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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

DEFENCE CAPABILITY ASSURANCE AND OVERSIGHT BILL 2023

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Fawcett)

DEFENCE CAPABILITY ASSURANCE AND OVERSIGHT BILL 2023

OUTLINE

This Bill creates an independent statutory body responsible for assessing the complex risks associated with materiel procurement and sustainment, including but not limited to technical risks pertaining to performance and certification.

This will expedite the procurement of Defence capability by providing capability managers and Government a high degree of confidence in the veracity and completeness of the information they use to make timely, risk informed decisions.

This Bill will enact measures that rectify systemic deficiencies highlighted in a number of Australian National Audit Office (ANAO) and Parliamentary reports. In the context of the Defence Strategic Update (DSU) 2020 these measures are a priority reform. DSU 2020 has driven a rapid expansion in the scope and complexity of the capabilities required for Australia's security while reducing the available timeframe for procurement and increasing supply chain vulnerability.

In this environment, it is imperative for Defence to be an effective "smart buyer". Decision-makers must have confidence that the requirements specified by Defence are achievable in the timeframe and will meet the operational need. They must also have confidence in the assessment of risks and be able to provide assurance to the war fighter, Government and the Parliament that weapons systems will be available for use when required and effective against extant and emerging threats.

The First Principles Review (2015) in recommending a "Smart buyer" approach, made the assumption that a Test & Evaluation (T&E) capability exists such that Defence can assess "whether risks and interdependencies have been identified and managed". Defence has long had dedicated policies outlining why T&E is important. They define it as a key systems engineering tool to identify risk and inform risk-based decisions, detailing how it should be used in acquisition, sustainment and force generation. Despite the extensive policy and process, Defence has struggled to effectively, objectively and consistently incorporate T&E into decision making across the capability life cycle.

In almost every review of Defence procurement, there has been a negative assessment of how Defence employs T&E. Consistent themes include difficulties creating and sustaining an experienced workforce; the lag and surge of experience in projects which makes it difficult to apply effective T&E early in the capability life cycle (e.g.: defining requirements); poor coordination between the various stakeholders in Defence T&E (including industry); poor investment in T&E infrastructure; and, a lack of accountability to ensure that Defence consistently uses T&E effectively to identify and manage risk.

When facing similar challenges, Australia's AUKUS partners took action to ensure independent assessment of risk by competent personnel having relevant qualifications and experience. The United States of America established an independent entity under Title 10 while the United Kingdom enacted a long-term partnership with industry to provide independent T&E.

The strategic circumstances of this decade—and beyond—require Australia to take measures to achieve timely, effective and sustainable change. This legislation addresses the root causes of past failures in the current procurement system and establishes a Defence Capability Assurance Agency (DCAA) to enable effective Defence acquisition and sustainment.

Based on the First Principles Review and actions taken by AUKUS partners, the core principles essential to accomplishing this include:

Independence. The risk identification function must be independent so that assessment is made without bias or influence (intended or unintended). Independence also ensures that the assessor of risk has a voice (NB not a veto) that is heard at each decision-making level of the capability life cycle.

Task-specific competence. Government must ensure staff with the right skills are employed to identify and manage risk. Competence is a matrix of qualifications and experience that are directly relevant to the task at hand.

Transparency. Previous inquiries highlight that risk assessors working within Defence face various barriers (individual or organisational) that influence whether decision-makers actually consider their assessments. Given the costs and national security implications, the taxpayer deserves to know that decisions are being made on the basis of accurate understanding of risk.

Accountability. The DCAA will be underpinned by an audited and enforceable requirement that Defence engages the Agency to evaluate risk across the capability life cycle. DCAA reports are to be specifically included in briefs provided to project managers, assurance bodies, Defence Investment Committee and the National Security Committee of Cabinet.

The DCAA will work with Defence to facilitate an agreed framework to develop and sustain a competent T&E workforce and fit-for-purpose T&E infrastructure. At a strategic level the DCAA will use the Integrated Investment Program (IIP) to provide expert advice regarding the scope and scale of T&E investment required to grow and sustain the people and infrastructure required to enable the objectives of the IIP. The DCAA will provide an input to future updates to the IIP. At the individual project level, the DCAA will work with Defence to agree any variations to T&E required as specific materiel solutions are tendered.

The DCAA will not duplicate Defence policy relating to T&E but ensure that such policy is implemented consistently and effectively by suitably qualified personnel. Although the DCAA will be responsible for the conduct of T&E, it is not intended that the DCAA will replace T&E entities within Defence where they exist, particularly where T&E intersects with other regulatory frameworks e.g.: airworthiness or seaworthiness. Instead, it is intended that the DCAA will exercise technical control to ensure that existing entities (and those that develop with emerging technology, including where T&E is provided by industry) work to internationally recognised standards for T&E and are supported by Defence with agreed resources.

Where an existing Defence T&E entity is the most suitable for a task, it is intended that the entity would be assigned to the DCAA for the conduct of T&E in support of that task— analogous to a military unit being “force assigned” to Joint Operations Command. This allows the DCAA to ensure that T&E is conducted utilising the most effective and efficient

workforce that is competent for the task. Where Defence does not have an existing T&E capability (or capacity) relevant to a domain, the DCAA will either provide competent T&E personnel from its own staff to enable timely and effective assessment of relevant risks, or facilitate the engagement of industry personnel meeting the relevant qualifications and experience requirements.

This Bill provides for an agreement (expected to be long-term in nature) with an Australian industry partner. The industry partner will provide depth of domain expertise and facilitate a consistent, comprehensive approach to T&E across the capability life cycle for all Defence systems and environments via four key functions:

- **Regulatory.** The DCAA will regulate the qualifications and professional standards of the Defence or other industry workforce tasked to conduct T&E. This function will be managed by an element of the DCAA known as the Defence Capability Assurance Regulator (DCAR), facilitated by the industry partner. This function is analogous to the regulatory role played by the Defence Aviation Safety Authority (DASA) which—among other outcomes—is responsible to oversee scope of delegated authority granted to individuals within the aerospace engineering and maintenance workforce. Whether an individual is operationally under the command of Army, Royal Australian Navy, Royal Australian Air Force, Capability Acquisition and Sustainment Group or is part of industry, DASA has technical control over what an individual is deemed competent to do in respect to an aircraft. As a discrete example, under DASR 66 - Military Aircraft Maintenance Licensing, DASA can authorise personnel who hold a Military Aircraft Maintenance License (MAML) to issue Certificates of Release to Service. The DCAR would likewise determine the scope of T&E practice an individual could exercise for the DCAA given their relevant qualifications and experience.
- **A T&E centre of excellence.** The industry partner will provide a small but highly experienced workforce with competence in T&E across operational domains (land, air, maritime, space and cyber). This ensures the DCAA is able to quickly deploy competent practitioners to support the conduct of T&E and related activities in any phase of the capability life cycle, particularly the initial phases where Defence has often been found lacking in previous reviews (e.g.: setting of requirements). They would also be responsible for mentoring and supporting the development and application of technical mastery across the T&E workforce in the various domains. This is analogous to the roles of DASA which includes sustaining deep expertise in specific areas e.g.: aerostructures. It is intended that the T&E Centre of Excellence will also engage with emerging practice and technology from allied nations (e.g.: 5-Eyes) and the commercial sector where appropriate (e.g.: aspects of cyber) to facilitate the capability to deal with the scope and depth of T&E forecast by the IIP and ensure best practice.
- **Training.** The industry partner would be responsible for the coordination and efficacy of T&E training (e.g.: approving training providers and specific courses). This ensures that the T&E workforce under the technical control of the DCAA (i.e.: DCAA staff, Defence personnel and other industry providers contracted to support T&E) can access training to obtain the required qualifications for their specific role (as determined by the DCAR). Subject to probity measures, the industry partner may also

provide an agreed scope of initial training or professional development to Defence or other industry personnel.

- **T&E infrastructure.** The DCAA will identify T&E infrastructure (e.g.: weapons and acoustic test ranges or electro-magnetic test facilities such as stirred mode chambers, or environmental test and virtual test facilities) required as part of procurement or through-life capability management. This may be a new test capability, an expanded scope, or sustainment of existing test capabilities beyond their currently funded life. Drawing on experienced practitioners in the T&E centre of excellence, it is intended that the industry partner will facilitate this analysis from the IIP. It is also intended that the DCAR will oversee compliance of ranges, facilities and related personnel (whether defence or industry) with relevant international standards. Subject to probity, the industry partner may also be contracted to provide or manage T&E infrastructure.

Assurance and accountability will be accomplished by a program of audit to ensure that Defence is engaging and resourcing the DCAA (including Defence T&E entities) in a timely manner as well as responding transparently to the subsequent reporting of any identified risks at all levels of decision making. This function will be accomplished by appropriately skilled and security-cleared staff working as part of a small independent assurance office created by this Bill, to be known as the Inspector-General of Defence Capability Assurance (IGDCA), analogous to the Inspector-General of Intelligence and Security.

Finally, the legislation creates a Parliamentary Joint Committee on Defence (PJCD) which would have amongst other tasks, oversight of the DCAA. A PJCD was a recommendation of a bi-partisan report of the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) in November 2018. Established along similar lines to the PJCS, the PJCD would have the span of functions outlined in the November 2018 report as well as specific oversight over capability acquisition, which would include Australia's involvement in AUKUS, and the operation of the DCAA and the IGDCA.

NOTES ON CLAUSES

Part 1—Preliminary

Clause 1: Short Title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. Clause 2 provides details of the commencement of this Bill.

Clause 3: Objects of this Act

3. Clause 3 sets out the objects of the Act. The objects are to:
 - a. expedite the procurement of defence capability by providing capability managers and the Australian Government a high degree of confidence in the veracity and completeness of the information they use to make timely, risk informed decisions,

- b. provide assurance to capability managers, the Australian Government and the Parliament that weapons systems will be available for use when required and effective against extant and emerging threats, and
- c. make existing defence procurement processes and requirements more effective and efficient by ensuring:
 - i. that risk assessment throughout the capability life cycle is consistently conducted by people who have appropriate qualifications and relevant experience,
 - ii. the assessment and reporting of risk is independent, free from overt or unintended bias or influence,
 - iii. identified risk is transparent to decision makers, and
 - iv. proposed risk mitigations are effective.

Clause 4: Simplified outline of this Act

- 4. This clause sets out a simplified outline of the Act. Simplified outlines are included in the Bill as a guide. Users should rely on the substantive provisions.

Clause 5: Definitions

- 5. Clause 5 defines terms used in the Bill. Although the DCAA is defined as a Defence Agency for the purposes of this Bill, the DCAA is independent of the Department of Defence and as such is not subject to direction by either the Secretary or Chief of Defence Force (CDF). As detailed in Division 2 of Part 2, the Director of the DCAA is accountable to the DCAA Board which is appointed by, and subject to general direction from, the Minister.

Clause 6: Act binds the Crown

- 6. Clause 6 provides that the Bill will bind the Crown in each of its capacities; however, it does not make the Crown liable to be prosecuted for an offence.

Clause 7: Extension to external Territories

- 7. This clause provides that the Bill applies to every external Territory.

Clause 8: Extraterritorial application

- 8. Clause 8 provides that the Bill extends to acts, omissions, matters and things outside Australia. This is intended to cover T&E activities carried out internationally in relation to projects that are funded and governed by Defence from Australia.

Part 2 – Defence Capability Assurance Agency

Division 1 – Introduction

Clause 9:

- 9. This clause provides a simplified outline of Part 2.

Division 2—Establishment and functions

Clauses 10-15:

10. This Division establishes the DCAA. The DCAA is to be a corporate Commonwealth entity, with a Board, Director, staff and contractors as engaged from time to time. The Director is responsible for the day-to-day administration of the DCAA and is empowered to act on behalf of the DCAA. Operations of the DCAA are overseen by a Board, which is the accountable authority of the DCAA for the purposes of the *Public Governance, Performance and Accountability Act 2013*.
11. The primary function of the DCAA is to provide timely, independent and competent assessment of risk in support of decision makers responsible for Defence capability acquisition and sustainment. To enable this, the DCAA will also regulate and coordinate the fundamental inputs to an effective and resilient Defence T&E capability.
12. It will exercise technical control over the conduct of timely and competent T&E and related activities (whether by DCAA staff, Defence entities temporarily assigned to the DCAA, or other industry stakeholders) and provide recommendations and advice for the purposes of informing decision-makers at each level for defence capability programs.
13. The DCAA will not be a decision-maker itself in relation to defence capabilities, respecting the ultimate responsibility held by capability managers to provide military response options to Government.
14. The functions of the DCAA are to be performed throughout the capability life cycle for Defence programs, from the initial setting of project requirements to the disposal of the relevant materiel—in line with the concept of the systems engineering V.
15. Stemming from strategic considerations such as the IIP, the capability life cycle is the process linking strategic direction, requirements, acquisition, sustainment, and disposal of major capital assets. The phases and decision gates of the capability life cycle, and the expected involvement of the DCAA, are:
 - a. **Strategy and Concepts** During the Strategy and Concepts Phase capability needs are identified through the force design process, informed by assessments of the ability to meet strategic guidance. The Strategy and Concepts Phase concludes with the Investment Committee consideration of a business case.
 - b. **Risk Mitigation and Requirement Setting.** Risk Mitigation and Requirement Setting involves the development and progression of capability options through the investment approval process. This phase leads to Government approval of an acquisition.
 - c. **Acquisition.** The Acquisition Phase involves the design, development and delivery of the required asset.
 - d. **In-Service and Disposal.** Once In-Service, Defence must sustain the product through its life including the provision of upgrades. Disposal involves withdrawing the product from service, managing the transition to a replacement (if required) and final disposal.

Example engagement of the DCAA across the capability life cycle

*In the case of a major capability procurement program, the DCAA will first be engaged during the **strategy and concepts phase** to support the early stages of risk identification. Scoping of the T&E appropriate to the nature and scale of the acquisition (including Preview T&E where required) will be undertaken to support the decision-makers' understanding of the resources required to identify risks associated with the capability being procured. The DCAA will also provide expert advice regarding the likelihood of the proposed acquisition delivering to the desired/required levels of performance in the timeframe required given knowledge of candidate systems potentially available from vendors (including via Foreign Military Sales).*

*As the project moves into a **risk mitigation and requirement-setting phase** the DCAA will critically assess the options being considered against the proposed operational concept. Where the risk assessment identifies that the full scope of intended military capability may not be reasonably likely in the timeframe available given the solutions available in the market, it will enable early decisions to optimise the trade-offs between capability, schedule and indicative cost, or to make an informed commitment to invest in the development path to achieve the required outcome.*

A critical role for competent T&E practitioners during this phase is translating the required operational outcomes into statements of requirement that can be tested in accordance with recognised test methods to produce the data which will be required by Defence engineering and operational authorities to accept the weapon systems into service. Competence for T&E personnel means having relevant qualifications and experience in risk assessment and certification activities acquired through supervised practice at Defence Force or industry T&E centres of expertise in addition to operational experience gained through their previous employment in the conduct of related military operations.

When conducted in a timely manner by competent personnel and transparently reported within the assurance framework created by the DCAA, Defence and Government decision makers can have greater confidence that risks accompanying the option selected are well understood and accounted for in the procurement proposal submitted for approval.

*During the **acquisition phase**, the DCAA in partnership with the Capability Acquisition and Sustainment Group will utilise T&E resources, in some cases from Defence T&E entities or specialist industry providers to shape and conduct T&E activities to ensure the system being acquired meets specifications set for the supplier. Whether a developmental platform or "off the shelf", history shows that unexpected issues will arise. The involvement of competent T&E personnel enables early identification and transparent assessment of the operational impacts of emerging risks, enabling timely action by decision makers to: pursue a remedy, agree to revise requirements or cancel the acquisition. After acceptance of the technical product, the introduction into service will require confirmatory assessments of operational effectiveness and suitability when integrated with the force in being. The DCAA will, in conducting T &E, conduct test programs while system is being utilised by the relevant operational service. T&E expertise provided through the DCAA will also be deployed to support system safety, certification, integration and interoperability aspects of the procurement program.*

16. To accomplish its intended function of providing timely and assured assessments of risk to Defence and Government decisions makers, the DCAA must have constructive

engagement and commitment by Defence. The IIP establishes the program of Defence capability procurement and from this program the expected scale and scope of T&E appropriate to procurement and sustainment of defence capabilities can be determined. The DCAA requires Defence to engage in a timely manner to ensure there is: agreement on the resources to be incorporated into the IIP for T&E, scaled to the likely risk of the proposed procurement; and provision in Defence planning and processes for DCAA assessment and reporting during each phase of the capability life cycle. In reaching this agreement, the DCAA must have regard to the operational imperatives affecting capability requirements and schedule when determining the scope and priority of T&E activities associated with any given defence materiel program.

17. The DCAA is not intended to be a large organisation. The DCAA, supported by Defence, will establish the conditions for the development and maintenance of the T&E workforce (DCAA, Defence, and industry), with training and the scope of supervised experience in T&E complying with standards set by the DCAR.
18. While the DCAA will be responsible for conducting T&E, the Agency will not duplicate Defence T&E capabilities, procedures and policies. It is intended that the DCAA will task the most appropriate, available T&E personnel and infrastructure (DCAA, Defence or industry) to ensure the required T&E is accomplished efficiently and effectively with timely and transparent reporting. Coordination and technical control across the domains will avoid duplication of resources and ensure consistent quality of practice.
19. Outcomes specific to T&E will be technically controlled by the DCAA whether accomplished by DCAA staff, Defence T&E entities assigned to the DCAA or an industry provider. Domain specific regulatory obligations, e.g.: airworthiness and seaworthiness, will remain the responsibility of the existing military regulator.
20. Where gaps in T&E capability are extant or emerge with new technology, the DCAA will be responsible to ensure the necessary T&E is accomplished to inform capability decisions. In the short term this may involve contracting industry to provide expertise or capacity for the DCAA to conduct the T&E. The mature state goal is, wherever possible, to have personnel from the Services operating the system—once suitably qualified and experienced—conduct the T&E under the technical control of the DCAA. These personnel may be posted to the DCAA as staff or may be assigned to the DCAA from a Defence T&E entity for a particular program. This will help ensure Defence T&E capabilities retain the highest levels of operational recency in addition to T&E competence. Options to be posted to Defence entities including CASG as well as the DCAA provide Defence personnel an opportunity and incentive to pursue a career in the T&E specialisation—addressing another deficiency highlighted in ANAO reports.
21. Each Defence capability program will be accountable to work with the DCAA to ensure availability of suitably qualified and experienced staff as well as the sustainment of T&E capabilities to an agreed level in accordance with the standards prescribed by the DCAR and with reference to the scope and scale dictated by the IIP.
22. The DCAA will establish specialist T&E capabilities internally and make this expertise available to procurement and sustainment programs, especially where T&E centres of expertise for some weapons/systems either do not exist or may be difficult to sustain within the service environment. It is intended that the allocation for T&E resources created in the IIP will fund the DCAA, including to procure support from appropriate

industry stakeholders and for the development of specific T&E capabilities on behalf of Defence to meet IIP outcomes.

23. While the DCAA is not a decision maker, Board will need to consider what liabilities it will be exposed to in the conduct of its functions and make appropriate provision.
24. To accomplish its functions the DCAA must be empowered to access all relevant information. The legislation requires the Secretary of the Defence Department and CDF to take all reasonable steps to ensure the necessary access to information, premises, documents and materiel. One of the functions of the IGDCA will be to ensure that even in highly classified settings, the DCAA is appropriately engaged and given access and resources required to undertake its functions.
25. While the Minister can provide directions to the DCAA, the legislated functions and regulated standards of the DCAA including the independence of its reporting are to be preserved.

Clauses 16 to 18:

26. The DCAA is responsible to ensure reports to a suitable standard are created regarding the risk assessments conducted (including in early phases such as requirements setting), and to provide those reports to decision-makers.
27. DCAA reports will be made available to the Minister and provided to staff within the Defence Force setting the capability requirements and staff within the Defence Department responsible for the day-to-day management of the program in question, as well staff involved in the various decision gates through to the Defence Investment Committee.
28. An audited requirement for timely and transparent reporting is a key part of the assurance function that decision-makers are basing their analysis on comprehensive and competent assessments of risk.
29. Not only must reports be created and shared, the Bill requires that the DCAA is integrated into meetings where decision-makers for Defence capabilities are considering matters relating to the capability so that it may provide recommendations or advice relating to capability assurance directly, preventing inadvertent or deliberate interpretation of advice and recommendations. It is intended that decision-making committees within Defence will include on their agenda briefings by the DCAA to highlight identified risk where relevant and to answer questions related to the efficacy of any proposed mitigations or other risk treatments. DCAA participation will provide confidence to the decision-makers regarding the independence of reporting and the freedom from overt or unintended bias or influence.
30. The DCAA will provide summary reports for individual projects to the office of the Minister as soon as practicable. Full reports would be available on request once completed and are to be provided to the Minister as part of any submission from Defence that is to be considered by the NSC. Staff from the DCAA are to be available to brief the Minister (or office) on the content and consequences of reports, including at meetings of the NSC.

31. The DCAA will prepare a report on a quarterly basis to the PJCD that summarises the T&E completed by the DCAA, which details risks assessed as unacceptable or where risk mitigation is highly desirable in relation to a defence materiel program. It will also report the recommendations or advice it has provided to the Defence Department and Defence Force (in practice, the relevant Service Chief, being the capability manager) based on those risk assessments.

Clause 19: Industry partner

32. The Bill provides for the DCAA, on behalf of the Commonwealth, to enter into an arrangement with an Australian industry partner to facilitate the Defence Capability Assurance Regulator (DCAR) function of the DCAA.

33. The DCAR will establish and maintain appropriate test and evaluation workforce standards for any person who is tasked to conduct T&E for Defence. This will include DCAA staff, Defence and industry personnel under the technical control of the DCAA.

34. The DCAR will oversee the quality and operation of test and evaluation infrastructure used by the DCAA.

35. The industry partner will also provide specialist expertise to the DCAA across all relevant domains. It is envisaged that this would be achieved by creating a Centre of Excellence for the T&E conducted by the DCAA to ensure best practice risk assessments by utilising best practice T&E methods and enabling facilities. This is analogous to the role played by DASA in having a workforce with deep professional mastery in areas such as aerostructures which can support weapon systems programs offices across the groups and services.

36. The staff comprising the T&E Centre of Excellence are to be available to front load capability projects with a depth of T&E experience where there is no other DCAA staff, assigned Defence member or industry personnel available with the requisite qualifications and experience. The aim would then be to expedite the appointment of a T&E practitioner who with appropriate levels of mentoring and supervision from the T&E Centre of Excellence, is deemed suitable by the DCAR to undertake the remainder of the task.

37. The DCAR will facilitate training for the implementation of workforce standards it sets. It is envisaged that the DCAR will ensure a comprehensive program of training from accredited training providers, and that the DCAR will identify and accredit training providers and facilitate places on courses for Defence Force members and APS staff to support the implementation of agreed workforce standards. This training would enable initial qualifications as well as ongoing investment in technical mastery.

38. It is intended that the DCAR will work with DCAA and Defence staff to determine the level of initial training appropriate for the scope and scale of T&E required for any given program. For example, this could range from a 12 month masters-level course at a dedicated T&E university or training facility overseas to a short-course (1-2 months) and to provide depth and create a stimulus for engagement that will lead to a more resilient and competent T&E specialisation. It is envisioned that funding for training is to be allocated from IIP programs.

39. The DCAR will support capability managers to ensure suitably qualified and experienced personnel and fit-for-purpose T&E infrastructure are available to ensure effectiveness and availability of weapons systems. To achieve this goal the Regulator will develop specialist expertise across the defence domains necessary to assist the DCAA to plan and conduct test and evaluation. The DCAR will also provide a resource where a surge is necessary to provide deep expertise not immediately available, supporting programs to mobilise and where appropriate, sustain a T&E capability.
40. It is intended that Service Chiefs will be responsible to post suitable personnel to undergo training facilitated by the industry partner and agreed as being required to effectively support the relevant service capability program(s) as a core element of the resourcing the acquisition and sustainment program.
41. It is not expected that the industry partner would normally provide training unless a probity framework acceptable to the Board was in place to separate the commercial interests from the regulatory function.

Division 3 – Director of the DCAA

Clauses 20 to 30:

42. There is to be a Director of the DCAA, who will be responsible for the day-to-day administration of the DCAA.
43. Clause 23 sets out the process for the appointment of the Director. The Director is to be appointed by the Board after consultation with the Defence Minister. In practice, the Director will need to be competent to direct and manage the operations of the agency across all domains and disciplines of test and evaluation, and will need significant organisational skills and deep knowledge of, and credible experience in the practice of complex technical test and evaluation.
44. The Director is to act in accordance with policies and strategies determined by, and the directions of, the Board. The Defence Minister may give directions to the DCAA under clause 15, but these must only be of a general nature. This ensures the DCAA is appropriately independent. In practice, it is envisaged that the Minister will give directions to the DCAA reflecting the Minister's expectations, and that the Board will then give directions such that the Director works in accordance with the expectations of the Minister.
45. The DCAA will be responsible for T&E across the capability life cycle. The Director must be in a position to understand the requirements from the most complex and potentially hazardous test events (normally developmental T&E) to the structured observation and assessment of regular operators using the equipment integrated with the force-in-being (normally operational T&E). The qualification and experience requirement for the Director is therefore set at the complex and hazardous end of the T&E spectrum to ensure that the DCAA is led by a practitioner who can provide informed leadership across the complete spectrum.
46. Clauses 24 to 30 set out a range of administrative matters relating to the Director, including in relation to remuneration, leave, resignation and termination. As an official of

a Commonwealth entity, the Director would be required to disclose certain interests under section 29 of the *Public Governance, Performance and Accountability Act 2013*.

Division 4 – Board of the DCAA

Subdivision A—Establishment and functions

Clauses 31 and 32:

47. The Board of the DCAA is established by clause 31.
48. The Board will provide strategic direction to the Agency in line with the any general directions from the Minister. In practice, the Board will monitor how the DCAA accomplishes directed strategies and objectives in conjunction with the Agency executive. Also, in practice, the Board will have an initial task to oversee the implementation of the Bill in terms of the structure of the DCAA and the interfaces between the Agency, Defence and industry.
49. The Board will also monitor the operational and financial position and performance of the organisation generally and hold the Director to account for organisational performance. The Board is responsible for the overseeing the governance, management and strategic direction of the DCAA and for delivering accountable corporate performance in accordance with the organisation's goals and objectives. In practice, the Board will need to ensure the principal risks faced by the organisation are identified and appropriate control and monitoring systems are in place to manage these risks.

Subdivision B—Board members

Clauses 33 to 41:

50. The Board consists of the Director and up to 6 members appointed by the Minister.
51. The Board must have an appropriate mix of relevant qualifications and experience that cater to both the technical and corporate requirements of the DCAA. The majority of Board members must have qualifications and relevant experience in test and evaluation. The experience base of the Board should, where practicable, span each domain (land, sea, air, space and cyber) as well as the range of T&E from developmental through to operational T&E including evolving methodologies such as Live Virtual Constructive Technologies for Test (LVCT).
52. While all Board members are to have in mind the timely and effective delivery of military capability, one member of the Board must be appointed with a singular focus on the imperatives of the operational communities. This Board member should be appointed on the recommendation of the CDF & Secretary.
53. There is to be a Chair and Deputy Chair of the Board.
54. Clauses 35 to 41 provide for a range of administrative matters relating to the Board, including acting appointments, terms and conditions, remuneration, leave of absence, restrictions on other paid work, and the resignation and termination of appointment of Board members.

Subdivision C—Meetings of the Board

Clauses 42 to 48:

55. These clauses provide for procedures relating to meetings of the Board, including convening and presiding at meetings, quorum, voting, conduct of meetings and minutes, as well as processes for the Board to make decisions without a meeting.

Division 5—Staff, contractors and other persons assisting

Clauses 49 to 51:

56. The staff of the DCAA are to be persons who are engaged under the *Public Service Act 1999* or who are members of the Defence Force and whose services are made available to the DCAA under an arrangement between the CDF and the DCAA. This arrangement is likely to be a posting to the DCAA as a member of staff, or as part of a tasking agreement where elements of a Defence T&E entity are “force assigned” to the DCAA to undertake an agreed T&E activity.

57. The DCAA may also engage contractors.

58. The DCAA may also be assisted by other persons under arrangements with Defence.

Division 6—Other matters

Clauses 52 to 54:

59. Clause 52 would require the Director, staff and contractors of the DCAA and other persons assisting to have appropriate security clearances. Clause 53 would require the DCAA to comply with any applicable regulatory requirements of the Defence Force, for example, the airworthiness regulatory structure where DCAA is conducting T&E on ADF aircraft or related systems.

60. Clause 54 provides for delegation by the Director.

Part 3 – Inspector-General of Defence Capability Assurance

Division 1—Introduction

Clause 55:

61. This clause provides a simplified outline of Part 3.

Division 2—Establishment and functions

Clauses 56 and 57:

62. The Inspector-General of Defence Capability Assurance (IGDCA) is established to inspect and to provide assurance of the timely and effective engagement by Defence with the DCAA. The IGDCA also provides assurance that defence has incorporated rules and adopted practice such that there is timely and transparent disclosure of identified risk to

all levels of decision-makers involved in capability development and procurement activities and that risk has been appropriately managed.

63. It is intended that the IGDCA will undertake formal inspections of the activities of Defence in accordance with an annual program developed by the IGDCA, or in response to a reference from the Minister. The IGDCA can act independently to initiate inquiries and conduct regular inspections and monitoring of DCAA activities.
64. To maintain the independence of the IGDCA, there is a limitation on a person being appointed as the IG if they held certain senior roles within Defence as their immediate past position.

Division 3—Inquiries

Clauses 58 to 62:

65. In conducting an inquiry, the IGDCA has significant powers which include requiring the attendance of witnesses, access to documents and entry into Defence premises.
66. Clause 59 provides for the IGDCA to have the power to obtain information and documents. Subclause 59(8) would make it an offence for a person to fail to be sworn or to make an affirmation or to give information or produce a document when required to do so under this section and to, after being given a notice under subclause 59(3), fail to comply with the notice or to answer a question that the IGDCA requires the person to answer. Subclause 59(9) places an evidential burden on the defendant regarding whether they have a reasonable excuse for contravening subclause 59(8). This is appropriate as this information is uniquely within the knowledge of the defendant.
67. Clause 61 requires the IGDCA to make appropriate arrangements for the security of Defence and DCAA documents.
68. Clause 62 provides for reporting of inquiry findings by the IGDCA.

Division 4—Administrative provisions relating to the Inspector-General

Clauses 63 to 70

69. Division 4 sets out administrative provisions relating to the IGDCA. The IGDCA is to be appointed by the Governor-General on a full-time or part time-basis, for no more than 5 years, and may be appointed to the office twice. Given the powers held by the IGDCA, the sensitivity of the information being inspected and potential implications for national security, the appointment is to be on the recommendation of the Prime Minister, following consultation with the Leader of the Opposition in the House of Representatives. The Governor-General may appoint someone to act as the Inspector-General, on the recommendation of the Prime Minister, following consultation with the Leader of the Opposition in the House of Representatives.
70. Clauses 65 to 70 provide for the remuneration, leave of absence, restrictions on other paid work, terms and conditions, resignation and termination of appointment for the IGDCA.

Division 5—Staff

Clauses 71 and 72

71. The staff of the IGDCA are to be persons who are engaged under the *Public Service Act 1999*.
72. The staff of the IGDCA will be required to have an appropriate security clearance as they must be able to operate at the highest security classification levels and will be empowered to access and consider all relevant information associated with the procurement and sustainment of all Defence capabilities.

Part 4 – Parliamentary Joint Committee on Defence

Division 1—Introduction

Clause 73:

73. This clause provides a simplified outline of Part 4.

Division 2—Establishment and Functions of Parliamentary Joint Committee on Defence

Clause 74 to 77:

74. The Parliamentary Joint Committee on Defence (PJCD) will be formed to provide bi-partisan oversight of the DCAA, the IGDCA and matters referred to it by the Minister or a House of the Parliament, in addition to other functions relating to defence. A primary objective of the PJCD is to provide oversight of Defence capability procurement and in-service management by reviewing their administration and expenditure and considering the effectiveness of the DCAA and the IGDCA in supporting the assurance of defence capabilities.
75. A PJCD was proposed by a report of the JSCFADT “Contestability and Consensus” in November 2018, modelled on the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the related provisions of *Intelligence Services Act 2001*. The discussion and recommendations in Chapter 6 of the JSCFADT report are relevant to this proposed committee with respect to the scope of the PJCD’s remit. There is currently overlap between various committees that provide oversight on the defence portfolio (e.g.: PJCIS over Australian Signals Directorate (ASD), Joint Committee of Public Accounts and Audit over defence capital works and ANAO audits of major defence projects). It is expected that the creation of the PJCD will lead to consideration within the Parliament as to whether consolidation of defence-related matters to the PJCD is warranted. This would inform the matters in relation to which the PJCD performs its functions. The administration and expenditure of the ASD is specifically excluded, noting that matter is covered by the PJCIS.
76. The PJCD can request the head, or any relevant member of a defence agency, to brief the Committee and must give the Parliament an annual report on the activities of the PJCD during the year.

Division 3—Procedure

Clauses 78 to 84:

77. Clauses 75 to 85 set out the procedures of the PJCD. The PJCD must not require a person or body to disclose to the PJCD information that at a given point in time is operationally sensitive to the extent that disclosure beyond a strict need-to-know basis would prejudice Australia's national security or the conduct of Australia's foreign relations. Unlike the PJCIS, this does not preclude the disclosure of operational matters but does provide the option for defence agencies to make the case to the Minister for non-disclosure at a given point in time, as provided for in Clause 80.
78. The intent is that the PJCD has the power to obtain information and documents and may require the timely provision of information or giving of evidence by defence agencies unless there is a specific, time sensitive reason for non-disclosure which has been approved by the Minister and a timeframe specified for sunseting of the certificate (which must not be more than 6 months). Given the purpose of the Committee and provisions of this Bill against unauthorised disclosure of information by Committee members, the intention of this Bill is that there are very few scenarios where an approval by the Minister for non-disclosure is expected to be justified.

Division 4—Offences

Clauses 85 to 89:

79. Clause 85 establishes an offence relating to disclosing or publishing evidence taken by, or the contents of a document produced to, the Committee in a review conducted in private. This only applies if the evidence or document is clearly identified as containing sensitive and security classified information which must not be disclosed without authorisation. Subclause 85(2) places an evidential burden on the defendant regarding whether the disclosure or publication relates to a matter that the defendant became aware of other than because of the giving of any evidence before, or the production of any document to, the Committee. This is appropriate as this matter is uniquely within the knowledge of the defendant.
80. Clause 86 establishes offences relating to giving evidence or producing documents. Subclauses 86(3) and (6) place an evidential burden on the defendant regarding whether refusing to answer a question or producing a document would tend to incriminate the person. This is appropriate as this matter is uniquely within the knowledge of the defendant.
81. Clause 87 establishes offences relating to the protection of witnesses.
82. Clause 88 establishes offences relating to the secrecy of records and documents.
83. Clause 89 provides that prosecutions of these offence can only be instituted by the Attorney-General or with the Attorney-General's consent.

Division 5—Administration

Clauses 90 to 99:

84. These clauses provide for the administration of the PJCD including the appointment of members, the terms of office of members, the election of the Chair and Deputy Chair as well as rules relating to meetings, quorum, voting and the conduct of proceedings. Clause 98 would require staff of the Committee and at least one staff of Committee members to hold appropriate security clearances. Clause 99 provides for the protection of information and documents.
85. The PJCD must make arrangements acceptable to the CDF and Secretary of the Defence Department for the security of any information held and any records made by the PJCD.

Division 6—Subcommittees

Clauses 100 to 103:

86. Clauses 100 to 103 provide for the PJCD to appoint subcommittees to inquire and report to the PJCD on matters as the PJCD directs, sets out the term of office for members of subcommittees and the operation of subcommittees, and provides for other matters relating to the subcommittees

Part 5 – Miscellaneous

Clauses 104 to 106:

87. Clause 104 is a simplified outline of Part 5.
88. Clause 105 provides for protection from liability for the protected persons set out in subclause (1). This purpose of this provision is to ensure the DCAA and IGDCAs are able to perform their functions and exercise their powers effectively, without being obstructed by challenges to the performance of those functions or the exercise of those powers through civil proceedings for loss, damage, or injury.
89. Clause 106 provides a rule-making power for the Defence Minister.

Statement of Compatibility with Human Rights

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

The Defence Capability Assurance and Oversight Bill 2023

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

This Bill creates an independent statutory body responsible for assessing the complex risks associated with materiel procurement and sustainment, including but not limited to technical risks pertaining to performance and certification. This body will be established as the Defence Capability Assurance Agency (DCAA). The purpose of the DCAA is to:

- a. expedite the procurement of defence capability by providing capability managers and the Australian Government a high degree of confidence in the veracity and completeness of the information they use to make timely, risk informed decisions,
- b. provide assurance to capability managers, the Australian Government and the Parliament that weapons systems will be available for use when required and effective against extant and emerging threats, and
- c. make existing defence procurement processes and requirements more effective and efficient by ensuring:
 - i. that risk assessment throughout the capability life cycle is consistently conducted by people who have appropriate qualifications and relevant experience,
 - ii. the assessment and reporting of risk is independent, free from overt or unintended bias or influence,
 - iii. identified risk is transparent to decision makers, and
 - iv. proposed risk mitigations are effective.

Assurance and accountability will be accomplished by a program of audit to ensure that Defence is engaging and resourcing the DCAA (including Defence T&E entities) in a timely manner as well as responding transparently to the subsequent reporting of any identified risks at all levels of decision making. This function will be accomplished by appropriately skilled and security-cleared staff working as part of a small independent assurance office created by this Bill, to be known as the Inspector-General of Defence Capability Assurance (IGDCA), analogous to the Inspector-General of Intelligence and Security.

Finally, the legislation creates a Parliamentary Joint Committee on Defence (PJCD) which would have amongst other tasks, oversight of the DCAA. A PJCD was a recommendation of a bi-partisan report of the Joint Standing Committee on Foreign Affairs, Defence and Trade

(JSCFADT) in November 2018, to be established along similar lines to the Parliamentary Joint Committee on Intelligence and Security (PJCIS). Parliamentary oversight of the efficacy of capability acquisition as part of the overall function of the Defence portfolio is an important accountability measure on behalf of the Australian public.

Human rights implications

As highlighted in the Preamble to the International Covenant on Civil and Political Rights,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

National security underpins the sovereign ability for governments to create these conditions.

The United Nations Office of the Commissioner for Human Rights (OCHR), in respect to delivering state services to the public, highlights that reforms to enhance good governance advance human rights when they improve the state's capacity to fulfil its responsibility, in this case, to provide the materiel needed for national security. The OCHR highlights that reform initiatives include mechanisms of accountability and transparency in decision-making.

Conclusion

This Bill is compatible with human rights as it enhances the governance underpinning key inputs to national security which is essential to maintain the conditions required for individuals to enjoy their civil and political rights.

Senator the Hon David Fawcett