National Tertiary Education Union | 20 years 1993-2013

National Tertiary Education Union ABN 38 579 396 344
National Office, 1st floor, 120 Clarendon St
PO Box 1323, South Melbourne VIC 3205
phone 03 9254 1910 *fax* 03 9254 1915
email national@nteu.org.au www.nteu.org.au

17 May 2013

Committee Secretary
Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Kathleen Dermody,

RE: Senate Foreign Affairs, Defence and Trade Legislation Committee's ongoing scrutiny of the Defence Trade Controls Act 2012

As the professional and industrial organisation that represents the interests of over 27,000 members employed in universities, the National Tertiary Education Union (NTEU) would like to make a submission to the Senate Foreign Affairs, Defence and Trade Legislation Committee (FADT Committee) in relation to the implementation of the Defence Trade Controls Act 2012 (the Act).

We strongly support the FADT Committee's role in conducting a six-monthly examination of progress in the implementation of the provisions of Act, and we recognise the importance of the work of the FADT Committee. Just before the passage of the Act, the NTEU wrote to the Defence Minister (26 October 2012) calling on him to ensure the transitional arrangements captured in the final legislation reflected the recommendations of the FADT Committee's final Report (10 October 2012).

We understand that for the Committee has a particular interest in exemptions surrounding research and international collaboration and clarity around the scope of regulation governing the transfer of intangibles.

We would remind the Committee that the NTEU has already expressed concerns about the implications of the Act upon our members within the university sector, and upon the nature of the social relations and structures that underpin research capability in public research settings.

In particular we have repeatedly referred to the role of academic freedom as a principle imbued across the university sector. In a letter to the Defence Minister on 17 January we repeated;

> In the theoretical debate about academic freedom in Australia and abroad, it is widely considered that a culture of intellectual freedom has depended upon a 'protective' element in the way academic freedom is articulated, or in other words an assurance for university researchers that they are imbued with a right to free and open inquiry *without fear of punitive sanction*.

The introduction of criminal sanctions under the Act for publication and particular international kinds of intangible supply covered under the Defence and Strategic Goods List (DSGL) challenges these widely enunciated principles, and requires great sensitivity by the Defence Department, the Steering Group and its members.

We acknowledge that judgement about the efficacy, practicality and integrity of the overarching legislation will in part depend upon the Steering Group as it progresses through its Forward Work Program and that it is premature to identify serious deficiencies in the permit regime. For instance, we would be keen to observe the outcomes of the "on-line DSGL search tool" that the Group is developing "to help exporters self-assess whether goods and technologies are controlled".

Nonetheless, the progress of the Steering Group is sufficient for scrutiny to be applied to the Groups progress, in particular in relation to the identification, assessment and management of the risks, costs and administrative burden associated with intangible transfers of DSGL technologies. We would also like to highlight a range of other matters that should be relevant to the FADT Committee.

Strengthened Export Controls Steering Group

Under section 74A (1) (d), one of the Steering Group's key purposes is to determine whether the Act, the regulations and the implementation arrangements are more restrictive than United States export control regulations in relation to university activities. Based on the Group's 25 March notes, we understand a meeting occurred on 12 April 2013 with visiting US regulators and university representatives to discuss the major differences between US and Australian export controls. We also understand the Steering Group will report to Ministers and the Senate on the outcome of the meeting.

The NTEU is interested in the outcomes of the Steering Group's meeting. In particular we would like to know if any legal advice has been obtained in relation to this matter and if, and when, this advice, or a summary of it can be made publicly available.

We would also note that the Steering Group's progress with its eight pilot programs has begun, and are keen for the progress to be reported upon.

Though the Steering Group brings together high level administrators from their respective organisations, we are interested in the consultation mechanisms undertaken by the Steering Group with researchers and scientists more broadly, noting that the industrial, legal and professional representative groups are not involved.

In arguing for consultative mechanisms that engage directly with university researchers, we would highlight a discussion paper prepared by the American Association for the Advancement of Science *Bridging Science and Security for Biological Research* (2012) which argued that the review of dual use processes in the United States had been fundamentally guided by an assumption of 'scientists, research administrators and security experts working together and openly communicating with each other', and the advantage of developing consultation mechanisms in the early implementation stage.

Defence Trade Controls Regulations 2013

On 5 February 2013, DECO released for public comment draft regulations under the Act. In response the NTEU raised four potential amendments:

- **Amendments to ministerial considerations listed in Section 7** (which establishes the criteria that the Minister must take into consideration for the purposes of granting a permit of the Act). The NTEU recommended that the Regulations be amended to give effect to clear national and public interests that are likely to be adversely affected if a permit is not authorised, including whether the permit is being provided to a public university, or a university staff member conducting research at an Australian university;
- **Further conditions tied to the refusal of a permit** such as the inclusion of conditions that guarantee dialogue between affected parties and institutions before a decision to refuse a permit is made under sections 11 or 16 of the Act;
- **An appeals mechanism** that outlines detail with regard to the review of administrative decisions, defines shorter time frames for administrative decision-making, and defines a wide

meaning for the 'standing' of parties beyond the affected person to include parties detrimentally affected by the decision and professional bodies representing affected persons;

- **Ministerial reporting requirements** to annually table in Parliament a count of permit applications made under Sections 11 and 16 (that include an analysis of successful and unsuccessful applications and subject to appropriate privacy provisions, the broad grounds on which applications were refused.

The NTEU has an interest in the progress of the draft Regulations including if and how they might have been altered from the original draft. We would also like to know when they will be enacted.

Defence Department and fostering closer links

In the FADT Committee's final Report, Recommendation 4 called on the Defence Department to "use the implementation process for the provisions of the Defence Trade Controls Bill to foster closer links with the research and university sectors and with the Department of Industry, Innovation, Science, Research and Tertiary Education and other relevant departments". Part of this concern was one considered by the NTEU in its letter to the FADT committee on 15 August 2012 where it stated the importance of further developing a sustained dialogue between the higher education sector and the Department about its communications strategy. The NTEU has had the opportunity to engage with the Department briefly and we are curious to know the Department's efforts in fostering closer links with relevant professional associations in the university sector.

On this matter, the NTEU has already had interactions with members that infer the existence of significant misunderstandings about the operation of the Act. In particular, in one instance a doctoral student reported that he was denied the opportunity for financial support by a public research organisation on the basis of concerns that he was an international student and was from a country currently experiencing political instability.

The NTEU readily understands that "the Act does not apply any controls on the conduct of research within Australia" and "that foreign students, researchers and industry workers should be able to come to Australia and use controlled technology without requiring a permit". The NTEU also understands that the FADT committee is focused at protecting the integrity of international collaboration.

We raise this particular example to emphasise that the strength of engagement by the Steering Group and DECO with the university sector is as much about addressing the risk of unintended consequences upon the many researchers who may be otherwise unlikely or unintended to be impacted upon by the legislation.

We would welcome any further communication with the FADT Committee about this submission.

Yours sincerely,

JEANNIE REA

National President