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Dear Dr Thom

**SUBMISSION TO THE REVIEW OF THE DEFENCE TRADE CONTROLS ACT  
2012**

1. The Department of Defence (Defence) welcomes the opportunity to make a submission to the Review of the *Defence Trade Controls Act 2012* (DTC Act). The submission is based upon Defence's experience with the DTC Act over the past two years.
2. Defence proposes a number of recommendations that may offer ways to improve its regulation of certain technology through the DTC Act, as well as potential options to address new challenges and issues that have arisen in the national security environment over the past two years.
3. Defence requests that the Review consider the proposals in this submission in concert with the views of other key stakeholder groups. Defence believes it has formed very productive relationships with key stakeholders over the past two years which have led to a high level of compliance with the DTC Act, and proposes these recommendations with the expectation that any eventual changes to the DTC Act will be developed in consultation with affected groups and in the spirit of working together to ensure Australia's interests are protected.

## Introduction

4. Successive Australian governments have supported international efforts to prevent the proliferation of military and dual-use goods and technology<sup>1</sup>. Australia is a signatory to a number of international arms control treaties and an active member of the four main multilateral export control regimes; Wassenaar Arrangement for Conventional Arms and Dual-Use Goods and Technologies; Australia Group on chemical and biological weapons materials; Nuclear Suppliers Group for nuclear and nuclear related goods, and Missile Technology Control Regime for ballistic missiles and other weapons of mass destruction (WMD) delivery systems. These initiatives seek to monitor and control (regulate) the global movement of goods and technology applicable for use by a military or other armed group, or WMD programs. Such efforts are important to Australia's national interest and international peace and security.
5. The Australian Government further recognises that strong, resilient and internationally-competitive defence industry and research sectors are also valuable to the national interest. The 2016 Defence White Paper and Defence Industry Policy Statement, the 2017 Naval Shipbuilding Plan, and the 2018 Defence Export Strategy and Defence Industrial Capability Plan all identify exports, collaboration and innovation as important to Australia's future prosperity.
6. The aims of Australia's export controls are to:
  - support a sustainable and cost effective defence capability;
  - ensure Australian industry and research bodies remain trusted collaborating partners with allied nations;
  - protect Australian Defence Force capability;
  - prevent the advancement of the military capabilities of actual and potential adversaries;
  - support national economic prosperity through responsible exports;
  - support responsible Australian participation in, and access to, international research collaboration;
  - uphold Australia's defence and foreign policies; and
  - prevent the illicit and irresponsible trade in conventional weapons and proliferation of weapons of mass destruction.

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<sup>1</sup> 'Military' goods and technology refers to goods and technology designed specifically for a military purpose. Military goods and technology are included in Part 1 of the DSG. 'Dual-use' goods and technology refers to goods and technology that have been designed for a commercial use but that also have a military application or military use.

## Export control terms

7. The term ‘export controls’ refers to the control of the transfer, supply, export or other movement of military and dual-use goods and technology. Australia’s export controls include the export of controlled goods from Australia; the intangible transfer of controlled technology, including technical assistance, from Australia to overseas; publishing of controlled technology; and brokering of controlled military goods and technology. It also includes ‘catch-all’ (or end-use) controls.
8. The term ‘goods’ refers to movable property of any kind, including but not limited to, documents, vessels and aircraft.<sup>2</sup> Exports of goods are subject to the compliance and enforcement measures provided in the *Customs Act 1901*.
9. The term ‘technology’ means specific information necessary for the development, production or use of a product.<sup>3</sup> The information takes the form of technical data (including, but not limited to, blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions), or technical assistance (including, but not limited to, instruction, skills, training, working knowledge and consulting services).
10. The ‘intangible transfer of technology’ occurs electronically (including but not limited to email, facsimile, and uploading to a server), or orally.
11. References to ‘persons’ within Australian legislation and in this submission, includes a body politic or corporate as well as an individual.<sup>4</sup>

## Australia’s export control legislation

12. Australia regulates the export and supply of military and dual-use goods and technology, including parts and components thereof and related materials, equipment and technologies transported to an external territory or nation. Goods and technology to which export controls apply are listed in a legislative instrument, the Defence and Strategic Goods List (DSGL).
13. The *Defence Trade Controls Act 2012* (DTC Act) regulates the supply and publication of DSGL technology, and the brokering of DSGL goods and technology.
14. Regulations 13(E-EK) of the Customs (Prohibited Exports) Regulations 1958 (Customs PE Regulations) regulate the export of DSGL goods.
15. Section 112BA of the *Customs Act 1901* (Customs Act) provides the Minister for Defence with the power to prohibit the export of uncontrolled goods that may be

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<sup>2</sup> As defined in the *Customs Act 1901* (Cth)

<sup>3</sup> As defined in the Defence and Strategic Goods List Amendment Instrument 2018

<sup>4</sup> Section 2C *Acts Interpretation Act 1901* (Cth)

destined for a military end-use assessed as prejudicial to Australia's security, defence, or international relations.

16. The *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (WMD Act) controls goods, services and technology that may contribute to a WMD program, regardless of whether they are listed on the DSGL. The WMD Act 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.

### **Multilateral export control regimes**

17. The four main multilateral export control regimes (the Regimes) of which Australia is a Participating State include the:
  - Wassenaar Arrangement for Conventional Arms and Dual-Use Goods and Technologies,
  - Australia Group on chemical and biological weapons materials,
  - Nuclear Suppliers Group for nuclear and nuclear related goods, and
  - Missile Technology Control Regime for ballistic missiles and other WMD delivery systems.
18. The Regimes have common objectives in seeking to control the proliferation of WMD and their missile delivery systems, and the transfer of conventional weapons or components thereof and dual-use goods and technology with destabilising implications.
19. The Regimes seek to achieve their objectives through the coordination of national export control laws and policies, in particular the implementation of agreed measures and uniform controlled goods and technology lists.

### **Defence and Strategic Goods List**

20. The DSGL is drafted in accordance with Government policy, Australia's international obligations and with consideration of the goods and technology identified for control by the four Regimes. The DSGL is divided into two parts: Part one (military) lists goods and technology specifically designed for military use; Part two (dual-use) lists goods and technology designed for a commercial purpose but which also could also be used for a military (including weapons of mass destruction) purpose.

### **History of the DTC Act 2012**

21. Prior to 2016, military and dual-use goods and technology were regulated by Regulation 13E of the Customs PE Regulations only. Exporters were required to obtain a permit before exporting DSGL goods. DSGL technology was largely unregulated, a permit was

only required to export technology stored on a good, such as a USB or hard drive. If an export was assessed as not in the national interest, the Minister for Defence had the power to refuse to issue a permit and the export could not legally proceed.

22. In 2003 and 2006 Participating States of the Wassenaar Arrangement agreed that, in addition to regulating the export of controlled goods, they should also regulate brokering in controlled goods and technology and the intangible transfer of controlled technology. The Regimes drafted and accepted best practice guidance for participant countries. The guidance advised best practice controls on intangible transfers of technology. Also during this period, the Regimes identified the control of international brokering activities as important to achieving export control aims.
23. In 2012, the *Defence Trade Controls Bill 2011* (DTC Bill) introduced controls on the 'supply' and 'publishing' of DSGL technology, and 'brokering' of DSGL goods and technology. The Bill implemented, in accordance with the national interest at the time, the commitments Australia had made as a Participating State in the export control Regimes.
24. Stakeholders, most notably the research sector, raised several concerns about the regulatory impact of the DTC Bill. Researchers' core business relies on the free and open sharing of technology and information; they routinely collaborate with foreign partners and communicate ideas and developments electronically. Consequently, the sector was concerned about the significant regulatory burden the Act would place over its activities, the impact of the controls on academic freedom and its ability to comply.
25. In response to stakeholder concerns, the DTC Bill was amended to include a provision that delayed the commencement of the offence provisions – referred to as the 'transition period'. Section 74A was included in the Bill also, which established a Steering Group to advise the Minister for Defence and Research Minister as to whether the controls fulfilled Australia's international obligations and national interest requirements, while not unnecessarily restricting trade, research and international collaboration or reducing the international competitiveness of the research sector.
26. The Department, the Steering Group and stakeholders worked closely together to address stakeholders' concerns with the DTC Act. The Steering Group accepted that the Act did not strike an appropriate balance between national security and regulatory burden. The Group recommended that Defence amend the DTC Act to adopt a more risk-based approach and implement policy changes to streamline the controls and reduce regulation. The risk-based approach included removing permit requirements for activities assessed as low risk at that time, limiting the control of oral supply of DSGL technology, and limiting brokering and publication controls to military goods and technology only (that is, Part 1 of the DSGL). Defence accepted these recommendations and amendments to the DTC Act were made by the *Defence Trade Controls Amendment Act 2015* (DTC Amendment Act).

27. Currently, the DTC Act regulates the:

- **supply of, or the provision of access to**, DSGL technology from a place in Australia to ‘another person’ in a place outside of Australia;
- **oral supply** of DSGL technology that has a military end-use or WMD end-use;
- **brokering** of DSGL Part 1 goods and technology; and provides the Minister for Defence with the authority to prohibit, by issuing a notice, a brokering activity involving Part 2 DSGL goods and technology that the Minister reasonably believes would prejudice the security, defence or international relations of Australia; and
- **publication** of DSGL Part 1 technology; and provides the Minister for Defence with the authority to prohibit, by issuing a notice, the publication of DSGL technology if the Minister reasonably believes the publication of the technology would prejudice the security, defence or international relations of Australia.

28. Defence submits that since the commencement of the DTC Act and DTC Amendment Act, the national security environment has evolved. While a risk-based approach is still valid, the original risk assessments have changed. Noting these challenges, Defence proposes that the DTC Act requires amendment to allow the Australian Government to more effectively control access to DSGL technology and other technology that may be used to prejudice the security, defence or international relations of Australia (sensitive technology). Controlling access to DSGL and emerging sensitive technology is important to Australia’s national security.

### **How has the national security environment changed?**

29. See classified [Annex A](#).

### **Regulating access to technology only when prejudicial to Australia’s interests**

30. Australians develop and trade in goods and technology and collaborate in research and development that is intended to contribute to Australian defence capability or have national economic benefit. The creativity and innovation of Australian’s leads to the development of unique and cutting edge technology that, when adapted for use in a military context, can provide Australia with a defence capability edge. If these unique technologies are obtained by foreign entities with intentions prejudicial to Australia’s interests, it erodes that capability edge. It also undermines the effort, ingenuity and funding invested in developing such technology in Australia.
31. Trade and collaboration with foreign entities can take place in a range of situations: from Australia to outside Australia, wholly within Australia and wholly outside of Australia, and in some instances the Australians involved are unaware of the ultimate intentions of foreign industry or research partners, or their governments.

32. In order to effectively protect certain technology assessed as important to security and defence capability, the Australian Government needs the ability to regulate access to and transfer of military, dual-use and sensitive technology where the recipient's intentions may be prejudicial to the interests of Australia and its allies.
33. Currently, the DTC Act controls the supply of DSGL technology if, at the time supply takes place, the supplier is in Australia and the recipient is not. The DTC Act emulates the controls placed on defence goods found in the Customs (PE) Regulations. Regulating the transfer of technology in the same manner that the export of goods is regulated allows technology assessed as significant to maintaining and developing national defence capability to be transferred without government oversight. For example, foreign persons in Australia could obtain technology know-how which could be developed and used by their country of origin for security or defence purposes and, ultimately, such technology could be used in a manner prejudicial to Australia's interests. Australia must have a range of control measures to deal with the range of situations in which technology can be transferred.
34. Limited government oversight and control of the transfer of sensitive technology by Australians to foreign entities could have significant consequences for Australian defence capability, industry and universities. Potential consequences include:
  - Allied nations restricting Australian (government, industry and academics) access to defence and other security-related technology due to concerns it will not be afforded appropriate safeguards and protections. This could have significant consequences for ADF capability, inter-operability with partner forces and collaboration opportunities.
  - Australians may provide foreign persons with, or access to, technology which may have outcomes prejudicial to Australia's security, defence or international relations.
35. Australia has technology that it is in the national interest to protect. This technology is assessed as significant to ensuring superior defence capability and it is in the national interest to control who has access to it. Such technology may be on the DSGL, or it may be emerging and not yet captured by the DSGL. Either way, the government should have the ability to determine whether access to such technology by foreign entities is in the national interest. If it is not, the government needs the ability to prevent such access.
36. One option to better safeguard technology is to regulate the transfer of controlled technology from a person in Australia to a foreign person regardless of geographical location. However, regulating transfers of all DSGL technology to foreign entities would be administratively burdensome for both the regulator and applicants, and it would not necessarily be driven by risk or capture all technology assessed as requiring control, such as emerging and developing defence technology.

37. A more effective measure would be to control technology transfers according to risk. For instance, if the government identifies technology, whether on the DSGL or not, that is significant to defence capability and security, it needs mechanisms to safeguard it from hostile foreign access in a targeted, rather than all encompassing, manner. This has the benefit of focusing effort and resources on protecting technology that would cause the most damage should it be obtained by foreign entities that may use it against Australian interests.
38. A risk-targeted approach could be adopted to allow the government to identify significant security and defence technology, and require transfers of this technology to be assessed and approved by government before it is given to certain foreign entities. Accordingly, Defence presents the following recommendations for consideration by the Review.

### **Recommendation 1**

39. The Department of Defence requests that the Review consider measures to require a person to apply for a permit to supply or transfer DSGL or uncontrolled technology to foreign entities when the Australian Government notifies them that it has reason to believe the technology is significant to developing or maintaining national defence capability or could be used to prejudice the security, defence or international relations of Australia.

### **Recommendation 2**

40. The Department of Defence requests that the Review consider expanding the power to prohibit the supply of technology to include both DSGL and uncontrolled technology.

### **Controls on sensitive<sup>5</sup> Part 2 DSGL technology**

41. Part 1 of the DSGL is subject to more controls than Part 2 of the DSGL. The distinction between the two parts of the DSGL reflects the risk-based approach adopted by Defence in the *Defence Trade Controls Amendment Act 2015*.
- The DTC Act regulates the publication of Part 1 (military) DSGL technology, but does not regulate the publication of Part 2 (dual-use) DSGL technology.
  - The DTC Act does not regulate the supply of DSGL Part 2 (dual-use) technology when the supply of the technology is preparatory to the publication of the DSGL technology. The supply of Part 1 (military) DSGL technology is regulated when the supply of the technology is preparatory to the publication of the DSGL technology.

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<sup>5</sup> 'Sensitive list of dual-use goods and technologies', Part 2 Defence and Strategic Goods List Amendment Instrument 2018



- The DTC Act regulates brokering activities involving Part 1 (military) DSGL technology, but does not regulate brokering activities involving any Part 2 (dual-use) technology.
42. The different regulatory requirements for Part 1 and Part 2 DSGL technology were recommended by the Steering Group as a way to reduce regulatory burden not commensurate with the security risk identified at the time. The distinction allows academics to submit papers relating to Part 2 technology for peer review or editing without the requirement to first obtain a permit. At the time, it was also assessed that the administrative burden for Government in regulating the publication of Part 2 DSGL technology and brokering activities involving Part 2 DSGL technology did not justify the benefit that might have been obtained.
43. Since that time, changes in the security environment necessitate stronger mechanisms to protect more sensitive dual-use Australian technology. These challenges have led Defence to reassess the situation. Part 2 of the DSGL contains technology that, while dual-use, is considered sensitive or very sensitive, including technology relating to nuclear materials.

### **Recommendation 3**

44. The Department of Defence requests that the Review give consideration to expanding the DTC Act controls relating to the publication of DSGL technology, the supply of DSGL technology in preparation for publication, and brokering of DSGL technology to regulate categories of sensitive technologies found in Part 2 of the DSGL.

### **Brokering controlled goods and technology**

45. The DTC Act introduced controls on ‘brokering’ activities under Division 2 of the Act. Brokering under the DTC Act is defined as a person or organisation acting as an agent or intermediary to arrange the supply of Part 1 DSGL goods, software or technology between two people and places located outside of Australia. For the activity to be considered brokering, the person must receive money or a non-cash benefit or advance their political, religious or ideological cause for arranging the supply.
46. The current definition of brokering in the DTC Act focuses on the relationships between parties rather than on the activities (facilitating arms sales or movements) that constitute brokering. The DTC Act controls only those instances where a person or entity acts as an agent or intermediary for the supply of military goods or dual-use goods with a military end-use. The definitions of ‘agent’ and ‘intermediary’ indicate that the supplier and recipient must both be aware and intend to act as a supplier to the recipient, or the recipient of the supplier, in the brokering arrangement.

47. The definition of brokering in the DTC Act does not capture the following transactions:
- Australian entities, creating and operating subsidiaries from a third country, in order to avoid compliance with Australian export controls; and
  - where a vendor organises for the purchased items to be sourced from overseas to fill their contracts.

#### **Recommendation 4**

48. The Department of Defence requests that the Review give consideration to amending the definition of brokering to remove the requirement for the broker to be acting as an agent or intermediary.

#### **Monitoring and Compliance**

49. The Australian Border Force (ABF) is responsible for enforcing regulations that control the export of DSGL goods. Goods leave the country via air and sea ports, where ABF officers can inspect goods to ensure their export is not in violation of the Customs (PE) Regulations. The Customs enforcement framework, therefore, is only capable of regulating the export of goods; it is not designed to, nor is it capable of, enforcing regulations that control the intangible transfer of technology.
50. Technology is generally transported over telecommunications infrastructure, over which ABF, or any authority, has little or no oversight. Controlled technology can be moved around the world in a matter of seconds, which means that regulating access to it, and ensuring compliance, presents a significant challenge.
51. Compliance with technology transfer regulations can be encouraged by:
- extensive outreach to industry and academia to ensure they understand the law and their responsibilities, and
  - monitoring compliance with regulations through the audit of records.
52. Defence has conducted extensive outreach to stakeholders on the requirements of the DTC Act since its inception, and stakeholders have been keen to engage and comply. However, complete surveillance of distributors of sensitive technology is not possible. Outreach and awareness raising ensures those who intend to comply know how to, but it does not deter deliberate non-compliance.
53. Administrative investigations and inspections by regulators have a significant part to play in monitoring transfers of technology. The DTC Act provides information gathering powers to the Secretary of Defence (or their delegate) to allow the Secretary to obtain information from a person if it is relevant to the operation of the DTC Act. The

information gathering powers allow the Secretary or his delegate to require the production of specific information or documents.

54. Noting the limitations of these powers, Defence does not have the ability to comprehensively gather information to monitor compliance, or to effectively investigate suspected non-compliance to determine whether cases should be referred to the Australian Federal Police or administrative compliance action should be taken.
55. While the DTC Act includes monitoring (enter and search) powers that may be performed by 'authorised officers' under the Act, the powers only apply to the Australia-US Trade Co-operation Treaty parts of the Act (Part 3 and Part 6) only. Extending the application of these powers to Part 2 (dealing with items in the DSGL) of the Act would improve Defence's ability to monitor compliance with the provisions relating to DSGL items, and enable Defence to take a graduated compliance approach by employing administrative action before referring to the AFP for investigation.

#### **Recommendation 5**

56. The Department of Defence requests that the Review consider extending the application of the DTC Act's Part 4 Monitoring Powers to Part 2 of the Act.
57. Thank you for the opportunity to contribute to this important Review. My point of contact should you wish to discuss this submission further is:

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Yours sincerely



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