Dear Senator Stephens

I am writing to update you on Universities Australia's concerns and activities regarding the proposed Defence Trade Controls Bill (2011) and to thank you again for the effort you, as chair, and other committee members put into considering this important matter.

I'm sure you're aware the matter is listed for debate in the Senate on Monday 29 October 2012.

I have attached the material which describes the amendments Universities Australia has proposed to the bill. We are making this material available to relevant Ministers, committee members and interested parliamentarians.

The information outlines our concerns and describes a possible way forward.

In brief, we have proposed amendments that are designed to give effect to the Committee's recommendations and findings from your final report on the bill.

The proposed amendments amount to three key elements:

- To ensure that the governments' amendments are guided by the principle that the restrictions on Australian researchers be no more severe than those which apply in the United States;
- To fully reflect the outcomes of roundtable discussions on the matter, that were led by the Chief Scientist; and
- To allow the Senate Committee to scrutinise the implementation process.

With respect to the first point, our draft amendments are based on the best advice available to us to date about how the US regulations might translate to the Australian context.

The wording closely follows the wording in US regulations in respect of exclusions for fundamental research, public domain, education and patenting.

We acknowledge, however, that there is some contention regarding the advice we have received and we understand the US Ambassador intends to provide the Senate Committee with a formal response regarding the US position on the legal advice that underpins these draft amendments.

Regards

Julie Ryan for

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Defence Trade Controls Bill 2011

Explanatory memorandum for the additional amendments to the bill recommended by Universities Australia

Overview

The Senate Foreign Affairs Defence and Trade Legislation Committee **("the committee")** tabled its final report on the *Defence Trade Controls Bill 2011 (Cth)* **("the bill")** on 10 October 2012. The final report comprised a majority report and a dissenting report signed by four non-government members. The committee did not have an opportunity to review the government's amendments before it completed its final report. The majority report nevertheless provided important guidance about the issues that the government amendments would need to address. The government tabled amendments to the bill in the Senate on 11 October 2012.

The majority report made three key suggestions designed to strengthen the bill and improve its implementation so far as it relates to universities. ***First,*** that the bill should not impose a burden on Australian universities which is heavier than that required by laws currently governing similar institutions in the US. Arising from this finding, the committee suggested that the principle of equivalency with the US arrangements should guide the drafting of the government amendments (para 2.19). ***Second,*** that the amendments to the bill and supporting regulations must fully and accurately reflect the outcomes of the 'roundtable' discussions chaired by the Chief Scientist, Professor Ian Chubb AC (para 3.6). ***Third***, that the committee should scrutinise the implementation of the bill during the transition period and report to the Senate on a six-monthly basis (recommendations 1 and 2).

Universities Australia strongly supports the majority report's view that these issues need to be addressed to reduce the risk of unintended consequences arising from the bill. The proposed amendments have been prepared with the assistance of Scott Bouvier of King & Wood Mallesons and drawing on other legal advice.

The proposed amendments to the bill seek to reflect as nearly as possible the findings and recommendations of the Senate Foreign Affairs, Defence and Trade Legislation Committee's report.

With respect to the first point, adoption of our proposed amendment would, as far as we can ascertain, bring Australia's system of export controls into alignment with the laws in place in the US pertaining to university research. Adoption by the Senate of appropriate complementary resolutions would ensure implementation proceeds transparently and in accordance with the transition arrangements agreed through the roundtable process and endorsed by the committee.

We note that at the recent Senate Supplementary Estimates hearings the Defence Chief Scientist indicated he understood the US Ambassador would provide further comment to the committee on the operation of US law. In the absence of further advice, the university sector has prepared an amendment that is as close as possible (allowing for the Australian context) to regulations in the United States in keeping with the committee's guidance. We would welcome further information clarifying the operation of US law.

(1) No disadvantage for Australian research (see Attachment A)

Amendment (1): Ensures Australian research is under no heavier burden than operates in the US under EAR and ITAR

In the US broad categories of research typically undertaken in accredited institutions of higher learning are <u>excluded</u> from export control restrictions. In submissions to the committee, Universities Australia and the University of Sydney highlighted that without amendment the bill would disadvantage Australian universities and their researchers. The committee concluded that the sector's concerns were "*fair and reasonable*" and that "*the effect of the bill should not place Australian universities and research organisations at a disadvantage compared to their counterparts in the US*" (para 2.16).

The US exclusions cover public domain information, fundamental research (which includes both basic and applied research in science and engineering which is ordinarily published), education and patenting. Our proposed **amendment (1)** draws on the language from the US Export Administration Regulations (EAR) (which governs dual use technologies) and the US International Traffic in Arms Regulation (ITAR) (which governs munitions) (**see Attachments B and C**). Its effect would be to provide equivalent exclusions for educational and research activities in registered Australian higher education institutions.

The committee supported universities' position that the legislation should not impose greater restrictions on Australian universities and researchers than are applied in the United States. To this end, it made clear that this principle should guide the drafting of government amendments to the bill.

The roundtable did not propose amendments of this kind. The legal advice on the operation of US law was not available at the time of the final roundtable meeting. The information was subsequently provided to the committee, however, and treated with due consideration.

The committee also recommended that government amendments must fully and accurately reflect the outcomes of the roundtable.

Amendment (2): Removes government amendment (12) that makes publication a crime as export regulations in the US contain no equivalent crime

To ensure consistency with proposed amendment 1, Government amendment (12) should be removed. Government amendment (12) would create a new criminal offence for the publication of certain technology without approval from the Minister for Defence. This is inconsistent with proposed amendment 1, which provides that Australian researchers not be disadvantaged by restrictions on publication more severe than are applied to their counterparts in the United States. Given the exclusions that exist in US regulations for research that is or will be published, the US Export Regulations contain no equivalent crime for publishing.

The creation of a criminal offence *for publication* would be unprecedented in Australia, and would be inconsistent with section 19.115 of the *Higher Education Support Act 2003 (Cth)*, which requires registered Australian higher education providers to uphold free intellectual inquiry in relation to learning, teaching and research.

Placing civilian science under the control of the Department for Defence – a government agency without expertise in assessing the broad public benefits of open science alongside national security considerations carries significant risks. It will be essential that any assessment of research findings that may have a national security risk also balances this against the risks that may result from suppressing the findings.

The responsible dissemination of knowledge through publication according to internationally accepted norms is essential to ensuring continued progress and innovation and ensures the benefits of new scientific knowledge and understanding are delivered to society at large. Security concerns need to be addressed, but equally, regulation should not unnecessarily impede the conduct of legitimate research or put at risk Australia's capacity to innovate, engage and compete internationally.

(2) Full implementation of the agreed transition arrangements (see Attachment D)

The outcomes of the roundtable process have not been fully reflected in the government's proposed amendments. Universities Australia recommends that the Senate amend Section 74A of the bill to ensure it reflects the roundtable outcomes as endorsed by the committee, including agreed transitional outcomes.

The amendments seek to ensure that the agreed full two year transition be legislated. This is essential given the priority and potential ramifications of the proposed legislation. Thorough

assessment and oversight must be conducted and informed amendments made before the legislation is applied in full.

The explanatory memorandum to government amendment (1) states that the transition period will last for two years from the day the treaty enters into force, and suggests that the relevant offence provisions will not apply for the full two years. This is not reflected in the government's amendment. We recommend that Section 2 of the Bill be amended to give effect to this minimum transition period.

Government Amendment (26) establishes Section 74A Strengthened Export Controls Steering Group, as envisaged by the roundtable outcomes. The draft terms of reference prepared during the Roundtable process were clear and detailed. They were the result of serious discussion by the roundtable. We note, however, that a number of key elements of steering group arrangements have not been addressed or are only partially addressed in section 74A. The amendments need to more accurately reflect the roundtable outcomes in respect of:

a) the agreed membership and chairing of the Committee, including specifying the Chief Scientist as Chair;
b) the specific functions of the Committee set out in the draft terms of reference;
c) ensuring the Committee's period of operation is not terminated prior to full Parliamentary scrutiny is completed;
d) ensuring a robust and authoritative role for the Minister administering the *Science and Industry Research Act 1949*; and
e) the provision of secretariat support to the Committee.

(3) Parliamentary oversight during the transition period

In response to recommendations 1 and 2, we propose that Section 74A would also require the six monthly reports to be tabled in both houses for the duration of the transition period.

In the interests of transparency and ensuring that the outcomes of the pilot processes are used to further improve the export control regime, Universities Australia supports the Senate passing a resolution to give effect to recommendation 2.

Attachments:

A: Draft proposed amendment prepared by King and Wood Mallesons

B: Export Administration Regulations 15 CFR 734.3, 734.7-10

C: International Traffic in Arms Regulations 22 CFR 120.10 and 120.11

D: Draft proposed amendments re: Roundtable outcomes

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UNIVERSITY PROPOSED AMENDMENTS

(1) Insert section 9A after section 9 of the Act

9A Exclusion for Research, Education and Information in the Public Domain

This Act does not apply to:

(a) information in the public domain;

(b) information that has been, or is intended to be, published in any publication available to members of the public;

(c) fundamental research, which is basic and applied research in science and engineering where the resulting information is ordinarily published and shared broadly in the scientific community (such research is to be distinguished from proprietary research and from industrial development, design, production and product utilisation, the results of which ordinarily are restricted for proprietary reasons or subject to other access and dissemination controls);

(d) educational information or instruction provided in courses by a higher education provider; or

(e) information which is the minimum necessary information for patent applications.

(2) Removal of Government Amendment (12) creating a crime of publishing certain information

Government Amendment (12) section 14A Publishing etc: DSGL Technology.
Delete in its entirety

Government Amendment (23): Delete in its entirety.

OTHER AMENDMENTS

Drafting supporting other amendments to give effect to the Senate Foreign Affairs, Defence and Trade Legislation Committee's findings in relation to the transitional arrangements have been prepared by Universities Australia and are available on request.

Summary Extract from US Export Administration Regulations
15 Code of Federal Regulations 734
Scope of the Export Administration Regulations

Downloaded from the Electronic Code of Federal Regulations current as at August 22 2012

…

§ 734.3 Items subject to the EAR.

…

(b) **The following items are not subject to the EAR**: …

(3) Publicly available technology and software, except software classified under ECCN 5D002[1] on the Commerce Control List, that:

(i) Are already published or will be published as described in §734.7 of this part;

(ii) Arise during, or result from, fundamental research, as described in §734.8 of this part;

(iii) Are educational, as described in §734.9 of this part;

(iv) Are included in certain patent applications, as described in §734.10 of this part.

…

§ 734.7 Published information and software.

(a) Information is "published" when it becomes generally accessible to the interested public in any form, including:

(1) Publication in periodicals, books, print, electronic, or any other media available for general distribution to any member of the public ...;

(2) Ready availability at libraries open to the public or at university libraries ...;

(3) Patents and open (published) patent applications available at any patent office; and

(4) Release at an open conference, meeting, seminar, trade show, or other open gathering. ...

(iii) "Publication" includes submission of papers to domestic or foreign editors or reviewers of journals, or to organizers of open conferences or other open gatherings, with the understanding that the papers will be made publicly available if favorably received. (See Supplement No. 1 to this part, Questions A(1) and A(3)). ...

§ 734.8 Information resulting from fundamental research.

---

[1] University note: ECCN 3D002 covers cryptographic software which does not fall within the exclusions set out in EAR.

(a) *Fundamental research.* Paragraphs (b) through (d) of this section and §734.11 of this part provide specific rules that will be used to determine whether research in particular institutional contexts qualifies as "fundamental research". The intent behind these rules is to identify as "fundamental research" basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community. Such research can be distinguished from proprietary research and from industrial development, design, production, and product utilization, the results of which ordinarily are restricted for proprietary reasons or specific national security reasons as defined in §734.11(b) of this part. ...

(b) *University based research.* (1) Research conducted by scientists, engineers, or students at a university normally will be considered fundamental research, as described in paragraphs (b) (2) through (6) of this section. ("University" means any accredited institution of higher education located in the United States.)

(2) Prepublication review by a sponsor of university research ... does not change the status of the research as fundamental research.

(3) Prepublication review by a sponsor of university research solely to ensure that publication would not compromise patent rights does not change the status of fundamental research, so long as the review causes no more than a temporary delay in publication of the research results. ...

(5) University based research is not considered "fundamental research" if the university or its researchers accept (at the request, for example, of an industrial sponsor) other restrictions on publication of scientific and technical information resulting from the project or activity. Scientific and technical information resulting from the research will nonetheless qualify as fundamental research once all such restrictions have expired or have been removed. ...

§ 734.9 Educational information.

"Educational information" referred to in §734.3(b)(3)(iii) of this part is not subject to the EAR if it is released by instruction in catalog courses and associated teaching laboratories of academic institutions. ...

§ 734.10 Patent applications.

The information referred to in §734.3(b)(3)(iv) of this part is: ...

(b) Information contained in a patent application, or an amendment, modification, supplement or division of an application, and authorized for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office, 37 CFR part 5; ...

Title 22 Foreign Relations Part 120

…

§ 120.10 Technical data.

(a) *Technical data* means, for purposes of this subchapter:

(1) Information, other than software as defined in § 120.10(a)(4), which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services;

(3) Information covered by an invention secrecy order;

(4) Software as defined in § 121.8(f) of this subchapter directly related to defense articles;

(5) This definition does not include information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in § 120.11. It also does not include basic marketing information on function or purpose or general system descriptions of defense articles.

(b) [Reserved]

[58 FR 39283, July 22, 1993, as amended at 61 FR 48831, Sept. 17, 1996; 71 FR 20537, Apr. 21, 2006]

§ 120.11 Public domain.

(a) *Public domain* means information which is published and which is generally accessible or available to the public:

(1) Through sales at newsstands and bookstores;

(2) Through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;

(3) Through second class mailing privileges granted by the U.S. Government;

(4) At libraries open to the public or from which the public can obtain documents;

(5) Through patents available at any patent office;

(6) Through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the United States;

(7) Through public release (*i.e.* , unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. government department or agency (see also § 125.4(b)(13) of this subchapter);

(8) Through fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community. 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 the results of which are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. University research will not be considered fundamental research if:

(i) The University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or

(ii) The research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

(b) [Reserved]

AMENDMENTS

Proposed changes to amendments. Amendment numbers refer to the amendment numbers in the amendments proposed by the Government. Critical substantive amendments are highlighted in yellow

Clause 2, page 2 (table item 2), omit the table item, substitute:

2. Except as provided in item 3, Sections 3 to 74	A day or days to be fixed by Proclamation. A Proclamation must not specify a day earlier than the day the Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation done at Sydney on 5 September 2007 enters into force. However, if any of the provision(s) do not commence within the period of 2 years beginning on the day the Treaty enters into force, they commence on the day after the end of that period. The Minister must announce by notice in the *Gazette* the day on which the Treaty enters into force.
3 Offence Provisions	A Proclamation must not, in respect of any provision creating an offence, specify a day earlier than two years after the day the Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation done at Sydney on 5 September 2007 enters into force.
4. Sections 74A and 75	The day this Act receives the Royal Assent.

[commencement]

(26) replace as follows:

Page 86 (after line 20), after clause 74, insert:

74A Strengthened Export Controls Steering Group

(1) As soon as practicable after this section commences, the Minister must appoint, in writing, the members of a Strengthened Export Controls Steering Group.

(2) Group's function is to provide advice to the Minister and the Research Minister from the day this Act receives Royal Asset until two years after the date on which the Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation done at Sydney on 5 September 2007 enters into force, 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 in light of the pilot.

(3) The Group must:
a) consider quarterly progress reports from participants in the pilot on implementation of the strengthened export controls;
b) through its Chair, report to the Ministers every six months; and
c) if required by the Ministers, provide additional reporting.

(4) The Group must advise the Department of Defence in relation to obtaining appropriate technical and scientific expertise regarding Australian Government consideration of the control lists of international regimes and the Australian DSGL.

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

(6) The Group membership must include:
a) Australia's Chief Scientist, as the Chair of the Group;
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 nominated by Universities Australia, one of whom is the co-Deputy Chair;
d) the Chief Executive Officer of the National Health and Medical Research Council, or their nominee;
e) the Chief Executive Officer of the Australian Research Council, or their nominee;
f) a representative from the Department of Industry, Innovation, Science, Research and Tertiary Education; and
g) a representative from the Department of Defence.

(7) The period of operation of the Group may be extended if agreed by the Minister and the Research Minister.

(8) The Group must report six monthly, in writing, to the Minister and the Research Minister, including providing any dissenting views of member on the Group.

(9) The Group must provide a final report to the Minister and the Research Minister, in writing, no later than two years after commencement of its operations.

(10) The Group must meet no less frequently than quarterly.

(11) A quorum of the Group is constituted by the Chair, two public sector representatives, one industry representative and one university/research representative.

(12) The Defence Export Control Office or other agency designated from time to time by the Minister and the Research Minister must provide a secretariat for the Group.

(13) The Secretariat must:
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 maintain Steering Group records.

(14) The office of a member of the Group is not a public office within the meaning of the *Remuneration Tribunal Act 1973*.

(15) The Group may determine the procedure to be followed in performing its functions.

(16) If directed by the Minister and the Research Minister, in writing, the Group is abolished immediately after its final report is given to both the Minister and the Research Minister.

(17) The Minister and the Research Minister must jointly cause a copy of the Group's reports (including the final report) to the Minister to be tabled in each House of the Parliament within 15 sitting days of that House after the day the Minister receives the report.

(18) The Group shall give carefully consider recommendations made to the Group by the Senate Defence, Foreign Affairs and Trade Committee from time to time.

An instrument under this section is not a legislative instrument.

(19) In this section:

Research Minister means the Minister administering the *Science and Industry Research Act 1949*.

[Strengthened Export Controls Steering Group]