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Dr Vivienne Thom AM
Independent Review of the Defence Trade Controls Act 2012 (Cth)
DTC Act Review Secretariat
R1-3-A003B
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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.

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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,

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Professor Duncan Ivison

Deputy Vice-Chancellor (Research)