

Secretary



Australian Government

**Department of Industry
Innovation, Science, Research
and Tertiary Education**

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Dear Dr Dermody

Defence Trade Controls Bill 2011

The Department of Industry, Innovation, Science, Research and Tertiary Education (the Department of Innovation) is grateful for the opportunity to provide a submission to the Senate Standing Committee on Foreign Affairs, Defence & Trade's consideration of the Defence Trade Controls Bill 2011 (the Bill).

The Department of Innovation recognises the need for tighter controls of Australia's export regime in line with our international obligations. We note that it will take time for universities to adapt to the proposed new regulations, and that ongoing compliance will represent an administrative burden. In revising the Bill and associated regulations, the Department of Defence should seek to minimise this administrative burden, while universities need to recognise that they may be required to amend their processes to accommodate necessary export control changes.

The Department of Innovation considers there are potentially negative implications of the Bill, as originally drafted, on the Australian higher education sector, public good research and industry, in particular the pharmaceuticals, biotechnology and nanotechnology sectors, arising from a large change in the regulatory environment.

In considering the Bill, 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. In part, the relatively high level of collaboration is due to our small population, which necessitates greater contact with international researchers than is the case in larger economies, such as the United States and the European Union. Given the importance of international collaboration to Australia's research and innovation, the tightening of regulations envisaged in the Bill may result in a significant administrative burden on the research sector and result in disruption to establishing international collaborations.

It is not necessarily appropriate to use as examples the regulatory regimes already in place in the United Kingdom and draw conclusions about the impact of the Bill on Australia. These controls are only applied for research collaborations with individuals based beyond the boundaries of the European Union, with the 500 million inhabitants of the EU effectively treated as being within the national borders of the UK. Even if Australia and the UK shared an identical regulatory

framework, the impact on Australian research would appear to be inherently greater due to differences in how national boundaries are drawn in the Bill.

However, we are encouraged with the progress of consultations by the Department of Defence with the higher education sector since March 2012 (noting that the consultations are ongoing and the Department of Defence is still developing options for consultation with the sector). The Department of Innovation, and portfolio agencies including the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian Nuclear Science and Technology Organisation (ANSTO), and the Australian Institute of Marine Science (AIMS), have also been engaged in these consultations. The Department of Innovation considers that the consultation process has addressed many of the concerns raised by the sector to date.

The Department of Defence has developed a series of options as part of a 'principles and options paper'. The adoption of one of these options (Option 3 in version 4 of the paper, circulated on 30 April 2012) in particular could deliver significant improvements to the Bill. This option approximates the United Kingdom's intangible control model, as well as broadening the definition of 'scientific research', and changing the order of the decision making process to exclude public domain information and most scientific research early on. We understand that Universities Australia and the University of Sydney, with which the Department of Defence has been consulting directly, also currently favour this option.

Aside from potential impacts on research, the Department of Innovation was also initially concerned that the Bill in its current form could have a negative impact on Australia's international student sector. Under the Bill as currently drafted, institutions risked:

1. being required to obtain a permit to offer training, teaching or research activities involving a foreign person in many fields, such as science and technology; and
2. failing to identify all Defence and Strategic Goods List (DSGL) items held by the institution and their uses where a foreign person is involved and failing to consider whether each activity will require a permit.

Consultations with the sector since March 2012 have looked closely at these issues, with Options 1 and 3 in the options paper both effectively exempting international students and other foreign nationals located in Australia from the control framework. Under Option 2 on the other hand, permits would still be required for all supplies to foreign employees, foreign students and foreign researchers in Australia. For this reason the Department of Innovation considers this to be the least preferred of the three options currently under consideration.

The Department of Defence has further developed the options paper to include a fourth option which was distributed for consultation on 4 June 2012. This fourth option does not include the broader research exemptions that are included in the other options, though public domain information and 'basic scientific research' are still exempt.

The Department of Innovation was also concerned that the current Bill would adversely impact on the pharmaceuticals, biotechnology and nanotechnology industries, either because they store or use affected materials or they would otherwise collaborate with overseas companies and researchers. Many companies operating in these sectors could inadvertently breach the Act. This could result in a negative impact on and reductions in international collaboration and commercial activity related to materials listed in the DSGL. The options paper developed as part of the consultation with the higher education sector has also addressed these concerns, and option 3 in particular would, if enacted, reduce the regulatory burden on these industries.

As part of the consultations, the higher education sector has recently raised as an outstanding concern that experimental research activity involving lower risk DSGL technology and posing

little risk to national security, will still be subject to control. The sector has recently proposed an adjustment to option 3, involving two additional filters to exclude from control requirements for low risk experimental research involving:

1. supply to Wassenaar Agreement countries outside Australia; and
2. supplies related to 'public good' research as demonstrated by the intention to publish.

We encourage the Department of Defence to consider the sector's proposal.

The Department of Innovation would like to note that to date the Department of Defence has in its consultations with the higher education sector dealt directly with Universities Australia and the University of Sydney but not the broader range of universities. Universities may have different viewpoints and it would be desirable to broaden the consultation process to include all Universities Australia members. The Department of Defence, through Universities Australia, is planning to broaden its consultation with universities and the Department of Innovation will facilitate ongoing consultation with the higher education sector.

From the perspective of portfolio agencies, a key issue that (at the time of writing) is yet to be addressed is the treatment of statutory authorities, whose staff have not been granted exemption from committing offences under the Bill. The Bill currently exempts employees of APS agencies, the Australian Defence Force, the Australian Federal Police and state and territory police forces acting in the course of their duties. The Department of Innovation considers that relevant statutory authorities (including agencies in the Innovation portfolio) should also be covered by the exemption where the authority is subject to Government direction and Parliamentary oversight (for instance through the Senate Estimates process). The Department of Innovation is working with relevant statutory authorities within this portfolio and the Department of Defence to resolve this matter.

The Department of Innovation considers that a clear communication and education campaign will be needed with the research sector to ensure smooth implementation of the Bill and ensure appropriate compliance. Additionally, to assess the Bill's regulatory impact, it should be reviewed within two years of commencement of the new arrangements, including an evaluation of the impact of the Bill on business (particularly exports), research, and higher education.

While the Department of Innovation had initial concerns with the original drafting of the Bill and its potential impact on the research and business sectors and the international student market, the consultation process has ensured the Department of Defence is aware of and is seeking to address key concerns. We understand that Universities Australia, the University of Sydney, and the Academy of Technological Sciences and Engineering (ATSE), view option 3, if implemented, as delivering the most satisfactory outcome, of the options proposed to date. The Department of Innovation also favours this option.

We will continue working with the Department of Defence to ensure that the Bill tightens Australia's export control regime, without placing an excessive and unreasonable burden on universities and the research and development sector more broadly.

Yours sincerely

Dr Don Russell

2 July
June 2012