



THE UNIVERSITY OF
SYDNEY

Professor Emma Johnston AO FAA FTSE FRSN
Deputy Vice-Chancellor (Research)

17 November 2023

Mr David Nockels
First Assistant Secretary
Defence Industry Policy
Department of Defence

Via: exportcontrol.reform@defence.gov.au

Dear Mr Nockels,

The University of Sydney welcomes the opportunity to provide feedback on the Exposure Draft to the [Defence Trade Controls Amendment Bill 2023 \(Cth\)](#).

As detailed in our attached submission to the consultation, based on information available to us to date, our initial assessment of the proposed changes is that, if enacted as proposed, and if the Government does not replace the 'Basic scientific research' definition in the DSGI with a broader 'Fundamental research' definition based on those included in the relevant US export control regulations, the proposed changes are likely to have significant consequences for the missions, international competitiveness and practical operations of Australia's universities.

While we do have some significant concerns about aspects of the Exposure Draft Bill and the way Defence is approaching its development, we are committed to working with Defence and other stakeholders to deliver a strengthened export control regime that is robust, risk-based and administratively workable.

To that end, please do not hesitate to contact me in the first instance as I am most willing to discuss any aspect of our initial submission in more detail (emma.l.johnston@sydney.edu.au, 02 8627 8150).

Yours sincerely,

(signature removed)

Professor Emma Johnston
Deputy Vice-Chancellor (Research)

Attachment: The University of Sydney, initial submission on the Exposure Draft, Defence Trade Controls Amendment Bill 2023 (Cth), 17 November 2023

The University of Sydney, initial submission on the *Exposure Draft, Defence Trade Controls Amendment Bill 2023 (Cth)*, 17 November 2023

Executive summary and recommendations

The University of Sydney appreciates the opportunity to provide feedback on the Exposure Draft of the [Defence Trade Controls Amendment Bill 2023 \(Cth\)](#) (Exposure Draft Bill). We have a long history of constructive engagement with Defence regarding the design and implementation of the *Defence Trade Controls Act 2012 (Cth)* (DTC Act) and are keen for this to continue. We appreciate that the strategic geopolitical context has changed significantly since 2012 and strongly support the efforts of the Australian, US and UK governments to create a licence-free environment to encourage and facilitate cooperation between industry, higher education and research sectors in these three countries. Lowering barriers to technology transfer and skills development between AUKUS partners will help speed up R&D and innovation arising from collaborations between organisations and individuals in the US, UK and Australia.

While we have some significant concerns about aspects of the Exposure Draft Bill and the way Defence is approaching its development, we remain committed to working with Defence and other stakeholders to deliver a strengthened export control regime that is robust, risk-based and administratively workable. Critically, before we can offer our support for the proposed changes to the DTC Act, we need to understand the detail of the proposed exemptions/exceptions, which we have only heard about informally to date. Without such detail it is impossible for us to assess the strategic and practical implications of the proposed changes for our operations. **Moreover, before any such legislation passes Parliament, we need to be confident that Australian firms, universities and researchers will be at no relative overall disadvantage compared to their counterpart organisations and colleagues in the US and UK.** Past experience with the DTC Act suggests making such comparisons is time consuming and difficult, and will require genuine cooperation and openness between Defence and the sector.

For these and other reasons discussed below, we recommend that Defence should consider:

1. Adopting, as an overarching policy objective and principle for these reforms, the goal of ensuring that the entirety of Australia's new (AUKUS) export controls framework must not impose controls on Australian firms, research institutions and researchers that are more restrictive of international collaborations than those that apply to counterpart organisations and researchers in the US and UK. Achieving this outcome is critical for the future competitiveness of Australia's research and innovation system and wider economy. Australia risks being left behind competitively in the global innovation stakes if our innovative firms and research institutions face barriers to international collaboration that are more restrictive than those faced by their counterparts in the US and UK.
2. Releasing publicly, as soon as possible, the detail of all exemptions/exceptions to the proposed new controls before the Bill is tabled in Parliament. This includes the precise wording of the definition for 'Fundamental research' that we understand Defence is proposing to include in the Defence Strategic Goods List (DSGL), replacing the current definition for 'Basic scientific research'; as well as details of all other exemptions/exceptions. We would like to see a draft of that part of the DSGL revised to contain the exact wording and placement of the additions and amendments.
3. Re-establishing the Strengthened Export Controls Steering Group (Section 74A of the DTC Act) for a limited period to play the same constructive role in the practical implementation of the reforms as it did from 2012-15, but in relation to practical implementation of the new offence provisions.
4. Running collaborative pilots (between Defence and the sector) of the proposed new control measures (especially in-country supplies) with suspension of the application of the penalty provisions (as occurred for the original DTC Act during the first six months of implementation).

5. Working with the Australian university and public research sector to develop and pilot multi-year technology control plans, covering distinct research programs or projects and technologies, reviewed and assessed as safe by Defence. This would provide more certainty for organisations and their staff, reduce compliance costs and provide more flexibility for Australian researchers.
6. Consulting with the Australian university sector to understand and address, through appropriate amendments to the Bill, the transition challenges it will face once the details of the exemptions are known, especially regarding the consequences for non-exempt foreign persons who are already in Australia and are employed or studying in Australian universities with exposure to DSGL technology.
7. Providing certainty about what will be included in the DSGL in the future, with the current review of the DTC Act occurring at the same time. The current review of the DTC Act has discussed with the sector the adoption of broad catch-all military provisions where the DSGL is unable to cover all emerging technology, which will likely broaden the scope of the DSGL over time.
8. Providing more time (over the summer and Parliamentary recess of 2023-24) for genuine consultation with stakeholders before the Bill is introduced to Parliament. Unless more time is provided for consultation, it is highly likely to be referred to an appropriate Parliamentary Committee for intense scrutiny, as occurred with the original DTC Act Bill in 2012. Taking a few more months to consult openly with stakeholders will help to ease the legislation's passage through Parliament.

Supporting rationales for our recommendations

Ten days is inadequate for consultation on legislation of this type and significance

We must, regrettably, stress from the outset that giving stakeholders just ten days to provide formal written feedback on proposed changes of such significance and legal complexity is inadequate. The task of assessing how the proposed changes will affect our operations has been made more difficult by the *ad hoc* way in which we have become aware through informal channels of various options for exemptions or exceptions from the proposed new offence provision, which Defence is considering through separate processes. Understanding the detail of these proposed exemptions/exceptions is critical for the higher education and broader public research sector, as organisations cannot meaningfully assess the likely consequences of the changes for their operations without this information. We therefore look forward to receiving full details about the proposed exemptions and exceptions at Defence's earliest convenience.

Commitment to working with Defence on export controls

The University of Sydney was involved extensively with the governmental and parliamentary processes that led to the passage of the *Defence Trade Controls Act 2012* (DTC Act).¹ We stayed closely engaged with the DTC Act's implementation in the early years, with our then Deputy Vice-Chancellor (Research), Professor Jill Trehwella, representing the sector on the *Strengthened Export Controls Steering Group*, which oversaw the DTC Act's implementation between 2012 and 2015. We engaged significantly in the first independent statutory review of the DTC Act, completed by Dr Vivienne Thom AO in 2018, and released by the Government early in 2019.² We made two submissions to Dr Thom's inquiry in 2018 and another, in February 2020, at her request and in collaboration with other NSW universities. This followed our participation in targeted consultations about implementation of key recommendations of the Thom Review relevant to universities. The issues we raised in those submissions remain relevant to, and inform, our perspectives on the Exposure Draft, and so we include our correspondence with Dr Thom in an attachment for context. This year, we have contributed to the Universities Australia and Group of Eight universities' submissions to the second 5-year statutory review of the DTC Act's operations and to Defence's related consultations on possible legislative 'exemptions' for the Australian higher education and research sectors. While concerned about the way Defence is consulting on the Exposure Draft Bill, we understand the pressure it is under to strengthen Australia's defence export controls framework to facilitate and support the AUKUS partnership. We are committed, as we have been since 2012, to working with Defence to develop solutions that are robust and workable.

¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_Implementation
² [Independent Review of the Defence Trade Controls Act 2012 | ADF Members & Families | Defence](#)

The AUKUS partnership and changed national security environment

The University of Sydney acknowledges the strategic and long-term significance to the Australian Government and Australia's national security of the AUKUS partnership announced in September 2021. We strongly support the efforts of the Australian, US and UK governments to create a licence-free environment to encourage and facilitate cooperation between industry, higher education and research sectors in these three countries. Lowering barriers to technology transfer and skills development between AUKUS partners will help speed up R&D and innovation arising from collaborations between organisations and individuals in the US, UK and Australia. We also recognise that the geopolitical and national security environment facing Australia has changed significantly since the DTC Act commenced in 2012 and that there are important gaps in the DTC Act's scope which need to be addressed to give the US and the UK the confidence to share sensitive technology with Australia, its companies and research institutions. Nevertheless, the development of legislation of such potential significance, greater complexity in institutional application and with such severe penalties for proven offences, should not be rushed. This is particularly so, given that many of the changes proposed in the Exposure Draft Bill respond to recommendations from the first independent review of the DTC Act's operation, completed more than five years ago,³ and with two other highly relevant reviews still to report.⁴

How the proposed Exposure Draft Bill may affect the University of Sydney

Based on information available to us to date, our initial assessment of the proposed changes is that, if enacted as proposed, and if the Government does not replace the 'Basic scientific research' definition in the DSGL with a broader 'Fundamental research' definition based on those included in the relevant US export control regulations,⁵ the proposed changes are likely to have significant consequences for the missions, international competitiveness and practical operations of Australia's universities.

Perhaps most significantly for universities, in response to the key findings and recommendations of Dr Vivienne Thom's independent review of the DTC Act, the Exposure Draft Bill proposes to extend the DTC Act's scope to also cover 'supplies' of DSGL technology, as well as certain 'goods' and 'services' to a 'foreign person' (effectively a person from any country other than the US or UK once the new framework is in place) that occur within or outside Australia. Currently, the DTC Act only regulates supplies of DSGL technology from a person in Australia to a person outside Australia.

The practical effect of the proposed regulation of 'in-country' supplies of DSGL technology is that for their faculties, schools, institutes and centres engaged in research and teaching involving DSGL goods, technologies or services that are not covered by one of the existing or proposed new DTC Act exemptions/exceptions we understand Defence is considering, universities may need to introduce systems and processes that involve an unprecedented level of monitoring of their employees, affiliates, research students and academic visitors, and their interactions with citizens of all foreign countries other than the US and UK. They will need to do this to make assessments on an ongoing basis of whether proposed activities may require notification to Defence Export Controls for the purpose of determining whether a permit is required.

Depending on the exemptions/exceptions that will be available, there could also be significant consequences during the transition to the framework for Australian university research programs and their personnel. For example, Australian universities currently have thousands of foreign staff and

³ <https://www.defence.gov.au/business-industry/export/controls/export-controls/independent-review-dtc-act-2012>

⁴ <https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-act-2012> and Department of Defence consultations: *Consideration of legislative exemptions for the higher education and research sectors*, August – October 2023.

⁵ **Australian Definition.** Defence and Strategic Goods List 2021 Division 4 – Definitions: "Basic scientific research" (GTN NTN ML22) means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective. **US Definitions: ITAR § 120.34 Fundamental research** is defined to mean **basic and applied research** in science and engineering where the resulting information is ordinarily published and shared broadly within the scientific community, as distinguished from research whose results are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. **ITAR § 120.43 Basic research** means a systemic study directed towards greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not include applied research. **ITAR § 120.43 Applied research** means a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements. **EAR § 734.8 (c) Fundamental research** means research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons.

research students (not from the US or UK) who are already legally in Australia and working or studying in Australian universities in areas with exposure to DSGI goods and technology. When the Defence Trade Controls Act was introduced in 2012 and the Autonomous Sanctions Act in 2011, the Government recognised the need for transition periods. A similar approach will be required to Defence's implementation of its proposed changes, yet there is no indication of transition arrangements in the Exposure Draft Bill.

Our experience with administering the United Nations and Australian Autonomous Sanctions regimes tells us that monitoring transfers to employees, students, visiting scholars and affiliates based within Australia would be a resource-intensive undertaking if it were to be done at scale. It will take us and other universities time to gather data to accurately predict the scale of the likely compliance requirements but, depending on the detail of the exemptions we understand Defence is considering separately from its amendments to the DTC Act, we could easily be talking about many thousands of visits/engagements with foreign persons each year, just at the University of Sydney. Focusing on targeted high-risk technologies and specific identified projects might be more manageable. Measures to fully or partially close this gap would certainly need to be piloted to allow the resource requirements, costs and impacts on the normal operations of universities to be assessed.

The principle of 'no disadvantage' for Australian universities, researchers and firms compared to their counterparts in the US and UK

It is impossible for us to assess, in the time available and without access to full information about exemptions/exceptions, the equivalency of what Defence is proposing compared to what universities and researchers face in the US and UK. **The basic policy principle that should be applied to the entirety of Defence's new export controls framework is that Australian researchers and research institutions should face controls that are no more restrictive to international collaborations than those applied to their colleagues and counterpart institutions in the US and UK.** Past experience with the DTC Act suggests making such comparisons is time consuming and difficult, and will require genuine cooperation and openness between Defence and the sector.

Concerns about gaps in Defence's policy processes

We note that a key recommendation of Dr Vivienne Thom's 2018 review (addressing the need to fill gaps in the DTC Act's controls, including 'supplies' that occur within or outside Australia) stressed that: 'To ensure that any amendment does not unnecessarily restrict trade, research and international collaboration, the legislative proposal should:

- ensure all decisions are targeted and based on risk-related consideration of the technology being supplied, the end user and the end use.
- contain measures to ensure transparency and scrutiny of decisions.
- limit additional uncertainty, complexity and risk of inadvertent breaches.
- minimise any increased compliance costs.'

We are aware of no consideration by Defence of targeted and risk-based options available to it to address the regulatory gaps identified in Dr Thom's review. Moreover, there is nothing in the Explanatory Memorandum to the Bill to suggest that Defence considered options that would limit uncertainty, complexity and the risk of inadvertent breaches, or minimise increased compliance costs. We have also had no visibility, since 2020, of the work of the DTC Act Review Implementation Working Group, which the government committed to establishing in 2019. There is one mention of it on a Defence website:

'In 2020, Defence established the DTC Act Review Implementation Working Group, chaired by Dr Vivienne Thom, consisting of government, industry, research and university representatives to develop practical risk-based proposals to inform Defence proposals to reform the legislation. The Working Group met for the first time in April and is expected to meet again in late 2020.'⁶

In a letter to the NSW Vice-Chancellors' Committee on 1 May 2020 (see top of **Attachment**) Dr Thom advised that the Implementation Working Group met on 7 April 2020, when it considered matters including the following:

⁶ [Independent Review of the Defence Trade Controls Act 2012 | ADF Members & Families | Defence](#)

- Various amendments to the supply provision of the DTC Act, including the introduction of a control on in-country transfers. This came from recommendation 4 of the Review, which identified the locational limitation of the existing provision that created a gap in the legislation. Through thorough consultation, Defence will put proposals for a control to Government that are risk-based and targeted on transfer activities within and outside of Australia.
- Use of Technology Control Plans (TCP), an agreement which would give entities a broad permit covering the scope and duration of a project or program to provide greater certainty and reduce administrative overheads.
- The need for proposals to be coordinated with other government initiatives, including with regard to sensitive technologies.
- The process of improving upon existing and developing new guidance material, online support and outreach and engagement activities to support universities and research organisations to undertake periodic reviews of their compliance and development of new projects and technologies.

Universities and other stakeholders need to know how the Implementation Working Group's ideas contributed to the approach now proposed in the Exposure Draft Bill. For example, from our review of the Exposure Draft Bill it is difficult to see evidence that the proposed new controls have been designed to be risk-based. Nor is there any evidence that the idea of Technology Control Plans (which we view as an important potential way to make the new in-country transfer regime workable for universities) has been progressed. If the Working Group did not continue, stakeholders deserve to know how Defence has progressed its work on implementation.

We also see no evidence in the Explanatory Memorandum to the Bill that Defence has followed the Australian Government's updated guidance to Commonwealth agencies and their staff on its expectations regarding policy impact analysis as a critical component for good policy development. The Australian Government Guide to Policy Impact Analysis, released March 2023, states at p.7:

The Government is dedicated to evidence-based policy development and decision-making processes... every policy proposal – regardless of whether impacts are positive or negative – must be subject to an appropriate degree of Australian Government Policy Impact Analysis. Impact Analysis is a factual assessment of a given issue; it is not a document designed to critique or praise a particular policy... **Every policy option must be carefully assessed, its likely impact costed and a range of viable alternatives considered in a transparent and accountable way against the existing arrangements. Robust evidence is critical to the Impact Analysis process. Relevant data that is available (as well as relevant data that is not available) must be identified. Where relevant data is not available, explanatory information must be provided. As robust data underpins evaluation, the evaluative process in the final report must set out a plan to close any data gaps that remain in the post-implementation phase.**⁷

Despite our and the sector's repeated offers (**see Attachment**) to work collaboratively with Defence to identify and assess available options for addressing the gaps in the DTC Act identified by Dr Thom's review, we are not aware of any such work occurring since our engagement with Dr Thom in early 2020. The Exposure Draft of the Bill therefore appears to have been released before other key steps in the policy development process have been completed, in defiance of the Department of Prime Minister and Cabinet's updated guidance for policy impact analysis.

Attachment University of Sydney and other relevant submissions and correspondence concerning the 2018 review of the DTC Act

⁷ https://oia.pmc.gov.au/sites/default/files/2023-05/oia-impact-analysis-guide-march-2023_0.pdf



Australian Government
Department of Defence

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Professor Paul Wellings CBE

Convener, New South Wales Vice-Chancellors' Committee
Cc Ellen Goh, Executive Officer
NSW Vice-Chancellors' Committee
C/o University of Wollongong
Wollongong NSW 2500

Dear Professor Wellings,

RE: DEFENCE TRADE CONTROLS ACT REVIEW CONSULTATIONS

Thank you for your recent correspondence.

I regret the delay in responding to Professor Ivison's initial correspondence, which was misdirected. I am aware of the substantive issues that were raised in the letter from Professor Ivison and reiterated in your correspondence from 16th April 2020. With the Department of Defence's assistance, I am able to provide you with the following information.

Since the consultations in late 2019, Defence has established the DTC Act Review Implementation Working Group ('Working Group'), which I chair. The Working Group includes representatives from Defence, other relevant government agencies, industry, small to medium sized enterprises and the research and academic sector. The research and academic sector is represented by Ms Catriona Jackson and Professor Chris Moran from Universities Australia, Ms Vicki Thomson of Group of Eight and Ms Kylie Emery from the Australian Research Council. Mr Cameron Ashe, Deputy Coordinator of National Counter Foreign Interference at Department of Home Affairs is involved in order to ensure coordination with the University Foreign Interference Taskforce (UFIT).

In accordance with the Government's commitments, the Working Group will advise on how to develop practical, risk-based legislative and non-legislative proposals to amend the DTC Act, and enhance Government's ability to prevent the transfer of defence and dual-use technology to entities that may use it in a manner contrary to Australian interests or who are acting on behalf of a foreign power.

The first Working Group meeting took place on 7 April 2020 and considered proposals to remediate the supply and brokering provisions and enhance Defence's outreach capabilities.

Working Group representatives undertook to their respective constituent bodies on the first proposals.

Several of the issues raised in your letter were noted at this first meeting and will continue to be considered as policy proposals are developed. To preserve the efficacy of the Working

Group and its processes, I will not elaborate extensively on the issues in your letter other than to note the Working Group's recent consideration of the following matters:

- Various amendments to the supply provision of the DTC Act, including the introduction of a control on in-country transfers. This came from recommendation 4 of the Review, which identified the locational limitation of the existing provision that created a gap in the legislation. Through thorough consultation, Defence will put proposals for a control to Government that are risk-based and targeted on transfer activities within and outside of Australia.
- Use of Technology Control Plans (TCP), an agreement which would give entities a broad permit covering the scope and duration of a project or program to provide greater certainty and reduce administrative overheads.
- The need for proposals to be coordinated with other government initiatives, including with regard to sensitive technologies.
- The process of improving upon existing and developing new guidance material, online support and outreach and engagement activities to support universities and research organisations to undertake periodic reviews of their compliance and development of new projects and technologies. I understand that Defence has approached Universities Australia and the Group of Eight with proposals for outreach to ensure that Defence Export Controls' technical resources are allocated to the areas of greatest need.

I thank you for bringing the issues in your letter to my attention. I encourage you to work collaboratively with the university and research representatives on the working group as the process continues to ensure a thorough exchange of ideas.

Yours sincerely,



Dr Vivienne Thom AM

Chair, Independent Review of the *Defence Trade Controls Act* (2012) Implementation Working Group

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1 May 2020

New South Wales Vice-Chancellors' Committee

Committee Convener
Professor Paul Wellings CBE
Vice-Chancellor and Principal
University of Wollongong

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16 April 2020

Dr Vivienne Thom
Independent Consultant
C/O Department of Defence
By email: DTCAct.consultation@defence.gov.au

Dear Dr Thom

DEFENCE TRADE CONTROLS ACT REVIEW CONSULTATIONS

This correspondence is written on behalf of the NSW Vice-Chancellors' Committee (the Committee), representing the thirteen universities in NSW and the ACT, in relation to the abovementioned matter.

On 4 February 2020, representatives from several of our universities wrote to you regarding the consultation session held in Sydney on 20 November 2019 with members of the Defence Export Controls Office (DEC), the universities and other NSW research institutions regarding your independent review of the Act.

The Committee adds its support to the suggestions outlined in the letter dated 4 February 2020, specifically:

1. The establishment of a Steering Group, comprising DEC officials and university representatives, as well as a Consultation Group of university representatives.
2. Collaborative piloting of any proposed new control measures to test their effectiveness and cost before such measures become law.
3. Focussing on targeted high-risk technologies and identified projects for monitoring in relation to intra-country transfers of controlled technology and software.
4. Ongoing consultation regarding the Defence Strategic Goods List, and an Advanced Notice of Proposed Rule Making system to manage new technologies impacted by national security interests.
5. Assistance to identify potential military use of intangible technology and support for early identification by Universities for other uses of developing intangible technology.
6. Sufficient Commonwealth resourcing for successful implementation of any changes.

The Committee strongly encourages you to consider and take up the suggestions outlined above.

Our universities are grateful for the ongoing opportunity to work with you and other stakeholders and we are available to explore these suggestions in further detail. If you would like to meet with the NSWVCC Deputy Vice-Chancellors (Research), then please contact the Executive Officer for a mutually convenient time.

We look forward to hearing from you.

Yours sincerely



Professor Paul Wellings CBE
Convener, New South Wales Vice-Chancellors' Committee

Cc NSWVCC members
NSWVCC Deputy Vice-Chancellors (Research)

NSWVCC MEMBERS:

Australian Catholic University • Australian National University • Charles Sturt University • Macquarie University • Southern Cross University
University of Canberra • University of Newcastle • University of New England • University of New South Wales • The University of Sydney
• University of Technology, Sydney • University of Wollongong • Western Sydney University



THE UNIVERSITY OF
SYDNEY

Duncan Ivison
Deputy Vice-Chancellor (Research)

4 February 2020

Dr Vivienne Thom
C/o Department of Defence

By email: DTCAct.consultation@defence.gov.au

Dear Dr Thom,

Defence Trade Controls Act Review consultations

I write on behalf of the Deputy Vice-Chancellors (Research) of the University of Newcastle, the University of Technology Sydney, the University of New South Wales, and the University of Sydney.

Representatives of our universities greatly appreciated the opportunity to meet with you, Danielle Tuckfield, other colleagues from the Defence Export Controls Office (DEC) and staff from other NSW research institutions in Sydney on 20 November 2019. My colleagues and I understand that the consultation session involved a very useful discussion about the gaps in Australia's defence export controls identified through your comprehensive independent review, and about the potential means by which these gaps might be closed effectively.

Our universities are grateful for the ongoing opportunity to work with you and other stakeholders to develop new measures to address the key areas of risk you have pinpointed.

We appreciate the commitment that the development of regulatory reforms will be undertaken within a framework that preserves the ability of Australian universities to freely conduct world class research and to collaborate on an equal footing with overseas institutions.

We also welcome the Department's acknowledgment of, and continued support for, the key values and behaviours which drive the success of Australian universities domestically and internationally: free intellectual inquiry, international collaboration, publication and dissemination of research findings.

We note with thanks the Department's recognition that any changes will be considered and proportionate and not unduly impact on the operations of universities, or impose significant costs in terms of money, time or other resources.

We have set out below some ideas arising from the Sydney consultation session for your consideration and, we hope, further exploration with you and DEC at your convenience.

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1. Steering Group and Consultative Group

We note that the Australian Government – in its response to your Independent Review – committed to establish such a group. However, we understand that at the Sydney consultation session on 20 November DEC staff advised that Defence was not proposing to establish such a body. We strongly support the formal establishment of a collaborative Steering Group/Working Group including Defence officials and senior and experienced individuals with an understanding of the University sector. This group would provide ongoing high-level advice to the Department and oversee the conduct of pilots at participating universities (see below).

We also think consideration could be given to establishing a Consultative Group of university representatives, which would address the more operational issues of any pilot and resulting changes and serve as a coordinating and communication body.

Of course, in constituting any such groups, care would need to be taken to ensure alignment and coordination with the University Foreign Interference Taskforce and its various Working Groups if they are to continue to function.

2. Collaborative piloting of new control measures before legislation

Regardless of the nature of the new controls that may be sought to be introduced, in our universities' view, the most important step to be undertaken in the University sector is to trial potential regulatory options for a period of at least eighteen (18) months, with:

- a defined series of objectives;
- a defined set of agreed impacts to measure;
- consultation with universities on a six-monthly basis during this period about issues and the impacts (including unintended impacts) arising from implementation, improvements/changes required and what aspects are achieving the stated objectives; and
- an independent review (which might possibly be led by you) at the end of the Pilot period, the results of which proceed to consultation between the University sector and the Department.

The Defence Trade Controls Act implementation pilots conducted from 2013 to 2015 proved particularly useful as they highlighted certain unanticipated outcomes, including the fact that the majority of publications of potential concern did not involve controlled technology. We feel strongly that conducting a new set of pilots would provide some clarity in areas for which we currently have only anecdotal indications of potential outcomes.

We are also of the view that pilots would allow universities to scope the resources required and the costs involved for universities to implement any proposed initiatives. Two good recent illustrations where the cost and resource implications have been much higher than anticipated are the administration of the United Nations Sanctions and Autonomous Sanctions within research-intensive universities. These institutions employ large numbers of staff, appoint affiliates, receive visitors from sanctioned countries and conduct extensive international visiting scholars' programs. Assessing individuals and their research (which can be quite dynamic) requires the time of many personnel. If fully costed, the resource impact would be enormous.

Our four universities would be happy to consider participating in a pilot of one or more new regulatory options. We are confident that other universities in NSW and other jurisdictions would also be willing to contribute to the testing of new regulatory proposals before any proposed legislative amendments are finalised.



3. Intra-country transfers of controlled technology and software

The Australian university sector has for many years recognised that intra-country transfers of intangible technology could be a cause for concern. The sector raised this issue during consultations on regulatory options when the Defence Trade Controls Act was being considered by the Parliament in 2012. However, the Government at that time elected to legislate a model that permitted intra-country transfer on grounds including that the DTC Act would work in concert with Australia's visa and immigration system to protect national security.

Our experience with administering the United Nations and Australian Autonomous Sanctions regimes tells us that monitoring transfers to employees, students, visiting scholars and affiliates based within Australia would be a resource intensive undertaking if it were to be done at scale. Focussing on targeted high-risk technologies and specific identified projects might be more manageable. Measures to fully or partially close this gap would certainly need to be piloted within to allow the costs and impacts on the normal operations universities to be assessed.

4. New and emerging technology

We acknowledge that the Defence Strategic Goods List (DSGL) is unable to keep pace with technological developments and that there are intangible technologies for which Australia's national security interests require the consideration of some controls. The absence of a clearly accessible description of technology under consideration does not assist us in identifying research groups at our universities that might be impacted. In the United States, a consultation (presumably still underway) commenced in November 2018 with the issue of an advance notice of proposed rulemaking (ANPRM) seeking public comment on criteria for identifying emerging technologies that are essential to the United States' national security interests. The ANPRM clearly identified, in very broad terms, the emerging technologies of potential concern under consideration by the United States.¹ Developing a similar notification for Australia, even on a confidential basis, would be helpful for understanding how Australian universities might be impacted by the participation of overseas collaborations, international visiting scholars and postgraduate students. We could, for example, conduct some meaningful analysis, which might make our contribution to future discussions more helpful.

5. Potential military use of intangible technology

We understand that this is also a gap that may need to be addressed. Many of our researchers have limited conception of the potential military applications for which their technology could be repurposed. A significant amount of support from the Department would need to be provided for a university to even attempt initial identification of any likely uses. This is an area that we are not equipped to deal with currently, although we do make inquiries when we are considering applications under the DTC Act.

6. Possible changes to the permit regime

Our universities are open to piloting initiatives like multi-year technology control plans, subject to discussion of their scope, duration, and how they would be applied. We would also be open to more flexible permits, noting that flexibility often comes with additional administration costs. Again, it would be important to pilot any proposed new measures in order to assess effectiveness, cost and impacts.

¹ <https://www.federalregister.gov/documents/2018/11/19/2018-25221/review-of-controls-for-certain-emerging-technologies>



7. Commonwealth resourcing

We understand that there have been significant improvements in permit processing times and the amount of useful resources provided by the Australian Government. Any changes arising from this consultation will require even further support from the Commonwealth via its website and contacts in the Department. This will be essential to any successful implementation – as you are aware from our previous experiences – and will require some further financial commitment from the Government.

Looking forward

In closing, we appreciate the efforts at engagement with the NSW research community that you are leading with colleagues from Defence Export Controls. Our staff are also appreciative of DEC's assistance helping us comply with legislation that is sometimes challenging to implement.

We appreciate the opportunity to participate in the consultations and to work with Defence to respond to identified needs to close gaps that are likely to compromise Australia's national security.

We are keen to work with you and DEC to develop legislative and policy responses that are proportionate to the risks, and which do not undermine our universities' basic values of freedom of academic inquiry and the ability to successfully pursue collaborative research with leading international research institutions.

We would be most grateful if we could meet with you and DEC staff early this year. Such a meeting could potentially take place as part of the first regular meeting of the NSW and ACT universities' Deputy Vice-Chancellors Research Committee, scheduled for the afternoon of 9 March at Macquarie University.

I chair the NSW (&ACT) universities' Deputy Vice-Chancellors Research Committee and would be your first point of contact to organise such a meeting:
duncan.ivison@sydney.edu.au, 02 8627 8150, 0411 735 063.

Yours sincerely,

(signature removed)

Duncan Ivison

Also on behalf of:

Professor Kevin Hall, Senior Deputy Vice-Chancellor & Vice-President Global Engagement & Partnerships, The University of Newcastle

Professor Glenn Wightwick, Deputy Vice-Chancellor of Innovation and Entrepreneurship, The University of Technology Sydney

Professor Nicholas Fisk, Deputy Vice-Chancellor (Research), The University of New South Wales



Duncan Ivison

Deputy Vice-Chancellor (Research)

16 July 2018

Dr Vivienne Thom AM
Independent Review of the Defence Trade Controls Act 2012 (Cth)
DTC Act Review Secretariat
R1-3-A003B
PO Box 7901
CANBERRA BC ACT 2600

By email: dtcact.review@defence.gov.au

Dear Dr Thom,

Supplementary submission to the Independent Statutory Review of the Defence Trade Controls Act 2012 (Cth)

Thank you for the opportunity to provide a supplementary submission in response to the suggestions by some stakeholders that the Defence Trade Controls Act 2012 (**Act**) is not meeting its national security objectives. We have read other stakeholders' submissions, including those from the Department of Foreign Affairs and Trade (**DFAT**) and the Department of Defence (**Defence**). The significant issues identified by Defence and its various recommended changes to the Act warrant a further response from the University of Sydney to complement the comments we understand Universities Australia and the Group of Eight universities will make on behalf of their respective members.

We support and cooperate with the Australian Government in its efforts to control access to new and emerging technologies to protect national security and maintain Australia's capability-edge with respect to unique technologies developed by Australia and its allies. Many of our researchers contribute to the development of these technologies, including in collaboration with Defence and Australia's allies. However, it is essential that any expanded controls on technology transfers necessary to safeguard security are applied within the risk-based framework currently built into the Act. Additional controls should not be legislated and implemented in ways that negatively impact the ability of Australian universities and other research organisations to develop new technologies and contribute to the expansion of Australia's research capability.

Defence's submission, while citing a changing global security landscape as its basis, provides limited guidance on the nature of the recent changes to the national security environment it believes necessitate what appear to be quite fundamental proposed changes to the Act. We are disappointed that Defence appears to have waited until this review to raise concerns that the Act is no longer fit-for-purpose, producing apparently well-developed proposals for change that would have significant implications for Australian universities' research and associated education activities.

However, we acknowledge and welcome Defence's assurances in its submission that any eventual changes to the Act will be developed in consultation with affected groups. We hope that during the review process the university sector is provided with further details about the reasons behind Defence's proposed changes. We look forward to working with Defence and all other stakeholders to ensure Australia's system of controls over dual use technology is both fit-for-purpose and proportionate in terms of the compliance burden it imposes and any impact it may have on Australia's research capability.



As a large and globally engaged research-intensive university, our concerns about Defence's recommended changes to the Act are outlined below.

Regulatory transparency and certainty

Together the Act and the DSGL provide organisations and individuals with certainty about which technologies and activities associated with them are controlled. As part of the legislative framework, the DSGL is subject to Parliamentary oversight. The Defence submission seeks powers to implement further controls (transfer of currently uncontrolled technology within and outside Australia, and publication) which will reside outside the framework provided by the DSGL.

We understand that Defence is seeking increased controls over the publication of research findings (including prepublication peer review and editing activities) involving DSGL Part 2 (dual use) technology (Recommendation 3) and address these proposals separately below.

The arbitrary nature of the powers Defence is seeking and the potential for arbitrary use of these powers without notice would remove the certainty the current legislative framework provides. This would impact negatively the ability of this University to deliver on its mission of conducting high quality research and providing internationally competitive educational experiences for higher degree by research (HDR) and other students.

We have seen no evidence suggesting the current regulatory scheme is ineffective, based as it is on co-operation between the Government and stakeholders, which is founded on clear and transparent rights and obligations set out in the Act and the DSGL. Moreover, this Act represents but one element of a suite of mechanisms that are meant to work together to protect national security, including the Autonomous Sanctions Act 2011 and regime and Australia's border security controls designed to prevent to entry into Australia of people who present a risk to national security. If it is Defence's assessment that Australia's system of border security is failing, by allowing entry by people of concern who may then be gaining access to DSGL and other emerging sensitive technology while here, evidence that this is occurring should be produced and consideration should be given to as to whether amending the Defence Trade Controls Act 2012 as proposed is the most effective way of addressing this threat.

Publication controls

Scholarly dissemination of research outcomes is a fundamental aspect of successful research and the global reputation of our universities. The results of the Strengthened Export Controls Publication Pilot (2013-2015) clearly demonstrated the extremely low risk of disclosure of controlled technology should Part 2 DSGL technology be exempted from the publication permit requirement. We do not believe that the risk profile has changed since the completion of the pilot. We are also not convinced that the extension proposed by Defence to the current controls regime can eliminate all risks, which would appear the intention. Defence's proposed controls over Part 2 DSGL technology will potentially damage Australian universities' ability to pursue research with potential dual use technologies and to disseminate results through publication. Combined with the additional controls proposed by Defence on the publication of sensitive emerging technology, and subject to further details being provided by Defence about how the new publication controls would operate, the proposed changes may have the following negative impacts on Australian university research:

- Researchers may be less likely to conduct research in areas where there is a risk they may be unable to publish. This will potentially constrain our research capabilities in a range of ways. Publication is critical to securing research funding and participation in collaborations with leading international research groups. These opportunities could be adversely affected by such legislation.
- Universities may be less likely to be able to advise their researchers as to the likelihood or not as to whether they will be able to publish. The current controls and the DSGL provide that certainty. The introduction of controls on sensitive emerging technology, which may not be able to be disclosed



to universities in a timely or transparent way, will remove their ability to advise with a degree of confidence.

- Talented domestic and international researchers, including HDR students, may be dissuaded from pursuing studies and subsequent research careers in Australia due to uncertainty about the ability to publish research outcomes. Australia has difficulty in attracting and retaining sufficient talented researchers already without the added burden of uncertainty surrounding publication and collaboration.

Collaboration

Collaboration is essential to successful research. Complex research designed to address pressing current problems is frequently conducted through international collaborations, which are multi-party and multi-disciplinary in nature, requiring personnel with varied skill sets and problem-solving approaches. Collaboration to achieve successful research outcomes requires timely and good quality publication of research results and clear understanding about the circumstances in which technical information and technology can be shared between research partners and published as results become available.

Australian researchers rely on international collaborations to provide access to first-rate expertise, equipment and facilities and the exponential capabilities provided by a large group of the very best people in their field working together. It is essential for the future of research in Australia that researchers based here can collaborate with international consortia with certainty about applicable controls, which Defence's proposals appear to undermine. These factors may influence potential international public and private sector collaborators removing Australian universities from consideration for admission to collaborations.

Expansion of the regulator's powers

The University views the increased entry, search and seizure powers Defence is seeking to be excessive and not warranted by the circumstances. The current powers in the Act are sufficient for the purposes of gathering evidence of breach and prosecuting breaches of the Act. Any expansion of current powers in the Act would have the potential to result in decisions and actions unaccompanied by explanation and not subject to Parliamentary oversight. It is unclear if any rights of judicial review or appeal would apply to any decision or actions taken by Defence as the regulator.

Impact of uncertainty on Australia future research capability

Australian universities have been successful in building Australia's research capabilities, often aided by funding from the Commonwealth and states, but also with significant contributions from domestic and international commercial partners and researchers. Defence's proposal that it be authorised to create a new regulatory framework sitting outside the DSGL by which it may, on a case by case basis, control the transfer of technology, which may or may not be listed on the DSGL, as well as control the publication of technology, would only serve to create a significant level of uncertainty for Australian research organisations, their current and prospective researchers and research students. If this occurs, it is likely to impact the ability of Australian research organisations and researchers to conduct research for the public good, make Australian researchers less attractive research partners for some current and potential future international collaborators and reduce the competitiveness, capability and impact of Australia's research effort.

We look forward to assisting you with this important review and thank you once again for the opportunity to make a supplementary submission.

Yours sincerely,

(Signature removed for electronic distribution)

Professor Duncan Ivison

Deputy Vice-Chancellor (Research)



Duncan Ivison

Deputy Vice-Chancellor (Research)

31 May 2018

Dr Vivienne Thom AO
Independent Review of the Defence Trade Controls Act 2012 (Cth)
DTC Act Review Secretariat
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By email: dtcact.review@defence.gov.au

Dear Dr Thom,

The University of Sydney welcomes the statutory review of the operation the Defence Trade Act 2012 (Cth) as amended in 2015 ('the Act') and appreciates the opportunity to provide feedback on issues covered by the review's terms of reference.

From 2012 to 2015 the University of Sydney worked closely with the Department of Defence, the Chief Scientist, Chief Defence Scientist, the Chief Executive of the Australian Research Council, other universities, public and private research organisations and other stakeholders on implementation of the Act to:

- review the impact of the legislation on research activities in Australia;
- establish a publication review which resulted in publications of *Defence and Strategic Goods List 1996 (DSGL) Part 2 Dual-Use Goods & Technology Research* without a permit (unless a military end-use is specified in the publication); and
- effect suspension of the offence provisions for an implementation period.

Those initiatives, along with the inclusion of review provision in section 74B of the Act were the result of a fruitful collaboration between stakeholders and the Government and we are pleased to participate in this review to help ensure the Act is an effective component of Australia's national security laws, which does not unnecessarily restrict trade, research and international collaboration.

Our comments in response to the questions raised by the review are as follows.

Whether the Act is fit for purpose

The University views the Act as currently providing sufficient controls to prevent the intangible supply or publication of DSGL technology and brokering of DSGL goods and DSGL technology to stem the proliferation of military and dual-use goods and technologies.

Whether there are any gaps in the Act's controls

In the course of applying the provisions of the Act, we have not identified any gaps in the technology specified in the Defence and Strategic Goods List. As we have discussed with Defence Export Controls (DEC) on a number of occasions, we believe that some of the controls in Part 2 of the DSGL lack clarity, while some controls exceed the parameters and characteristics intended to be controlled.



Those specific controls could be narrowed or brought up to date with developments in technology and we would be happy to provide further details and examples as required.

Whether any unintended consequences are resulting from the Act's controls

In the range of research projects we have reviewed thus far in the context of applying for an assessment or seeking a permit, we have not observed any unintended consequences resulting from the Act's controls. We do note the cost of compliance and certain anti-competitive effects, which we discuss in the paragraph below.

Any other matters considered relevant.

Industry, university and other research consultation group

The University suggests that the Government consider incorporating a provision in the Act, which provides for a structured and continuing communication between the Government and representative experts from the industry, university and wider not-for-profit research sectors required to comply with the legislation. We recommend that the review consider re-establishing a group similar to the Strengthened Export Controls Steering Group, which was established in 2012 to advise and assist the Department of Defence on practical implementation issues during the transition period.

While the purpose of the reviews conducted under s74B of the Act allows parties to discuss issues regarding implementation and operation of the legislation, reconstituting such a group would provide a valuable ongoing forum for consultation on the impact of the Act and for the ongoing identification and resolution of administrative issues.

Section 74B

Technological developments in areas that are the subject of controls are fast changing, as is the geopolitical climate. In this environment we feel that the five-year period mandated for subsequent reviews is too long. The University would like to see this period reduced to three years.

Considerable cost of implementation in a research-intensive university

The University of Sydney has several thousand researchers who are employees, visitors, affiliates or higher degree by research students and we conduct a wide range of research across many disciplines.

Although the University has so far only found it necessary to apply for a limited number of permits, we have had to devote considerable resources to working with specific researchers (subject matter experts) to decide whether the goods or technology involved should be assessed by DEC as controlled technology, or that an application for a permit should be made.

The impact of the compliance obligation the Act and other national security legislation (Autonomous Sanctions and United Nations etc) imposes remains considerable and is certainly greater than the burden placed on corporations and other organisations with narrower and less distributed research activities. This places the University at a significant competitive disadvantage as we are required to devote far greater resources to Defence Trade Controls and other national security education, intra-Faculty systems, assessment and compliance.

While we do not have precise estimates of the total time and financial costs the University incurs annually complying with the Act's requirements, at least eight legal and administrative staff are involved on a weekly basis. Compliance also requires the investment of significant time by the researchers and Faculty support staff reviewing activities against the DSGI and the Act's export control requirements. Of course, whenever researchers and other staff must dedicate their time to legislative compliance there are opportunity costs. It is therefore critical that the legislation and supporting administrative processes are proportionate to the risks involved and as simple, streamlined and efficient as possible.



The greater resources and efforts which this University and similarly-sized research-intensive universities devote to compliance is supported by the considerable assistance which DEC staff provide. We cannot speak highly enough of the support DEC officers provide through this process.

Development of the Online DSGL Tool

The University appreciates the Department's efforts developing guidance materials, which have proved to be most useful for our compliance staff and academics dealing with the export controls regime. The development of the Online DSGL Tool has also been a welcome initiative. The Tool is a helpful starting point for our staff. It also serves as a useful cross-check at the end of our review of a specific research activity. For example, the Tool provides greater ease of use by providing the General Technology Note and the General Software Note immediately adjacent to the relevant items.

The University believes that the Tool could be developed further to make it even more useful and we would be happy to make suggestions, although that is outside the scope of this review.

I would be pleased to host you for a campus visit to meet with staff responsible for our compliance, education and training activities relating to the Defence Trade Controls Act and other national security laws. We would also be happy to arrange for you to meet with some of our academic staff and affiliates who have first-hand experience dealing with Australia's and other nations' export control regimes covering the intangible supply, publication and brokering of defence and strategic goods and technology.

We look forward to engaging with you and the review team over the coming months.

Yours sincerely,

(signature removed)

Professor Duncan Ivison
Deputy Vice-Chancellor (Research)