THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

DEFENCE TRADE CONTROLS AMENDMENT BILL 2015

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Defence the Honourable Senator David Johnston)
GENERAL OUTLINE

The Defence Trade Controls Amendment Bill 2015 will amend the Defence Trade Controls Act 2012 (the Act) which received Royal Assent on 13 November 2012.

The Act includes measures to strengthen Australia’s export controls to meet our international obligations as a member of the Wassenaar Arrangement, the Missile Technology Control Regime, the Australia Group and the Nuclear Suppliers Group. The Act also gives 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 Treaty provisions commenced operation on 6 June 2013, and will not be amended in any substantive way by the Bill.

The Act introduced new export controls on the intangible supply of Defence and Strategic Goods List (DSGL) controlled technologies, the prohibition of the publication of controlled technology, and the regulation of brokering activities.

Due to stakeholder concerns about the impact of the new export controls the commencement of these controls were delayed by a transition period, during which offence provisions do not apply. A Strengthened Export Controls Steering Group was established under section 74A of the Act to test the legislation and to advise Government on legislative amendments during the transition period.

During this transition phase the Department of Defence, in partnership with the Strengthened Export Controls Steering Group and the Department of Industry, has conducted extensive consultation on the potential impacts of the Act and proposed measures to reduce these impacts. This consultation has informed the development of the amendments in the Bill.

In broad terms, the amendments:

a) provide two new exceptions to the supply offence in section 10;
   i. for the oral supply of Defence and Strategic Goods List (DSGL) technology, where the supply is not the provision of access to DSGL technology and is not for use in a Weapons of Mass Destruction program or for a military end-use; and
   ii. for the supply of dual-use (Part 2) DSGL technology where the supply is preparatory to the publication of Part 2 DSGL technology.

b) extend the exception for needing to obtain a permit for supplies to, or from, members of the Australian Public Service, Australian Defence Force, Australian Federal Police, and State and Territory police to include employees of the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS);

c) allow for applicants to apply for supply and brokering permits on behalf of projects, and for permits to be issued to project participants;

d) narrow the publication offence to ‘publishing’ military (Part 1) DSGL technology where no approval has been given or the publication is in contravention of a condition of an approval;
e) allow the Minister to prohibit publication of military (Part 1) or dual-use (Part 2) DGSL technology where the publication would prejudice the defence, security or international relations of Australia;

f) allow the Secretary of Defence to issue an interim prohibition notice for the publication of military (Part 1) or dual-use (Part 2) DGSL technology, where the Secretary considers there may be grounds for the Minister to issue a prohibition notice;

g) amend the brokering definition of ‘arranges’ to be an exhaustive definition and to include that the broker must receive money or a non-cash benefit which includes property or services in any form other than money;

h) narrow the scope of the brokering offence in section 15(1) of the Act to apply to the brokering of goods or technology listed in Part 1 of the DSGL;

i) establish new offences for brokering dual-use (Part 2) DSGL goods or technology (without a permit, or in contravention of a condition of a permit) where the broker knows, or is reckless or negligent as to whether the goods or technology may be for a WMD program or military end-use;

j) extend the exception for needing to obtain a permit for brokering to, include employees of ASIO and ASIS;

k) include two additional exceptions to the brokering offence in section 15(1) (except where for a WMD program):
   i. where either the brokered supply is from, or the broker conducts their brokering from within, a State that is a member of the four main export control regimes (the Wassenaar Arrangement, Missile Technology Control Regime, Nuclear Suppliers Group, Australia Group) and that State is listed in a legislative instrument; or
   ii. the brokered supply is in connection with a contract specified in a legislative instrument – these contracts may include government business.

l) allow the Minister to prohibit the brokering of military (Part 1) or dual-use (Part 2) DGSL technology where the brokered supply would prejudice the defence, security or international relations of Australia;

m) allow the Minister to direct a person to seek a permit for the brokering of dual-use (Part 2) DSGL goods or technology;

n) require the Minister, delegate of the Minister, or the Secretary, to consider criteria prescribed in the Regulation and to have regard to any other matters the decision maker considers appropriate before making any decision under the Act that requires the decision maker to consider whether an activity would prejudice Australia’s security, defence or international relations; and

o) provide for the review of the operation of the Act, except for Parts 3 and 4. The review will occur initially two years after the commencement of section 10 and then subsequently at intervals of not longer than five years. The Minister must table a copy of the review report in each House of the Parliament.

**Financial Impact Statement**

The cost of implementing the strengthened export controls will be met from within existing resources. As these amendments will reduce the regulatory and administrative burden on stakeholders, including universities, research organisations and private sector companies, the
amendments are expected to reduce the previously anticipated compliance costs for stakeholders.

REGULATION IMPACT STATEMENT - TO BE INSERTED
DEFENCE TRADE CONTROLS AMENDMENT BILL 2015

Clause 1 – Short title

1. This provides for the citation of the Act as the Defence Trade Controls Amendment Act 2015.

Clause 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 to 3 and anything else in the Bill not covered in the Table commences on the day on which the Act receives the Royal Assent.

4. Items 2 and 8 of the table provide that items 1 to 8 and items 45 to 70 in the Schedule will commence on the day on which the Act receives Royal Assent.

5. Item 3 of the table provides that items 9 to 15 in the Schedule commence immediately after the commencement of section 10 of the Defence Trade Controls Act 2012.

6. Item 4 of the table provides that items 16 to 22 in the Schedule commence on the later of either the day after the Bill receives the Royal Assent or immediately after the commencement of section 11 of the Defence Trade Controls Act 2012.

7. Item 5 of the table provides that items 23 to 37 in the Schedule commence immediately after the commencement of section 14 of the Defence Trade Controls Act 2012.

8. Item 6 of the table provides that items 38 to 42 in the Schedule commence on the later of either the day after the Bill receives the Royal Assent or immediately after the commencement of section 16 of the Defence Trade Controls Act 2012.

9. Item 7 of the table provides that items 43 and 44 in the Schedule commence on the later of either the day after the Bill receives the Royal Assent or immediately after the commencement of section 20 of the Defence Trade Controls Act 2012.

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

Clause 3 – Schedule(s)

11. This provides that legislation specified in the schedule is amended or repealed as set out in the Schedule.
Schedule 1–Amendments

Defence Trade Controls Act 2012

Item 1 Section 3

12. This repeals and replaces the simplified outline for the Act.

Item 2 Subsection 4(1) (definition of arranges)

13. This repeals and replaces the definition for arranges

Item 3 Subsection 4(1)

14. This inserts additional definitions for terms used in the Act.

Items 4, 5, 6 and 7 Subsection 5A

15. The definition of ‘arranging’ has been amended to restrict its application to defined circumstances. The amended definition of arranging includes when a broker acts as an agent or intermediary and either receives ‘money or a non-cash benefit’ or acts for the purpose of advancing a political, religious or ideological cause. The definition of non-cash benefit is defined subsection 4(1) to mean ‘property of services in any form other than money’.

16. To be ‘arranging’ a supply, a person would need to be acting as an agent for another person, or as an intermediary between two or more other persons, and receiving some form of benefit. The benefit would need to be either money or non-cash benefit, for example, weapons. Receiving a research benefit would not be considered to be a non-cash benefit. A person can also be arranging a supply for the purpose of advancing a political, religious or ideological cause; for example, a political activist who brokers the supply of weapons to a militia group that is advancing their political cause.

Item 8 Before Division 1 of Part 2

17. This inserts a simplified outline for Part 2.

Item 9 Subparagraphs 10(1)(c)(i) and (ii)

18. This simplifies the language to remove the term ‘DSGL technology’.

Item 10 After the heading to subsection 10(2)

19. This adds a new exception to the supply offence so that the controls do not apply to the oral supply of DSGL technology. The exception does not apply where the supply is by way of the provision of access to DSGL technology or where the supply is for a military end-use or for use in a Weapons of Mass Destruction program (WMD program).
20. If a person is talking to an overseas colleague to supply them with DSGL technology, the person will not need to apply for a permit. However they will need a permit, if they provide orally the overseas colleague with a password to enable the colleague to access the DSGL technology on a database.

21. Further, a permit will be required if a person is providing DSGL technology to an individual or entity for use in a WMD program, or where DSGL technology is supplied for use in relation to operations or activities conducted by an armed force or armed group. The definition of WMD program and military end-use are set out in subsection 4(1).

Item 11 Paragraph 10(3)(a)

22. This amendment includes wording to extend the exception in subsections 10(3)(a) to exclude supplies to a member of the Australian Public Service, the Australian Defence Force or police (AFP or State or Territory police) located outside Australia who receive the supply in the course of their duties. Previously, the exception applied only to supplies by these persons.

Item 12 Paragraph 10(3)(a)

23. This amendment includes wording to extend the exception in subsections 10(3)(a) to exclude supplies by or to employees of ASIO or ASIS provided they send or receive the supply in the course of their duties.

Item 13 Paragraph 10(3)(b)

24. This amendment includes wording to extend the exception in subsections 10(3)(b) to supplies to a member of the Australian Public Service, the Australian Defence Force, police (AFP or State or Territory police), or employees of ASIO or ASIS.

Item 14 After subsection 10(3)

25. This amendment adds an exception for supply of dual-use (Part 2) DSGL technology where the supply is preparatory to publication of that technology. This exception will not be available where a publication prohibition notice has been issued under either subsection 14B(1) or subsection 14C(1).

26. If a person sends their draft publication overseas to a peer reviewer or journal editor, they would not need to obtain a permit.

Item 15 Subsection 10(5)

27. This amendment removes the geographical jurisdiction which is now included as a note under subsection 10(1). Section 14.1 of the Criminal Code (standard geographical jurisdiction) applies to an offence against subsection 10(1).

Item 16 Subsection 11(1)

28. This amendment removes the requirement for a person to apply for a permit for the supply to be to ‘another person’. This will enable people to apply for broader permits.
Item 17 Subsection 11(2) and (3)

29. These amendments make it possible for one person to apply for a permit to supply DSGL technology under subsection 11(2) or for one person to apply on behalf of project participants for a permit under subsection 11(2A). The application for a permit under subsection 11(2A) will be able to specify multiple supplies and multiple project participants.

30. The Minister is required to consider and decide whether or not to issue a permit to each project participant specified in an application.

Item 18 Subsection 11(4)

31. This amendment allows the Minister to issue a permit to project participants specified in an application.

Item 19 Subsection 11(4)

32. This amendment removes the reference to the Minister’s requirement to have regard to criteria prescribed by the Regulations. Item 44 below inserts this requirement as a stand-alone provision that will apply to any decisions where the Minister, delegate of the Minister, or Secretary, needs to decide whether an activity will prejudice the security, defence or international relations of Australia.

Item 20 Subsection 11(5)

33. This amendment will expand the activities able to be covered by a permit to cover specified supplies for a specified project.

Item 21 Subsection 11(6)

34. This amendment allows the Minister to refuse to give a permit (and notice) to a project participant.

Item 22 Subsection 12(3)

35. This amendment increases the minimum specified period for new or varied conditions to take effect to 14 days (it was previously 7 days).

Item 23 Section 14 (heading)

36. This amendment inserts a new heading.

Item 24 Subsection 14(1)

37. This amendment changes the wording in the supply prohibition power in section 14(1) to require the Minister to reasonably believe that the supply would prejudice Australia’s security, defence or international relations before he or she can issue a prohibition notice.
Item 25 Section 14A

38. This repeals and replaces section 14A. The section has been amended by:
   - narrowing the scope of the offence for publishing military (Part 1) DSGL technology – the dissemination of military (Part 1) DSGL technology has been removed. The term ‘publish’ is defined in section 4 as ‘publish on the internet or otherwise’;
   - narrowing the scope of the offence to only apply to military (Part 1) DSGL technology;
   - providing that the Minister can approve, or revoke an approval, if the publication would prejudice Australia’s security, defence or international relations; and
   - providing that an approval can be issued subject to conditions.

39. This amendment also adds a new section 14B to provide a power for the Minister to prohibit the publication of military (Part 1) or dual-use (Part 2) DSGL technology where the Minister reasonably believes that the publication would prejudice Australia’s defence, security or international relations.

40. Before the Minister decides to issue a prohibition notice under section 14B or refuse an approval under section 14A, the Department of Defence will consult with the affected person, subject matter experts, and policy areas from relevant Government agencies, including the Department of Industry when the decision relates to university or research publications. The views expressed in this consultation will be included in the advice provided to the Minister. The Minister may also decide to consult directly with relevant Ministers before making a decision.

41. The Minister must give notice specifying the period that the notice will be in force which must not be more than 12 months. Subsequent notice may be issued. Notices may be revoked.

42. It is an offence for a person to publish in contravention of a notice issued under section 14B. The offence is punishable by imprisonment for 10 years, or 2500 penalty units, or both.

43. This amendment also adds a new section 14C to provide a power for the Secretary to issue a 90-day interim notice to prohibit the publication of military (Part 1) or dual-use (Part 2) DSGL technology. The notice may be issued if the Secretary considers that there may be grounds for the Minister to issue a notice under section 14B. This power will provide the Department of Defence time to consult and brief the Minister in order to make a final decision under section 14B.

44. The notice comes into force when received and remains in force until a section 14B notice is issued, or for 90 days, or it is revoked. Subsequent notice may be issued.

45. It is an offence for a person to publish in contravention of a notice issued under section 14C. The offence is punishable by imprisonment for 10 years, or 2500 penalty units, or both.
Item 26 Section 15 (heading)

46. This repeals and replaces the heading for Section 15.

Item 27 Subparagraph 15(1)(a)(i)

47. This amendment narrows the offence in section 15(1)(a) to the brokering of military (Part 1) DSGL goods without a permit.

Item 28 Subparagraph 15(1)(a)(ii)

48. This amendment narrows the offence in section 15(1)(a) to the brokering of military (Part 1) DSGL technology without a permit.

Item 29 After paragraph 15(1)(b)

49. This amendment adds a subsection to specify that the offence will apply when there is no brokering prohibition notice in force under subsection 15A(1).

Item 30 After subsection 15(1)

50. This amendment adds a subsection that makes it an offence to broker the supply of dual-use (Part 2) DSGL goods or technology, without a permission or in breach of a permit condition, when the broker knows, or is reckless or negligent, as to whether the goods or technology will or may be used for a military end use. Military end-use is defined in subsection 4(1). The offence is punishable by imprisonment for 10 years, or 2500 penalty units, or both.

Item 31 Subsection 15(2)

51. This amendment makes the exception in subsection 15(2) apply to the offences in subsection 15(1) and 15(1A).

Item 32 Paragraph 15(2)(a)

52. This amendment includes wording to extend the exception in subsections 15(2)(a) to exclude brokering by employees of ASIO or ASIS where the brokering is in the course of their duties.

Item 33 Subsection 15(3)

53. This amendment makes the exception in subsection 15(3) to also apply to the offence in subsection 15(1A).

Item 34 Subsection 15(4)

54. This amends the subsection 15(4) exception which applies to the subsection 15(1) and 15(1A) brokering offences to include both brokering supplies from specified foreign countries and for brokers located within specified foreign countries. The specified foreign countries need to be members of all four main export control regimes (the
Wassenaar Arrangement, Missile Technology Control Regime, Nuclear Suppliers Group, Australia Group) and specified in a legislative instrument.

55. This amendment also adds subsections 15(4B) and 15(4C) to allow the Minister to specify, by another legislative instrument, contracts that will be exempt from the brokering offence – these contracts may include government business contracts.

56. Subsection 15(4D) adds an offence to broker the supply of dual-use (Part 2) DSGL goods or technology, without a permission or in breach of a permit condition, when the broker knows, or is reckless or negligent, as to whether the goods or technology will or may be used for a weapons of mass destruction program. A weapons of mass destruction (WMD) program is defined in subsection 4(1). The offence is punishable by imprisonment for 10 years, or 2500 penalty units, or both.

**Item 35 At the end of subsection 15(5)**

57. This amendment ensures the geographical jurisdiction in subsection 15(5) applies to the offences in subsections 15(1A) and 15(4D).

**Item 36 Subsection 15(6)**

58. This amendment adds definitions for the export control regimes - Australia Group, Missile Technology Control Regime and Nuclear Suppliers Group.

**Item 37 After section 15**

59. This amendment adds a new section 15A to provide a power for the Minister to prohibit the brokering of military (Part 1) and dual-use (Part 2) DSGL goods or technology where the Minister reasonably believes that the brokering would prejudice Australia’s defence, security or international relations.

60. The Minister must give notice specifying the period that the notice will be in force which must not be more than 12 months. Subsequent notice may be issued. Notices may be revoked.

61. It is an offence for a person to broker in contravention of a notice issued under section 15A. The offence is punishable by imprisonment for 10 years, or 2500 penalty units, or both.

62. This amendment also adds a new section 15B to provide a power for the Minister to direct a person not to broker dual-use (Part 2) DSGL goods or technology without a permit.

63. Brokering of dual-use (Part 2) DSGL goods or technology will not require a brokering permit unless the broker is ‘tapped on the shoulder’ which will take the form of being served with section 15B notice that would require them to apply for permits in the circumstances specified in the notice. Notices may be revoked.

64. It is an offence for a person to broker in contravention of a notice issued under section 15B. The offence is punishable by imprisonment for 10 years, or 2500 penalty units, or both.
Item 38 Section 16 (heading)

65. This repeals and replaces the heading for Section 16.

Item 39 Subsection 16(2)

66. This amendment will expand the activities able to be covered in an application to include brokering supplies for a project.

Item 40 Subsection 16(4)

67. This amendment removes the reference to the Minister’s requirement to have regard to criteria prescribed by the Regulations. Item 44 below inserts this requirement as a standalone provision that will apply to any decisions where the Minister, delegate of the Minister, or Secretary, needs to decide whether an activity will prejudice the security, defence or international relations of Australia.

Item 41 Subsection 16(5)

68. This amendment will expand the activities able to be covered by a permit to cover specified supplies for a specified project.

Item 42 Subsection 17(3)

69. This amendment increases the minimum specified period for new or varied conditions to take effect to 14 days (it was previously 7 days).

Item 43 At the end of section 20

70. This amendment adds a subsection to ensure that when a broker’s registration ceases to be in force, any permits held by that broker will be deemed to be revoked.

Item 44 At the end of Part 2

71. Where the Minister, delegate of the Minister, or Secretary, needs to decide whether a Part 2 activity will prejudice the security, defence or international relations of Australia, this amendment requires the Minister, delegate of the Minister, or Secretary, to have regard to criteria prescribed by the Regulations. The Minister, delegate of the Minister, or Secretary may also have regard to other appropriate matters.

Item 45 Division 1 of Part 3

72. This repeals and replaces the simplified outline for Division 1 of Part 3.

Item 46 Section 37

73. This repeals and replaces the simplified outline for Division 1 of Part 4.
Item 47 subsection 40(3) (note)

74. This amendment removes the note at the end of subsection 40(3) as the inclusion of this particular note is inconsistent with Commonwealth drafting practice. Section 14.1 of the Criminal Code (standard geographical jurisdiction) applies to the offence in subsection 40(3).

Item 48 subsection 43(3) (note)

75. This amendment removes the note at the end of subsection 40(3) as the inclusion of this particular note is inconsistent with Commonwealth drafting practice. Section 14.1 of the Criminal Code (standard geographical jurisdiction) applies to the offence in subsection 40(3).

Item 49 subsection 48(2) (note)

76. This amendment removes the note at the end of subsection 40(3) as the inclusion of this particular note is inconsistent with Commonwealth drafting practice. Section 14.1 of the Criminal Code (standard geographical jurisdiction) applies to the offence in subsection 40(3).

Item 50 subsection 49 (note)

77. This amendment removes the note at the end of subsection 40(3) as the inclusion of this particular note is inconsistent with Commonwealth drafting practice. Section 14.1 of the Criminal Code (standard geographical jurisdiction) applies to the offence in subsection 40(3).

Item 51 Before section 52

78. This inserts a simplified outline for Part 5.

Item 52 Before section 58

79. This inserts a simplified outline for Part 6.

Item 53 Before section 63

80. This inserts a simplified outline for Part 7.

Item 54 Section 63

81. This inserts a subparagraph number.

Item 55 Paragraph 63(a)

82. This amendment includes a decision to refuse a permit to any person (including project participants) as a reviewable decision.
Item 56 After paragraph 63(c)

83. This includes additional decisions to the list of reviewable decisions.

Item 57 At the end of section 63

84. This adds a subparagraph to include a decision of the Secretary to issue a notice under subsection 14C(1) as a reviewable decision.

Item 58 Subsection 64(1)

85. This amendment repeals and substitutes a new subsection 64(1) to provide for internal review for decision made by a delegate of the Minister or a decision made by the Secretary.

Item 59 Before section 66

86. This inserts a simplified outline for Part 8.

Item 60 Section 68(1)

87. This repeals and substitutes a new subsection 68(1) to provide that reasons for decisions made personally by the Minister or Secretary must not disclose reasons where that disclosure would prejudice Australia’s security, defence or international relations.

Item 61 Section 72 (heading)

88. This repeals and substitutes the heading for section 72.

Item 62 Subsection 72(1)

89. This amendment includes additional notices to the list of matters that can be certified by an evidential certificate.

Item 63 Subsection 72(1)

90. This amendment provides that evidential certificate can also certify specified matters.

Item 64 Subsection 72(1)

91. This amendment provides that the Secretary can certify that a notice under subsection 14C(1) was in force.

Item 65 Subsection 72(2)

92. This amendment specifies that a certificate issued by the Secretary will also be prima facie evidence of the matters stated in the certificate.
**Item 66 Subsection 73(2)**

93. This amendment removes the previous publication approval subparagraph from the list of decisions that can not be delegated by the Minister. The amendment also adds the new decisions for prohibiting a publication of dual-use (Part 2) DSGL technology and prohibiting brokering of DSGL goods or technology to the list of decisions that can not be delegated by the Minister.

**Item 67 Subsection 73(7) (table item 1)**

94. This amendment alters the language used in Item 1 to reflect that supply permits may be applied for on behalf of a number of project participants.

**Item 68 Subsection 73(7) (after table item 1)**

95. This amendment adds a new decision for refusing to approve publication to the table of decisions in subsection 73(7). These decisions can not be made by a delegate if the delegate is satisfied that the activity or approval would prejudice the security, defence or international relations of Australia.

**Item 69 Subsection 74 (2)**

96. This amendment adds new decisions – for prohibiting publication under section 14C and evidential certificates under section 72 – to the list of decisions that can not be delegated by the Secretary.

**Item 70 After section 74A**

97. This amendment adds new section to provide for the review of the operation of the Act, except for Parts 3 and 4. The review will occur initially, two years after the commencement of section 10 and then subsequently, at intervals of not longer than five years. The Minister must table a copy of the review report in each House of the Parliament.
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence Trade Controls Amendment Bill 2015

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The Defence Trade Controls Amendment Bill 2015 will amend the Defence Trade Controls Act 2012 (the Act) which received Royal Assent on 13 November 2012.

The Act introduced new export controls on the intangible supply of Defence and Strategic Goods List (DSGL) controlled technologies, the prohibition of the publication of controlled technology, and the regulation of brokering activities.

In response to stakeholder concerns the Department of Defence is amending the Act to reduce the potential impacts and regulatory burden while still meeting Australia’s national security requirements and obligations under international counter-proliferation regimes.

The main proposed amendments include:

- Removing controls on the verbal supply of controlled technology;
- Exempting the supply of controlled technology by, or to, APS, ADF, ASIO, ASIS, and police from the supply offence;
- Narrowing the scope of the publication offence to apply only to the publication of technology on military (Part 1) of the DSGL, and including a Ministerial prohibition power that can be exercised in specific instances where the publication of military (Part 1) or dual-use (Part 2) DSGL technology would prejudice the security, defence or international relations of Australia;
- Limiting the requirement for brokering permits to military (Part 1) DSGL items with brokers of dual-use items only required to seek permits if they know or suspect that the items will be for a military end-use or a WMD program, or if the broker is directed to seek a permit. A Ministerial prohibition power is also included that can be exercised in specific instances where the brokering of military (Part 1) or dual-use (Part 2) DSGL items or would prejudice the security, defence or international relations of Australia;
- Excluding brokering supplies from, or brokering activity within, states that are considered to have comparable export controls to Australia and are members of all four main counter-proliferation regimes;
- Excluding brokering in relation to specified government business; and
- Establishing mechanisms for regular review of legislation and permanent stakeholder consultation arrangements.

Further detail on the measures included in the Bill is included in the Explanatory Memorandum.
Human rights implications

The Bill engages the following human rights:

- The right to freedom of expression in Article 19(2) of the *International Covenant on Civil and Political rights* (ICCPR): and

- The presumption of innocence in Article 14(2) of the ICCPR.

The right to freedom of expression

The right to freedom of expression protects an individual’s right to express information and ideas in any medium including through written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. The protection extends to all information and ideas not just those that are favourable (subject to limitations).

The Bill includes amendments to the Act which limit the right to freedom of expression. Specifically, Item 26 in Schedule 1 to the Bill inserts a new section 14A which restricts the publication of the sensitive military technology that is listed in Part 1 of the Defence and Strategic Goods Lists (DSGL), to the public or section of the public without approval. Further, Item 27 inserts a new section 14B which provides that the publication of military (Part 1) or dual-use (Part 2) DGSL technology may be prohibited where the Minister for Defence reasonably believes that the publication of that technology would prejudice the security, defence or international relations of Australia. These provisions have been included in the Bill to ensure that the sharing of sensitive technologies remains controlled and that the current controls are not undermined by the publication of such technology to the public generally. The publication of sensitive technology to the public, or a section of the public would effectively result in existing export controls being redundant as the technology would be available to members of the public. Public access to sensitive technology has implications for national security and Australia’s international export and counter-proliferation obligations. The new sections 14A and 14B ensure sensitive technologies are properly controlled and provide a mechanism for consideration of all risks, including risks to national security, associated with any publication.

The right to freedom of expression is not an absolute right and may be permissibly limited (Article 19(3) ICCPR) by law for specific purposes including national security. The limitations on the publication of DSGL technology are reasonable, necessary and proportionate to achieving the objective of maintaining controls on sensitive DSGL technology, which if published, may be a risk to national security. The limitation on publication in the new section 14A only applies to sensitive military (Part 1) DSGL technology and is not a blanket prohibition. The Minister may approve a publication where the publication would not prejudice the security, defence or international relations of Australia. Further, the Bill provides for internal and external review of a decision not to approve a publication of military (Part 1) DSGL technology.

Publication of military (Part 1) or dual-use (Part 2) DSGL technology can only be prohibited under the new section 14B in circumstances where the Minister reasonably believes that the publication of that technology would prejudice the security, defence or international relations of Australia. A prohibition decision is also subject to internal and external review.
The presumption of innocence

The presumption of innocence provides that any person charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. It requires the prosecution to prove a criminal charge and guarantees that no guilt can be presumed until that charge has been proved beyond reasonable doubt.

The Bill includes defences that reverse the onus of proof which limit the right to be presumed innocent until proven guilty, as a person who fails to discharge the burden of proof, may be convicted despite reasonable doubt as to their guilt. However, reverse onus of proof offences will not necessarily be inconsistent with the presumption of innocence provided that they are reasonable in the circumstances and maintain a defendant’s right to a defence or to a fair hearing.

Subsection 10(1) of the Bill provides an offence for supplying DSGL technology from Australia to a place outside Australia without a permit, or in contravention of a condition of a permit. Item 10 in Schedule 1 includes a new exception to the supply offence where the supply is made orally and is not the provision of access to DSGL technology and is not for a military end-use or for use in a Weapons of Mass Destruction program. The exception shifts the evidential burden to the defendant. It is appropriate that a defendant seeking to rely upon this exception prove that he or she made the supply orally, as the way in which the supply was made is clearly, and may be solely, within the defendant’s personal knowledge. Further, the purpose of the supply, to whom the oral supply is made, and the intended use of the DSGL technology will also be clearly within the defendant’s personal knowledge.

Item 14 inserts an additional exception to the supply offence where dual-use (Part 2) DSGL technology is being supplied and the supply is preparatory to the publication of the DSGL technology (and the publication has not been prohibited). It is reasonable that a defendant relying on this exception be required to provide evidence that a supply is preparatory to a publication as this information will be solely within the knowledge of the defendant. It would be more practical and less burdensome for the defendant to establish that the supply was preparatory to publication than it would be for the prosecution to prove that the supply was not preparatory to a publication.

Item 26 includes an exception to the new section 14A publication offence where the military (Part 1) DSGL technology being published has been made lawfully available to the public or section of the public. It is appropriate that a defendant seeking to rely upon this exception have the evidentiary burden of establishing that the technology has already been made available to the public lawfully, as the defendant will have particular knowledge of the technology they have published and will be aware how the technology was made available to the public previously.

Item 36 includes two exceptions to the brokering offences in section 15(1) and the proposed new subsection 15(1A) (Item 32). The exceptions apply where either the brokered supply is from, of the broker conducts their brokering from within, a state that is a member of all four main export control regimes (the Wassenaar Arrangement, Missile Technology Control Regime, Nuclear Suppliers Group, Australia Group) and that State is listed in a legislative instrument. It is solely within the knowledge of a broker arranging the supply of military (Part 1) DSGL goods or technology as to where the goods or technology were supplied from or where she or he (the broker) was located when undertaking the brokering activity. It is reasonable, and more practical in these circumstances, that the evidentiary burden lies with the defendant rather than the prosecution needing to prove that the brokered supply was not from, or the broker did not conduct their brokering from within, the specified state.
Conclusion
The Bill engages the rights of freedom of expression and the presumption of innocence and does so in order to enhance the export control regime which supports Australia’s defence, security and international obligations. To the extent that the Bill may also limit human rights, those limitations are reasonable, necessary and proportionate.

David Johnston
Minister for Defence