



17 February 2012

Director
Outreach and Legislation
Department of Defence
Defence Export Control Office
R1-1-A037
PO Box 7901
CANBERRA BC ACT 2610

Dear Director

RE: Submission on exposure draft of Defence Trade Controls Regulations 2012

We write to you as a coalition of Australian NGOs to provide comments on the exposure draft of the Defence Trade Controls Regulations 2012 – Feb 12 Version. We wish to thank you for your efforts in outreach to both industry and civil society regarding this proposed legislation, and for providing this opportunity to comment through a public process.

We note that in the Explanatory Statement accompanying the exposure draft, this legislation has been drafted as part of a process to implement the 2007 *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*, which aims to create a framework for bilateral trade between Australia and the United States in defence articles between approved communities, without the need for export licenses. Whilst recognising that this aims to reduce administrative delays associated with export control systems, we feel it important to raise our concerns about the possible inconsistencies of the Treaty provisions and new legislation with Australia's future ratification of the proposed Arms Trade Treaty (ATT).

Whilst the elements and obligations of an ATT are still subject to final negotiation and agreement through the UN Negotiating Conference in July 2012, the express

purpose of the ATT as set out in UN General Assembly Resolution 64/48 and agreed by a vast majority of UN Member States is “to establish the highest possible common international standards for the import, export and transfer of conventional arms”. We are concerned that a framework of export license exempt trade in defence articles may establish exceptions to the universal high standards that an ATT aims to establish.

Bilateral Trade Without Export Licenses

In particular, we have concerns about how the provisions allowing bilateral trade without export license requirements may affect ATT reporting and transparency requirements. We note and welcome that under the Defence Trade Controls Regulations 2012, the holder of an approval to be a member of the Australian Community, and thus deemed suitable to access US Defence Articles, will be required to submit an annual report to the Minister of Defence, both on compliance with the approval conditions and the provisions of the Bill. We further welcome that the Regulations set out clear obligations for Australian community members to complete and retain records for the supply of goods or technology or provision of defence services.

However, we note that similar bilateral arrangements providing for export license exempt trade in military goods and technology, such as the Canadian-US Defence Development and Production Sharing Arrangements (DDPSA), have resulted in incomplete reporting and limited transparency. Under DDPSA, no formal process exists to authorise, document or monitor trade in military goods from Canada to the US, and permit exemptions mean that exports of military goods and technology to the United States are not reported in the Canadian Department of Foreign Affairs and International Trade’s *Report on Exports of Military Goods from Canada*. This creates a significant transparency gap as the US exports represent an estimated 70 percent of all Canadian military exports. We are concerned that implementation of a similar license free arrangement between Australia and the US could limit monitoring and documentation of Australian military exports to the US if a rigorous reporting system is not put in place. Australia noted in its submission to the Secretary General on the feasibility, scope and draft parameters in 2007, that “in order to be effective, an Arms Trade Treaty requires a level of public transparency” and we encourage Australia to ensure consistent transparency in all arms transfers, in line with and to the extent practised within various other international transfer control regimes to which Australia is a party.

Assessment Processes

Equally, we wish to query how the assessment process required for approval into the Australian community, outlined in the Regulations, will operate alongside the authorisation process and requirements proposed under the ATT. Whilst recognising that the Regulations set out clear requirements which must be satisfied for inclusion in the Australian Community, including a Commonwealth issued security clearance, and an assessment of any significant ties to a proscribed country, we note that this framework only provides for an initial assessment. Whilst Regulation 9 of the Regulations allows the Minister to review at any time whether a person has significant ties to a proscribed country and continues to be suitable to access US defence articles, there is no expressed obligation to undertake periodic or ongoing reviews to assess possible changes in an individual’s circumstances. Under the proposed ATT, States party will be required to approve or deny a transfer of arms on the basis of an assessment that takes into account the nature of the arms to be transferred and a risk assessment of the potential use of the weapon. We express

concerns that an initial authorisation for approval into the Australian community, without a process for mandatory periodic review, as currently set out in the Regulations, does not correspond to the authorisation and assessment requirements. These authorisation and assessment requirements are undertaken on the basis of the actual defence articles being transferred and their potential use and end-user, that an ATT would seek to establish.

A strong and effective Arms Trade Treaty will establish high universal standards for international arms transfers. However, national implementation will nevertheless result in some standards variation, especially since ATT standards will be considered a base and states may seek higher standards in their national controls. Under the current defence trade arrangements between Canada and the US such a variation has resulted in Canadian weapons components being supplied via the US to states that would have been denied direct shipment from Canada. We express concerns that license-free defence trade between Australia and the US could potentially generate similar problems.

Australia has played a leading role in the UN process towards an Arms Trade Treaty since 2006, as one of the co-authors of the original UN General Assembly Resolution 61/89 and UN General Assembly First Committee Resolution L.38/Rev 1, the latter of which set in place the framework for a UN negotiating conference in 2012. We believe that as an ongoing strong supporter of the ATT process, Australia should make all efforts to ensure that its national legislation is consistent with the eventual Arms Trade Treaty and exceptions are not carved out which will serve to weaken, rather than reinforce, the universal high standards that the ATT seeks to establish.

We thank you for considering this submission and look forward to further discussion on the issues contained therein. A representative of the coalition which have endorsed this letter is willing to speak to the Senate Standing Committee on Foreign Affairs, Defence and Trade to elaborate on the content of this submission.

Yours faithfully

Oxfam Australia

Act for Peace NCCA

Gunpolicy.org

ANBLC

Amnesty International

Medical Association for Prevention of War

Pacific Small Arms Action Group

Australian Council For International Development