UNIVERSITIES AUSTRALIA

Senator Raff Ciccone, Committee Chair
Foreign Affairs, Defence and Trade Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

1 February 2024

Dear Senator Ciccone

UA appreciates the opportunity to continue our engagement on Australia's Defence Trade Controls framework in the context of this inquiry.

We wish to reiterate the constructive feedback that we have already provided through submissions to the Department of Defence with respect to the Exposure Draft of amendments which led to the *Defence Trade Controls Amendment Bill 2023 [Provisions]* (the Bill) (Attachment A) and the broader 2023 Review of the *Defence Trade Controls Act 2012* (Attachment B).

We note that it is difficult to delve deeper into the issues relating to this Bill until such time as the promised Exposure Drafts of amendments to the *Defence Trade Controls Regulation 2013* and the *Defence Strategic Goods List 2021* are made available.

As we have flagged in previous engagements, the specific phrasing of a new "Fundamental Research" definition along with details of other exemptions from offences are the most pressing concerns of our membership. Critically, the Bill defers to delegated legislation on these and other important matters.

I reaffirm the commitment of our sector to supporting the development and implementation of an appropriately balanced Defence Trade Controls framework which fulfills national security requirements while supporting ongoing research collaboration with international partners – both within Australia and globally.

Yours sincerely

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Attachment A

SUBMISSION ON AMENDMENTS TO THE *DEFENCE TRADE CONTROLS ACT 2012*

17 November 2023

Universities Australia (UA) welcomes the opportunity to make a submission with respect to proposed amendments to the *Defence Trade Controls Act 2012* (the Act) as articulated in the Exposure Draft of the Defence Trade Controls Amendment Bill 2023 (the Bill) and Explanatory Memorandum.

We note that the timeline for comment on complex legislative amendments has been too short for deep consideration – for both UA and our member universities. UA consider it imperative that this Bill be subject to an inquiry by the relevant Parliamentary Committee, and pending the outcomes of that inquiry, that the Department of Defence conduct appropriate consultation to inform the drafting subsequent amendments to the *Defence Trade Controls Regulation 2013* (the regulations).

We also acknowledge the other critical ongoing work of reviewing the Act, being undertaken by Mr Peter Tesch and Professor Graeme Samuel AC. In our submission to that review (Attachment A), UA noted that Australia needs to leverage its research sector to full effect in order to meet AUKUS challenges. To this end, UA considers that any legislative and/or policy change in this space should be aimed at reducing complexity and enhancing clarity around obligations.

Universities and the Department of Defence learned a great deal from the development of the original iteration of Australia's defence trade control regime – including the importance genuine engagement to strike the right balance of controls without stifling our ability to collaborate and the critical need for appropriate transition and support arrangements. UA and our members look forward to continued deep engagement to ensure that this balance is maintained.

ALL INTERNATIONAL RESEARCH COLLABORATION IS IMPORTANT

Australian Universities are committed to making AUKUS as successful as possible and UA acknowledges the necessity of amendments to enable our researchers to collaborate freely with US and UK counterparts. It is critical that this not come at the expense of limiting our ability to cooperate with other existing and potential international research collaborators.

The significant amount of detail which the Bill defers to subordinate legislation is a major cause for concern for the university sector. The new offences, if implemented as drafted and without properly articulated exemptions, would immediately jeopardise a significant proportion of Australia's ongoing collaborative research projects with partners outside of the US and UK. This is because research and research training, are fundamentally international endeavours.

According to UA data in 2020 our 39 member universities had 5,281 international research/academic partnerships across 124 countries - the US and UK are 4th and 7th respectively according to total collaborations. These partnerships not only dramatically increase the reach and impact of Australian research, they are also a critical component of Australia's soft power, particularly within our region.

Based on the Bill, there may be exemptions for employees of institutions who are citizens of certain countries included in the *Defence Trade Controls Act 2012 - Foreign Countries List* which comprises 25 countries including the US and UK (noting again that certain details are deferred to regulations). In considering the

reach and application of the proposed new controls, it is important to note that 11 of our top 20 research collaborator countries are not on this list and would therefore not be included in this exemption from permit requirements, accounting for 49 per cent of current partnerships.

This is just one example of the how the lack of specific details in the Bill may impact significantly on current and future research collaboration. A more general concern is that the amendments do not recognise the nature of research collaboration as multifaceted and multimodal. It is not as simple as the bilateral 'supply' of information or knowledge, or the provision of access to a resource or technology. It requires genuine ongoing exchange – of ideas, of staff, of students – and it is built on the basis of trust.

UA has encouraged our members to respond to this consultation individually, noting that the proposed amendments will impact each of them differently and that they have unique perspectives as those potentially subject to offences under the Act and as proposed in the Bill. However, we do wish to make the following additional specific observations and comments.

NOTES ON PROPOSED AMENDMENTS

Australian Person

UA welcomes the broad and unambiguous definition of *Australian person.* Noting that permanent residents are included, presumably as they are considered low risk and are trusted by the Government to live, work and study in Australia without restriction, UA suggests the consideration of including holders of Subclass 444 Special Category Visas (SCV) within the definition.

This is a visa category exclusively for New Zealand citizens who meet eligibility criteria including character requirements. Such visa holders enjoy privileges otherwise reserved for permanent residents and citizens including the ability to apply directly for Australian citizenship (without need a permanent visa as an interim step). SCV holders are also explicitly identified in the *Higher Education Support Act 2003* to enable their eligibility for income contingent loans under the Higher Education Loan Program.

Though a minor change, this could meaningfully (and with minimal risk) expand the pool of AUKUS collaborators to include the many New Zealand academics and PhD students who choose to work and study in Australia.

Relevant Supplies and Relevant Services

UA is broadly comfortable with the concepts of relevant supply and relevant DSGL services as mechanisms for ringfencing the AUKUS exemption. We would note, however, that paragraphs 5C(1)(c) and similarly, 5C(2)(c) are ambiguously phrased.

Importantly, the Explanatory Memorandum makes clear that the intended effect of these sections is to "…enable the Minister to specify certain DSGL goods and DSGL technology that will continue to be a 'relevant supply and 'relevant DSGL services' and subject to the permit requirements…". In other words, items listed in a relevant determination would not be covered by the AUKUS exemption.

However, the wording of the amendments is at best confusing and possibly suggestive of the contrary effect – i.e. that ***only*** things in the determination would be exempt from permit requirements. UA recommends reconsidering the drafting of these amendments for the avoidance of doubt.

While we are otherwise comfortable with these mechanisms, UA recommends removing paragraphs 5C(1)(d) and similarly, 5C(2)(d) from the Bill. These paragraphs would allow the Department of Defence to add "any other requirements" to these mechanisms through regulations.

The exemption is the fundamental underpinning of the value of the Bill from a research collaboration perspective. It exists as a direct trade-off with the proposed additional safeguards (i.e. offences) and the only

impact that more requirements could possibly have would be to reduce its scope (undermining the overall value proposition).

This would appear unnecessary noting that sections 5C(1)(c) and 5C(2)(c) already provide a specific and more acceptable way for a Minister to exclude particular goods/technologies/services from the scope of the exemption.

Most importantly, the inclusion of these apparent Henry VIII clauses would seem to allow the regulations broad scope for subordinate legislation to significantly modify the application of (and potentially contradict) the primary legislation.

Repeal of subsection 10(1A)

This subsection was previously an exemption with respect to the supply of DSGL technology. The Bill would see it replaced by unrelated clauses around *absolute liability* and it does not appear to be reintegrated into other offence exemptions. This repeal is also not explained in the Estimates Memorandum.

UA seeks clarity around the repeal of the current subsection 10(1A).

New Offences

As a peak body, UA does not interact with the Act in the same way that practitioners in our member organisations do. We have encouraged our members to make individual submissions - being best placed to assess the likely impacts (intended and unintended) in particular with respect to the proposed new offences.

UA acknowledges the good faith efforts of the Department of Defence in seeking to avoid the potential for unintended consequences with respect to required new safeguards. This includes consultation through the University Foreign Interference Taskforce and targeted consultations with Deputy Vice-Chancellors (Research) and other experts in the higher education sector. However, we reiterate that the period for consultation on this Exposure Draft has not been adequate.

Noting the risk of unintended consequences, UA recommends a pilot phase with respect to new offences similar to arrangements during the first six months of implementation of the current Act. Consideration should also be given to grandfathering arrangements for foreign researchers (including PhD students) already conducting research within our research institutions.

Exemptions deferred to regulations

Across the existing and proposed new offences the Bill proposes exemptions in situations where the supplier holds a covered security clearance and when the supply is made *"…solely or primarily for a purpose prescribed by the regulations…"* – see 10(3B), 10A(6), 10B(7) and 10C(6).

UA understands and welcomes that the Department of Defence intends to consult separately on subsequent amendments to the regulations but also seeks further detail with respect to the possible/intended "purposes" which may be prescribed for these exemptions.

Similarly, we would welcome any further detail on the even broader clauses allowing additional exemptions to be prescribed in regulations - see 10A(8), 10B(8) and 10C(7).

UA would welcome the opportunity to work with the Department of Defence around a clear and functional 'basic research' exemption which could potentially be implemented through such mechanisms.

Imposition of permit obligations

UA has concerns about the imposition of 'obligations' on permit holders outlined in the proposed new subsections 11(7A) through 11(13). The espoused purpose of this is to *"…provide Defence with additional assurances, mitigate/manage risks, or increase visibility of an entity's export compliance".*

Our concern is two-fold. Firstly, this would potentially add a significant compliance burden onto permit holders. Secondly, rather than mitigate risk, this appears to shift risk onto permit holders. In the broader context of the Bill which establishes 3 new offences, explicitly tied to constitutional heads of power, this seems an unnecessary additional burden which may represent a barrier to participation in defence focused research.

CONCLUSION

Australia's universities are actively engaged in supporting the Australian Government's Defence objectives. Achieving the right balance between fulfilling national security requirements and supporting research collaboration is in our mutual interest - both within and beyond AUKUS.

UA has endeavoured to provide constructive feedback aimed at ensuring that these amendments adequately establish (and protect) the scope of the exemption which is the critical counterbalance to the understood need for increased safeguards. As stated above, amendments should be considered with the dual aims of minimising complexity and maximising clarity in mind.

UA looks forward to participating in the necessary further consultation and engagement around amendments to both the Act and the regulations.

Attachment B

SUBMISSION TO THE 2023 REVIEW OF THE *DEFENCE TRADE CONTROLS ACT 2012*

3 November 2023

Universities Australia (UA) welcomes the opportunity to make a submission to the *Defence Trade Controls Act 2012* Review (the Review) and also wishes to acknowledge the other critical ongoing work within the Department of Defence such as strengthening Australia's export control legislation in the context of AUKUS as well as the *Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023.*

At the outset, UA acknowledges the importance of the *Defence Trade Controls Act 2012* Act (the Act) as a safeguard of Australia's national interests and in meeting the obligations we have to our key strategic partners. Further, we recognise that the elements of the Act subject to this review are, generally speaking, fit for purpose with the caveat that we understand the likely need for AUKUS related amendments which are out of scope for this review.

UA also acknowledges that universities are more mature and better equipped to ensure the protection of knowledge and technology today compared to 2018 (when the Thom Review was undertaken). We recognise the important and ongoing role of the University Foreign Interference Taskforce (UFIT) in providing guidance and raising awareness in the sector.

UNIVERSITY RESEARCH IS CRITICAL TO DEFENCE OBJECTIVES

Australia needs to leverage its research sector to full effect to meet its significant Defence challenges (including those presented by AUKUS). This requires an inclusive approach which addresses the barriers to participation in defence research (at both institutional and individual research level). It also requires consideration of (and genuine efforts to include) all current and potential international collaborators. In broad terms, this Review could support this aim through:

Simplicity and streamlining

In principle, **UA considers that any legislative and/or policy change stemming from this Review should be aimed at reducing complexity**. Noting that this may be in scope for other ongoing Defence processes, a key component of this would be a functional and clear 'basic research' exemption which supports collaboration both in the context of AUKUS as well as globally.

Pragmatically, more efficient and transparent processes (including with respect to permit applications) would also be welcomed.

Enhanced clarity and greater certainty

The need for clear guidance materials and case studies is critical in such a complex and high stakes context. UA members have indicated that additional clarity is necessary to assist researchers and universities to understand their obligations and to better navigate processes surrounding the Act.

Any changes to legislation or policy should also recognise the unique barriers and challenges faced by institutions of varying size and scale. This may include consideration of targeted support, training, and resources to support compliance – supporting more inclusive participation of universities in defence research.

The Australian Government should make a commitment to ongoing conversation and consultation in addition to 5-yearly reviews of the Act. This could include planned, regular sectoral engagements with Department of Defence and the co-design of support and guidance materials.

The Co-leads of the Review have expressed a view favouring an approach which is preventative rather than the punitive. To this end, compliance processes (and associated guidance materials) should reflect this, fostering cooperation and compliance and supporting researchers to make informed decisions. UA strongly supports this approach.

SINCE THE LAST REVIEW

In 2018, the Thom Review made a range of legislative recommendations aimed at 'closing gaps'. Ultimately there were no changes to the Act stemming from the Thom Review.

There have, however, been significant changes in the university research landscape. The university sector has matured significantly in its approach to countering foreign interference, including increased risk awareness and mitigation capabilities and with respect to due diligence in assessing potential international collaborators.

The 2019 establishment of the University Foreign Interference Taskforce and subsequent Guidelines to Counter Foreign Interference in the Australian University Sector (the Guidelines) refreshed in 2021 represent key steps on this ongoing journey. Importantly, the Guidelines were designed in partnership between the Australian Government and the sector. As such, they have been universally adopted and are increasingly supported by a range of other important resources including risk management and due diligence frameworks, case studies and a growing range of tools and templates. International partners are looking to Australia as an example of best practice collaboration between the sector and the government in countering foreign interference.

Essentially, the sector (in partnership with government) has been engaged in an increasingly effective form of principles-based regulation which will continue to support capability building across all institutions. While not diminishing the important role of the Act as an effective and necessary foundation for this collaborative work, UA considers that there is minimal need for any further 'rules based' regulation (i.e. prescriptive legislation) to be imposed with respect to university research.

RESPONSE TO PROPOSAL PUT FORWARD BY THE REVIEW CO-LEADS

UA was pleased to attend the 2023 Review of the *Defence Trade Controls Act 2012* Academia and Industry Roundtable on 24 October 2023.

At that event the Review Co-leads outlined a proposal which UA understands as follows (See Box 1).

Box 1: A possible emerging technologies catch all prohibition

- The Co-leads may recommend to Government the inclusion of what was described as a 'catch all prohibition' to account for the fact that it is increasingly difficult for the Defence Strategic Goods List (DSGL) to keep pace with emerging technology.
- It has not been determined how such a prohibition may be included in legislation – which would be a matter for Government in response to the Review.
- The current intention is that this would be supplemental to current triggers aimed at capturing non-DSGL technology which has the potential to enhance the capability of a foreign military. The reviewers indicated that this would be supported by:
  - » a granular list of criteria of perhaps 30-40 to be included in either the Regulation or guidelines associated with DTCA,
  - » a comprehensive compendium of case studies, guidelines, and other tools (potentially deidentified case outcomes). As described, this would represent a significant increase in the depth and breadth of support products, and
  - » a network of 'trusted agents' embedded within universities and/or peak bodies and accredited by Defence to act as advisors to the sector (but not as decision-makers).

A primary concern with respect to such a provision would be the potential for it to truly 'catch all' technologies and developments (including 'non-goods' such as Intellectual Property). The result of this would be to impose significant additional regulatory burden on individuals and institutions engaged in defence research. This burden would only serve to increase the barriers to participation, particularly among smaller institutions. There may also be additional resource implications with such a prohibition which could lead to unintended consequences if not addressed.

If designed and implemented appropriately, UA considers that this is potentially a way of addressing a clear and increasing gap in our export controls, especially relating to new and emerging technologies where the DSGL cannot always keep pace, while adding to clarity and certainty for university researchers. Placed in an appropriate contextual framework such a provision may lead to deeper consideration by individuals and institutions of the potential implications of their research.

In this sense, it may provide a kind of litmus test for a broad range of research on the periphery of the defence sphere – supporting researchers to give greater thought to dual-use potential at an earlier stage. The converse of this, as flagged above, is the potential for the inadvertent and unnecessary capturing of a broad range of research in DTCA processes.

UA understands that this risk would be mitigated by criteria designed to provide clarity around what may be in or out of scope – getting this element right would therefore be of critical importance. However, specifying circumstances of non-compliance may inadvertently set an expectation that any list of criteria will be exhaustive. An incomplete, or otherwise incorrect, set of criteria may provide a false sense of security and in so doing could expose institutions to risk, rather than to assist in identifying them.

UA RECOMMENDATION: A PRINCIPLES-BASED APPROACH

An alternate approach to a long list of criteria may be a smaller number of 'principles' – statements which assist in conceptualising possible negative outcomes/breaches as a guide to determining the potential for any technology (or knowledge) to benefit a foreign military.

The use of criteria implies testing propositions against well-defined thresholds which may be cleared or not cleared. They also tend have a focus on a point in time (i.e., the time at which a proposition is tested against them), whereas principles have the benefit of being forward looking – provoking consideration of hypothetical future circumstances. They also allow for the human elements of experience, understanding and judgement.

Regardless of whether it is a matter of criteria or principles – UA considers that it would be critical that they be determined via a co-design process with key stakeholders (including universities).

A key theme espoused by the Co-leads at the 24 October roundtable was that of "awareness, understanding and acceptance". A co-design process (potentially leveraging UFIT) would address all three components of this approach.

Awareness would be served by the inclusion of stakeholders in a such a genuine consultation. The process itself would create a nucleus of key individuals with deep understanding, not only of the outcomes, but how they were reached. The mere fact that outcomes were co-designed with impacted sectors would go a long way towards generating broader acceptance, just as it did across the university sector when the Countering Foreign Interference Guidelines were formulated.

If a recommendation of this kind is pursued, UA would be supportive of the idea of a comprehensive compendium of guidance materials – noting that such products would need to be in place as foundational pieces to support any legislative changes – not bolted on (or forgotten about) after the passage of legislation. As appropriate, UA would also support the co-design of new materials to ensure that are effective in providing clarity and certainty for stakeholders.

UA also supports the idea of a network of 'trusted agents'. This may be the critical element to this proposal, however UA envisages a range of potential challenges and implementation issues. For instance, a model whereby institutions (for instance, universities) each have such an agent would engender high levels of trust and would likely be effective - but may be too resource intensive to be practicable. In a model with fewer trusted agents (for example in peak bodies or through the Australian Defence Science and Universities Network, operating independently and/or only embedded in some institutions) access would likely be disparate, potentially favouring larger institutions.

Should an appropriate model be implemented, with an adequate number of individuals trained and accredited by the Department of Defence then this has the potential to rapidly add significant capability across the sector – providing researchers with equitable levels of direct access to expertise and trusted advice would go a long way towards reducing the barriers to broader participation in defence research.

This is an idea worthy of consideration by government even if there are no changes to the current legislative framework stemming from this review. This could include support for a community of practice among trusted agents to ensure their continued professional development and further enhance the value of the network.

CONCLUSION

Australia's universities are actively engaged in supporting the Australian Government's Defence objectives and are committed to proactively ensuring compliance with our Defence Trade Controls. Achieving the right balance between fulfilling national security requirements and supporting research and international collaboration is in our mutual interest.

UA considers the Act, as it stands, to be generally fit for purpose. We acknowledge the potential utility of amendments which consider the risks associated with the emergence of technologies not covered by the DSGL.

We reiterate that any amendments or policy changes should be based on the principles of reduced complexity and increased clarity and with consideration of the risks and concerns highlighted above – in particular the need for appropriate support mechanisms to be established prior to any legislative change coming into effect.

UA is happy to work directly with the Co-leads of this Review, and to bring together experts from the university sector, to ensure that we are able to achieve this balance while also leveraging the full potential of our national research capacity. UA looks forward to ongoing engagement with respect to this Review and how its recommendations intersect with other critical work in the defence trade controls space.