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AMBASSADOR OF THE UNITED STATES OF AMERICA
Canberra, Australia
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Senator Ursula Stephens, Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House
Canberra ACT 2600

Dear Senator Stephens,

I would like to take this opportunity to make a written submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee regarding the application of U.S. export controls on academics and universities. Specifically, I would like to reiterate that there are no exemptions to U.S. export control regulations that allow for the export from the U.S. of controlled technology used in fundamental research without a U.S. government authorization, as suggested by some Australian academics and to dispel the claim that Australian researchers would be disadvantaged compared to U.S. researchers by passage of the Defence Trade Controls Bill 2011.

The U.S. government is the ultimate authority when it comes to administering and interpreting U.S. export control systems, and its interpretations are binding on all entities involved in exports of U.S. controlled technology. In response to the claims expressed before your committee, the U.S. Department of State contacted the U.S. lawyer contracted by the University of Sydney to provide advice on the scope of U.S. International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). The State Department specifically informed him of the errors he made in his interpretations of U.S. regulations. As they made clear, there is no exception that allows controlled technology to be exported out of the U.S. for fundamental research without U.S. government authorization that would allow a U.S. researcher to gain an advantage over his or her Australian colleagues. In fact, with limited exception, export controlled technology used by foreign researchers or students while in the U.S., requires government authorization prior to its transfer.

Based on the publicly available documents we have seen on the proposed legislation, U.S. export control laws would continue to be more stringent than Australian laws when it comes to controls on technology. For example, in many circumstances, the U.S. requires a license for the transfer of ITAR/EAR controlled technology to foreign persons when they are studying or employed in or outside the United States. The U.S. government also controls the transfer of ITAR/EAR technology when a U.S. person is overseas for research or employment. We also require authorizations for the export of ITAR/EAR controlled technology from a U.S. person to a U.S. or foreign person located overseas.

In the legal advice provided to the University of Sydney, there seems to be a misperception about what the United States does or does not control for export/transfer. While it is true that the ITAR and the EAR might not control information (e.g., technology) that is in the public domain or is the result of certain types of fundamental research, that does not mean that export controlled information used to conduct that fundamental research is exempt. A U.S. researcher could share such export controlled information with a foreign researcher, either in or outside the United States, only after obtaining authorization from the U.S. government. As noted in my September 18 letter to Chief Scientist Professor Ian Chubb, this can mean that the technology “inputs” to the research, if controlled for export, require an authorization to export, while the “output” information may not be controlled for export.

The U.S. government interfaces regularly with American research institutions to ensure that U.S. export controls are not needlessly hampering fundamental research. That said, although research may be directed toward purely civil pursuits, such as curing or preventing illness or exploring our universe, the technology used in such research can, and has been, exploited by those who mean to harm or threaten others. We see time and again that technology used in legitimate research can be used to create chemical and biological weapons, missiles, and other items of concern. To not control such technology, even when it is used for very legitimate and often civil uses, is to make our nations vulnerable to the potential grave threats that release of this technology represents. This is why the 41 members of the Wassenaar Arrangement call for the control of transfers of dual-use and munitions technology, and why most advanced nations have export controls on such technology. It is important for regulators to strike the right balance between the threat of unauthorized disclosure of controlled technology and the need to conduct legitimate civil research using this technology. It is also important for communities that have not been regulated before to consider the effect that proliferation of advanced strategic technology can have on global security.

Sincerely,

Jeffrey Bleich