

REPUBLIC OF SOUTH AFRICA

NATIONAL CONVENTIONAL ARMS CONTROL AMENDMENT BILL

(As amended by the Portfolio Committee on Defence (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF DEFENCE)

[B 45B—2008]

ISBN 978-1-77037-428-7

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the National Conventional Arms Control Act, 2002, so as to alter certain definitions and to insert others; to ensure proper compliance and accountability in trade and possession in controlled items; to expand the functions of the National Conventional Arms Control Committee relating to the regulation of assistance or service in a country of armed conflict; to provide for matters connected with the work and conduct of the Committee and its secretariat; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 41 of 2002

1. Section 1 of the National Conventional Arms Control Act, 2002 (hereinafter referred to as the principal Act), is hereby amended— 5

(a) by the insertion before the definition of “**brokering services**” of the following definition:

“ ‘**armed conflict**’ means armed conflict as defined in the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act;”;

(b) by the substitution for the definition of “**brokering services**” of the following definition: 10

“ ‘**brokering services**’ means—

- (a) acting as an agent in negotiating or arranging a contract, purchase, sale or transfer of [**conventional arms**] controlled items for a commission, advantage or cause, whether financially or otherwise; 15
- (b) acting as an agent in negotiating or arranging a contract for the provision of services for a commission, advantage or cause, whether financially or otherwise;
- (c) facilitating the transfer of documentation, payment, transportation or freight forwarding, or any combination of the aforementioned, in respect of any transaction relating to buying, selling or transfer of [**conventional arms**] controlled items; and 20
- (d) acting as intermediary between any manufacturer or [**supplier**] provider of [**conventional arms or provider of services**] controlled items, and any buyer or recipient thereof;”;

- (c) by the substitution for the definition of “**competent authority**” of the following definition:
 “**‘competent authority’** means [the Minister, the Chairperson of the Committee or] the Committee, or any subcommittee to which, or any member of the Committee, a subcommittee or the secretariat, or any inspector of the Inspectorate, to whom, a power has been delegated or a duty has been assigned in terms of section 11;”;
- (d) by the substitution for the definition of “**contracting**” of the following definition:
 “**‘contracting’** means the entering into a commitment by a person to engage in trade in [conventional arms] controlled items, whether it is done in exchange for currency or any other commodity or to advance a cause;”;
- (e) by the deletion of the definition of “**conventional arms**”;
- (f) by the insertion after the definition of “**contracting**” of the following definition:
 “**‘controlled items’** means controlled items specified in a notice published by the Committee in the *Gazette* in terms of section 27(3);”;
- (g) by the substitution for the definition of “**convey**” of the following definition:
 “**‘convey’**, in relation to [conventional arms] controlled items, means to transport [conventional arms] controlled items through or over the territory of the Republic, its territorial waters or its airspace to any other place or destination outside the Republic, whether or not such [conventional arms] controlled items are off-loaded, and “conveyance” must be interpreted accordingly;”;
- (h) by the insertion after the definition of “**Department**” of the following definition:
 “**‘domestic transfer’** means a transfer of ownership of controlled items from one person to another within the Republic;”;
- (i) by the deletion of the definition of “**dual-use goods**”;
- (j) by the substitution for the definition of “**export**” of the following definition:
 “**‘export’**, in relation to [conventional arms] controlled items, means the transfer of [conventional arms] controlled items from the Republic to any place outside the Republic by any person, and “exportation” must be interpreted accordingly;”;
- (k) by the substitution for the definition of “**import**” of the following definition:
 “**‘import’**, in relation to [conventional arms] controlled items, means to bring [conventional arms] these items into any part of the Republic, irrespective of whether it is done in exchange for currency or any other commodity, and “importation” must be interpreted accordingly;”;
- (l) by the substitution for the definition of “**manufacture**” of the following definition:
 “**‘manufacture’**, in relation to [conventional arms] controlled items, includes the design, development, production and assembly thereof, and “manufacturing” must be interpreted accordingly;”;
- (m) by the substitution for the definition of “**marketing**” of the following definition:
 “**‘marketing’**, in relation to [conventional arms] controlled items, includes the promotion of [conventional arms] controlled items, and any negotiations, offer, tender advertising, shows, exhibitions or giving of information relating to [conventional arms] controlled items, and “market” when used as a verb must be interpreted accordingly;”;
- (n) by the substitution for the definition of “**permit**” of the following definition:
 “**‘permit’** means [an armaments development and manufacturing permit, a marketing permit, a contracting permit, an export permit, an import permit, or a conveyance permit authorised in terms of section 14(2)] a permit contemplated in section 14;”;
- (o) by the insertion after the definition of “**prescribe**” of the following definition:
 “**‘Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act’** means the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict, 2006 (Act No. 27 of 2006);”;
- (p) by the deletion of the definition of “**record**”;

- (q) by the substitution for the definition of “**re-export**” of the following definition:
 “**‘re-export’**, in relation to **[conventional arms]** controlled items, means to export imported **[conventional arms]** controlled items, or to cause **[imported conventional arms]** these imported items to be exported to any place other than that from which they were originally imported, whether or not it is done in exchange for currency or any other commodity, and “re-exportation” must be interpreted accordingly;”;
- (r) by the substitution for the definition of “**Secretary**” of the following definition:
 “**‘Secretary’** means the Secretary for Defence appointed in terms of section **[7B of the Defence Act, 1957 (Act No. 44 of 1957)]** 7 of the Defence Act, 2002 (Act No. 42 of 2002);”;
- (s) by the deletion of the definition of “**services**”;
- (t) by the substitution for the definition of “**technology**” of the following definition:
 “**‘technology’** includes any technique, expertise or know-how that can be utilised in the design, development, manufacture, upgrading, refurbishment or maintenance of **[conventional arms]** controlled items;”;
- (u) by the substitution for the definition of “**trade in conventional arms**” of the following definition:
 “**‘trade in [conventional arms] controlled items’** includes—
 (a) any activity relating to the manufacturing, marketing, contracting, exportation, re-exportation, importation or conveyance of **[conventional arms]** controlled items;
 (b) **[the renderings of brokering services]** domestic transfers such as sale, takeover, letting, lending, donation or transfer within the Republic; and
 (c) the rendering of services.”.

Amendment of section 3 of Act 41 of 2002

2. Section 3 of the principal Act is hereby amended by the substitution for paragraphs (a), (b), (c) and (d) of the following paragraphs, respectively:
- “(a) implement Government policy and applicable legislation regarding trade in **[conventional arms in]** or possession of controlled items, prohibition of mercenary activity and rendering of certain assistance or services in a country of armed conflict in order to establish, apply and ensure a legitimate, effective and transparent control process in and for the Republic, which—
 (i) conforms to international law and the guiding principles and criteria contained in section 15 and in section 9 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act; and
 (ii) is applicable to the control and regulation of trade in **[conventional arms]** or possession of controlled items, and to the regulation of the rendering of certain assistance or services in a country of armed conflict;
- (b) protect the economic and national security interests of the Republic by ensuring adequate control of trade in **[conventional arms]** controlled items and rendering of certain assistance or services in a country of armed conflict in accordance with the policy referred to in paragraph (a); **[and]**
- (c) foster national and international confidence in the Committee’s procedures for control over trade in **[conventional arms]** controlled items and rendering of certain assistance or services in a country of armed conflict; and
- (d) fulfil any obligation imposed under the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act.”.

Amendment of section 4 of Act 41 of 2002

3. Section 4 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) The Committee must—

- (a) establish processes and structures necessary for effective control of trade in **[conventional arms]** and possession of controlled items; 5
- (aA) establish processes and structures necessary for effective regulation of the rendering of certain assistance or services in a country of armed conflict in accordance with section 3 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act; 10
- (b) establish guidelines, structures and processes necessary for the scrutiny and assessment of an application for the issue of a permit under this Act and the Prohibition of Mercenary Activities and Regulation of Rendering of Certain Activities in Country of Armed Conflict Act; 15
- (c) where necessary, liaise with relevant Government agencies regarding the enforcement of this Act and the Prohibition of Mercenary Activities and Regulation of Rendering of Certain Activities in Country of Armed Conflict Act; 20
- (d) authorise or refuse the issue of any permit contemplated in section 14;
- (dA) grant or refuse an application for authorisation as contemplated in section 7 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act; 25
- (e) ensure that the conditions under which a permit is issued are complied with;
- (f) keep a register in the prescribed form of persons involved in trade in **[conventional arms]** and possession of controlled items;
- (g) keep a register of every permit issued; and 30
- (h) issue reports as specified in section 23.”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) The Committee may—

- (a) inside or outside the Republic, conduct any investigation into, inspection of and research in connection with any trade in **[conventional arms]** and possession of controlled items; 35
- (b) consult with the Minister with regard to any aspect that falls within the powers of the Minister in terms of this Act;
- (c) evaluate and comment on trade in **[conventional arms]** and possession of controlled items; 40
- (d) make recommendations to the Cabinet concerning the control of trade in **[conventional arms]** and possession of controlled items; and
- (e) direct any subcommittee to make information which it has in its possession available to the Committee, the Cabinet, Parliament or any committee of Parliament.”; and 45

(c) by the addition of the following subsections after subsection (3):

“(4) The Committee may determine that a specific quantity or type of any controlled item may only be imported, exported, conveyed, traded in or disposed of in terms of any other Act with the approval of the Committee, in addition to the approval required in terms of any such Act. 50

(5) For the purposes of subsection (4), any application for the import, export, conveyance, trade in or disposal of a controlled item determined in terms of subsection (4), received under the relevant Act, must be submitted to the Committee.”. 55

Amendment of section 5 of Act 41 of 2002

4. Section 5 of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

“(3) The President must designate one member of the Committee as the chairperson and another as the deputy chairperson, such members being Ministers 60

who do not have a line-function interest in trade in **[conventional arms]** controlled items.”.

Amendment of section 9 of Act 41 of 2002

5. Section 9 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for paragraph (a) of the following paragraph: 5

“(a) that trade in **[conventional arms]** and possession of controlled items is conducted in compliance with this Act; and”; and

(b) by the addition of the following subsections:

“(6) (a) The Minister may, with the concurrence of the Committee, 10
designate any employee of the State as an inspector.

(b) Any employee designated as an inspector must exercise his or her powers under this Act in consultation with the Inspectorate.

(7) In the exercise of powers vested in an inspector in terms of this section, the inspector may call upon a police officer to assist with the execution of that power.”. 15

Amendment of section 12 of Act 41 of 2002

6. Section 12 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) In addition to the audit of the financial statements of the Department in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999), the Auditor-General must audit the **[registers and processes contemplated in section 4]** affairs of the Committee.”. 20

Substitution of section 13 of Act 41 of 2002

7. The following section is hereby substituted for section 13 of the principal Act: 25

“Control over **[conventional arms and provision of service] controlled items**

13. (1) No person may trade in **[conventional arms]** or possess controlled items referred to in section 27(3), unless that person is registered with the secretariat and in possession of a permit authorised by the Committee and issued by the secretariat. 30

(2) For the purposes of subsection (1) “possess controlled items” does not include the possession of such items under the following circumstances:

(a) In the case of firearms, ammunition, prohibited firearms and restricted firearms, referred to in the Firearms Control Act, 2000 (Act No. 60 of 2000), if these items are— 35

(i) possessed by official institutions and members of official institutions, referred to in Chapter 11 of the Firearms Control Act, 2000, in accordance with the procedures laid down by, or a licence, permit or authorisation issued under, Chapter 11 of the Firearms Control Act, 2000; 40

(ii) possessed by any person, business, firearms dealer or manufacturer, security service provider or as part of a public or private collection, in accordance with a licence, permit or authorisation issued or recognised in terms of the Firearms Control Act, 2000; 45

(iii) imported, exported, stored, used or transported by a defence force or police force of any country or any multinational or international defence force or policing agency, or possessed by any member of such force or agency while on official duty, by virtue of an exemption from the provisions of the Firearms Control Act, 2000, granted by the Minister of Safety and Security, after consultation with the Ministers of Defence and of Foreign Affairs, by notice in the *Gazette*; 50

- (b) in the case of explosives—
- (i) which in terms of the Explosives Act, 2003 (Act No. 15 of 2003), are defined as explosives, unauthorised explosives, authorised explosives or plastic explosives if such explosives are possessed by a person, manufacturer or dealer by virtue of a permit, licence or authorisation issued in terms of that Act; 5
 - (ii) if the transfer, storage, transportation, manufacturing, destruction, distribution or any other use thereof relate to occupational health or occupational safety and are governed and approved by or under the Mine Health and Safety Act, 1996 (Act No. 29 of 1996), or the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); 10
 - (iii) if the explosives are imported, exported, stored, used, manufactured or transported by a defence force or police force of any country or any multinational or international defence force or policing agency, by virtue of an exemption from the provisions of the Explosives Act, 2003 (Act No. 15 of 2003), granted by the Minister of Safety and Security to any such force or agency, or any member thereof while on official duty, after consultation with the Ministers of Defence and of Foreign Affairs and by notice in the *Gazette*; 15 20
- (c) in the case of controlled goods as defined in section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993), if such goods are possessed by virtue of a permit issued by the South African Council for the Non-Proliferation of Weapons of Mass Destruction, under section 13(2) of that Act; 25
- (d) in the case of radio apparatus as defined in the Electronic Communications Act, 2003 (Act No. 36 of 2003), if such apparatus is possessed by virtue of a licence issued in terms of that Act; 30
- (e) in the case of nuclear material, restricted material and nuclear-related equipment and material as defined in section 1 of the Nuclear Energy Act, 1999 (Act No. 46 of 1999), if such material is possessed by virtue of a written authorisation issued in terms of section 34 of that Act; 30
- (f) in the case of other controlled items, not mentioned in paragraphs (a) to (e)— 35
- (i) if such items are required to be possessed by the security services of the Republic referred to in section 199 of the Constitution and security services established by national legislation, in the performance of their functions; 40
 - (ii) if the possession thereof is necessary for the transfer of such controlled item that a permit authorising such possession has been issued and the possession of such controlled item is in accordance with the provisions and conditions stipulated in such permit; and 45
 - (iii) being a vehicle, aircraft or vessel, if the possession is necessitated for emergency repairs. 45
- (g) in the case of maintenance, repair, or upgrade of controlled items—
- (i) possession is permitted if such possession is only for the purposes of maintenance, repair or upgrade of controlled items belonging to a duly registered person as contemplated in section 13; 50
 - (ii) such possession as referred to in subparagraph (i) is limited to the following conditions:
 - (aa) maintenance, repair or upgrade must be carried out within a reasonable time; and 55
 - (bb) while the controlled items are in possession of the person carrying out the maintenance, repair or upgrade, such person may not use such controlled items for any purpose other than for testing.”.

Amendment of section 14 of Act 41 of 2002

8. Section 14 of the principal Act is hereby amended—

(a) by the substitution for subsection (4) of the following subsection:

“(4) A permit issued under subsection (2)—

- (a) must prescribe the quantity, type and value of the **[conventional arms]** controlled items, where applicable, which may be transferred or destroyed domestically, exported, re-exported, marketed, imported, conveyed, manufactured, traded or brokered thereunder; 5
- (b) may prescribe the period within which, the harbour, port or airport through or from which, the person, country or territory from or to which, the route along which and the manner in which the **[conventional arms]** controlled items in question must be transferred or destroyed domestically, exported, re-exported, marketed, imported, conveyed, manufactured **[or]**, traded or rendered; and 10
- (c) may prescribe such other conditions as the Committee determines.”; 15

(b) by the substitution for subsection (5) of the following subsection:

“(5) An application for a permit for the re-exportation of **[conventional arms]** controlled items must be accompanied by a notification issued by the government of the country from which such **[conventional arms]** controlled items were originally imported, indicating that government’s consent that such **[conventional arms]** items may be so re-exported.”; and 20

(c) by the insertion of the following subsection after subsection (5):

“(5A) Any person who applies for a permit contemplated in this section, must give an undertaking to the Committee in the prescribed form and manner that the re-exportation of controlled items does not violate end-user requirements set by any foreign supplier.”. 25

Amendment of section 15 of Act 41 of 2002

9. Section 15 of the principal Act is hereby amended by the substitution for paragraphs (d), (e) and (k) of the following paragraphs, respectively: 30

- “(d) avoid transfers of **[conventional arms]** controlled items to governments that systematically violate or suppress human rights and fundamental freedoms; 30
- (e) avoid transfers of **[conventional arms]** controlled items that are likely to contribute to the escalation of regional military conflicts, endanger peace by introducing destabilising military capabilities into a region or otherwise contribute to regional instability; 35
- (k) avoid the export of **[conventional arms]** controlled items that may be used for purposes other than the legitimate defence and security needs of the government of the country of import.”. 40

Substitution of section 16 of Act 41 of 2002

10. The following section is hereby substituted for section 16 of the principal Act:

“Accountability where **[conventional arms]** controlled items are exported

16. Where **[conventional arms]** controlled items are exported, and— 45

- (a) ownership thereof is transferred, the Committee must satisfy itself that the government of the country of import has given an undertaking, reflected in an end-user certificate, that the **[conventional arms]** controlled items in question will not be transferred, re-sold or re-exported to any other country without the prior approval of the Committee, acting on behalf of the Government of South Africa; 50
- (b) transfer of ownership does not take place, the Committee must—
 - (i) obtain a letter from the government of the country of import stating that the **[arms]** controlled items in question are intended for demonstration or evaluation purposes and whether they will be returned; or 55

- (ii) obtain a letter from the applicant stating that the arms in question are being exported for repair or integration only and will be returned;
- (c) where there is an undertaking that the **[arms]** controlled items in question are to be returned, the Committee must satisfy itself that the **[conventional arms]** controlled items have been returned to the Republic in accordance with the undertaking; 5
- (d) the **[arms]** controlled items in question have been expended during demonstration, the Committee must obtain a certificate from the government of the country of import verifying that fact.”. 10

Substitution of section 17 of Act 41 of 2002

11. The following section is hereby substituted for section 17 of the principal Act:

“End-user certificate

- 17. (1)** Subject to section 16, whenever **[conventional arms]** controlled items are exported, a person authorised by the government of the country to which the **[arms]** controlled items referred to in section 27(3)(a) and (b) are exported must issue an end-user certificate— 15
- (a) setting out the name and address of the declared end-user;
 - (b) giving a description of the **[conventional arms]** controlled items and quantities involved, as well as the use of such items; 20
 - (c) undertaking that the **[conventional arms]** controlled items will not be transferred or re-exported to any other **[party]** person or country without the authorisation of the South African Government;
 - (d) undertaking that proof of importation will be supplied, by way of a **[Delivery Verification Certificate]** delivery verification; 25
 - (e) containing the authorisation to issue the certificate in question; and
 - (f) containing such other matters as may be prescribed.
- (2) Whenever controlled items referred to in section 27(3)(c) are exported, the Committee may require a person authorised by the government of the country to which the controlled items are being exported to issue a certificate undertaking that the controlled items shall not be— 30
- (a) transferred or re-exported to any other person or country without the authorisation of the Committee; and
 - (b) used in developing or manufacturing weapons of mass destruction or for related purposes. 35
- (3) The Committee may on such terms and conditions as may be prescribed exempt any exporter from compliance with subsection (1).
- (4) Whenever controlled items and services are imported into the Republic, the competent authority of the South African Government may issue an end-user certificate wherein an undertaking is given that the controlled items in question will not be transferred, re-sold or re-exported to any other country without the prior approval of the relevant authority of the exporting country.”. 40

Amendment of section 19 of Act 41 of 2002

12. Section 19 of the principal Act is hereby amended by the substitution in subsection (3) for paragraph (a) of the following paragraph: 45

“(a) in relation to premises on or from which there is reason to believe that trade in **[conventional arms]** controlled items is being conducted in contravention of this Act; and”.

Amendment of section 22 of Act 41 of 2002

13. Section 22 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 50

“(1) Upon the written request of any competent authority, any person who trades in **[conventional arms]** controlled items in the course of his or her business must furnish the competent authority, within a specified period or at 55

specified intervals, with such information at his or her disposal as may be specified in the request.”.

Substitution of section 23 of Act 41 of 2002

14. The following section is hereby substituted for section 23 of the principal Act:

“Disclosure and non-disclosure of information

5

23. (1) The Committee must—

- | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| (a) annually prepare a report and cause such report to be submitted to the Secretary-General of the United Nations for the purposes of the United Nations Register of Conventional Arms, established in terms of United Nations Resolution 46/36L of 6 December 1991; | 10 |
| (b) annually or from time to time prepare a report and cause such report to be submitted to any international body as may be required in terms of the Republic’s international obligations; and | |
| (c) report to Cabinet and Parliament on all transfers of controlled items concluded during the preceding quarter. | 15 |
| (2) A copy of the report contemplated in subsection (1)(a) must be tabled in Parliament before it is submitted to the United Nations. | |
| (3) (a) The Committee must at the end of the first quarter of each year present to Parliament an annual report on all transfers of controlled items concluded during the preceding calendar year. | 20 |
| (b) The report contemplated in paragraph (a) must— | |
| (i) reflect the country, type and description of controlled items involved, the total value per type exported to the country for the year; and | |
| (ii) reflect the quantity of controlled items involved, except if disclosure is prohibited in terms of a confidentiality clause in the contract of sale. | 25 |
| (4) In the case of information contemplated in subsection (3)(b)(ii), the Committee must submit such information to Parliament on a confidential basis. | 30 |
| (5) Information concerning the technical specifications of controlled items may be omitted from a report contemplated in this section in order to protect military and commercial secrets. | |
| (6) No person may disclose any information concerning the business of the Committee except— | 35 |
| (a) with the permission of a competent authority; | |
| (b) as required in terms of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); | |
| (c) to a person who needs the information for performance of official functions; or | 40 |
| (d) to execute the decisions of the Committee. | |
| (7) For the purposes of this section ‘transfers’ include the following: | |
| (a) registration; | |
| (b) marketing; | |
| (c) contracting; | 45 |
| (d) export; | |
| (e) import; or | |
| (f) conveyance.” | |

Substitution of section 24 of Act 41 of 2002

15. Section 24 of the principal Act is hereby amended— 50

- (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
- “(a) **[trades in conventional arms in contravention of section 13] contravenes section 13;**”;
- (b) by the substitution in subsection (1) for paragraph (d) of the following paragraph: 55
- “(d) contravenes section 23[(3)]6;”; and

(c) by the substitution for subsection (3) of the following subsection:

“(3) A court convicting any person of an offence referred to in subsection (1)(a) [, (b)] or (c) may, in addition to any other penalty which it may impose, order seizure of any goods, or any other article, or any material or substance in respect of which such offence was committed[, **and the goods, article, material or substance so seized, must be disposed of as the Secretary either generally or in any particular case may order**].”.

Insertion of section 24A in Act 41 of 2002

16. The following section is hereby inserted in the principal Act after section 24: 10

“Administrative fines

24A. (1) Notwithstanding anything to the contrary in this Act, the Committee may impose an administrative fine on any person, hereinafter called “the offender”—

(a) who is alleged to have committed an offence contemplated in section 24(1)(b) to (j); or 15

(b) who fails to keep the prescribed records, minutes, registers and financial statements as required by the regulations.

(2) An administrative fine imposed under subsection (1) may not exceed 10 per cent of the offender’s annual turnover in the Republic and its exports from the Republic during the offender’s preceding financial year. 20

(3) When determining an appropriate fine, the Committee must consider the following factors:

(a) The nature, duration, gravity and extent of the contravention;

(b) any damage to the economic or national security interests suffered as a result of the contravention;

(c) the market circumstances in which the contravention took place;

(d) the level of profit derived from the contravention;

(e) the degree to which the offender has co-operated with the Committee; and 25

(f) whether the offender has previously contravened this Act.

(4) Where the Committee is considering the imposition of an administrative fine it must cause to be delivered by hand to the offender an infringement notice which must contain the particulars of the offences contemplated in subsection (1). 30

(5) A notice contemplated in subsection (4) must—

(a) specify the name and address of the offender;

(b) specify the particulars of the alleged offence;

(c) specify the amount of the administrative fine the Committee intends to impose; and 35

(d) inform the offender that he or she is entitled to elect to be tried in court instead of paying the administrative fine.

(6) The imposition of an administrative fine is subject to compliance with the rules relating to a fair administrative action.

(7) If an offender elects to be tried in court the Committee must hand the matter over to the National Prosecuting Authority and inform the offender accordingly. 40

(8) (a) If an offender fails to comply with the requirements of a notice contemplated in subsection (4), the Committee may file with the clerk or registrar of any competent court a statement setting forth the alleged offence and the amount of the administrative fine payable by the offender. 45

(b) Any such statement has the effect of a civil judgment lawfully given by the court in favour of the Committee for a liquid debt to the amount specified in the statement.

(9) The Committee may not impose an administrative fine contemplated in this section if the person concerned has been charged with a criminal offence in respect of the same set of facts. 50 55

(10) No prosecution may be instituted against a person if the person concerned has paid an administrative fine in terms of this section in respect of the same set of facts.

(11) An administrative fine imposed in terms of this section does not constitute a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(12) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.”.

Insertion of sections 25A and 25B in Act 41 of 2002

17. The following sections are hereby inserted in the principal Act after section 25: 10

“Exemptions

25A. (1) The Chairperson and one member of the Committee may, in cases of an emergency or special operations and at the request of the National Commissioner of the South African Police Service or Chief of the South African National Defence Force, grant an exemption to the South African Police Service or South African National Defence Force from the provisions of this Act relating to the export and import of controlled items.

(2) Any request for an exemption under subsection (1) must be—

- (a) lodged with the secretariat; and
- (b) accompanied by a comprehensive list of controlled items sought to be imported or exported and the name of the country from which the controlled items are being imported or to which they are exported.

(3) Any exemption granted under subsection (1) must be tabled before the Committee for ratification at the next ensuing meeting of the Committee.

Industry Internal Compliance Programme

25B. (1) The Committee may determine guidelines for an Industry Internal Compliance Programme.

(2) The Industry Internal Compliance Programme contemplated in subsection (1) must, among others, provide for—

- (a) the principles of trade in and possession of controlled items;
- (b) internal compliance procedures and methods to be followed; and
- (c) standards to be maintained in the execution of certain activities relating to trade in and possession of controlled items.

(3) In order to encourage good practices, the Minister may, in concurrence with the Committee, prescribe a grading system and terms of grading in terms of which persons may be graded in accordance with their history of compliance with the Industry Internal Compliance Programme.”.

Substitution of section 27 of Act 41 of 2002

18. The following section is hereby substituted for section 27 of the principal Act: 40

“Regulations and notices

27. (1) The Minister may make regulations, with the concurrence of the Committee, regarding—

- (a) the types of permits to be issued and the procedure to be followed when applying for any permit in terms of this Act and the disclosure of information relating thereto;
- (b) the conditions under which a permit may be issued and the disclosure of information relating thereto;
- (c) matters which must be contained in an end-user certificate;
- (d) the keeping of records, minutes, registers and financial statements by any person who is the holder of a permit in terms of this Act;
- (dA) terms and conditions for domestic transfers of controlled items;
- (dB) trade in and possession of controlled items;

- (e) the format of reports to be furnished to the Minister, the Committee, the Cabinet or Parliament in terms of this Act;
- (f) the procedure to be followed in connection with requests for reasons for decisions by a competent authority; and
- (g) any other matter which it may be necessary or expedient to prescribe in order to achieve the objects of this Act or which may or must be prescribed in terms of this Act.

[(3)] (2) A regulation may prescribe a penalty of a fine or of imprisonment for a period not exceeding five years, or both a fine and such imprisonment, for any contravention thereof or any failure to comply therewith.

[(4) Any regulation which is likely to result in state expenditure must be made with the concurrence of the Minister of Finance.]

(3) The Committee may, by notice in the *Gazette*, publish a list of controlled items to which this Act is applicable, including—

- (a) weapons, munitions, explosives, bombs, armaments, vessels, vehicles and aircraft designed or manufactured for use in war, and any other articles of war;
- (b) any component, equipment, system, processes and technology of whatever nature capable of being used in the design, development, manufacture, upgrading, refurbishment or maintenance of anything contemplated in paragraph (a);
- (c) products, technologies, services or other goods which, besides their normal use and application for civilian purposes, can also be used for the furtherance of general military capability; and
- (d) any services relating to controlled items of whatever nature or form to any institution or country, including—
 - (i) aid;
 - (ii) advice;
 - (iii) assistance;
 - (iv) training;
 - (v) product support;
 - (vi) contractual after-sales and warranty services; and
 - (vii) brokering.

(4) The Committee may, by notice in the *Gazette*, publish a list of prohibited items, which items may not be manufactured, possessed or transferred under this Act.”.

Amendment of long title of Act 41 of 2002

19. The following long title is hereby substituted for the long title to the principal Act:

To establish the National Conventional Arms Control Committee; to ensure compliance with the policy of the Government in respect of arms control; to ensure the implementation of a legitimate, effective and transparent control process; to foster national and international confidence in the control procedures; to provide for an Inspectorate to ensure compliance with the provisions of this Act; to provide for guidelines and criteria to be used when assessing applications for permits made in terms of this Act; to ensure adherence to international treaties and agreements; to ensure proper accountability in the trade in [conventional arms] controlled items; to provide for matters connected with the work and conduct of the Committee and its secretariat; and to provide for matters connected therewith.”.

Short title and commencement

20. This Act is called the National Conventional Arms Control Amendment Act, 2008, and takes effect on a date determined by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE NATIONAL CONVENTIONAL ARMS CONTROL AMENDMENT BILL, 2008

1. SUMMARY OF BILL

- 1.1 The proposed amendments to the National Conventional Arms Control Act, 2002 (Act No. 41 of 2002) (hereinafter referred to as “the Act”) are aimed at addressing two key objectives. Firstly, to improve and facilitate the regulatory role of the National Conventional Arms Control Committee (hereinafter referred to as “the NCACC”) in relation to the transfer of conventional arms in South Africa. Secondly, to bring the Act in line with the business realities that the NCACC and the defence industry are confronted with.

The amendments seek to achieve these objectives by, *inter alia*, redefining certain terms used in the Act, extend the objects of the NCACC, provide for a mechanism to deal with dual-use goods and technologies, provide for management of information related to arms transfer and provide for proper industry compliance and accountability measures.

2. STRATEGIC FOCUS OF MEMORANDUM

- 2.1 South Africa has committed itself to the international agenda of disarmament and non-proliferation of arms. Built into this agenda is the right of States to engage in responsible and accountable trade in arms. Given South Africa’s strong defence industry base, the need for South Africa’s own effective mechanism to regulate arms transfers is fulfilled by the existence of the NCACC established and operating under the Act. The strategic focus of this Bill is to amend certain areas of the Act which govern the regulation of arms transfer in South Africa. The amendment of the Act will ensure that the South African arms control mechanism becomes more effective thus promoting responsibility and accountability in South African arms transfers. This in turn will be in line with South Africa’s standing obligations on arms trade.

3. DISCUSSION

The proposed amendment of the Act seeks to make the Act much more focused and clearer for purposes of ensuring that conventional arms control in South Africa is conducted on commonly understood and unambiguous basis. To this end, the proposed amendments deal with the following aspects:

3.1.1 Scope of Application

The proposed amendment seeks to correct and extend the application of the Act from being only concerned with regulating trade in conventional arms as conducted across South African borders to include regulating possession of conventional arms in South Africa and domestic trading amongst South African persons on conventional arms.

3.1.2 Definitions (Section 1 of Act)

For easy reading and elimination of possible misinterpretation challenges in the implementation of the Act, the proposed definitions include those of *armed conflict*, *competent authority*, *controlled items*, *domestic transfer*, *permit and possession*. (See clause 1).

3.1.3 Objects of NCACC (Section 3 of Act)

In order to cater and accommodate for all the work conducted by the NCACC, clause 2 of the Bill proposes that the objects of the NCACC be extended to include the regulation of conventional arms’ possession and domestic transfer of conventional arms. Further to this, the Bill also proposes that the Act makes an allowance for the NCACC’s

administration of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006) as recently promulgated.

3.1.4 Functions of NCACC (Section 4 of Act)

For purposes of catering for all the functions executed by the NCACC, clause 3 of the Bill proposes that the NCACC's range of functions be extended. This extension of functions should include those functions related to the administration of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006).

3.1.5 Dealing with Dual-Use Goods and Technologies (Section 13 of Act)

Given the dual application nature of these goods and technologies, the proposed amendment of section 13 seeks to set less onerous control standards on these items (see clause 7). This is intended to deal with the commercial utility of these items.

3.1.6 End-User Certificates (Section 17 of Act)

As a measure of control, recipient countries are obliged to provide end-user certificates (hereinafter referred to as "EUC's) for conventional arms they purchase from South Africa. This is an international rule and practice applicable to arms trade. Clause 11 seeks to provide for a selective and considered exemption to this rule for items intended for onwards export after storage and integration into bigger conventional arms systems. This exemption from the EUC requirement will be done on a case by case basis, on application and on such terms and conditions as may be prescribed. This proposed amendment is informed by the prevailing market realities where defence industry operations are arranged on a *value chain* principle.

3.1.7. Disclosure and Non-Disclosure of Information (Section 23 of Act)

The proposed amendment in clause 14 retains the prevailing NCACC's reporting obligations to Cabinet, Parliament and the United Nations. The Bill, however, proposes that the report to Parliament be enhanced. In the first instance, the Parliamentary report must not only deal with exports but with all transfers authorised by the NCACC over a particular reporting period. "All transfers" refer to marketing, contracting, exporting, importing and conveyance authorisation by the NCACC. In the second instance, the report to Parliament must provide adequate details on all transfers authorised. Over and above information relating to country, type, quantity and values, the report must provide description of the controlled items transferred.

In order to deal with concerns around sensitivities of information to be contained in the reports, the Bill retains the NCACC's powers to exercise discretion on the level and kind of information to be released. This discretion is, however, to be exercised within the provisions and limitations of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

The Bill retains the NCACC's obligation to provide reasons for administrative decisions taken. This obligation, however, has to be fulfilled within the parameters of the exemptions and limitations provided for by the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

3.1.8 Offences and Penalties (Section 24 of Act)

Clause 15 of the Bill proposes that over and above the existing offences, unauthorised possession and domestic trade be criminalised and corresponding penalties be applied.

3.1.9 Administrative Penalties (Section 24 of Act)

In order to deal with what could be considered as less serious violations of the Act but taking a long a time to finalise through the court process, clause 16 of the Bill proposes that administrative penalties be introduced. For the realisation of this, the Bill proposes for the empowerment of the NCACC to administer these penalties using a mechanism that complies with the rules of fair administrative justice. The Bill, however, proposes the retention of the court process as a recourse option. Finer details of the administrative penalties mechanism are to be dealt with in the regulations to the Act.

3.1.10 Exemptions (Section 25 of Act)

Clause 17 of the Bill proposes that the South African National Defence Force (SANDF) and the South African Police Service (SAPS) be exempted from the permit requirements in instances of legitimate emergency operations and deployment. This will be done to ensure that the SANDF and SAPS attend to all attendant security emergencies but without derogating from accountability and responsibility requirements in controlled items transfers.

3.1.11 Industry Internal Compliance Programme (Section 25 of Act)

In order to promote compliance best practice in the defence industry, the Bill proposes that the NCACC be provided with a platform to issue guidelines for defence Industry Internal Compliance Programme. Finer details of the Industry Internal Compliance Programme are to be provided in the regulations to the Act.

Linked to this Industry Internal Compliance Programme, the Bill proposes the introduction of the concept to grade companies. The methodology of the grading system will be dealt with in the regulations to the Act. This methodology will, *inter alia*, include aspects such as company performance in terms of compliance with the set rules and conditions of conventional arms trade.

3.1.12 Programme Approval

In order to facilitate trade and limit the strain on the arms control administrative capability, the Bill introduces the concept of program approval, without derogating from the fundamental arms control principles of responsibility and accountability. A practical implication of the program approval concept is the idea of multiple export or import permits. These multiple export or import permits are based on a mandatory reconciliation requirement. Details of the program approval are to be provided in the regulations to the Act (See clause 18).

3.1.14 Regulations and Notices (Section 27 of Act)

Clause 18 of the Bill proposes that section 27 of the Act be expanded to provide the NCACC with the requisite powers to issue notices and make regulations on various provisions of the Act. The NCACC's powers to issue notices will cater for the necessary periodic publication of lists of controlled items. The proposed platform for

regulations will also enable the NCACC to deal with many aspects including conditions applicable to permits.

3.1.15 Cross referencing to other relevant legislation (various sections of Act)

The Bill proposes that the Act be properly cross referenced to other relevant pieces of legislation. Those include, but are not limited to, the following:

- Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006 (Act No. 27 of 2006). Reference is made to this Act for purposes of ensuring that the NCACC's responsibility of administering this Act is properly linked with the NCACC's founding legislation.
- Firearms Control Act, 2000 (Act No. 60 of 2000), Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993) and Explosives Act, 2003 (Act No. 15 of 2003), Mine Health and Safety Act, 1996 (Act No. 29 of 1996), Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), Electronic Communications Act, 2003 (Act No. 36 of 2003), Nuclear Energy Act, 1999 (Act No. 46 of 1999). Reference is made to these Acts for purposes of ensuring proper boundary management between the NCACC and other agencies of government. Items or materials that bear relations with controlled items but are controlled by other government agencies under specific legislation are, in terms of Section 13 of the Bill, to be confined to those agencies and exempted from the application of the Act.

4. IMPLEMENTATION PLAN

Once passed the amendments will be implemented by the NCACC and its already established supporting administrative structures.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

The Bill does not have any organisational and personnel implications. The existing structures of the Department of Defence and the NCACC will manage the implementation of these amendments.

6. FINANCIAL IMPLICATIONS FOR STATE

The amendment of the Act will have no financial implications.

7. CONSTITUTIONAL IMPLICATIONS

The Bill is aligned with Constitutional imperatives.

8. CONSULTATION

The Bill was duly consulted with and is supported by the following Departments and Agencies:

- Department of Foreign Affairs.
- Department of Trade and Industry.
- Department of Public Enterprises.
- National Intelligence Agency.
- South African Secret Service.
- National Prosecuting Authority.
- Auditor-General.

9. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Defence are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

The State Law Advisers are of the opinion that it not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.