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Committee Secretary

Foreign Affairs, Defence and Trade Legislation Committee (FADT)

Department of the Senate

Email. fadt.sen@aph.gov.au

Dear Dr Kathleen Dermody,

RE: Progress of the Defence Trade Controls legislation

Thank you for the opportunity to respond to the FADT Senate Standing committee about the progress of Defence Controls legislation. The National Tertiary Education Union (NTEU) has a strong commitment to protecting the professional interests of university staff in relation to the operation of this legislation. We commend the Committee's ongoing concerns in the implementation of the legislation through the conduct of regular six-monthly inquiries, in accordance with its 11 October 2012 recommendation.

Our initial concern was prompted in 2012 about the introduction of criminal offences impacting university staff. Of particular concern was that the Act created criminal offences for the 'intangible supply' (including emails, scans and faxes) (s10) of research, and eventually would include 'publication' of research (including journal articles, referred conference papers, blog posts) (s14A).

It was clear that the Act would have fundamental implications for the everyday scholarly activities undertaken by a potentially large body of university researchers and scientists. In a letter to Minister Stephen Smith on 17 January 2013 we stated that the publications offence "strikes at the heart of why researchers at universities undertake research and pursue academic careers". Our concern included how it extended to a vast array of 'dual use' technologies that could potentially serve both military and non-military purposes. We argued that "the breadth of 'dual use' technologies covered under the Defence and Strategic Goods List (DSGL) means that a much larger group of researchers than has been anticipated would have to understand the legislation and consider applying for a permit to ensure that their research activities do not attract criminal liability".

We expressed concerns about the chilling effect on the culture of intellectual freedom in Australian universities and subsequently the robustness of scientific debate. We also expressed concern that the legislation would be wider than Australia's obligations under the *2007 Australia – United States Defence Trade Cooperation Treaty* to control the intangible transfer of goods and technologies. The legislation would potentially have unintended consequences that restricted Australia's capacity for innovative and ground breaking research.

Furthermore, before final passage of the Bill the NTEU recommended to the Defence Minister on 26

October 2012 significant changes to the legislation. We subsequently have argued that the legislation requires not only a refinement of the application of the Act (such as through the permit regime) but substantive legislative reform.

The need for legislative improvement notwithstanding, with less than a year remaining on the Steering Group's 24 month transition period there are recent developments through the Steering Group that suggests important progress is being made.

Many of these correspond with the NTEU's stated concerns. In minutes and ongoing discussions, the Steering Group has identified areas of concern shared by the NTEU including:

- That academics (not merely institutions) will always bear a substantial responsibility for compliance with the Act;
- The administrative burden constrains the everyday activities of university staff;
- Concerns about the efficacy of a supply offence that is so widely conceived;
- Concerns about the efficacy of a publication offence that is so widely conceived;
- The need for a robust communications strategy with both institutions and individual scholars to avoid the proliferation of poor information;
- The need for greater procedural fairness relating to Ministerial decisions such as a meeting between affected parties and the Department before decisions about denying a permit is made.

In particular, the NTEU is highly encouraged by one critical development in the approach of the Steering Group. Following comparisons with the US defence control system which highlighted that in specific areas the legislation compared poorly to the US (particularly in relation to US dual use publications controls), the Steering Group outlined it may recommend additional exemptions or exclusions be applied to reduce the burden on exporters of dual-use technologies, particularly with regard to lower-risk activities and has also now explicitly highlighted the necessity of implementing a more risk based management of export controls implemented through legislation. This is a highly significant improvement.

In this light, we would like to see further progress through the Steering Group who are undertaking trials in relation to a more risk based approach. It is very important that results and findings from these trials are shared with the sector.

Consistent with our references to the American Association for the Advancement of Science's discussion paper *Bridging Science and Security for Biological Research (2012)* we would reinforce the need for stakeholder engagement that focuses not only institutions but affected researchers as the trials advance and advice to the sector is formulated.

The NTEU has been consistently reminded about the impact of poor information, particularly in relation to misunderstandings amongst staff about the operation of the *Autonomous Sanctions Act 2011* and the *Autonomous Sanctions Regulation 2011*. We would reinforce that the NTEU can play an important role in ensuring that robust information about Defence controls is disseminated widely.

As detailed in the Steering Groups reports and minutes, the NTEU supports exploration of the possibility of legislative and policy reform during 2014 addressing the following areas:

- The introduction of a risk based management of export controls
- In this process, an exclusion of parties that are unlikely to export control items
- The construction of processes that minimise the administrative burden on parties including:
 - Open licences,

- Extended licences,
- Removal of controls on verbal supply, and
- Removal of controls on tangible exports for individual use in Customs Act
- A narrowing of the publications offence so that it focuses on the DSGL's Military List
- Introduction of a legal defence for due diligence
- Mechanisms for ongoing legislative review, such as permanent strategic engagement between DECO and industry, research and government stakeholders
- Greater procedural fairness in Ministerial decisions

In particular, we believe that 2014 will be crucial in relation to stakeholder and sector engagement, and we emphasise the need for information about the effects of the legislation to be extensively and properly communicated to affected researchers, and that processes to receive open and unfiltered feedback is established.

We would welcome any opportunity to discuss our opinions and concerns further with Committee members.

Yours faithfully,



JEANNIE REA

National President