



THE UNIVERSITY OF  
**SYDNEY**

**Professor Emma Johnston AO FAA FTSE FRSN**  
Deputy Vice-Chancellor (Research)

17 November 2023

Mr David Nockels  
First Assistant Secretary  
Defence Industry Policy  
Department of Defence

Via: [exportcontrol.reform@defence.gov.au](mailto:exportcontrol.reform@defence.gov.au)

Dear Mr Nockels,

The University of Sydney welcomes the opportunity to provide feedback on the Exposure Draft to the [Defence Trade Controls Amendment Bill 2023 \(Cth\)](#).

As detailed in our attached submission to the consultation, based on information available to us to date, our initial assessment of the proposed changes is that, if enacted as proposed, and if the Government does not replace the 'Basic scientific research' definition in the DSGI with a broader 'Fundamental research' definition based on those included in the relevant US export control regulations, the proposed changes are likely to have significant consequences for the missions, international competitiveness and practical operations of Australia's universities.

While we do have some significant concerns about aspects of the Exposure Draft Bill and the way Defence is approaching its development, we are committed to working with Defence and other stakeholders to deliver a strengthened export control regime that is robust, risk-based and administratively workable.

To that end, please do not hesitate to contact me in the first instance as I am most willing to discuss any aspect of our initial submission in more detail ([emma.l.johnston@sydney.edu.au](mailto:emma.l.johnston@sydney.edu.au), 02 8627 8150).

Yours sincerely,

(signature removed)

Professor Emma Johnston  
Deputy Vice-Chancellor (Research)

**Attachment:** The University of Sydney, initial submission on the Exposure Draft, Defence Trade Controls Amendment Bill 2023 (Cth), 17 November 2023

## The University of Sydney, initial submission on the *Exposure Draft, Defence Trade Controls Amendment Bill 2023 (Cth)*, 17 November 2023

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### Executive summary and recommendations

The University of Sydney appreciates the opportunity to provide feedback on the Exposure Draft of the Defence Trade Controls Amendment Bill 2023 (Exposure Draft Bill). We have a long history of constructive engagement with Defence regarding the design and implementation of the *Defence Trade Controls Act 2012 (Cth)* (DTC Act) and are keen for this to continue. We appreciate that the strategic geopolitical context has changed significantly since 2012 and strongly support the efforts of the Australian, US and UK governments to create a licence-free environment to encourage and facilitate cooperation between industry, higher education and research sectors in these three countries. Lowering barriers to technology transfer and skills development between AUKUS partners will help speed up R&D and innovation arising from collaborations between organisations and individuals in the US, UK and Australia.

While we have some significant concerns about aspects of the Exposure Draft Bill and the way Defence is approaching its development, we remain committed to working with Defence and other stakeholders to deliver a strengthened export control regime that is robust, risk-based and administratively workable. Critically, before we can offer our support for the proposed changes to the DTC Act, we need to understand the detail of the proposed exemptions/exceptions, which we have only heard about informally to date. Without such detail it is impossible for us to assess the strategic and practical implications of the proposed changes for our operations. **Moreover, before any such legislation passes Parliament, we need to be confident that Australian firms, universities and** experience with the DTC Act suggests making such comparisons is time consuming and difficult, and will require genuine cooperation and openness between Defence and the sector.

For these and other reasons discussed below, we recommend that Defence should consider:

1. Adopting, as an overarching policy objective and principle for these reforms, the goal of ensuring that the entirety of Australia's new (AUKUS) export controls framework must not impose controls on Australian firms, research institutions and researchers that are more restrictive of international collaborations than those that apply to counterpart organisations and researchers in the US and UK. Achieving this outcome is critical for the future competitiveness of Australia's research and innovation system and wider economy. Australia risks being left behind competitively in the global innovation stakes if our innovative firms and research institutions face barriers to international collaboration that are more restrictive than those faced by their counterparts in the US and UK.
2. Releasing publicly, as soon as possible, the detail of all exemptions/exceptions to the proposed new controls before the Bill is tabled in Parliament. This includes the precise wording of the definition for 'Fundamental research' that we understand Defence is proposing to include in the Defence Strategic Goods List (DSGL), replacing the current definition for 'Basic scientific research'; as well as details of all other exemptions/exceptions. We would like to see a draft of that part of the DSGL revised to contain the exact wording and placement of the additions and amendments.
3. Re-establishing the Strengthened Export Controls Steering Group (Section 74A of the DTC Act) for a limited period to play the same constructive role in the practical implementation of the reforms as it did from 2012-15, but in relation to practical implementation of the new offence provisions.
4. Running collaborative pilots (between Defence and the sector) of the proposed new control measures (especially in-country supplies) with suspension of the application of the penalty provisions (as occurred for the original DTC Act during the first six months of implementation).

5. Working with the Australian university and public research sector to develop and pilot multi-year technology control plans, covering distinct research programs or projects and technologies, reviewed and assessed as safe by Defence. This would provide more certainty for organisations and their staff, reduce compliance costs and provide more flexibility for Australian researchers.
6. Consulting with the Australian university sector to understand and address, through appropriate amendments to the Bill, the transition challenges it will face once the details of the exemptions are known, especially regarding the consequences for non-exempt foreign persons who are already in Australia and are employed or studying in Australian universities with exposure to DSGL technology.
7. Providing certainty about what will be included in the DSGL in the future, with the current review of the DTC Act occurring at the same time. The current review of the DTC Act has discussed with the sector the adoption of broad catch-all military provisions where the DSGL is unable to cover all emerging technology, which will likely broaden the scope of the DSGL over time.
8. Providing more time (over the summer and Parliamentary recess of 2023-24) for genuine consultation with stakeholders before the Bill is introduced to Parliament. Unless more time is provided for consultation, it is highly likely to be referred to an appropriate Parliamentary Committee for intense scrutiny, as occurred with the original DTC Act Bill in 2012. Taking a few more months to consult openly with stakeholders will help to ease the legislation's passage through Parliament.

## Supporting rationales for our recommendations

### Ten days is inadequate for consultation on legislation of this type and significance

We must, regrettably, stress from the outset that giving stakeholders just ten days to provide formal written feedback on proposed changes of such significance and legal complexity is inadequate. The task of assessing how the proposed changes will affect our operations has been made more difficult by the *ad hoc* way in which we have become aware through informal channels of various options for exemptions or exceptions from the proposed new offence provision, which Defence is considering through separate processes. Understanding the detail of these proposed exemptions/exceptions is critical for the higher education and broader public research sector, as organisations cannot meaningfully assess the likely consequences of the changes for their operations without this information. We therefore look forward to receiving full details about the proposed exemptions and exceptions at Defence's earliest convenience.

### Commitment to working with Defence on export controls

The University of Sydney was involved extensively with the governmental and parliamentary processes that led to the passage of the *Defence Trade Controls Act 2012* (DTC Act).<sup>1</sup> We stayed closely engaged with the DTC Act's implementation in the early years, with our then Deputy Vice-Chancellor (Research), Professor Jill Trehwella, representing the sector on the *Strengthened Export Controls Steering Group*, which oversaw the DTC Act's implementation between 2012 and 2015. We engaged significantly in the first independent statutory review of the DTC Act, completed by Dr Vivienne Thom AO in 2018, and released by the Government early in 2019.<sup>2</sup> We made two submissions to Dr Thom's inquiry in 2018 and another, in February 2020, at her request and in collaboration with other NSW universities. This followed our participation in targeted consultations about implementation of key recommendations of the Thom Review relevant to universities. The issues we raised in those submissions remain relevant to, and inform, our perspectives on the Exposure Draft, and so we include our correspondence with Dr Thom in an attachment for context. This year, we have contributed to the Universities Australia and Group of Eight universities' submissions to the second 5-year statutory review of the DTC Act's operations and to Defence's related consultations on possible legislative 'exemptions' for the Australian higher education and research sectors. While concerned about the way Defence is consulting on the Exposure Draft Bill, we understand the pressure it is under to strengthen Australia's defence export controls framework to facilitate and support the AUKUS partnership. We are committed, as we have been since 2012, to working with Defence to develop solutions that are robust and workable.

<sup>1</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Trade\\_Implementation](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_Implementation)  
<sup>2</sup> [Independent Review of the Defence Trade Controls Act 2012 | ADF Members & Families | Defence](#)

## The AUKUS partnership and changed national security environment

The University of Sydney acknowledges the strategic and long-term significance to the Australian Government and Australia's national security of the AUKUS partnership announced in September 2021. We strongly support the efforts of the Australian, US and UK governments to create a licence-free environment to encourage and facilitate cooperation between industry, higher education and research sectors in these three countries. Lowering barriers to technology transfer and skills development between AUKUS partners will help speed up R&D and innovation arising from collaborations between organisations and individuals in the US, UK and Australia. We also recognise that the geopolitical and national security environment facing Australia has changed significantly since the DTC Act commenced in 2012 and that there are important gaps in the DTC Act's scope which need to be addressed to give the US and the UK the confidence to share sensitive technology with Australia, its companies and research institutions. Nevertheless, the development of legislation of such potential significance, greater complexity in institutional application and with such severe penalties for proven offences, should not be rushed. This is particularly so, given that many of the changes proposed in the Exposure Draft Bill respond to recommendations from the first independent review of the DTC Act's operation, completed more than five years ago,<sup>3</sup> and with two other highly relevant reviews still to report.<sup>4</sup>

### How the proposed Exposure Draft Bill may affect the University of Sydney

Based on information available to us to date, our initial assessment of the proposed changes is that, if enacted as proposed, and if the Government does not replace the 'Basic scientific research' definition in the DSGL with a broader 'Fundamental research' definition based on those included in the relevant US export control regulations,<sup>5</sup> the proposed changes are likely to have significant consequences for the missions, international competitiveness and practical operations of Australia's universities.

Perhaps most significantly for universities, in response to the key findings and recommendations of Dr Vivienne Thom's independent review of the DTC Act, the Exposure Draft Bill proposes to extend the DTC Act's scope to also cover 'supplies' of DSGL technology, as well as certain 'goods' and 'services' to a 'foreign person' (effectively a person from any country other than the US or UK once the new framework is in place) that occur within or outside Australia. Currently, the DTC Act only regulates supplies of DSGL technology from a person in Australia to a person outside Australia.

The practical effect of the proposed regulation of 'in-country' supplies of DSGL technology is that for their faculties, schools, institutes and centres engaged in research and teaching involving DSGL goods, technologies or services that are not covered by one of the existing or proposed new DTC Act exemptions/exceptions we understand Defence is considering, universities may need to introduce systems and processes that involve an unprecedented level of monitoring of their employees, affiliates, research students and academic visitors, and their interactions with citizens of all foreign countries other than the US and UK. They will need to do this to make assessments on an ongoing basis of whether proposed activities may require notification to Defence Export Controls for the purpose of determining whether a permit is required.

Depending on the exemptions/exceptions that will be available, there could also be significant consequences during the transition to the framework for Australian university research programs and their personnel. For example, Australian universities currently have thousands of foreign staff and

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<sup>3</sup> <https://www.defence.gov.au/business-industry/export/controls/export-controls/independent-review-dtc-act-2012>

<sup>4</sup> <https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-act-2012> and Department of Defence consultations: *Consideration of legislative exemptions for the higher education and research sectors*, August – October 2023.

<sup>5</sup> **Australian Definition.** Defence and Strategic Goods List 2021 Division 4 – Definitions: "Basic scientific research" (GTN NTN ML22) means 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. **US Definitions: ITAR § 120.34 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 whose results are restricted for proprietary reasons or specific U.S. Government access and dissemination controls. **ITAR § 120.43 Basic research** means a systemic study directed towards greater knowledge or understanding of the fundamental aspects of phenomena and observable facts without specific applications towards processes or products in mind. It does not include applied research. **ITAR § 120.43 Applied research** means a systemic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met. It is a systematic application of knowledge toward the production of useful materials, devices, and systems or methods, including design, development, and improvement of prototypes and new processes to meet specific requirements. **EAR § 734.8 (c) Fundamental research** means research in science, engineering, or mathematics, the results of which ordinarily are published and shared broadly within the research community, and for which the researchers have not accepted restrictions for proprietary or national security reasons.

research students (not from the US or UK) who are already legally in Australia and working or studying in Australian universities in areas with exposure to DSGI goods and technology. When the Defence Trade Controls Act was introduced in 2012 and the Autonomous Sanctions Act in 2011, the Government recognised the need for transition periods. A similar approach will be required to Defence's implementation of its proposed changes, yet there is no indication of transition arrangements in the Exposure Draft Bill.

Our experience with administering the United Nations and Australian Autonomous Sanctions regimes tells us that monitoring transfers to employees, students, visiting scholars and affiliates based within Australia would be a resource-intensive undertaking if it were to be done at scale. It will take us and other universities time to gather data to accurately predict the scale of the likely compliance requirements but, depending on the detail of the exemptions we understand Defence is considering separately from its amendments to the DTC Act, we could easily be talking about many thousands of visits/engagements with foreign persons each year, just at the University of Sydney. Focusing on targeted high-risk technologies and specific identified projects might be more manageable. Measures to fully or partially close this gap would certainly need to be piloted to allow the resource requirements, costs and impacts on the normal operations of universities to be assessed.

### **The principle of 'no disadvantage' for Australian universities, researchers and firms compared to their counterparts in the US and UK**

It is impossible for us to assess, in the time available and without access to full information about exemptions/exceptions, the equivalency of what Defence is proposing compared to what universities and researchers face in the US and UK. **The basic policy principle that should be applied to the entirety of Defence's new export controls framework is that Australian researchers and research institutions should face controls that are no more restrictive to international collaborations than those applied to their colleagues and counterpart institutions in the US and UK.** Past experience with the DTC Act suggests making such comparisons is time consuming and difficult, and will require genuine cooperation and openness between Defence and the sector.

### **Concerns about gaps in Defence's policy processes**

We note that a key recommendation of Dr Vivienne Thom's 2018 review (addressing the need to fill gaps in the DTC Act's controls, including 'supplies' that occur within or outside Australia) stressed that: 'To ensure that any amendment does not unnecessarily restrict trade, research and international collaboration, the legislative proposal should:

- ensure all decisions are targeted and based on risk-related consideration of the technology being supplied, the end user and the end use.
- contain measures to ensure transparency and scrutiny of decisions.
- limit additional uncertainty, complexity and risk of inadvertent breaches.
- minimise any increased compliance costs.'

We are aware of no consideration by Defence of targeted and risk-based options available to it to address the regulatory gaps identified in Dr Thom's review. Moreover, there is nothing in the Explanatory Memorandum to the Bill to suggest that Defence considered options that would limit uncertainty, complexity and the risk of inadvertent breaches, or minimise increased compliance costs. We have also had no visibility, since 2020, of the work of the DTC Act Review Implementation Working Group, which the government committed to establishing in 2019. There is one mention of it on a Defence website:

'In 2020, Defence established the DTC Act Review Implementation Working Group, chaired by Dr Vivienne Thom, consisting of government, industry, research and university representatives to develop practical risk-based proposals to inform Defence proposals to reform the legislation. The Working Group met for the first time in April and is expected to meet again in late 2020.'<sup>6</sup>

In a letter to the NSW Vice-Chancellors' Committee on 1 May 2020 (see top of **Attachment**) Dr Thom advised that the Implementation Working Group met on 7 April 2020, when it considered matters including the following:

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<sup>6</sup> [Independent Review of the Defence Trade Controls Act 2012 | ADF Members & Families | Defence](#)

- Various amendments to the supply provision of the DTC Act, including the introduction of a control on in-country transfers. This came from recommendation 4 of the Review, which identified the locational limitation of the existing provision that created a gap in the legislation. Through thorough consultation, Defence will put proposals for a control to Government that are risk-based and targeted on transfer activities within and outside of Australia.
- Use of Technology Control Plans (TCP), an agreement which would give entities a broad permit covering the scope and duration of a project or program to provide greater certainty and reduce administrative overheads.
- The need for proposals to be coordinated with other government initiatives, including with regard to sensitive technologies.
- The process of improving upon existing and developing new guidance material, online support and outreach and engagement activities to support universities and research organisations to undertake periodic reviews of their compliance and development of new projects and technologies.

Universities and other stakeholders need to know how the Implementation Working Group's ideas contributed to the approach now proposed in the Exposure Draft Bill. For example, from our review of the Exposure Draft Bill it is difficult to see evidence that the proposed new controls have been designed to be risk-based. Nor is there any evidence that the idea of Technology Control Plans (which we view as an important potential way to make the new in-country transfer regime workable for universities) has been progressed. If the Working Group did not continue, stakeholders deserve to know how Defence has progressed its work on implementation.

We also see no evidence in the Explanatory Memorandum to the Bill that Defence has followed the Australian Government's updated guidance to Commonwealth agencies and their staff on its expectations regarding policy impact analysis as a critical component for good policy development. The Australian Government Guide to Policy Impact Analysis, released March 2023, states at p.7:

The Government is dedicated to evidence-based policy development and decision-making processes... every policy proposal – regardless of whether impacts are positive or negative – must be subject to an appropriate degree of Australian Government Policy Impact Analysis. Impact Analysis is a factual assessment of a given issue; it is not a document designed to critique or praise a particular policy... **Every policy option must be carefully assessed, its likely impact costed and a range of viable alternatives considered in a transparent and accountable way against the existing arrangements. Robust evidence is critical to the Impact Analysis process. Relevant data that is available (as well as relevant data that is not available) must be identified. Where relevant data is not available, explanatory information must be provided. As robust data underpins evaluation, the evaluative process in the final report must set out a plan to close any data gaps that remain in the post-implementation phase.**<sup>7</sup>

Despite our and the sector's repeated offers (**see Attachment**) to work collaboratively with Defence to identify and assess available options for addressing the gaps in the DTC Act identified by Dr Thom's review, we are not aware of any such work occurring since our engagement with Dr Thom in early 2020. The Exposure Draft of the Bill therefore appears to have been released before other key steps in the policy development process have been completed, in defiance of the Department of Prime Minister and Cabinet's updated guidance for policy impact analysis.

**Attachment** University of Sydney and other relevant submissions and correspondence concerning the 2018 review of the DTC Act

<sup>7</sup> [https://oia.pmc.gov.au/sites/default/files/2023-05/oia-impact-analysis-guide-march-2023\\_0.pdf](https://oia.pmc.gov.au/sites/default/files/2023-05/oia-impact-analysis-guide-march-2023_0.pdf)