent with the penalties under sections 10, 14 and 15 of this Bill.

Notices

161. The Minister may issue a notice under subsection 32(4) to an Australian Community member in relation to exempted goods or technology relating to goods. The notice may direct the Australian Community member to comply with specified conditions. Section 67 deals with receipt of notices issued under this section.

Geographical jurisdiction

162. This section applies section 15.4 (extended geographical jurisdiction - category D) of the *Criminal Code Act 1995* to the offence. This provides the broadest possible jurisdiction under the *Criminal Code Act 1995*. The offence will apply to any conduct by any person whether or not the conduct or the result of the conduct occurs in Australia.

Notice not a legislative instrument

163. This provision is included to assist readers as an exempted article direction notice made under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Division 4 – Ministerial directions

Section 33 Ministerial directions – avoiding prejudice to the security, defence or international relations of Australia

164. Section 33 gives effect to Article 8(6) of the Treaty and section 11(4) of the Implementing Arrangement where the Australian Government is concerned about the ability of a non-Government US Community Member to protect Australian origin Defence Articles.

165. Subsection 33(1) provides that the Minister may issue a direction to members of the Australian Community directing them to not supply, within the framework of the Treaty, DSGL goods or technology or services related to DSGL goods or technology, that are not a US Defence Article, to a specified member of the US Community.

166. The Australian Community Member could still apply for an authorisation to export particular goods under Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958* or for a permit to supply particular technology or services under section 11 of the Bill to the US Community member and this will be considered in accordance with those provisions.

167. Subsection 33(2) provides that to issue the Ministerial direction notice, the Minister must be satisfied that the direction is necessary to avoid prejudice to the security, defence or international relations of Australia.

Revocation

168. Subsection 33(3) provides that the Minister may revoke a direction issued under this section.

Notice of direction

169. Subsection 33(4) provides that the Minister must a person who is a body corporate and holds an approval under section 27 of a direction or revocation issued under section 33. Section 67 deals with receipt of notices issued under this section.

170. The conditions of an approval under section 27 will require a person who is a body corporate to make all employees who are also Australian Community members aware of a Direction made under section 33.

Publication of direction

171. Subsection 33(5) provides that the Minister must publish on the Department of Defence's website any direction or revocation issued under this section.

172. This website can be found at http://www.defence.gov.au/strategy/deco

Offence

173. Subsection 33(6) creates an offence for an Australian Community member to:

- supply goods or technology relating to goods; or
- provide defence services in relation to goods or in relation to technology relating to goods; and
- where the supply or provision of defence services contravenes a direction in force under subsection 33(1); and
- the Australian Community member knows of the contravention; and
- a notice under subsection 33(7) approving the supply or provision of services is not force.

174. This offence applies to all Australian Community members. The maximum penalty for this criminal offence is 10 years imprisonment or 2,500 penalty units or both. This penalty is consistent with the penalty in the *Customs Act 1901* for the export of goods listed on the DSGL without a ministerial permission. It is also consistent with the penalties under section 10 of this Bill.

Notice approving supply or provision of defence services

175. Subsection 33(7) provides that the Minister may issue a notice that authorises an activity that would otherwise be in contravention of a direction.

Geographical jurisdiction

176. Subsection 33(8) applies section 15.4 (extended geographical jurisdiction - category D) of the *Criminal Code Act 1995* to the offence. This provides the broadest possible jurisdiction under the *Criminal Code Act 1995*. The offence will apply to any conduct by any person whether or not the conduct or the result of the conduct occurs in Australia.

Non-legislative instruments

177. Subsection 33(9) is included to assist readers as directions or notices made under this section are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 34 Ministerial directions – suspension or cancellation of approvals

Suspension of approvals

178. Subsection 34(1) provides that the Minister may direct an Australian Community member who has been suspended to take or refrain from taking certain action in relation to US Defence Articles that are in the suspended Australian Community member's possession, custody or control at the time the suspension comes into force.

179. A Ministerial direction issued under subsection 34(2) takes effect from the time the Australian Community member receives the notice. The notice expires at the same time

any suspension under section 27 ceases to have effect. Section 67 deals with receipt of notices issued under this section.

Cancellation of approvals

180. Subsection 34(4) provides that the Minister may issue a direction to a person who is a body corporate that has had its approval under section 27 cancelled. The Ministerial direction may require the person to do something, or refrain from doing something, (for example in relation to handling, storing, transferring or exporting) in relation to US Defence Articles that are in the possession, custody or control of a person who is a body corporate at the time the cancellation comes into force.

181. A notice issued under subsection 34(5) takes effect from the time the person who is a body corporate receives the notice. Section 67 deals with receipt of notices issued under this section.

182. The Minister may issue a notice under subsections 34(6) and 34(7) to a person stating that the direction has been revoked. A revocation takes effect from the time the person who is a body corporate receives the notice. Section 67 deals with receipt of notices issued under this section.

Offence

183. Subsection 34(8) introduces an offence where a person who is a body corporate fails to comply with a notice issued under subsections 34(1) or (4). The offence attracts a maximum penalty of 12,500 penalty units. Ordinarily the penalty for an offence is set on the basis of an individual and a corporate multiplier applies under section 4B(3) of the *Crimes Act 1914* to determine the maximum penalty for a body corporate. As in this case the offence only applies to a body corporate, the maximum penalty has been set with the corporate multiplier already taken into account. Accordingly, the penalty that has been set for a body corporate is equivalent for a penalty of 10 years imprisonment or 2,500 penalty units which would have otherwise applied to an individual.

184. Subsection 34(9) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsection 34(8). This means the offence will apply to:

- Australian bodies corporate for conduct in or outside of Australia;
- conduct by any person who is a body corporate that occurs wholly or partly in Australia; or
- conduct by any person who is a body corporate outside Australia where the result of the conduct occurs wholly or partly in Australia.

Notice not a legislative instrument

185. This provision is included to assist readers as notices made under this section are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Division 5 – Other matters

Section 35 Transition to the Defense Trade Cooperation Treaty

186. Section 7 of the Implementing Arrangement sets out the procedures for transitioning a Defence Article from a US Government licence or other authorisation to the procedures established under the Treaty. This section provides a mechanism to enable a Defence Article which is subject to a US Government licence to be transitioned under the Treaty. The arrangements can apply to a Defence Article whether it was received by the Australian Community member prior to or after the commencement of this Part of the Bill.

187. Subsections 35(1) and (2) set out the requirements for transitioning goods or technology relating to goods that were received by an Australian Community member under a US Government licence or other authorisation into the Treaty framework.

188. Subsection 35(1) allows an Australian Community member to apply to the Minister for a notice approving the transition of such goods or technology into the Treaty framework.

189. Section 35(2) provides that if the Minister is satisfied that all prescribed requirements are met, the Minister may give the Australian Community member a notice specifying that the goods or technology are taken to be a US Defence Article.

190. Subsections 35(3) and (4) provide that a notice comes into force at the time the Australian Community member receives the notice and has effect according to its terms. Section 67 deals with receipt of notices issued under this section.

Refusing to approve transition to the Treaty

191. Subsection 35(5) provides that if the Minister refuses to provide a notice under subsection 35(2), the Minister must give the Australian Community member notice of the decision and reasons for the refusal, except as provided in section 68. Section 67 deals with receipt of notices issued under this section.

Notice not a legislative instrument

192. This provision is included to assist readers as a transition refusal notice made under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 36 Defence Trade Cooperation Munitions List

193. Subsection 36(1) requires the Minister to make a document known as the Defense Trade Cooperation Munitions List (DTCML). The DTCML must contain two parts. Part 1 is to contain a list of goods that are within the scope of the Treaty are goods listed in either or both the Defence and Strategic Goods List and the United States Munitions List referred to in Article 1(1)(n) of the Treaty.

194. Subsection 36(4) provides that Part 2 of the DTCML is to cpntin a list of goods that are exempt from the scope of the Treaty.

195. The DTCML reflects the obligations under the Treaty to protect US Defence Articles and therefore Australia has committed to providing an agreed level of protection for these items. In accordance with section 4 of the Implementing Arrangement, both the US and Australian Governments have the ability to exempt certain goods from the scope of the Treaty. This will enable both Governments transactional oversight of the exempted goods which will be the most sensitive Defence goods.

196. The DTCML made under this section is a legislative instrument; however, it is exempt from section 42 of the *Legislative Instruments Act 2003* which allows an instrument to be disallowed by Parliament. The DTCML is fundamental to the operation of Parts 3, 4, 5 and 6 of the Bill as it is these Parts which give effect to the Treaty and establish the basis of the offences for individuals and companies who fail to comply with their Treaty obligations. If the DTCML were to be disallowed, those parts of the Bill could not operate and Australia could not give effect to the Treaty.

Part 4 – Monitoring powers

Division 1– Preliminary

Section 37 Simplified outline

197. This section provides a simplified outline of Part 4 of the Bill. This Part provides monitoring powers for the purposes of ensuring that Australian Community members comply with the Treaty obligations.

Section 38 No limit on section 71

198. This section provides that this Part does not limit section 71 relating to the forfeiture of things.

Division 2 – Appointment of authorised officers and issue of identity cards

Section 39 Appointment of authorised officers

199. This section provides that the Secretary of the Department of Defence may appoint authorised officers for the purposes of carrying out the monitoring powers in the Bill. An authorised officer must be either an Australian Public Servant (APS6 or higher) employed by the Department of Defence or an Australian Defence Force member (Warrant Officer or higher). Defence considers that an APS6 or Warrant Officer has sufficient experience to exercise the judgement required to properly exercise the monitoring powers included in the Bill. There will also be a sufficient pool of officers at these ranks to undertake the monitoring functions.

200. Before the Secretary can appoint a person as an authorised officer, he or she must be satisfied that the person has appropriate qualifications and experience to exercise monitoring powers. In making this decision, the Secretary will take into consideration a person's:

- formal qualifications, such as a Certificate IV or Diploma in Government (Investigations);
- relevant training including:
  - legislative interpretation;
  - evidence handling procedures;
  - intelligence analysis;
- relevant employment experience, including experience involving:
  - audit and compliance;
  - intelligence analysis;
  - investigation; and
- ability to gain and maintain a national security clearance to an appropriate level.

201. In exercising monitoring powers under the Bill, an authorised officer must comply with any direction issued by the Secretary under subsection 39(3).

202. A direction to an authorised officer issued by the Secretary must be in writing.

203. Subsection 39(4) is included to assist readers' understanding only; a direction issued under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 40 Identity cards

204. This section provides that the Secretary must issue an identity card to an authorised officer.

Form of identity card

205. The form of an authorised officer's identity card must comply with requirements set out in the regulations and must contain a recent photo of the authorised officer.

Offence

206. Subsection 39(3) creates an offence for a person holding an identity card to not return the identity card to the Secretary within seven days of ceasing to be an authorised officer.

207. The maximum penalty is five penalty units. This penalty is intended to prevent former authorised officers from misusing the monitoring powers under this Part. The offence is one of strict liability. The penalty is low and strict liability is considered appropriate to

provide a deterrent to keeping an identity card once a person has ceased to be an authorised officer. The offence does not apply if the former authorised officer's identity card was lost or destroyed.

Authorised officer must carry card

208. An authorised officer must carry his or her identity card at all times while exercising the monitoring powers of an authorised officer under the Bill.

Division 3 – Powers of authorised officers

209. Division 3 contains the provisions that specify authorised officers' powers. It is intended that these powers will be exercised by authorised officers to monitor and encourage industry compliance with their Treaty obligations. It is not intended that authorised officers will use these powers to investigate offences as this activity is more appropriately conducted by the Australian Federal Police.

Section 41 Authorised officer may enter treaty premises at any reasonable time of day

210. This section provides that an authorised officer may, on giving 24 hours' notice to a person, who is a body corporate and holds an approval under section 27, enter specified premises at any reasonable time of day to exercise themonitoring powers set out in section 42. Specified premises include:

- any premises specified by the applicant in an application made under section 27 for membership of the Australian Community;
- any additional premises identified by a body corporate; and
- any premises used wholly or partly by abody corporate for business operations (excluding places of residence).

211. It is a condition of a section 27 approval under paragraph 28(1)(b) that a body corporate allow an authorised officer to enter any premises referred to in section 41 for the purpose of finding out whether the body corporate has complied with Parts 3 or 6 of the Bill or a condition of the approval. The obligation to allow an authorised officer to enter premises will continue while an approval under section 27 is suspended.

212. The monitoring powers provided for in the Bill are intended to ensure compliance with the obligations that Australian Community members voluntarily agree to abide by in return for the opportunity to operate in a less regulated commercial environment. The Implementing Arrangement in subsection 11(6) recognises the need for a regime of inspection and audit by the Australian government of records and Defence Articles.

Section 42 Monitoring powers of authorised officers

213. This section sets out the powers of authorised officers may exercise. These powers are set out in subsections 42(1) through (5).

Section 43 Authorised officer may require person to answer questions or produce documents

214. This section provides that an authorised officer who enters premises under section 41 may require a person at the premises to answer questions and produce documents if the authorised officer believes on reasonable grounds that the person can answer a question or produce the documents. An authorised officer may require any person, including an employee or representative of a body corporate or the occupier of the premises to answer questions or produce documents.

215. Subsection 43(3) creates an offence to fail to answer a question or produce a document as requested by an authorised officer under this section. This offence carries a maximum penalty of imprisonment for 6 months.

Section 44 Self-incrimination

216. Section 44 requires a person to answer a question or to produce a document to an authorised officer. The person cannot refuse to produce the document or answer questions because it might incriminate them or expose them to a penalty. However, any documents produced and answers given, and anything obtained as a direct or indirect consequence, are not admissible in evidence against an individual who produces the document or provides the answers in criminal proceedings, unless the proceedings are for an offence against section 43(3) of this Bill or an offence involving the provision of false or misleading information or documents.

217. The provisions in the Bill regulating the privilege against self-incrimination are in the usual form for overriding the privilege subject to a 'use and derivative use' immunity. They ensure self-incriminatory disclosures cannot be used against an individual who makes the disclosure, either directly in court (known as 'use' immunity) or indirectly to gather other evidence against the individual (known as 'derivative use' immunity). However, the information could be used against a third party, such as an accomplice or a body corporate.

218. The treatment of self-incrimination in the Bill is consistent with enforcement powers in other equivalent Commonwealth legislation and is consistent with the views of the Senate Standing Committee for the Scrutiny of Bills, as well as the Australian Government's legal policy regarding the privilege against self-incrimination as set out in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

219. The removal of the privilege, subject to a use/derivative use immunity, will enhance the ability to monitor and ensure compliance with the defence trade control regime and therefore assist in the effective administration of the regime. The effective administration of the defence trade controls is of major public importance and is integral to the multilateral effort to control proliferation of defence and dual-use goods and technology. Non-compliance could undermine these efforts and affect national security and international relationships.

Division 4 – Obligations of authorised officers

Section 45 Announcement before entry

220. This section provides that before entering premises under section 41, an authorised officer must advise that he or she is authorised to enter the premises and must show their identity card to the occupier of the premises or a representative.

Section 46 Occupier to be informed of rights and responsibilities

221. If an authorised officer enters premises under section 41, the authorised officer must inform the occupier the occupier's rights and responsibilities.

Division 5 – Occupier's rights and responsibilities

Section 47 Occupier entitled to observe search

222. This section provides that if an authorised officer enters premises, under section 41, the occupier of the premises is entitled to observe the search. Should the occupier impede the search, the right to observe ceases.

Section 48 Occupier to provide authorised officer with facilities and assistance

223. Section 48 provides that an occupier of premises or a person apparently representing the occupier, must provide reasonable facilities and assistance to an authorised officer or a person assisting the authorised officer.

224. It is an offence to fail to provide these facilities and assistance. This offence carries a maximum penalty of 30 penalty units.

Division 6 – Other matters

Section 49 Tampering etc. with things secured

225. This section creates an offence to tamper, interfere with or destroy a thing that has been secured under subsection 42(5).

226. This offence carries a maximum penalty of 6 months imprisonment which is considered to be an appropriate deterrent to prevent potential destruction and interference with evidence.

Section 50 Persons assisting authorised officers

227. This section provides that an authorised officer who enters premises may be given necessary and reasonable assistance by other people. A person who provides assistance to an authorised officer is referred to as a person assisting an authorised officer. A person assisting an authorised officer could include a US government official.

Powers of a person assisting

228. Subsection 50(2) provides that a person assisting an authorised officer may enter the premises and comply with the directions given by the authorised officer. This means that a person assisting can exercise monitoring powers contained in sections 42, 43, 45 and 46, under direction.

229. Subsection 50(3) provides that any power carried out by a person assisting an authorised officer will be considered as having been carried out by the authorised officer.

230. Subsection 50(4) provides that if an authorised officer directs a person assisting in writing, the direction is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. To assist readers' understanding, a direction to a person assisting made under this section is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory of the law.

Section 51 Compensation for damage to electronic equipment

231. Subsection 51(1) provides an allowance for compensation in the circumstances listed.

232. Subsection 51(2) provides that the amount of compensation must be agreed by both the Commonwealth and owner or user and must be reasonable in relation to the damage or corruption caused.

233. Subsection 51(3) provides that where the Commonwealth and owner or user are unable to reach agreement on the amount of compensation payable, the owner or user may take the matter to the Federal Court of Australia, which will determine the amount of compensation to be paid.

234. Subsection 51(4) provides that in determining the amount of compensation, consideration must be given to whether the occupier of the premises, or the occupier's employees or agents, provided any warning or guidance on the operation of the equipment that was subsequently damaged or corrupted. Such guidance, or lack thereof, may affect the amount of compensation.

235. Subsection 51(5) provides a definition of 'damage' in relation to data.

Part 5 – Information-gathering powers

Section 52 Secretary may obtain information and documents

Scope

236. This section provides that if the Secretary believes on reasonable grounds that a person has information or a document that is relevant to the operation of this Act, the Secretary may exercise the information-gathering powers set out in subsection 52(2).

Requirement

237. Subsection 52(2) provides that the Secretary may give a notice to a person requiring the person to provide information or produce documents, or make copies of documents and give the copies to the Secretary within a specified timeframe and in the manner specified in the notice.

238. Subsection 52(3) provides that the timeframe for providing or producing the requested information or documents must be at least 14 days after the notice has been given under subsection 52(2).

239. Subsection 52(4) provides that the notice must set out:

- the offence for failing to comply with a notice, and
- information about giving false and misleading information or documents.

Offence

240. Subsection 52(5) creates an offence to fail to comply with a notice issued under subsection 52(2). This offence attracts a maximum penalty of 6 months imprisonment.

241. Subsection 52(6) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsection 52(5). This means the offence will apply to:

- Australian citizens, residents and bodies corporate for conduct in or outside of Australia;
- conduct by any person that occurs wholly or partly in Australia; or
- conduct by any person outside Australia where the result of the conduct occurs wholly or partly in Australia.

Section 53 Copying documents – compensation

242. Section 53 provides that a person is entitled to be paid reasonable compensation by the Secretary on behalf of the Commonwealth for complying with a requirement to produce or make copies of documents in a specified time and manner.

Section 54 Secretary may inspect and copy original documents

243. This section provides that the Secretary may inspect, make copies and retain those copies of the whole or parts of documents produced in accordance with paragraph 52(2)(b).

Section 55 Secretary retain copies of documents

244. This section provides that the Secretary may inspect and keep the copy of a document produced in accordance with paragraph 52(2)(c).

Section 56 Secretary may retain original documents

245. This section provides that the Secretary may take possession of a document produced under paragraph 52(2)(b) and keep that document for as long as is reasonable necessary.

246. The person who is otherwise entitled to keep that document must be given a certified copy of the document as soon as is reasonably practicable.

247. All courts and tribunals must treat a certified copy of a document as an original for the purposes of evidence.

248. Until a certified copy of a document is provided, the person otherwise entitled to the document, or a person authorised by that person, must be allowed to inspect and make copies of the document at times and places that the Secretary thinks is appropriate.

Section 57 Self-incrimination

249. Section 52 requires a person to provide information or produce a document to the Secretary. The person cannot refuse to produce the document or provide the information because it might incriminate them or expose them to a penalty. However, any documents produced and information given, and anything obtained as a direct or indirect consequence, are not admissible in evidence against an individual who produces the document or provides the information in criminal proceedings, unless the proceedings are for an offence against section 52(5) of this Bill or an offence involving the provision of false or misleading information or documents.

250. The provisions in the Bill regulating the privilege against self-incrimination are in the usual form for overriding the privilege subject to a 'use and derivative use' immunity. They ensure self-incriminatory disclosures cannot be used against an individual who makes the disclosure, either directly in court (known as 'use' immunity) or indirectly to gather other evidence against the individual (known as 'derivative use' immunity). However, the information could be used against a third party, such as an accomplice or a body corporate.

251. The treatment of self-incrimination in the Bill is consistent with enforcement powers in other equivalent Commonwealth legislation and is consistent with the views of the Senate Standing Committee for the Scrutiny of Bills, as well as the Australian Government's legal policy regarding the privilege against self-incrimination as set out in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

252. The removal of the privilege, subject to a use/derivative use immunity, will enhance the ability to monitor and ensure compliance with the defence trade control regime and therefore assist in the effective administration of the regime. The effective administration of the defence trade controls is of major public importance and is integral to the multilateral effort to control proliferation of defence and dual-use goods and technology. Non-compliance could undermine these efforts and affect national security and international relationships.

Part 6 – Record-keeping

Section 58 Making and retaining records

Permit holders

253. Subsections 58(1) and 58(2) provide that a permit holder must make a record of each activity or arrangement done under a permit issued under section 11 or section 16 of this Bill within seven days of the activity or arrangement being conducted.

Australian Community members

254. Subsection 58(3) provides that a person who is a body corporate and who holds an approval under section 27 must make a record of each activity or arrangement prescribed by the regulations that the member does, and that the record must be made within seven days of doing the activity.

Form of record

255. Subsection 58(4) provides that a record made under this section must contain the information prescribed by the regulations. The regulations may prescribe that different types of information must be recorded for different kinds of records.

Retention of record

256. Subsection 58(5) provides that a record must be retained for five years from the date the record was created.

Offence

257. Subsection 58(6) creates an offence where a person fails to make or retain a record in accordance with this section. This offence is a strict liability offence and is punishable by a maximum of 30 penalty units.

258. Subsection 58(7) provides that the offence under subsection 58(6) is a strict liability offence. The application of strict liability negates the requirements to prove fault (*Criminal Code Act 1995* section 6). A defence of honest and reasonable mistake of fact may be raised for a strict liability offence (*Criminal Code Act 1995* section 9.2). It is considered that failing to make or retain a record should attract a strict liability offence to provide an adequate for failing to comply with record keeping requirements which will attract a minor penalty of a maximum of 30 penalty units.

259. Subsection 58(8) applies section 15.4 (extended geographical jurisdiction - category D) of the *Criminal Code Act 1995* to the offence. This provides the broadest possible jurisdiction under the *Criminal Code Act 1995*. The offence will apply to any conduct by any person whether or not the conduct or the result of the conduct occurs in Australia.

Section 59 Production of records

260. Subsection 59(1) provides that the Secretary may give a person who is required to make records under section 58 a notice requiring the person to produce specified records. The notice must specify the timeframe for production of the records. Section 67 deals with receipt of notices issued under this section.

261. Subsection 59(2) provides that the timeframe for the notice must be at least 14 days after the notice has been given.

262. Subsection 59(3) provides that the notice must set out:

- the offence for failing to comply with a notice, and
- information about giving false and misleading information or documents.

Offence

263. Subsection 59(4) provides that a person commits an offence if they fail to comply with a request for records.

264. This offence attracts a maximum penalty of 6 months imprisonment.

265. Subsection 59(5) applies section 15.4 (extended geographical jurisdiction - category D) of the *Criminal Code Act 1995* to the offence. This provides the broadest possible jurisdiction under the *Criminal Code Act 1995*. The offence will apply to any conduct by any person whether or not the conduct or the result of the conduct occurs in Australia.

Section 60 Secretary may inspect and copy records

266. Section 60 provides that once a record has been produced, the Secretary may inspect the record and make and retain copies of the whole record or parts of the record.

Section 61 Secretary may retain records

267. This section provides that the Secretary may take and retain a record produced under this Part for as long as reasonably necessary.

268. If a record is retained by the Secretary, the person is entitled to be given a certified copy of the record as soon as practicable.

269. A certified copy of a record must be accepted by all courts and tribunals as if it were an original copy for the purpose of evidence.

270. Until a certified copy of a record is provided, the person entitled to the record, or a person authorised by that person, may inspect and make copies of the record. Access to the record may be granted at appropriate times and places.

Section 62 Self-incrimination

271. Section 59 requires a person to produce records made under section 58 to the Secretary. The person cannot refuse to produce a record because it might incriminate them or expose them to a penalty. However, any records produced and anything obtained as a direct or indirect consequence, are not admissible in evidence against an individual who

produces the document or provides the information in criminal proceedings, unless the proceedings are for an offence against section 58(6) and section 59(4) of the Bill or an offence involving the provision of false or misleading information or documents.

272. The provisions in the Bill regulating the privilege against self-incrimination are in the usual form for overriding the privilege subject to a 'use and' 'derivative use' immunity. They ensure self-incriminatory disclosures cannot be used against an individual who makes the disclosure, either directly in court (known as 'use' immunity) or indirectly to gather other evidence against the individual (known as 'derivative use' immunity). However, the information could be used against a third party, such as an accomplice or a body corporate.

273. The treatment of self-incrimination in the Bill is consistent with enforcement powers in other equivalent Commonwealth legislation and is consistent with the views of the Senate Standing Committee for the Scrutiny of Bills, as well as the Australian Government's legal policy regarding the privilege against self-incrimination as set out in A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

274. The removal of the privilege, subject to a use/derivative use immunity, will enhance the ability to monitor and ensure compliance with the Approved Community and therefore assist in the effective administration of the Approved Community. The effective administration of the Approved Community is a prerequisite to the proper operation of the Treaty and Implementing Arrangement. Non-compliance could undermine the Approved Community regime and ultimately affect the Australia-US defence relationship.

Part 7 – Review of decisions

275. In addition to the existing rights of review under the *Administrative Decisions (Judicial Review) Act 1977*, it is considered appropriate that a number of decisions under this Bill should be subject to merit review to ensure a level of accountability and openness in such decision making. These decisions will be subject to review of the facts, law and policy considerations of the original decision.

276. There are a limited a number of decisions under the Bill which have specific factors that justify excluding them from merit review. These factors include decisions that are personally vested in the Minister (non-delegable decisions) due to their highly sensitive content and the fact that they involve issues of the highest consequence to Government. These decisions are of high political importance relating to Australia's security, defence or international relations.

277. This approach is consistent with the policy objectives for excluding merit review for certain decisions as contained in the Administrative Review Council's publication, *What Decisions Should be Subject to Merit Review*.

Section 63 Reviewable decisions

278. This section lists the decisions that will be subject to a merit review. These are decisions which can be made by the Minister or a delegate.

Section 64 Internal review by Minister of reviewable decisions

Scope

279. Subsection 64(1) provides for internal review by the Minister of a decision made by the Minister's delegate.

Request for review

280. Subsection 64(2) provides that a person may request that the Minister review a reviewable decision as listed in section 63.

281. Subsection 64(3) provides that a request that the Minister review a decision must be made in writing to the Minister within 30 days from the day the person was informed of the delegate's decision, unless the Minister allows a longer period.

282. Subsection 64(4) provides that a request to the Minister to review a decision must set out the reasons for the request.

Review of reviewable decisions

283. Subsection 64(5) provides that the Minister must personally review a request for a review of a decision.

284. Subsection 64(6) provides that the Minister may affirm, vary or set aside the decision. If the Minister sets the decision aside, the Minister must make the decision the Minister thinks appropriate.

Notice of a decision

285. Subsection 64(7) provides that the Minister must give the person who requested the review, a notice providing the reasons for the Minister's decision, except as provided in section 68, and set out the person's right to have the Minister's decision reviewed by the Administrative Appeals Tribunal. Failure to give the person notice does not affect the validity of the Minister's decision.

Affirmation of reviewable decision by operation of law

286. Subsection 64(8) provides that if a person does not receive a review decision notice within 90 days from the date of the person's request, then the Minister is taken to have confirmed the original decision.

Section 65 Review by Administrative Appeals Tribunal

287. Section 65 provides that a person may apply to the Administrative Appeals Tribunal for a review of a reviewable decision made by the Minister personally or a decision made on review by the Minister under section 64.

Part 8 – Other matters

Section 66 Applications under Part 2 or 3

288. An application made under a provision of Part 2 or 3 of the Bill must be made in the form approved by the Minister. An application must provide the information required by the form with any supporting documents and attach the regulated fee if applicable.

289. Subsection 66(2) provides that the Minister may request additional information where the Minister considers that the additional information is necessary to decide the application.

Section 67 Notices, permits and approvals under this Bill

290. A notice, permit or approval provided under this Bill must be provided by one of the methods prescribed by the regulations. A person is taken to have received the notice, permit or approval at the time prescribed by the regulations.

291. This section has effect despite any provision in the *Electronic Transactions Act 1999*.

Section 68 Disclosure of reasons for decisions

Decisions made by the Minister personally

292. Section 68 provides that if a decision is to be made by the Minister personally and reasons for the decision must be given in a notice, the notice must not disclose the reasons for the decision if the reasons would prejudice the security, defence or international relations of Australia.

Decisions made by delegates of the Minister

293. If a decision is made by a delegate of the Minister and the delegate believes that the disclosure of the reasons would prejudice the security, defence or international relations of Australia, subsection 68(2) provides the delegate must refer the case to the Minister who will decide whether to allow the delegate to exempt the reasons. Where the reasons for the decision are not disclosed under this section, the notice must state that the non-disclosure is because disclosure would prejudice the security, defence or international relations of Australia.

Section 69 Disclosure of information and documents

294. This section provides for the disclosure of information and documents to the entities listed in the section or prescribed by a legislative instrument.

295. The section provides safeguards to any disclosure. The first is that the disclosure must be for a purpose connected with the administration of the Act. The second is that the Secretary must be satisfied that the person will not further disclose the information provided.

296. Section 69 applies regardless of any other Commonwealth, or State or Territory, law.

297. This provision seeks to give effect to obligations under the Implementing Arrangements to enable the information sharing with US authorities. Similar provisions are contained in other Commonwealth legislation including the *Autonomous Sanctions Act 2011* and the *Charter of the United Nations Act 1945.*

Section 70 Injunctions

298. Section 70 provides for the Minister to seek a restraining or performance injunction from the Federal Court in relation to any conduct that was or would be an offence under this Bill. The Federal Court (the Court) may grant an injunction or an interim injunction, or discharge or vary an injunction.

Restraining injunctions

299. Subsection 70(1) provides that the Court may grant a restraining injunction to restrain a person from certain conducts that was or would be an offence under this Bill.

Performance injunctions

300. Subsection 70(2) provides that the Court may grant a performing injunction to require a person to perform in circumstances where a person has failed or will fail to do a thing.

Interim injunctions

301. Subsection 70(3) allows for an interim restraining or performing injunction from the Court before it makes the final decision.

Discharging or varying injunctions

302. Subsection 70(4) allows the Court to discharge or vary an injunction.

Certain limits on granting injunctions not to apply

303. Subsection 70(5) provides that the Court may still exercise its power to grant a restraining injunction whether or not it appears to the Court that a person intends to engage or has engaged in certain conduct.

304. Similarly, subsection 70(6) provides that the Court may still exercise its power to grant a performing injunction regardless whether or not it appears to the Court that a person intends to refuse or fail to perform or whether or not the person has previously done so.

Other powers of the Federal Court unaffected

305. Subsection 70(7) provides that other powers of the Court are not affected.

Section 71 Forfeiture

306. Subsection 71(1) provides that if a person supplies or attempts to supply goods in contravention of this Bill, the goods and any thing in which they are contained are forfeited to the Commonwealth.

307. Subsection 71(2) provides that if a person supplies or attempts to supply technology relating to goods in contravention of this Bill, the technology and any thing that contains the technology and is used in the supply or attempted supply are forfeited to the Commonwealth.

Seizure

308. Subsection 71(3) provides that the forfeited goods, technology and thing may be seized without warrant and taken before a summary court by:

- a member of the Australian Defence Force,
- a member of an Australian police force, or
- a Customs officer.

This seizure power also exists for goods, technology or things that the person has reasonable grounds to believe are forfeited.

Role of court of summary jurisdiction

309. Subsection 71(4) provides that if the seized goods technology or thing are taken before a summary court, the court must inquire into the matter and either:

- if the court is satisfied that the goods, technology or thing are forfeited, order them to be condemned, or
- if the court is satisfied that the goods, technology or thing are not forfeited, order them to be delivered to whomever the court is satisfied is entitled.

310. Subsection 71(5) provides that a court may require a notice of inquiry to be given to anyone the court thinks appropriate.

Pending prosecutions

311. Subsection 71(6) provides that orders under subsection 71(4) cannot be made if there is a prosecution pending for an offence against this Bill.

Storage of things

312. Subsection 71(7) provides that seized goods, technology or things must be stored in accordance with the procedures prescribed by the regulations until an order is made under subsection 71(4).

Destruction etc. of things

313. Subsection 71(8) provides that condemned goods, technology or things must be destroyed or dealt with in accordance procedures prescribed by the regulations.

314. Subsection 71(9) provides that condemned goods, technology or things must be stored in accordance with the procedures prescribed by the regulations until they are destroyed or dealt with.

Section 72 Evidential certificates by Minister

315. Subsection 72(1) provides that the Minister may certify in writing that a prohibition notice under section 14 of the Bill was in force in relation to a specified person on a specified day.

316. Subsection 72(2) provides the certificate issued under subsection 72(1) is admissible as prima facie evidence of the matters stated in the certificate.

Section 73 Delegation by Minister

Delegation by Minister

317. Section 73 provides for the Minister to delegate a number of the Minister's functions or powers under the Bill to appropriately senior levels of Departmental officials. This power of delegation does not apply to the Minister's powers under: section 11(8), section 14, section 16(8), paragraph 29(1)(c), section 30, section 33, section 34, section 64, section 68 or section 72. These are all decisions that either involve issues of the highest consequence to government being decisions of high political importance relating to Australia's security, defence or international relations or decisions that prevent persons or companies from undertaking commercial activities.

318. In addition, in performing functions or exercising powers under a delegation, the delegate must comply with directions of the Minister and must not make certain decisions set out in subsection 73(7) if the delegate is satisfied that the activity or approval would prejudice the security, defence or international relations of Australia.

Section 74 Delegation by Secretary

319. Section 74 provides for the Secretary to delegate any of the Secretary's functions or powers under the Bill to appropriately senior levels of Departmental officials other than the Secretary's power under section 39 which relates to the appointment of authorised officers. In exercising functions or powers under a delegation, the delegate must comply with directions of the Secretary.

Section 75 Regulations

320. Section 75 provides that the Governor-General may make regulations as prescribed by the Bill or which are necessary or convenient for giving effect to the Bill.