

# Submission to the Review of the *Defence Trade Controls Act 2012*

## Recommendations

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1. Update the *Defence Trade Controls Act*
2. Incorporate all the provisions of the *Arms Trade Treaty*
3. Increase the transparency of Australian defence exports
4. Institute regular parliamentary reviews of defence trade controls treaty obligations
5. Create a consistent import/export reporting process, then divide the information requirements between Departments of Defence; Foreign Affairs and Trade; and Home Affairs

## Introduction

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The current act contains a vast number of categories of controlled goods, does not align with Australia's obligations under the *Arms Trade Treaty* and has led to inconsistent reporting on Australia's defence exports. This submission discusses means to remedy these issues, including concerns we may not be meeting our treaty obligations, in an updated act. It is organised under the four main issues of: *Arms Trade Treaty*, transparency, governance, and other treaty obligations.

## Arms Trade Treaty

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When Australia ratified the *Arms Trade Treaty* (ATT) in 2014 it was deemed that no legislative arrangements needed to be made because our existing legal and policy framework sufficed. However, recent issues have highlighted this may not be the case. Any update of the Defence Trade Controls Act should fully incorporate the provisions of the Arms Trade Treaty.

The treaty requires that all arms transfers are assessed and authorised on the likelihood of their being used in gross breaches of human rights, or in violence against women. Authorisations for transfers to Saudi Arabia since April 2016 would show that these provisions are not currently being met. Saudi Arabia has an appalling record of women's rights and is currently waging a war in Yemen that has caused the "world's worst humanitarian crisis."<sup>1</sup> A blockade prevented the arrival of food, fuel, medicine, and humanitarian supplies.<sup>2</sup> By December 2017, bombing reportedly killed 10 000 civilians<sup>3</sup> and according to the UN children's agency, an average of five children a day are killed or injured in the violence.<sup>4</sup>

Australia is in the process of developing a new whole of government National Action Plan (NAP) on Women, Peace and Security (WPS). Arms control is an important component of the WPS agenda. UN Security Council Resolution 2106 on WPS notes "the provision in the Arms Trade Treaty that exporting States Parties shall take into account the risk of covered conventional arms or items being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women

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<sup>1</sup> <https://reliefweb.int/report/yemen/yemen-world-s-worst-humanitarian-crisis-enters-another-year>

<sup>2</sup> <https://www.theguardian.com/world/2017/nov/24/saudi-arabia-continues-to-block-humanitarian-aid-to-yemen>

<sup>3</sup> [https://www.washingtonpost.com/news/worldviews/wp/2017/11/30/saudi-arabia-lifted-its-blockade-of-yemen-its-not-nearly-enough-to-prevent-a-famine/?utm\\_term=.add7f563fed2](https://www.washingtonpost.com/news/worldviews/wp/2017/11/30/saudi-arabia-lifted-its-blockade-of-yemen-its-not-nearly-enough-to-prevent-a-famine/?utm_term=.add7f563fed2)

<sup>4</sup> [https://www.unicef.org/infobycountry/yemen\\_85651.html](https://www.unicef.org/infobycountry/yemen_85651.html)

and children.”<sup>5</sup> During the life of *Australia’s National Action Plan on Women, Peace and Security 2012–18*, civil society repeatedly raised concerns about the implementation of the gender provisions of the ATT at the Annual Civil Society Dialogues on WPS.<sup>6</sup> These concerns need to be met in the operationalisation of Defence trade controls. They should also be included in and reported against in Australia’s next NAP.

## Transparency

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States parties to the ATT are required to submit annual reports on authorised and actual transfers, their quantity and/or value, as well as the final importing state (or, in the case of imports, the exporting state). Transparency is key to the effective implementation of the ATT.

Australia completed the baseline questionnaire as well as the two subsequently required reports. However, the submitted reports lack a significant amount of information. No effort has been made to include any exported ammunition. There are serious discrepancies between the figures reported against the ATT and publicly available figures from Defence, with no explanation of the discrepancy. The ATT reporting only provides figures on authorised exports, not the actual exports.

Data on actual exports, once held by Customs and Border Protection, is now held by the new Department of Home Affairs. Even Freedom of Information (FOI) requests<sup>7</sup> have been denied access to the data expected under the ATT on the grounds of breach of commercial confidence. The relevant data is recorded in the Integrated Cargo System (ICS). But the data was deemed “sufficiently secret in that only the importer/exporter itself (or those acting on their behalf) would be aware of the data relating to their importation/exportation activities.” However, this goes against the very principle and purpose of the ATT and its reporting regime.

At present, the “importer/exporter views their data as valuable commercial information that has been given to the Department in confidence for the limited purposes of assessing Customs duties.”<sup>8</sup> If the “importer/exporter would not be aware, and is certainly not advised, that Department may disclose the sensitive commercial information they provide”<sup>9</sup> then the import/export process needs to be updated and importers/exporters need to be advised as such, to ensure compliance with the ATT.

An updated *Defence Trade Controls Act* should also allow for greater parliamentary oversight. In 2017, Defence refused to answer questions during Senate Estimates relating to Australia’s obligations under the ATT. The safety and integrity of Australia’s obligations under the ATT are of paramount significance to global peace and security and the rules based global order. Adherence to treaty requirements is not something that should be held behind closed doors, but should be subject to regular parliamentary scrutiny, through regular review by the Joint Standing Committee on Treaties or the Joint Standing Committee on Foreign Affairs, Defence and Trade.

## Governance

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Australia’s reports against the ATT are prepared and submitted by the Department of Foreign Affairs and Trade (DFAT). Neither a link, nor the reports themselves are available on the DFAT website. An

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<sup>5</sup> [http://www.securitycouncilreport.org/atf/cf/%7B65BF969B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s\\_res\\_2106.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF969B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2106.pdf)

<sup>6</sup> <https://wpscoalition.org/>

<sup>7</sup> Department of Home Affairs reference - FOI Request: FA 18/02/01147, File Number: ADF2018/22816

<sup>8</sup> Department of Home Affairs reference - FOI Request: FA 18/02/01147, File Number: ADF2018/22816

<sup>9</sup> Department of Home Affairs reference - FOI Request: FA 18/02/01147, File Number: ADF2018/22816

FOI request to the Department of Defence for the information required under the ATT was denied on the basis that information didn't exist.<sup>10</sup>

While the Defence Export Controls statistics webpage<sup>11</sup> contains some useful data available to the public, there is no archive of this information for civil society or academia to research trends and track changes. The data on that page should include key information required under the ATT. Then, all that data, including in its raw form, should be made available to the public for analysis. While some would need to remain classified, the information expected under the ATT should not be.

The entire process of defence import/export needs to have a consistent reporting process, with information requirements then divided as appropriate between DFAT, Defence and Home Affairs. This consistency is important for traceability, oversight and transparency. In turn, it would mean we are better able to tell if we are meeting our obligations under international law. Creating such a process would require consideration of the item(s) to be exported, rather than taking the agency's information requirements as a start point and may require building a new e-platform.

## Other treaty obligations

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The *Defence Trade Controls Act* also needs to address Australia's other treaty obligations relating to chemical, biological, radiological and nuclear weapons and technology. The international treaties on land mines, cluster munitions, biological and chemical weapons all existed prior to the *Defence Trade Controls Act*. Other controls are implemented through the *Weapons of Mass Destruction Act*. Any attempt to further strengthen Australia's attempts to protect the world from such weapons would be valuable.

## About the author

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This submission has been prepared by Susan Hutchinson, a PhD candidate at the Coral Bell School of the Australian National University. Susan is an expert in civil-military interaction. Her research and opinions have appeared in *The Conversation* and on the blogs of the Lowy Institute, Australian Strategic Policy Institute, Huffington Post, New Mandala and Broad Agenda. Susan has consulted to the Department of Defence, served in the public service and the Australian Army. She founded the Annual Civil Society Dialogue on Women, Peace and Security and remains a member of the Australian Civil Society Coalition on Women, Peace and Security. She is also the architect of the *prosecute; don't perpetrate* campaign to end impunity for conflict related sexual violence.

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<sup>10</sup> Department of Defence reference - FOI 290/17/18

<sup>11</sup> <http://www.defence.gov.au/ExportControls/Statistics.asp>