

1994

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

**WEAPONS OF MASS DESTRUCTION (PREVENTION OF PROLIFERATION)
BILL 1994**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Foreign Affairs,
Senator the Hon Gareth Evans QC)

WEAPONS OF MASS DESTRUCTION (PREVENTION OF PROLIFERATION) BILL 1994

OUTLINE

The purpose of this Bill is to prevent Australian assistance being given to programs for the development of weapons of mass destruction (WMD) programs.

Widespread international recognition of the horrific consequences of the use of weapons of mass destruction (nuclear, biological and chemical weapons and their missile delivery systems) and the dangers to peace and stability created by proliferation of such weapons have resulted in multilateral treaties either banning them or restricting their proliferation, principally the Nuclear Non-Proliferation Treaty, the Biological Weapons Convention and the Chemical Weapons Convention (which is not yet in force).

Apart from these global measures, other measures have been taken to stem proliferation of WMD. In concert with other advanced industrialised countries and suppliers, the Australian Government has introduced a range of export controls to try to prevent the transfer, directly or indirectly, of goods and technology, which could be used in the development of WMD, to programs known to be or suspected of posing a WMD proliferation risk. These controls were developed by international export control regimes of which Australia is a member - the Nuclear Suppliers' Group and the Zangger Committee (nuclear), the Australia Group (chemical and biological) and the Missile Technology Control Regime (missile delivery systems).

Australia's export controls on goods, including technology in a tangible form, are covered by the *Customs Act 1901* through the Customs (Prohibited Exports) Regulations (hereinafter referred to as the Customs Regulations).

It is not possible to identify and describe, for regulatory purposes, all items that might be used in a WMD program. Some items may be identified but, because of their widespread commercial application, it would be impracticable to include them in Regulations. Once in Regulations, all exports of these items would require a permit, which would create an unnecessary administrative burden on the licensing authority as well as for industry. However, the Government would still want to have the authority to stop such items from being exported to a destination considered to be a WMD proliferation risk.

The Customs Regulations also cannot control the supply by an Australian of goods and technology overseas or the provision of services or other assistance to a WMD program. Services or assistance could for example take the form of a consultancy contract to provide technical, operational or management advice to a WMD program; financial assistance; brokering the supply of materials; or specialised training. It would also cover the transmission of information by telephone, fax and other forms which cannot be covered under the Customs Regulations.

Similar difficulties experienced by other countries with their non-proliferation controls have led to the development of legislation known as "catch-all" or "safety-net" provisions.

Although such legislation can take different forms, essentially it works in two ways: it puts an onus on a person not to export goods or provide a service or other assistance intentionally or recklessly to a WMD program, and it provides the Government with a mechanism to prevent the export of goods or the provision of a service or other assistance to an actual or possible WMD program. While there is a wide range of goods and services that can be used in a WMD program which have legitimate commercial uses and are not specifically controlled under existing legislation, it is contrary to Australia's interest not to have fully adequate legislative means of preventing the provision of such goods and services to WMD programs of concern.

This legislation is not meant to be a front-line defence against possible Australian assistance to proliferation of WMD. The Customs Regulations, information programs and persuasion fulfil that function. The legislation would be used only when all other measures fail. It would also serve to spell out the Government's clear intention to prevent Australian assistance to proliferation of WMD. It will, in effect, reinforce the legislative basis available to reinforce the Government to prevent any Australian assistance to WMD programs and to ensure Australia meets its obligations under international non-proliferation treaties.

FINANCIAL IMPACT

The enactment of this legislation will have no financial impact.

NOTES ON CLAUSES

Clause 1 Short title

1. This clause provides for the Act to be cited as the Weapons of Mass Destruction (Prevention of Proliferation) Act 1994.

Clause 2 Commencement

2. This clause provides for the commencement of the Act six months after it receives the Royal Assent if it has not previously been proclaimed.

Clause 3 Interpretation

3. This clause provides definitions for terms used in the Act.

Clause 4 Provision of Services

4. Without limiting the generality of the term "provision of services", examples are given of the main types of services that are covered by the term "provision of services".

Clause 5 Extension to external Territories

5. The Act extends to Australia's external territories.

Clause 6 Object and operation of Act

6. The object of the Act is to prevent the export or supply of goods or the provision of services which will or may assist the development, production, acquisition or stockpiling of weapons of mass destruction or missiles capable of carrying them. The Act does not extend to exports of goods covered by the Customs (Prohibited Exports) Regulations. This clause also provides that the Act extends to acts done or omitted to be done by an Australian citizen, resident or corporation outside of Australia and the external Territories.

Clause 7 Additional operation of Act

7. This clause sets out the Constitutional basis for the Act.

Clause 8 Act to bind the Crown

8. This clause provides that the Act binds the Crown in all its capacities but the Crown will not be liable to be prosecuted for an offence.

Clause 9 Prohibition on supplying goods for WMD program

9. This clause prohibits a person from supplying goods to another person if the first person believes or suspects the goods will or may be used in a WMD program, except where it is authorised by virtue of a ministerial permit or written notice.

Clause 10 Prohibition on exporting goods for WMD program

10. This clause prohibits a person from exporting goods, which are not covered by the Customs (Prohibited Exports) Regulations, if he/she believes or suspects the goods will or may be used in a WMD program, except where it is authorised by virtue of a ministerial permit or written notice.

Clause 11 Prohibition on providing services for WMD program

11. This clause prohibits a person from providing any service to another person if the first person believes or suspects the service will or may be used in a WMD program, except where it is authorised by virtue of a ministerial permit or written notice.

Clause 12 Request to the Minister for Information

12. This clause enables a person to request the Minister to inform him or her whether the Minister believes or suspects a proposed export or supply of goods or provision of a service will or may assist a WMD program. The Minister must provide the person with the information in writing as soon as possible.

Clause 13 Permits

13. Under this clause, if the Minister is satisfied that a proposed export or supply of goods or provision of a service would not be contrary to Australia's international or treaty obligations or the national interest by assisting a WMD program, the Minister may give a person, upon application, a permit to undertake that activity. The Minister may place conditions on the permit.

Clause 14 Notice prohibiting supply or export of goods or provision of services

14. This clause enables the Minister to give a person notice prohibiting that person from supplying or exporting particular goods or providing a particular service to another person if the Minister believes or suspects that the proposed activity would or might assist a WMD program and that a permit could not be given under clause 13. The notice may prohibit the person from supplying or exporting particular goods or providing a particular service, or allow the person to engage in these activities providing they comply with conditions specified in the notice. The Minister may revoke the notice.

15. A notice will remain in force for 12 months but may be renewed by the Minister.

16. It would be an offence to knowingly export or supply the goods or provide the service in contravention of the notice.

Clause 15 Conduct by directors, servants and agents

17. This clause provides that where it is necessary to establish the state of mind of a body corporate for the purposes of this Act, the state of mind or conduct of a director, servant or agent of a body corporate shall be deemed to be the state of mind or conduct of the body corporate, provided the director, servant or agent acts within his or her authority. Similarly, a person shall be attributed with the state of mind or conduct of his or her servant or agent.

Clause 16 Injunctions

18. This clause provides for the Minister to seek an injunction from a court of competent jurisdiction to restrain a person from any conduct that was or would be an offence under this Act. The court may grant an injunction or an interim injunction, or discharge or vary an injunction.

Clause 17 Forfeiture of goods

19. This clause provides for the forfeiture of goods to the Commonwealth if a person exports or supplies the goods, or attempts to export or supply them, in contravention of the Act. Provision is also made for the seizure of the goods, procedures for taking them before a court of summary jurisdiction and for their destruction, if ordered by the court.

Clause 18 Evidential certificates by Minister

20. Under this clause, a certificate given by the Minister in a court proceeding concerning a written notice provided under clause 14 which prohibits assistance to a WMD program, is admissible as evidence of the matters stated in the certificate.

Clause 19 Delegation by Minister

21. The Minister may delegate all or any of his or her powers to an officer of the Department except the power to give, renew or revoke a notice under clause 14.

Clause 20 Attorney-General's consent required to prosecutions

22. This clause requires the consent of the Attorney-General for the prosecution of an offence against the Act.

Clause 21 Regulations

23. Regulations may be made by the Governor-General as prescribed in the Act or which are necessary or convenient for giving effect to the Act.



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