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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

DEFENCE TRADE CONTROLS BILL 2011

SUPPLEMENTARY EXPLANATORY MEMORANDUM

*(Amendments to be moved on behalf of the Government)*

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

## **DEFENCE TRADE CONTROLS BILL 2011**

### **GENERAL OUTLINE**

The Defence Trade Control Bill 2011 (the Bill) was introduced on 2 November 2011 and was referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report. The Committee provided a preliminary report on the Bill on 15 August 2012 which recommended some amendments to the Bill and Explanatory Memorandum as well as recommending further consultation be undertaken.

Following the release of the preliminary report the Minister for Defence appointed Mr Ken Peacock and Dr Alex Zelinsky to conduct further consultations on the Bill. Mr Peacock and Dr Zelinsky have held consultations with key University and research sector stakeholders, the Chief Scientist and the Department of Industry, Innovation, Science, Research and Tertiary Education.

The following amendments address the recommendations provided by the Senate Committee and Mr Peacock and Dr Zelinsky. The amendments to the Bill provide for:

- The commencement provisions in the Bill to be amended to allow for commencement of the majority of the clause to be proclaimed. This will provide for a period for industry and the academic and research sector to transition to the new strengthening export controls in Part 2 of the Bill introduces and enable the staggered commencement of provisions of the Bill.
- A definition for the term “arranges” to be included, as recommended by the Senate Committee, to provide greater certainty as to the activities the brokering provisions are intended to cover.
- The concept of Defence services to be removed from the offence and brokering provisions in Part 2 as explicit coverage of these services is unnecessary as the services will now be covered by the definition of ‘DSGL technology’.
- The offences of supplying DSGL technology to be adjusted to remove the controls of supply inside Australia and the concept of supplying technology be adjusted to include supply by way of providing access to technology.
- The clarification of decision making criteria for giving a permit for the supply of the DSGL technology and for a permit in relation to arranging the supply of DSGL goods or technology. This amendment will give effect to the recommendation of the Senate Committee that criteria relating to international relations; human rights; regional security; national security; and foreign policy that are specified in the Explanatory Memorandum be reflected in the legislation.
- The inclusion for a new offence for publishing or disseminating DSGL technology to the public, or to a section of the public by electronic or other means.

- Technical adjustments to better reflect the scope of the two parts of the Defence Trade Cooperation Munitions List
- The adjustment of record-keeping requirements to reduce the administrative burden on industry and the academic and research sectors.
- Establishment of Strengthened Export Controls Steering Group.

### **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.

# **DEFENCE TRADE CONTROLS BILL 2011**

## **NOTES ON AMENDMENTS**

### **Amendment (1)**

1. Amendment 1 will substitute new commencement provisions for the majority of clauses in the Bill. Clauses 3 to 74 will commence on a day or days to be fixed by proclamation. The proclamation must not specify a day that occurs before the day the Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation done at Sydney on 5 September 2007 enters into force. However, if any of the provisions do not commence within the period of 2 years beginning on the day the Treaty enters into force, they commence on the day after the end of that period. The Minister must notify in the Gazette the day on which the Treaty enters into force.
2. Clauses 74A and 75 commence on the day on which the Bill receives Royal Assent. This will allow the Strengthened Export Controls Steering Group and the regulation making power to commence operation on assent.
3. Commencement of clauses 1 and 2 remains as the date of Royal Assent.
4. Commencement by proclamation for clauses 3 to 74 allows for a phased transition period. This period will last 2 years from the day the Treaty enters into force. It is anticipated that during the first year, the Defence Export Control Office will focus on assisting research and industry institutions with a comprehensive education and awareness raising program that will assist organisations to build their internal compliance arrangements. This will include a pilot program, which is further detailed in this Explanatory Memorandum under section 74A.
5. The subsequent 12 months in the transition period will allow institutions to seek permits under section 11, register as brokers under section 15 and seek brokering permits under section 16. During this period the relevant offence provisions will not apply.
6. Record-keeping obligations will commence as soon as a permit is obtained. Record-keeping offence provisions will not commence until other offence provisions relating to strengthened export controls commence

### **Amendment (2)**

7. Amendment 2 revises the simplified outline of the Act in relation to Part 2 the Bill to reflect the amendments.

### **Amendment (3)**

8. Amendment 3 inserts a reference to the meaning of arranges which is specified in section 5A.

#### **Amendment (4)**

9. Amendment 4 inserts a new definition of ***DSGL technology*** into clause 4 of the Bill. DSGL technology means technology or software as defined in the Defence and Strategic Goods List, and within the scope of that list.
10. Under the DSGL, technology means specific information necessary for the development, production or use of a product. This information may take the form of technical data or technical assistance. For many DSGL goods, the technology will be controlled if the supplied technology would enable the ‘production’ or ‘development’ of the DSGL good. For more sensitive DSGL goods, the technology will be controlled if the supplied technology would enable the ‘production’, ‘development’ or ‘use’ of the DSGL good. Further, it is only the information which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions of that DSGL-listed item that is controlled by the term DSGL technology.
11. It is noted that the DSGL contains exemptions relating to technology or software in the public domain and to basic scientific research.
12. As a consequence of the new definition of DSGL technology amendments 9, 10, 11 and 13 will adjust clauses 10, 14 and 15 of the Bill to apply the definition of DSGL technology in place of the current concept of “technology relating to goods, where the technology is listed on the DSGL”. Other minor consequential amendments will be made to the Bill to reflect the removal of the concept of defence services and the inclusion of the definition of DSGL technology.

#### **Amendment (5)**

13. Amendment 5 adjusts the definition of supply to also include, in relation to DSGL technology, providing access to DSGL technology.

#### **Amendment (6)**

14. Amendment 6 makes a consequential amendment to the definition of Article 3(1) US Defence Article as a result of the amendment to the Defence Trade Munitions List (DTCML) at clause 36 of the Bill (amendment 18). An Article 3(1) US Defence Article means goods that are listed on Part 1 of the DTCML and are not listed on Part 2 of the DTCML and where the goods are initially moved from a United States Community Member to an Australian Community member for an activity within the scope of the Defense Trade Cooperation Treaty.

#### **Amendment (7)**

15. Amendment 7 makes the same consequential amendment as amendment 6 the definition of Article 3(3) US Defence Article. An Article 3(3) US Defence Article means goods listed on Part 1 of the DTCML and not listed on Part 2 DTCML, acquired by Australia through the Foreign Military Sales (FMS) program which fall within the scope of the Treaty.

## **Amendment (8)**

16. Amendment 8 inserts a new clause 5A which provides meaning for the term *arranges*. This provides that a broker arranges for another person to supply goods or DSGL technology if the broker acts as an agent of a person, or as an intermediary between two or more persons in relation to the supply. This provision will apply where the broker receives, or is to receive, any commission, fee or other benefit for so acting, or where the broker so acts for the purpose of advancing a political, religious or ideological cause.
17. 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 and there is no fee, commission or other benefit obtained by the first person.
18. This clause is not intended to limit the meaning of arranges for the purposes of the Act.

## **Amendment (9)**

19. Amendment 9 substitutes a new clause 10 which provides for offences relating to the supply of DSGL technology. The amendment adjusts clause 10 to remove the controls of supply inside Australia and includes the new concept of supplying technology by way of providing access.
20. Subclause 10(1) creates an offence where a person:
  - (a) supplies DSGL technology to another person; and
  - (b) either:
    - i. the supply is from a place in Australia to a place outside Australia; or
    - ii. if the supply is the provision of access to DSGL technology – at the time of the provision of access, the supplier is in Australia and the other person is outside Australia; and
  - (c) the supplier either:
    - i. does not hold a permit under section 11; or
    - ii. contravenes a condition of their permit.
21. This offence regulates the supply of DSGL technology from Australia to a place outside Australia. The offence also applies to the supply of information where a person in Australia provides access to DSGL technology to another person outside Australia. This offence will apply to situations where the supplier does not actually send information to another person rather they make access to the information available to another person outside Australia. For example, the provision of access to DSGL technology may occur by the sharing of data through centralised servers on computer networks, internet-based hyperlinked documents, or through the use of distributed peer-to-peer networking.
22. The maximum penalty for an offence under subclause 10(1) remains as 10 years imprisonment or 2,500 penalty units or both.

23. A consequential amendment is made to the exception in subclause 10(2) as a result of the amendment to clause 36 of the Bill (amendment 18).
24. Amendment 9 also substitutes a new clause 11 which provides for permits for the purposes of clause 10. The amendment adjusts clause 11 to apply the definition of DSGL technology and remove the concept of defence services as a result of amendment 4.
25. Clause 11 is also amended to ensure that in giving a permit under clause 11 the Minister has regard to the criteria prescribed by the regulations and to any other matters that the Minister considers appropriate. This amendment will give effect to the recommendation of the Senate Foreign Affairs, Defence and Trade Legislation Committee that criteria relating to international relations; human rights; regional security; national security; and foreign policy that are specified in the Explanatory Memorandum be reflected in the legislation.

#### **Amendment (10)**

26. Amendment 10 substitutes a new clause 14 into the Bill to remove the reference to the Minister giving a notice prohibiting the provision of defence services, as defence services are now covered by the new definition of DSGL technology (Amendment 4).

#### **Amendment (11)**

27. Amendment 11 substitutes a new offence provision for clause 14 to remove the reference to defence services which is now covered by the new definition of DSGL technology (Amendment 4).

#### **Amendment (12)**

28. Amendment 12 introduces a new offence for publishing or disseminating DSGL technology.
29. Clause 14A(1) makes it an offence for a person to publish or otherwise disseminate DSGL technology to the public, or to a section of the public, by electronic or other means where the person does not hold an approval under this section.
30. This offence will cover persons who intentionally release controlled DSGL technology into the public domain. As a safeguard the offence provision will include the ability for the Minister to give written approval for the publication or dissemination of DSGL technology if it is in the public interest to do so.
31. The offence does not apply if the DSGL technology has already been lawfully made available to the public, or to the section of the public.

32. The defendant bears the burden of proof for the exception to the offence. 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.
33. 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.
34. Clause 14(3) provides that the Minister may, in writing, approve a person publishing or otherwise disseminating specified DSGL technology to the public or to a specified section of the public. The Minister may give an approval only if the Minister is satisfied it is in the public interest to do so.
35. The Minister’s power to approve publication or dissemination is included to cover the rare occasion that the public interest in sharing DSGL technology outweighs the security risk of sharing that information. For example, in case of the H5N1 Avian Influenza, there was a risk of pandemic and it is arguable that the public interest benefit of sharing the controlled information may have outweighed the security risk of sharing the controlled information.
36. Clause 14A (5) provides that section 15.2 (extended geographical jurisdiction - category B) of the *Criminal Code Act 1995* applies to an offence against subsections 14A(1). This means the offences will apply to:
- (a) Australian citizens, residents and bodies corporate for conduct in or outside of Australia;
  - (b) conduct by any person that occurs wholly or partly in Australia; or
  - (c) conduct by any person outside Australia where the result of the conduct occurs wholly or partly in Australia.
37. An approval from the Minister under clause 14 is not a legislative instrument.

### **Amendment (13)**

38. Amendment 13 substitutes a new clause 15 which provides an offence for arranging supplies in relation to the DSGL. The amendment adjusts clause 15 to apply the definition of DSGL technology and remove the concept of defence services as a result of amendment 4.
39. The term *arranges* is defined in the new clause 5A(amendment 8).

### **Amendment (14)**

40. Amendment 14 is a consequential amendment which removes the reference to defence services and includes a reference to the new term DSGL technology for the offence provision relating clause 14, as a result of amendment 4.



### **Amendment (15)**

41. Amendment 15 is a consequential amendment to include the new term DSGL technology in clause 16 which provides for registered brokers to apply the Minister for permits, as a result of amendment 4.

### **Amendment (16)**

42. Amendment 16 is amended to ensure that in giving a permit for a brokering arrangement under clause 16 the Minister has regard to the criteria prescribed by the regulations and to any other matters that the Minister considers appropriate. This amendment will give effect to the recommendation of the Senate Foreign Affairs, Defence and Trade Legislation Committee that criteria relating to international relations; human rights; regional security; national security; and foreign policy that are specified in the Explanatory Memorandum be reflected in the legislation.

### **Amendment (17)**

43. Amendment 17 is a consequential amendment which amends Note 2 at the end of subclause 27(1) of the Bill to include the new term DSGL technology, as a result of amendment 4.

### **Amendment (18)**

44. Amendment 18 adjusts subclause 36(3) of the Bill. Clause 36 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 either or both of the goods listed in the DSGL and goods listed in the United States Munitions List referred to in Article 1(1)(n) of the Treaty. Part 2 of the DTCML is to contain a list of goods that are exempt from the scope of the Treaty.
45. The amendment to subclause 36(3) is a technical amendment to better recognise that there will be two parts of the DTCML which must be read together.

### **Amendments (19) and (20)**

46. Amendment 19 substitutes a new clause 58 which provides for the keeping and retaining of records and amendment 20 makes a consequential adjustment to a reference used in clause 59.
47. The amendments will reduce the administrative burden on industry and the academic and research sectors. The record keeping requirements are intentionally broad and provide that the person must only keep records of the relevant activity that the person does. The regulations will prescribe the information that is to be included in a record.

### **Amendment (21)**

48. Amendment 21 is a consequential amendment adjusting a reference in clause 63 which deals with the review of decisions, as a result of amendment 9.

### **Amendment (22)**

49. Amendment 22 is a consequential amendment adjusting a reference in clause 71 which deals with the forfeiture, as a result of amendment 4.

### **Amendment (23), (24) and (25)**

50. Amendment 23 adjusts subclause 73(2) which deals with those decisions of the Minister which cannot be delegated to include decisions made under the new clause 14A(3). The amendment will ensure that a decision to give an approval to a person to publish or disseminate DSGL technology to the public, or a specific section of the public, can only be made by the Minister.

51. There are a limited a number of decisions under the Bill which have specific factors that justify that the decision remain with the Minister. This is due to their highly sensitive content and the fact that they involve issues of the highest consequence to Government. It is considered that the decision to approve publication or dissemination in clause 14A(3) falls within these types of decisions and should be non-delegable.

52. Amendments 24 and 25 are consequential amendments adjusting references in clause 73 which deals with delegations made by the Minister, as a result of amendment 9.

### **Amendment (26)**

53. Amendment 26 inserts a new clause 74A which will establish the Strengthened Export Controls Steering Group (the Steering Group). This Group will provide oversight and independent advice until all the provisions commence or up until the end of the Act's two year transition period. The Group will report to the Minister for Defence and the Minister responsible for research, currently the Minister for Tertiary Education, Skills, Science and Research (the Ministers).

54. Subclause 74A(1) provides that the Steering Group will be established as soon as is practicable after the Act receives Royal Assent. Members must be appointed by the Minister for Defence in writing.

55. Subclause 74A(2) provides that the Minister for Defence will determine the functions of the Steering Group. It is expected that the Group's functions may include providing independent advice to the Department of Defence and the Ministers throughout the transition period, including:

- (a) advising of the adequacy of organisational and government arrangements to identify, assess and manage risks, costs and administrative burden associated with intangible transfers of DSGL technologies;
- (b) providing oversight, design and delivery advice regarding the pilot program, to identify the adequacy of the legislation, regulations, implementation arrangements and resources for regulating intangible transfers;
- (c) providing recommendations on amendments to legislation, regulations and implementing arrangements; and
- (d) advising the Department of Defence on how to obtain appropriate technical expertise regarding Australian Government consideration of the control lists of international regimes and the Australian DSGL.

56. It is envisaged that the Steering Group will consider quarterly progress reports from participants in the pilot on the implementation of the strengthened export controls.

57. Subclause 74A(2) provides that the Steering Group give six monthly written reports to the Ministers.

58. Subsection 74A(3) provides that the Steering Group must comply with written instructions from the Minister for Defence.

59. Subsection 74A(4) provides that the Minister for Defence must designate a member of the Steering Group as the Chair. It is expected that the Steering Group will be chaired by an eminent person, and the other members will be comprised of 10 representatives from government agencies, industry and the research/university sectors. The Steering Group is likely to be constituted as follows:

- (a) the Chair;
- (b) up to four representatives from the industry sector, one of whom is the co-Deputy Chair;
- (c) two representatives from the university/research sectors, one of whom is the co-Deputy Chair;
- (d) the CEO of the National Health and Medical Research Council, or representative nominated by that CEO;
- (e) the CEO of the Australian Research Council, or representative nominated by that CEO;
- (f) a representative from the Department of Industry, Innovation, Science, Research and Tertiary Education; and
- (g) a representative from the Department of Defence.

60. Subclause 74A(5) provides that the Minister for Defence may determine the terms and conditions applicable to a member of the Steering Group.

61. Subclause 74A(6) provides that being a member of the Steering Group is not a public office within the meaning of the *Remuneration Tribunal Act 1973*.

62. Subclause 74A(7) provides that the Steering Group may determine its own procedures in performing its functions.
63. Subclause 74A(8) provides that Steering Group's final report must be given to the Ministers before the end of the period of two years after the Treaty comes into force.
64. Subclause 74A(9) provides that the Steering Group is abolished immediately after it has given its final report to the Ministers.
65. Subclause 74A(10) provides that the Minister must table a copy of the Steering Group's final report in Parliament within 15 sitting days of receiving the report.
66. Subclause 74A(11) provides that an instrument under clause 74A is not a legislative instrument.
67. One of the main functions of the Steering Group will be to oversee the pilot program that will be established during the Act's transition period. There may be more than one pilot program.
68. The pilot program will determine the costs and benefits associated with the regime, the feasibility of its implementation, the processes and interaction required to successfully implement the Bill during the transition period, and identify any aspects that require modification prior to the offence provisions coming into full effect.
69. The framework for the pilot program is to be agreed by the Steering Group and, pending consideration of the Steering Group, will span two grant funding cycles with interim reporting to identify improvements.
70. The pilot program will review mechanisms by which organisations can determine thresholds for technology assessments beyond which an organisation will consult with Defence and, if required, seek a permit.
71. Specifically, the pilot program will evaluate the model where the technology assessment process begins with an institutional assessment process for open academically-based research in accordance with guidelines incorporated into the supplement to the Australian Code for the Responsible Conduct of Research. This step recognises that not all activities to supply technology to 'develop,' 'produce,' or in some cases 'use' an item on the DSGL will involve the level of detail which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions of that DSGL-listed item. The institution involved in activities of this type must have processes for assessing technology and for determining when advice should be sought from Defence about a possible permit.

This model provides exemptions from export controls for research where:

- ☞ the activity is ‘basic scientific research’, as defined in the DSGL and Wassenaar Arrangements (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).
- ☞ the technology is already ‘in the public domain’, as defined in the DSGL (technology or software which has been made available without further restrictions upon its further dissemination (copyright restrictions do not remove technology or software from being in the public domain)).

72. Participants in the program will represent a cross section of industry and the academic and research sectors. This will allow better analysis of the strengthened export controls across the most relevant sectors.
73. The participants for the pilot program will be determined by the Department of Defence.
74. The Steering Group will consider quarterly progress reports from participants in the pilot program on implementation of the strengthened export controls.