

QUT response to Questions on Notice

Senate Foreign Affairs, Defence and Trade Legislation Committee hearing on Friday 1 March 2024 of its inquiry into the provisions of the Defence Trade Controls Amendment Bill 2023

- 1. Senator FAWCETT:** Could you take on notice if there are any other areas or any other particular definitions—we've focused a lot on 'fundamental research'—that you believe are critical to get right, that you've got concerns with the current way they are defined. Let us know what the areas are and if you have proposed alternatives.

The definition – and location – of 'fundamental research' is the most important definitional consideration in the Amendment of the DCTA. The only reference to this aspect of real-world research activity in the current Act is a note to the definition of DSGT technology, which states "the Defence and Strategic Goods List contains exemptions relating to technology or software in the public domain and to basic scientific research." This set of exemptions is both far too narrow and in the wrong place. The Amendment Bill does not currently address this omission in any way.

As the Committee has heard, it is the strong view of the entire sector that the definition of 'fundamental research' agreed in consultation between the Department of Defence and the higher education and research working group must be included in the Act itself, rather than in the Regulations or the DSGT. Subject to the further considerations of that working group in concert with the Department of Defence, QUT prefers the following definition:

'Fundamental research' is defined to mean basic or applied research that is intended for public disclosure or to be shared broadly within the research community, and not research whose results are restricted for national security reasons.'

Additionally, should the sector's call for good faith considerations to be countenanced in the Bill, to make its strict liability provisions more responsive to real-world conditions, then definitions of good faith actions will need to be drafted in consultation with actual researchers to ensure they meet their intent in practice.

In particular, QUT's call for a genuine emergency exception to prevent loss of life, serious injury or serious environmental contamination will also require a definition that is meaningful in real-life application.

In both the particular case of genuine emergency and the general case of good faith action, there are likely to be definitions in other legislation that could serve as initial wording, but the research sector should be consulted before final wording is adopted, in order to ensure legislative efficacy.

Finally, should a de minimis principle be adopted as discussed below at answer 4, QUT would recommend the adjustment of the functional definitions of 'relevant supplies' and

‘relevant DSSL services’ in the Amendment Bill’s proposed new section 5C of the Act, to integrate the de minimis principle in each of those descriptive definitions.

2. Senator FAWCETT: Could I ask, under the current regime, how many people does the university employ specifically to support researchers associated with QUT in making sure they are complying with Defence Trade Controls?

Dr Byron: Are you talking about administrative staff?

Senator FAWCETT: Yes.

Dr Byron: I will have to take that on notice, but it would be in the order of magnitude of dozens rather than hundreds. That would be my guess, but I'll take that on notice.

In addition to a dedicated full-time Export Control and Security Officer within our research portfolio, many other QUT staff devote a portion of their time to ensuring QUT is compliant with the DTCA, including research administrators, research team leaders, professional supporting staff and senior staff, amounting to an estimate in the order of 10-20 FTE across the university. This excludes the vigilance of researchers themselves.

3. Senator FAWCETT: As we expand this to deemed exports, re-exports, deemed re-exports and retransfers et cetera, has the university done any planning as to what additional staff they will need to take on?

Dr Byron: The people responsible for that are watching these proceedings with great interest.

Senator FAWCETT: Take it on notice; are you happy with that?

Yes, the university is watching carefully the progress of the DTCA amendment agenda, with a view to ensuring we are adequately equipped to meet the increased administrative burden, including through additional staffing. It is very difficult to place a number on this at present, before we know the final shape and extent of the reform in detail, and pending an audit of staff and students to determine exactly how many of our research community are affected. Once the Bill is enacted the scope and scale of the task will be more apparent, but we can safely advise the Committee that there will be, in addition to a very substantial spike in transitional labour required, a significant increase in ongoing administrative support to ensure compliance.

4. Senator FAWCETT: I spoke to you before about EAR and whether splitting the system to align with what the US has done, which is the stated intent of this change, would be worthwhile. I've asked you to take that on notice. Could you also take on notice a similar but different approach which has been recommended by EOS in their submission, and others as well, about a de minimis principle which is used in part 734 of the Export Administration Regulations in the US and is also applied to certain ITAR goods. Can you take on notice whether you think that application—because it's been expressed particularly in the light of product and intellectual property from industry—would also help the research sector, both with the nature of research but also the sort of people you can engage in that research?

QUT supports the proposal to include a de minimis principle in the Act: it would benefit the research and higher education sectors to the same extent it would benefit industry.

For example, a de minimis principle could usefully apply to the provision of safety training as part of induction courses for new research staff, new research students and visiting academics. Under the proposed regime, instruction in the use of certain protective equipment on the Munitions List (e.g. ML7.f) to a non-exempt person not (or not yet) in possession of a permit would constitute 'relevant DSGI supply': with a de minimis principle in force, it could be determined that such safety instruction forms an acceptably minor activity.

We agree with EOS that the inclusion of a de minimis principle could be achieved conveniently by adjusting the definitions of 'relevant supplies' and 'relevant DSGI services', although as mentioned above at answer 1, QUT would prefer to see that alteration made in the Act (in the proposed new section 5C) via the current Amendment Bill rather than by the circuitous means of the Regulations.

5. [Senator FAWCETT:] The second question I have for you to take on notice is you said you currently have 'dozens', not hundreds—was your word—in the administrative area. I'd like to understand how many applications on an annual basis are made to DEC for licences, permits et cetera and whether you have a timely response from them under the current system and, given the expansion of those four areas under these regulations, will this legislation if it were to come into force, what's a rough order of magnitude increase in the number of applications you think you would be making? We can then do some extrapolation about the potential size of resource investment that would be required to maintain a timely response to the sector?

This is a very difficult question to answer at this point, especially with the Bill still in progress. A precise answer will only be possible in retrospect, but even a ball-park estimate is difficult to offer without knowing exactly how many staff and students may require permits, for exactly what activities, and under exactly what exclusions and conditions.

Under the current regime, we seek only the occasional permit, in the order of just a few per annum, for carriage of DSGI goods or transmission of DSGI technology offshore, which is not a common activity for QUT staff. This is no guide at all to the anticipated need for permits in the new DTC context.

Even though it creates a licence-free context for AUKUS partners and other exempt persons, the proposed regime expands enormously the kinds of everyday activities that come under its aegis: it includes interactions with the person standing next to a researcher at an Australian lab bench; conversations at domestic conferences and symposia; supervisory discussions; engagement with industry partners at their Australian premises. These are events that occur multiple times per day, with multiple people – in one's own lab, at the café, in the classroom – some of whom are not within the 'safe room' created by the Amendment Bill.

As a consequence, we anticipate that QUT will need to apply for hundreds of permits per annum, potentially thousands, in order to ensure all staff and students are compliant. The transitional period will be especially intensive.

At the moment, universities engage productively with the Department of Defence seeking advice to determine the necessity of making formal applications. In periods of staffing pressure at its end, the Department has occasionally had to suspend that informal advisory engagement, asking universities to go ahead and seek formal rulings. It is virtually certain that this will happen under the new regime, resulting in a greater overall administrative burden in the interests of an orderly process under significant staffing pressure.

On timeliness, it seems unlikely that permit processing could be timely during the initial transitional phase due to the sudden elevation of administrative pressure. Timeliness will also be a challenge later on, if sufficient resources are not allocated to handle the significant increase in work. The effect of delays in processing will slow down and harm research activity on the ground, including potential detriment to the recruitment and retention of research talent.

Relevant to this answer, QUT notes that a witness appearing later in the hearing on behalf of ASPI argued that many respondents were simply wrong about these sorts of effects of the amendments. When pressed to provide a concrete example, she said:

I think there are some particular actors or institutions that believe they come under some of the more restrictive elements of this legislation, and, particularly in universities, they are probably academics who don't quite understand how this actually applies to them in practice.

QUT refutes this characterisation in its entirety, and we do so from the perspective of an institution that is intimately aware of how research actually operates in a higher education setting, 'in practice'. It is surprising to QUT that ASPI is prepared to offer evidence so far outside its area of expertise and knowledge. We suggest that the Committee should weight those remarks in proportion to the witness's experience working inside an actual university, which appears to be nil.

QUT thanks the Committee again for the opportunity to appear. We would be pleased to provide any further assistance to the Committee that it should require.