

SUPPLEMENTARY SUBMISSION TO THE REVIEW OF THE *DEFENCE TRADE CONTROLS ACT 2012*

16 July 2018

Universities Australia welcomes the opportunity to make a supplementary submission to the Review of the *Defence Trade Controls Act 2012*. Universities Australia is the peak body for Australia's 39 comprehensive universities, which educate more than a million students and undertake research to add to the stock of advanced knowledge.

Universities Australia wishes to express serious concerns regarding matters raised in the submissions from the Department of Defence and the Department of Foreign Affairs and Trade/Austrade.

Executive Summary

It is in Australia's national interest to maintain a strong national defence. It is equally in the national interest to ensure that Australia fosters a thriving, internationally connected and innovative research sector. It is research and development that gives Australia its best chance of achieving future economic and social prosperity, as well as providing knowledge and technology to support its national security. Balancing the twin national aims – security and knowledge flow – serves all our interests. Getting the balance wrong serves no-one.

In its submission, the Department of Defence has suggested that the Defence Export Controls scheme be altered to give the Department the ability to control the supply of any technology at any time, as well as sweeping compliance and enforcement powers.

Universities Australia is deeply concerned about the impact of the Department of Defence proposals would have, if enacted. The proposals do not provide for an appropriate balance between security interests and a thriving research and development capability. If adopted, they could:

- damage Australia's competitive advantages by threatening international collaborations across a wide range of research fields, as well as reducing the ability of Australia to compete for talented local and international researchers;
- threaten investment in Australian research and development, making it more difficult to build new industries (including a defence industry), or achieve the ambitions of government initiatives such as the Global innovation Strategy; and
- undermine the effectiveness of the Defence Export Controls regime by reducing the trust and cooperation between Defence and the research sector that is essential to the success of the scheme.

We urge the Review to ensure that Australia's national interests are enhanced through maintaining a cooperative and constructive approach to the regulation of sensitive technology.

Importance of cooperation to the success of Defence Trade Controls

In our original submission, Universities Australia noted that the constructive approach that had been taken by the regulator was particularly helpful in ensuring the scheme worked as efficiently as possible. We note that in its submission, the Department of Defence has acknowledged the proactive engagement of stakeholders with the scheme.

The willingness of universities to engage with the regulator is crucial to the success of the scheme. As noted in the Department's submission, "*Defence believes it has formed very productive relationships with key stakeholders over the past two years which have led to a high level of compliance with the DTC Act.*" The constructive approach, pioneered by the use of the Steering Group in producing the 2015 Amendments to the *Act*, has been key to its acceptance.

Universities Australia strongly urges the retention of such a cooperative approach in order to achieve the aims of scheme. We cannot support changes that undermine trust but increase regulation.

Department of Defence proposals

Universities Australia expresses serious concerns at the combined implications of four of the recommendations raised in the submission of the Department of Defence, viz:

- Recommendation 1: *The Department of Defence requests that the Review consider measures to require a person to apply for a permit to supply or transfer DSSL or uncontrolled technology to foreign entities when the Australian Government notifies them that it has reason to believe the technology is significant to developing or maintaining national defence capability or could be used to prejudice the security, defence or international relations of Australia.*
- Recommendation 2: *The Department of Defence requests that the Review consider expanding the power to prohibit the supply of technology to include both DSSL and uncontrolled technology.*
- Recommendation 3: *The Department of Defence requests that the Review give consideration to expanding the DTC Act controls relating to the publication of DSSL technology, the supply of DSSL technology in preparation for publication, and brokering of DSSL technology to regulate categories of sensitive technologies found in Part 2 of the DSSL.*
- Recommendation 5: *The Department of Defence requests that the Review consider extending the application of the DTC Act's Part 4 Monitoring Powers to Part 2 of the Act.*

Universities Australia also notes that the Department of Foreign Affairs and Trade/Austrade recommended in their submission that the Review consider extending the Act to include technology that is not listed on the DSSL, and to regulate supply of technology within Australia.

What do the Defence proposals mean?

In plain terms, Universities Australia has interpreted the submission from the Department of Defence as proposing that the Review recommend:

- 1) Defence be given the power to control the supply of *any* technology, regardless of whether or not it appears on the DSGL, at its sole discretion;
- 2) Defence be given the power to determine, at its sole discretion, that *any* technology is significant to the national defence capability or national security, and to regulate its supply or transfer;
- 3) Defence be given the power to control publication or supply in preparation for publication, of civilian technology appearing on Part 2 of the DSGL, and
- 4) Defence be given warrantless search and seizure powers to effect compliance with its expanded remit.

In summary, it appears that Defence is suggesting that it be provided with the ability to control and prevent the export of any technology, at any time, at its sole discretion, with the ability to enforce its decisions through warrantless entry, search and seizure powers delegated to any person considered suitable by the Secretary of the Department of Defence.

Implications of proposed changes to the *Defence Trade Controls Act 2012*

1. These proposals, if adopted, repudiate the compromise position struck by the Steering Group in 2015 that allowed for the maintenance of academic freedom and autonomy in research by not restricting publication of technology on Part 2 of the DSGL – technology with entirely legitimate civilian uses. The proposals go further, to provide the ability to restrict publication of even uncontrolled technology on the basis of information that is not open to public scrutiny.

The proposals run the risk of damaging the cooperative and constructive approach that the university sector has taken in engaging with the DTCA. They represent a significant restriction of academic freedom and autonomy, as well as potentially undermining the effectiveness of the regulatory scheme.

2. The potential implications for international research collaborations are problematic, as they amount to significant restrictions on the ability of universities to publish or commercialise their work. International academic collaborations rely on the free transfer of research and information across borders. The imposition of controls outlined in the Department of Defence's submission may weaken the appetite of international partners to collaborate with Australian researchers, as there would be little certainty as to whether research would end up being controlled by the Act.
3. The proposals are not compatible with a number of Australian Government policies. These include the Global Innovation Strategy; Australia 2030: Prosperity through Innovation; and the National Science Statement. They are also contrary to the ambitions of the broader National Innovation and Science Agenda. Should the supply of the products of research be controlled at the sole discretion of the regulator, it could considerably devalue the research. Even the uncertainty associated with the possibility of such control could make partners unwilling to invest in it – this would be a result contrary to the Australian government's policy of seeking to improve the commercialisation or translation of university research to end-users.
4. The proposals would make it difficult to achieve an innovative Australian defence industry. The possibility of a wide-ranging system of controlling any export could have the effect of

significantly damaging the ability of both universities and those conducting commercial research endeavours to invest in the development of new technology. Without a clear understanding of the likelihood of whether an export will be controlled or not, there can be no understanding as to how a technology might be able to be developed or deployed, and hence the potential value of the technology is highly uncertain.

5. The proposals for monitoring powers to be extended to the whole of the DTCA are of concern and appear excessive. Coupled with the other proposals, it provides the regulator with the ability to arbitrarily decide to control supply, export or publication of any technology, whether specified in the DSGL or not, and to enter premises almost immediately to enforce its decision. Such extensive powers are incompatible with the free conduct of research and inquiry and threaten the ability of universities to carry out research in the public interest. Should monitoring powers be legitimately required to ensure compliance with the DTCA, then such powers must be based solely on export controls subject to Parliamentary oversight, and implement proper monitoring processes, using the *Regulatory Powers (Standard Provisions) Act 2014*.

The importance of international collaboration to modern research

Universities are increasingly international enterprises and will only be more so in the future. International engagement links Australian researchers and innovators with unique opportunities available in other countries. It is not possible to remain at the cutting edge of innovation without strong international partnerships; the modern research and innovation effort is bigger than any single nation. International collaborative science programs commonly allow Australian researchers and innovators access to facilities and expertise not available in Australia, often for a fraction of their true cost.

International engagement and collaboration is essential to higher education and research. Australia remains a relatively small economy, and despite our disproportionate contribution to the world research effort, we will continue to rely on utilising the expertise and resources of international peers. Australians researchers constantly battle the tyranny of distance to collaborate with peers in R&D-intensive economies. University researchers are at the forefront of forging international collaborations; should the burden of regulation on these links become too onerous, our international collaborators will look to share their knowledge and resources with other nations instead.

The proposals described in submissions to this Review represent a significant threat to these partnerships. International collaborations, through which collaborators share progress, are essential to the conduct of modern research. Such partnerships cannot exist on a one-way basis, in which Australia reaps the benefits of international research but quarantines the results of Australian research.

The Department's proposals also risk undermining Australia's capacity to attract and retain research talent. Australia is not just a collaborator with international partners; we also compete with other countries for high quality academic talent. If working as a researcher in the relevant fields in Australia is made too difficult, then there is a real risk that researchers will move elsewhere.

Parliamentary oversight and due process are critical to continuing research capability

Unfortunately, the effects of these proposals could easily impede Australia's international research links and hinder international collaboration. Should Defence be given the power to unilaterally prohibit or control supply of any technology, irrespective of whether it has been included on the DSGL, this could make the confident conduct of research very difficult. If research cannot be published, nor supplied for commercial or non-commercial use, it cannot be effectively employed. Researchers and institutions would, rightly, refuse to conduct research where the spectre of such a wide-ranging control system looms.

The current system relies on the Defence and Strategic Goods List to ensure that researchers and other participants are able to reliably determine those technologies which may be subject to export

controls. This list is publicly available and subject to Parliamentary oversight. This means the operation of the existing scheme is conducted upon known terms that support the rule of law and provide reasonable mechanisms for supervising the scheme's operation. The proposals raised in the Defence submission seek to circumvent the DSGL, by allowing Defence to control supply and publication, regardless of whether Parliament has specifically allowed for it.

Such proposals, if implemented, would undermine confidence in the Defence Trade Controls regime, as well as the confidence of institutions supporting Australia's national interests through innovation and technological development.

Should it be determined that the current DSGL is no longer meeting the needs of the scheme (and it has not yet been publicly demonstrated that this is the case), then consideration should first be given to improving the DSGL and the processes for its revision.

Future directions

Universities Australia notes with encouragement Defence's suggestion that *'any eventual changes to the DTC Act will be developed in consultation with affected groups and in the spirit of working together to ensure Australia's interests are protected'*. Universities Australia finds the proposals raised in the submission by the Department of Defence greatly concerning, and looks forward to discussing those concerns with the Reviewer. Universities Australia is committed to ensuring that the regulation of research is effective and efficient.