UNIVERSITIES AUSTRALIA

DISCOVER LEARN LEAD

Submission to the Senate Committee on Foreign Affairs, Defence and Trade (FADT) – Defence Trade Controls Bill 2011

3 October 2012

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Summary / Key Messages

1. Universities Australia has significant concerns about the effect that the proposed *Defence Trade Controls Bill 2011*, as currently framed, will have on Australia's research capacity and the social and economic benefits that flow from it. Universities Australia cannot support the Bill In the absence of a proper Regulatory Impact Assessment (RIA) having been conducted.
2. Should the Parliament choose to proceed with the Bill, however, Universities Australia supports amendments being incorporated that fully and accurately reflect the outcomes of the roundtable discussions led by the Chief Scientist, as the means for mitigating, at least partially, the risks to Australian research posed by the scheme.
3. The roundtable process addressed many of the concerns raised by universities and, if accurately reflected in the legislation, will result in significant improvements in legislation implementation and operation, to that originally proposed.
4. The Committee may wish to consider legal advice provided to the University of Sydney by White and Case (lawyers) of Washington DC, dated 2 October. The substance of this advice, if accepted, may assist the Government develop an alternative approach to defence trade controls that meet the terms of the Australia-United States Defence Trade Cooperation Treaty. The advice (at Appendix 3) suggests Australia could adopt a lighter and less costly regulatory model than that being proposed, that establishes an effective regime of export controls on dual purpose goods, with comparable restrictions to those that apply to researchers in the United States.
5. In the event that the legislation is passed, and the outcomes of the roundtable discussions incorporated, Universities Australia will continue to work constructively with Government and other stakeholders throughout the trial period, to ensure the legislation delivers on its objectives, and particularly to enhance our national security while protecting the nation's research interests.
6. Universities Australia expects that prior to completion of the minimum two year transition period, the legislation will be amended as required to reflect the evidence and findings of the trial.

Background

In November 2010 the Australian and US Governments re-affirmed their commitment to ratify the Australia-United States Defence Trade Cooperation Treaty, signed in 2007 by then Prime Minister John Howard and former President George W. Bush. Enabling legislation passed through the US Congress in September 2010. The Minister for Defence introduced the Defence Trade Controls Bill to the Australian Parliament in November 2011. The matter was referred to the Senate Committee on Foreign Affairs, Defence and Trade (FADT) on 22 November 2011. The Bill is in part to strengthen export controls under the Wassenaar Arrangement endorsed by Australia along with 40 other countries. It is this part of the Bill that impacts on universities.

The fundamental purpose of the Australia United States Defence Trade Cooperation Treaty is to reduce the administrative burden of export controls in respect of defence trade between defence industries in Australia and the United States. The US Congress imposed a condition on ratification that requires Australia to strengthen its controls on intangibles. Throughout the

process, universities have been working on developing approaches that are consistent with the Treaty and meet the objectives to strengthen controls on intangibles, without unnecessarily adding to administrative burden on researchers or constraining research and innovation.

The university sector has advocated changes to the Bill since early 2012 to protect Australian research interests. In June 2012 the Department of Defence released a paper, "Principles for Strengthened Export Controls" and UA provided an initial submission to the Senate Committee. This submission noted that the sector supports strengthening export controls for national security purposes, but warned against aspects of the Bill which would compromise research activity, place Australian researchers at a disadvantage relative to their counterparts overseas and add unnecessarily to their regulatory burden.

Following discussions with the Department of Defence to negotiate a workable compromise, Universities Australia (UA) advised the Senate Committee in August of the sector's disappointment with negotiations and outlined a number of specific concerns. The interim report of the Senate Committee of August 15 accepted UA's claim that consultation had been inadequate and more time was needed to enable outstanding issues to be resolved. The Senate Committee endorsed UA's recommendation that the Chief Scientist be invited to lead a roundtable consultation with academic and other stakeholders.

The roundtable process has concluded and the results have, we understand, been communicated to Ministers.

Introduction

This is the fourth submission Universities Australia (UA) has provided to the Senate Committee on Foreign Affairs, Defence and Trade in relation to the *Defence Trade Controls Bill 2011*[1]. UA appreciates the interest the Committee has shown in this serious matter and the approach it has taken in responding to the concerns raised.

Our strong advocacy on the matter reflects concern within the sector about the potential for the Bill to significantly constrain and damage Australia's research effort and outcomes, albeit unintentionally. We have a responsibility to the university sector and the broader community to protect Australia's world class research capability, and secure the benefits that flow from it.

There is an irony in that a Bill designed to support and reduce the administrative burden on defence trade has the potential to substantially increase the regulatory burden on a range of civilian innovation activities, with as yet an unknown effects, on research in health, agriculture, mining, manufacture and trade.

Throughout the process, Universities Australia has sought outcomes that are proportionate to risk and consistent with Australia's tradition of open scholarly inquiry. This does not imply that universities do not appreciate the critical importance of safeguarding national security. Indeed,

[1] Universities Australia provided written advice to the Senate Committee on 19 March 2012 and 7 August 2012, and provided a formal Submission in June 2012.

the university sector believes our position of supporting a vibrant and productive research sector is central to Australia's national well-being and security interests. Universities Australia supports the objectives of the legislation, which are two-fold:

a. to facilitate defence trade (which the fact sheet issued by the Department of Foreign Affairs and Trade indicates "…*is anticipated … will halve Australia's requirements for US export licences. This will create significant time and cost savings for Government and industry*"); and
b. to strengthen controls of disclosure of dual-use technology.....

It is the second of these points that is of most concern to the university sector.

Defence Trade Controls Bill Roundtable

The roundtable process

Recommendation 6 of the Committee's Preliminary Report (August 2012) endorsed the roundtable approach proposed by Universities Australia. Since the Committee delivered its preliminary report[2], the Chief Scientist, Professor Ian Chubb, has chaired a roundtable process to discuss the impact of the Bill on the innovation sector and how those impacts might be ameliorated. UA has been pleased to participate in the consultations and takes this opportunity to acknowledge and thank the Chief Scientist, the Defence Chief Scientist and other roundtable participants for their efforts to address these difficult issues[3].

The sector strongly asserts that consultation and a rigorous regulatory impact assessment (RIA) should be undertaken prior to the introduction of legislation. Within the constraints of the existing process, where this has not occurred, UA is of the view that substantial and positive improvements to the scheme have been made. If accurately reflected in the legislation, these provide the opportunity to reduce the risks associated with the Bill.

Notwithstanding the outcomes of the roundtable (discussed below), the sector remains concerned about the impact of the legislation. A number of our concerns relate to aspects of policy that were beyond the scope of the roundtable process. Should the Parliament pass amended legislation, the minimum two year transition period must enable outstanding concerns to be examined and addressed prior to the full impact of the legislation coming into effect.

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[2] *Foreign Affairs, Defence and Trade Legislation Committee's Preliminary Report on the Defence Trade Controls Bill 2011 (August 2012)*

[3] The Roundtable was chaired by the Chief Scientists, Professor Ian Chubb. The Ministers for Defence, Defence Material, and Defence Science and Personnel also appointed the Chief Defence Scientist, Dr Alex Zelinsky and Mr Ken Peacock to join the consultations on behalf of the Department of Defence. Universities Australia was represented by Dr Pamela Kinnear – UA Deputy Chief Executive, Professor Mike Calford – Chair of the UA Deputy Vice Chancellor/Pro-Vice Chancellor Research Committee; and an expert group led by Professor Jill Trewhella – Deputy Vice Chancellor, Research, and the University of Sydney. Representatives were also appointed by DIISRTE, CRC Association, ARC, NHMRC, Department of Health and Ageing, ANSTO, Australian Academy of Science, ATSE, ABARES, GRDC, DAFF, and Department of Defence.

Irrespective of how the legislation proceeds, Universities Australia will continue to work collaboratively and constructively with all stakeholders, noting that the process to date makes clear the need for comprehensive consultation to occur within and between sectors, including government agencies, to establish a workable, informed and effective system that addresses risks that may arise from research associated with dual use technologies.

Outcomes

The roundtable achieved welcome agreement with respect to procedural concessions to mitigate risks associated with legislating in the absence of a thorough assessment of the scope of activities to be captured by the Bill. As the Explanatory Memorandum for the Bill noted:

> "*there is no statistical data available to Defence in terms of the number of ...research programs that relate to items on the DSGL (Defence Strategic Goods List)* or of the regulatory impact on the university sector."[4]

The outcomes are likely to result in a reduction in the potential compliance burden for universities, compared with the provisions of the original Bill. For outcomes see Appendix 1.

However, we understand that controls on intangible transfers of technology will be introduced both on export (transmission outside Australia) and, importantly, publication (to a member of the public). This could also mean controls apply inside Australia, depending on how the proposed amendments are incorporated into the Bill.

No substantive exemptions have been offered beyond those already incorporated in the Defence Strategic Goods List.

The sector will review the re-drafted legislation, once it has been tabled, for consistency with roundtable outcomes.

Outstanding concerns, not able to be addressed during the roundtable process, must be dealt with substantively in the trial phase and under the auspices of the Steering Group.

Discussion

With the exception of the provision of a trial arrangements, the proposed amendments to the Bill are unlikely to result is a scheme that is fundamentally different to that proposed previously by the Department of Defence as 'Option 4'. This was broadly rejected by the university sector. This means the role of the Steering Group will be particularly important in identifying and arguing for policy change during the transition period. It is critical, therefore, that the proposed minimum two year transition period is enacted and facilitates a thorough and robust assessment of the impact of the legislation on defence trade, the effectiveness and efficiency of the control regime, and also the conduct and output of Australian research.

The original Explanatory Memorandum tabled with the Bill expressed an intention that the scheme would have "*minimal impact on university courses or university research*", and be

[4]Regulatory Impact Statement: Defence Trade Controls Bill (2011) – page 22.

confined in impact to "*very specialised and high end research*"[5]. It is imperative that the intention as expressed is delivered and that operational arrangements support that outcome.

Terms of Reference for the Steering Group

Government representatives have prepared *draft Terms of Reference and Business Rules* for the proposed Strengthened Export Controls Steering Group. These were provided to UA roundtable representatives at their meeting of 21 September 2012 and provide adequate scope for addressing the outstanding issues of concern to the university sector (refer Appendix 2).

Outstanding issues

The following is a summary of key outstanding issues to be addressed through the trial.

Coverage of the Legislation - Exemptions and Exclusions

An area of substantial concern relates to coverage of the legislation, and particularly the risk that the Australian legislation imposes, *or is interpreted so as to impose,* greater restrictions on Australian universities and researchers than are applied in the United States.

This has been an area of considerable debate throughout the process. Universities are seeking appropriate exclusions from the regulatory net for low-risk, basic and applied research that would normally be published in the open scientific literature. To manage any residual risk in the context of exemptions (or exceptions), we support the implementation of a non-legislative risk management framework such as has proven to be broadly effective in other areas of potential risk in the university sector.

However, advice has been provided to a number of roundtable members from various US sources that appear to offer contradictory views of how defence control arrangements are applied to universities and research in the US.

Independent US legal advice, received on 3 October, appears to clarify issues and strongly supports the need to examine closely the extent and application of 'exemptions' and 'exclusions' in the Australian context - including a detailed comparison with counterpart legislation and practice in the US. The Committee may wish to consider legal advice provided to the University of Sydney by White and Case (lawyers) of Washington DC, dated 2 October. We understand the Committee has been provided with a copy of this advice by the University of Sydney The substance of this advice, if accepted, may assist the Government to develop an alternate approach to defence trade controls and meet the terms of the Australia-United States Defence Trade Cooperation Treaty. The advice (at Appendix 3), addresses the scope and operation of existing US export control regulations as they pertain to research undertaken by institutions of higher learning and research activities that are excluded from that regime. The advice also highlights the US approach to delivering an effective regime of export controls while differentiating between defence and military articles and dual use items. This

[5] Defence Trade Controls Bill Explanatory Memorandum, p 21

advice includes broader issues that relate to the implications of various bodies administering those controls. Exemptions and exceptions must be an early and major focus of the Steering Group, if established. Australian researchers should be subject to similar but not more severe regulatory constraints than their US counterparts. This matter requires priority attention. Discussions with officials from the Department of Defence to date suggests they are prepared to accept only two classes of "exemption" (basic and in the public domain). Matters of interpretation – such as what is actually covered by those exemption categories - need to be considered carefully, particularly in light of the legal advice mentioned above.

Academic freedom

'Freedom of inquiry' plays a vital role in research and technological innovation. Government policy support for academic freedom was only recently reaffirmed and embodied in section 19.115 of the *Higher Education Support Act 2003*. That Act prescribes that universities must have policies that uphold free intellectual inquiry in relation to learning, teaching and research. Just as there are risks that scientific knowledge may be misused, there are risks of controlling scientific inquiry. The legislation should include a similar provision to that contained in the Higher Education Support Act. A balanced approach to risk assessment is crucial.

Scope of the self-assessment process

Our understanding is that an outcome of the roundtable process was an agreement that academic research assessed by institutions as being of zero or low risk will be managed within institutions and not referred beyond internal assessment processes. This self-assessment approach is supported by UA and will need to be embodied in the proposed supplement to The Code.

It is not clear at present, However, how the supplements to the Code will interact with the proposed amendments to the Bill. If the Bill is enacted without consideration of exclusions similar to those described in the White and Case advice (at Appendix 3), the sector will be heavily reliant on the agreed procedural 'safeguards' being inserted into the Bill; and the robustness and effectiveness of the Steering Group in securing amendments to the legislation that ensure the compliance burden does not exceed what is required to manage proportionate risk and ensure that research of no or low-risk is not captured.

In this context, the sector is mindful to ensure the self-assessment provisions in any supplement to the Code are not reduced to an assessment of compliance with the export control regime and risk assessment of disclosure.

Effect should be given to the stated intent of the Bill, as set out in the Explanatory Memorandum, to limit impact to "very specialised and high end research".

Criminality

Recognising that the legislation would require penalty provisions to deter breaches and allow for action to be taken where breaches occur, the Bill should not result in a situation where the act of publishing research in acceptable scientific literature is criminalised.

Proposals advanced during the roundtable consultation included an option that it be made a crime for a researcher to publish DSGL controlled information. Controls on intangible transfers of technology will be introduced as part of the export control regime in the Bill (transmission *outside Australia*). The Department of Defence also introduced the concept of an offence for publishing information controlled by the Bill. Depending on how the proposed amendments in the Bill read, this could mean an extension of controls *inside Australia.* Our current understanding is that the Department of Defence intends to introduce a criminal offence in respect of publication of such information[6]. It is important in drafting the offence provisions that this does not apply to the conduct of ordinary research activities.

Managing risks and costs

New regulatory requirements often impose significant, and unfunded, additional costs. In keeping with the Government's policy on regulation, arrangements should be designed to minimise the cost impost on the research community, including universities.

Australian engagement in international research

Australia's research status is world class in a number of fields. Our success is disproportionate to our size and resourcing, so Australia 'punches well above its weight'. This success is partly a result of, and in turn leads to, close collaboration with top international researchers. The DIISRTE submission to the Senate Committee noted the importance of collaboration to Australian research: *"it is important to note that Australian research involves a high degree of international collaboration. In 2010 it has been estimated that 42% of Australian research involved international collaboration, compared with 29% in the United States, 44% in Canada, 26% in the European Union and 13% in China".*

We need to recognise this strength and ensure we do not inadvertently erode it. Greater clarity is needed in how aspects of the proposed legislation might work in practice. For instance, the test in the current Bill which is to be applied in determining whether a permit would be required for the transfer of intangibles (or the communication of information) focuses on wording that already exists in the DSGL: By implication this may mean such knowledge cannot be published, and may become unavailable for wider civilian uses. The combined effect of the controls on 'exports' and on 'publication' provisions could mean that communication of such information for open science becomes subject to the permission of the Minister for Defence.

Clearly, clarity around such issues is needed.

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[6] In a Defence paper made available during the sub group discussions as part of the roundtable process the following was stated: "*...an offence for publishing controlled information could be included which would apply if the proposed publication would communicate how to 'develop', 'produce' or in some cases 'use', the DSGL goods (akin to the practice around publishing classified information)".*[1]]

Australian Government
Department of Industry, Innovation,
Science, Research and Tertiary Education

Defence Trade Controls Bill

This paper reflects the outcomes of the roundtable discussion chaired by the Chief Scientist on 21 September 2012 and establishes the way forward for the Defence Trade Controls Bill.

- Establish the Strengthened Export Controls Steering Group, reporting to the Minister for Defence and the Minister for Tertiary Education, Skills, Science and Research (the Ministers).

- A transition period of at least 24 months with no offence provisions in effect. The Steering Group may recommend an extension to this non-offence provision transition period.

- A pilot program (not limited to a single pilot) to test the regulatory impact of the regime.
  - The pilot to determine the costs and benefits associated with the regime, the feasibility of its implementation, the processes and interaction required to successfully implement the bill during the transition period, and identify any aspects that require modification prior to the offence provisions coming into full effect.
  - The framework for the pilot to be agreed by the Steering Group and, pending consideration of the Steering Group, will span two grant funding cycles with interim reporting to identify improvements.
  - The pilot will review mechanisms by which organisations can determine thresholds for technologies assessments beyond which an organisation will consult with Defence and, if required, seek a permit.

- Internal institutional practices and structures (including a supplement to the Australian Code for the Responsible Conduct of Research) to be developed to reduce the need to interact with Government agencies on the legislative regime.

- The Model to be tested as part of the pilot will consist of an export control regime that:
  - Begins with an institutional assessment process for open academically based research in accordance with guidelines incorporated into the supplement to the Australian Code for the Responsible Conduct of Research. This step recognises that not all activities to supply technology to 'develop', 'produce', or in comes cases 'use', an item on the DSGL will involve the level of detail which is peculiarly responsible for achieving or extending

the controlled performance levels, characteristics or functions of the DSGL listed item. The institutions involved in activities of this type must have processes for assessing technology and for determining when advice is to be sought from Defence about a possible permit in accordance with established guidelines.

- Provides exemptions from export controls for research, where :
  - The activity is 'basic scientific research', as defined in the DSGL and Wassenaar Arrangements (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).
  - The technology is already 'in the public domain', as defined in the DSGL (technology or software which has been made available without further restrictions upon its further dissemination (copyright restrictions do not remove technology or software from being in the public domain))
- Provides exemptions for transfers of technologies within Australia's domestic borders.

- The legislation that is passed must incorporate or allow for the following:
  - Modification, if necessary, once the results of the pilot studies are known.
  - A non-offence transition period of no less than 24 months, and with the possibility of an extension on the recommendations of the Steering Group.
  - Pilot studies governed by the Steering Group.
  - Pilot studies to test outcomes from the Model.
  - A formal evaluation against agreed criteria to include outcomes of pilot studies.
  - A final report from the Steering Group to be submitted to the Ministers to be tabled in Parliament.
  - Ordinary scientific communication is permissible, where the institution and individual have complied with established guidelines which include the institutional assessment model outlined above
  - The provisions relating to Defence Services are deleted.
  - Controls on foreign employees and students in Australia are removed.
  - Controls on Australians overseas are removed.

- The indicative flowchart that has been tabled, incorporating an institutional management framework for research that falls below a certain technology assessment threshold and, above that threshold, an application for a permit to Defence would have to be made. This is to be tested during the pilot.

- Amendments to the legislation and the regulations to be drafted reasonably quickly, with appropriate consultation with the sector. A small sub group will meet to consider the amendments.

- NHMRC to take the lead in developing a supplement to the Australian Code for the Responsible Conduct of Research applicable to universities and other research institutions, including government agencies and be:
    - developed in consultation with relevant research institutions, government departments, other funding agencies, and the Steering Group;
    - supported by the existing reference group.

APPENDIX 2

STRENGTHENED EXPORT CONTROLS STEERING GROUP

(DRAFT) TERMS OF REFERENCE AND BUSINESS RULES

Purpose

1. The Strengthened Export Controls Steering Group was recommended in the preliminary report of the Senate Foreign Affairs, Defence and Trade Legislation Committee on the Defence Trade Controls Bill 2011 (the Bill) and at the 6 September 2012 roundtable chaired by Australia's Chief Scientist. These Terms of Reference were discussed and agreed at a second roundtable chaired by Australia's Chief Scientist on 21 September 2012.

2. The Bill will introduce controls on the supply of Defence and Strategic Goods List (DSGL) technologies and software to close the gap in Australia's export controls and align those controls with the expected best-practices as outlined in the Wassenaar Arrangement's publication *Best Practices for Implementing Intangible Transfer of Technology Controls* (the Wassenaar Guidance) that were agreed in 2006.

3. The Steering Group's function is to provide advice to the Department of Defence and Minister for Defence, and the Minister for Tertiary Education, Skills, Science and Research (the Ministers) throughout the transition period of the Defence Trade Controls Act in relation to:
   a) the adequacy of organisational and government arrangements to identify, assess and manage risks, costs and administrative burden associated with intangible transfers of DSGL technologies;
   b) oversight, design and delivery of a pilot program to identify the adequacy of the legislation, regulations, implementation arrangements and resources for regulating intangible transfers;
   c) recommendations on amendments to legislation, regulations and implementing arrangements.

4. In order to fulfill its role, the Steering Group will:
   a) consider quarterly progress reports from participants in the pilot on implementation of the strengthened export controls;
   b) through the Chair, report to the Ministers every six months; and
   c) if required by the Ministers, provide additional reporting.

5. The Steering Group will advise the Department of Defence on how to obtain appropriate technical expertise regarding Australian Government consideration of the control lists of international regimes and the Australian DSGL.

6. The Steering Group may establish sub-groups, as required, to support its function. Sub-groups will report back to the Steering Group.

Membership

7. The Steering Group membership will comprise:

    a) Australia's Chief Scientist as the Chair;
    b) up to four representatives from the industry sector, one of whom is the co-Deputy Chair;
    c) two representatives from the university/research sectors, one of whom is the co-Deputy Chair;
    d) the CEO of the National Health and Medical Research Council, or representative nominated by that CEO;
    e) the CEO of the Australian Research Council, or representative nominated by that CEO;
    f) a representative from the Department of Industry, Innovation, Science, Research and Tertiary Education; and
    g) a representative from the Department of Defence.

8. There will be no substitutions or additional attendees unless agreed with the Chair.

9. The Steering Group will be established for the period of the transition period but the period may be extended if agreed by the Ministers.

Reporting

10. The Chair will report six monthly, in writing, to the Ministers and the Department of Defence, including any dissenting membership views.

11. The Steering Group will provide a final report, in writing, at the conclusion of the two year transition period to the Ministers. The Ministers will jointly table this report in the Parliament.

Meetings

12. The frequency and timing of meetings of the Steering Group is at the discretion of the Chair, however it is expected to meet at least quarterly, supplemented by out of session consideration of matters as necessary.

13. A quorum of the Steering Group will be met when there are a minimum of the Chair, two public sector representatives, one industry representative and one university/research representative.

Secretariat

14. The Steering Group will be supported by a Secretariat provided by the Defence Export Control Office.

15. The Secretariat will:

a) prepare and circulate agendas in conjunction with the Chair;
b) work with the authors of agenda papers to ensure quality and timeliness;
c) ensure that the agenda approved by the Chair and papers are received by members at least one week before each meeting;
d) prepare and provide to the Chair, within one week of the meeting, the minutes, outcomes and actions arising;
e) circulate the meeting outcomes to all members following clearance by the Chair; and
f) maintain Steering Group records.

MEMORANDUM

WHITE & CASE

Washington, DC

Date: October 2, 2012

To: Jill Trewhella, Deputy Vice Chancellor Research, University of Sydney

From: Maury J. Mechanick

Re: Applicability of US Export Control Regime to Fundamental Research Conducted By Accredited Institutions of Higher Learning

You have requested that White & Case LLP provide advice regarding the scope of export control regulations in the United States, particularly the International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR"), as they pertain to various categories of research activities undertaken by accredited institutions of higher learning.

Overview of U.S. Export Control Regime

The U.S. export control regime is intended to control the export of sensitive military/defense articles and services (including technical data) and dual use items and technical data to foreign countries and to individuals who are citizens of those countries, including instances in which those individuals may be physically located in the United States. These controls generally take the form of formal export licensing requirements, where prior approval for exports must be obtained from the relevant supervisory agency in the United States. In the case of ITAR, the relevant supervisory agency is the Directorate of Defense Trade Controls ("DDTC"), situated within the U.S. Department of State. In the case of EAR, the relevant supervisory agency is the Bureau of Industry and Security ("BIS"), situated within the U.S. Department of Commerce. While the scope of the export control regimes administered by these two entities are fairly broad, there are certain **exclusions** that apply, particularly in the case of fundamental research conducted by accredited institutions of higher learning in the United States, including basic and applied research in science and engineering.

Potential Misperceptions Regarding the Applicability of Export Controls to Accredited Institutions of Higher Learning

We understand that some potential misperceptions about the nature and applicability of the U.S. export control regime as applied to fundamental research conducted by accredited institutions of higher learning in the United States has arisen in connection with the pending consideration of legislation currently before the Australian Parliament, specifically the Defence Trade Controls Bill 2011 ("DTC"). It is further our understanding that these potential misperceptions may have given rise to a specific concern that this legislation could result in the imposition of restrictions on the conduct of fundamental research by accredited institutions of higher learning that would actually be more restrictive than any restrictions that might apply under the U.S. export control regime.

This confusion regarding the scope of such controls under the U.S. export control regime is attributable at least in part to perceived inconsistencies between a letter from the U.S. Ambassador to Australia (Ambassador Jeffrey L. Bleich) to Professor Ian Chubb AC (accompanied by an attachment reflecting guidance provided by the U.S. State Department and the U.S. Department of Commerce), and information that has been provided by a number of major research-oriented universities in the United States regarding their understanding of how the U.S. export control regime applies to their activities.

In our view, this confusion is both unfortunate and misplaced, when in fact the views expressed in the U.S. Ambassador's letter and those of the major research-oriented universities are actually much more in harmony than may initially appear. The problem to a large extent is a linguistic one, revolving around the misuse of or confusion between two similar concepts, which in practical application may seem more-or-less interchangeable, but which reflect nuanced differences in meaning that, in our view, may have contributed to this state of confusion. The two concepts in question are "exemption" and "exclusion."

Criticality of the Distinction Between Exclusion and Exemption

It is important to first clearly differentiate between "exemptions" and "exclusions." In the context of potential applicability of export control regimes to university-conducted fundamental research including basic and applied research in science and engineering, use of the term "exemption" would imply that, but for a specific action or exception that has been accorded to accredited institutions of higher learning, the governing regulatory regime would apply to them. This then implies that such institutions have been accorded certain protected status because of their status as an accredited institution of higher learning, which would not necessarily apply to other entities. Use of the term "exclusion" connotes a slightly different understanding, which in this case would mean that the regulatory regime was never intended to apply to certain activities in the first place. Thus, rather than any protected status emanating from some sort of preferential treatment to be accorded to accredited institutions of higher learning, to the extent that institutions conducting fundamental research would be protected, it is because the regulatory regime was never intended to apply to such research in the first place.

The confusion that has arisen may be attributable, at least in part, to the U.S. universities themselves speaking of exemptions from export control regulation, rather than exclusions. This then appears to give rise to an apparent contradiction of their position with that expressed in Ambassador Bleich's letter (and reaffirmed in the separate guidance provided), which unequivocally states that "[u]niversities in the United States are not exempted from U.S. ITAR and dual-use export controls." From a proper reading of the U.S. export controls statutes and regulations, that statement is absolutely correct and incontrovertible -- universities in the United States are not exempt from such export controls. **The separate guidance, however, then goes on to identify a number of matters to which ITAR does not apply, or in the terminology referred to above, would be areas that have been excluded from ITAR's coverage. In our view, the description that follows of these exclusions can still be read as fairly broad-reaching in scope, which we believe reflects the proper intent, and would generally align with the views of individual universities, notwithstanding their use of the term "exemption."**

The Scope of U.S. Exclusions for Fundamental Research

As described in the guidance information provided by the U.S. Departments of State and Commerce, and as memorialized in the actual regulations that have been promulgated with respect to ITAR and EAR, the exclusions for fundamental research contained in each are fairly broadly stated.

Specifically, in the case of ITAR, **fundamental research in science and engineering is considered to be in the "public domain" in the United States, and therefore excluded from the scope of ITAR coverage, where the resulting information is ordinarily published and shared in the scientific community**. Further, in providing a specific definition of fundamental research, ITAR then distinguishes basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly in the scientific community (which would qualify as fundamental research), from research that would not be considered fundamental research, such as research the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls, which are typically applied primarily in instances where the research is funded by the U.S. Government.

The exclusion in the case of EAR, if anything, may be even more broadly worded. The exclusion applies to "publicly available technology and software" (except for certain classified software) that: **(1) are already published or will be published; (2) arise during, or result from, fundamental research (defined essentially the same as under ITAR); (3) are educational; or (4) are included in certain patent applications**.

Even in those areas of research that may fall outside the scope of the specific exclusion provided, the potential applicability of the ITAR or EAR restrictions may not be as foreboding as it would initially appear. For example, as reflected in the Ambassador Bleich's letter:

> In the United States, if a university wants to use specifically controlled equipment or data, they would need a license or other approval to transfer this technical data or allow access to the equipment to a foreign person. In most situations, if the use of these items or through the use of uncontrolled items

> finding are made which are not otherwise restricted by dissemination controls, they would not be controlled."

In other words, as the Ambassador goes on to observe, while "an input to research might be controlled" it does not necessarily follow that the output would be controlled. To be absolutely clear, however, a distinction between "input" and "output" only becomes relevant in those instances in which the research activity falls outside of the scope of fundamental research as defined in ITAR or EAR; if the research qualifies as fundamental research, then neither the input nor the output should be subject to export control restrictions.

Differentiation Between Defense/Military Articles and Dual Use Items

There is one other important matter that should be addressed in connection with consideration of the DTC now underway, which deals with clear differentiation in regulatory treatment and scope of regulatory oversight between the ITAR and EAR regimes in the United States.

As previously noted, the ITAR regime in the United States is administered by the DDTC. As an office in the U.S. Department of State, DDTC's orientation is principally driven by national security/foreign affairs considerations, and its focus is on controlling articles and services that are viewed as having primarily a defense or military (munitions) application. In the case of ITAR, the restrictions that apply are generally applied across the board to all countries without exception, although there are certain countries identified for which export licenses would be unlikely to ever be approved under any circumstances.

In contrast, the EAR regime in the United States is administered by the BIS. As an office in the U.S. Department of Commerce, BIS's orientation is somewhat more commercially grounded. While there is a definite focus on properly controlling the export of dual items and technical to the extent that potential military applications are foreseeable, there is a countervailing interest in minimizing undue interference in those instances in which the intended applications would clearly be of a non-military nature. In the case of EAR, the restrictions are

also much more country specific, and for exports to certain countries there may be no or limited regulatory compliance required, whereas for other countries a more rigorous licensing regime would be in place. Thus, the two regulatory regimes, while grounded on similar concerns, have evolved in somewhat different directions, including separate staff with different orientations and in some instances skill sets as well.

A clear understanding of these distinctions would be particularly important in terms of how these items are treated under the proposed DTC. **If munitions and dual use controls are consolidated under a single regulatory regime without appropriate differentiation, which would appear to be the case with respect to the Defence Strategic Goods List, Amendment 2011, there would be a propensity to impose more severe restrictions with respect to dual use items and technical data because of heightened concerns emanating from those items and technical data that are characterized as munitions.** To the extent this combination would have an impact on research conducted by accredited institutions of higher learning, it could result in a more restrictive regime in place for research activities that fall outside of scope of exclusions for fundamental research, particularly with respect to dual use items or technical data.