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Senator Raff Ciccone
Chair
Senate Foreign Affairs, Defence and Trade Legislation Committee
Parliament House, Canberra

Submission on the Defence Trade Controls Amendment Bill 2023

Thank you for the opportunity to make a submission on the Defence Trade Controls Amendment Bill 2023 (the 2023 Amendment Bill).

Background to this submission

For background to this submission, I am an Australian citizen currently residing in New Zealand, having lived in Australia until 2019. Between 2009-2019 I was Vice President of Civil Liberties Australia (CLA), a non-party political NGO based in Canberra.

In 2023, I was awarded a PhD (Regulation and Governance) from the Australian National University.[1] My research and thesis focused on the use of securitization in Australia biosecurity legislation – and one of my case studies was the *Defence Trade Controls Act 2012* (Cth) (DTCA) and the fraught policy contest that surrounded that legislation's development. My submission on the 2023 Amendment Bill is informed by my research on this topic.

In support of my submission and to aid the Committee, I have also attached a published article of mine on the passage of the DTCA in 2012.[2] This article is based on my research and reflects many of the themes and concerns expressed in my submission on the 2023 Amendment Bill.

Scope of this submission

My submission is primarily limited to those parts of the 2023 Amendment Bill that would amend Part 1 and sections 9A – 14C of the DTCA. I have no comments on the changes to the brokering offences. I also make no comment on the AUKUS arrangements, which is one of the stated drivers for this Bill. I do note, however, that similar strategic and diplomatic imperatives drove both the development of the Defence Trade Controls Bill 2011, as well as contributing to the sense of urgency that led to problems for the Department of Defence when the Bill came before Parliament.[3]

My submission primarily focuses on the relationship between the proposed amendments and the academic and health research sector. This contrasts with much of material provided by Defence which focuses on the 'opportunities' for defence-aligned industries.

[1] Timothy Vines, *Securitization as a mechanism in Australia's Biosecurity lawmaking and disease response* (2023, PhD Thesis, Australian National University) https://doi.org/10.25911/BGMH-9J97 ('*Securitization*').
[2] Timothy Vines, 'Beakers and Borders: Export Controls and the Life-Sciences under the Defence Trade Controls Act 2012' (2018) 25(3) *Journal of Law and Medicine* 655 ('*Beakers and Borders*').
[3] See *Beakers and Borders*.

Submission

There are four main points I wish to bring to the Committee's attention.

First – the 2023 Amendment Bill represents a seismic shift in the scope and reach of the DTCA. It also increases the extent to which defence and security interests shape (if not constrain) research policy and academic freedom in Australia. It is doubtful that the academic sector has had sufficient opportunity to contribute meaningfully to such a fundamental rewrite of the DTCA.

Although the amendments in the 2023 Amendment Bill appear small in nature – adding only a few new offences and updating terminology – they represent a profound change in the scope of the DTCA. Currently, the DTCA creates a 'virtual border' around Australia and regulates the transfer of goods and 'technology' (ie, information) across that border.[4] Once someone is inside Australia most provisions of the DTCA do not apply in relation to technology transfers.

Where this border exists in a critical element of the law. The 2023 Amendment Bill would collapse this border and, instead, regulate transfers *within Australia* and between individual in Australia.

The establishment of the virtual border in 2011 was controversial to the academic sector, as it would have impacted many ordinary research activities.[5] There was significant uncertainty about its application to international students, including those undertaking higher research degree programs. The decision to exclude domestic transfers was a concession won by the academic sector and this Amendment Bill undoes it and reopens these points of uncertainty.

Relevantly, the improvements to the 2011 Defence Trade Controls Bill (and DTCA) required months of engagement between Defence and the research community. This engagement was facilitated by a former Chief Scientist, whose participation help bridged the divide between the defence and academic communities. Based on the material available to the Committee, it is questionable whether similar engagement has occurred in this fundamental rewrite of the DTCA.

For example, Defence's regulatory Impact Analysis, Explanatory Memorandum, and duration of Defence's public consultation on Bill do not suggest that these interests have been sufficiently considered, nor the opportunity-cost of lost research opportunities adequately accounted for. It is noted that Defence's consultation was primarily 'confidential' and 'targeted'.[6] Such forms of consultation make it difficult for non-insiders (including many of the researchers likely to be affected by the change in regulation) to understand, let alone influence, policy development.

To the extent public consultation on the draft Bill occurred, it is noted that consultation commenced on Melbourne Cup Day (a public holiday in Victoria) and was limited to 10 days including one weekend. Even with the best of intentions, it is questionable how much influence submitters could have had on '[ensuring final legislation is fit for purpose and minimise regulatory burden on affected stakeholders' given:

A) the limited time to prepare submissions (including seeking technical and legal advice);
B) prior consultation was confidential, likely limiting available information to respond to; and
C) the fact that the legislation had already been drafted and was, indeed, introduced to Parliament 9 working days after the close of submissions.

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[4] 'Virtual border' was the phrase used by a senior Defence official during the debate on the 2011 Bill: Evidence to the Senate Foreign Affairs, Defence and Trade Committee, Parliament of Australia, Canberra, 21 March 2012 (Michael Shoebridge) p 10; *Securitization* p 96.
[5] See *Beakers and Borders*; *Securitization* pp 184-185 and Chapter 5 generally.
[6] Department of Defence, *Impact Analysis Strengthening Australia's Export Control Framework* (2023) p 47.

I recognise that Defence acknowledges that its public consultation was 'compressed', although I question whether its stated justification ('to seize the opportunity for a national exemption to US export control licencing')[7] will provide comfort to those who might have prioritised a more careful and even weighing of competing interests. Ultimately, it should be for Defence officials to satisfy the Committee that their consultation met the standards they themselves identified in their Impact Analysis (extracted below).[8]

Table 16: Consultation principles

Purposeful:	Consultation is appropriately planned to identify its purpose, scope, stakeholders, risk, activities, resources, and timeframes.
Broad Based:	Consultation is broad to ensure diversity of stakeholders affected by the changes is considered.
Timely:	Timeframes for consultation are realistic to allow stakeholders enough time to provide a considered response.
Accessible:	Consultation is online and in-person to enable stakeholders can readily contribute to consultation matters.
Transparent:	Consultation is transparent and comprehensive, engaging stakeholders from the earliest possible stage to participate in the process and ensuring outcomes visible.
Evaluate and Review:	The effectiveness of consultation is evaluated and reviewed to ensure methods are fit for purpose and engage all views, and changes are made as required.

In relation to this issue, **I would recommend that the Committee**:

- Obtain information from Defence officials on their targeted consultation and, in particular, which organisations from the academic and research communities it included.
- If they have not already made submissions, the Committee should invite Australia's public research funders to comment on the Bill.
- If they have not already made a submission, the Committee should invite groups that represent the interests of *researchers* (as opposed to academic institutions) to comment on the Bill, for example the Australian Academy of Science. The Society of University Lawyers (SoUL) would also be a relevant body.
- Defence should provide evidence it has engaged with discipline specific groups – for example those involved in life science research, cryptography, and research involving AI and quantum computing.
- The Committee should, as was the case in 2012, consider issuing a 'preliminary report' while further consultation occurs.[9] A final report should be withheld until the Committee is satisfied that all relevant parties have been genuinely consulted.
- The Committee should consider adopting an ongoing oversight role of this consultation process.

[7] Department of Defence, *Impact Analysis Strengthening Australia's Export Control Framework* (2023) p 54.
[8] Department of Defence, *Impact Analysis Strengthening Australia's Export Control Framework* (2023) p 47, Table 16.
[9] Preliminary report: Defence Trade Controls Bill 2011 [Provisions] – Parliament of Australia (aph.gov.au), especially chapter 4.

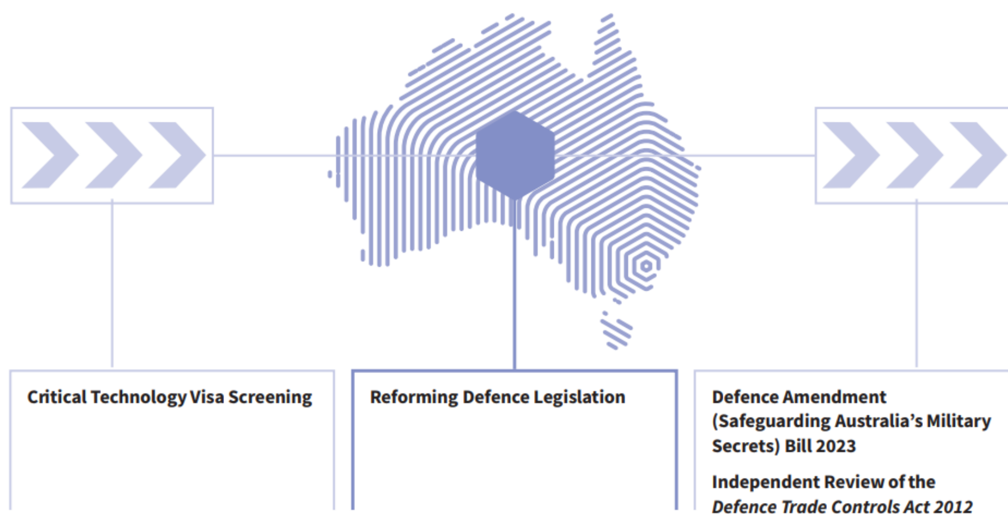
Second – these amendments undo much of the good work achieved by previous iterations of this Committee during the development of the Defence Trade Controls Bill 2011 and the 2015 amendments to the DTCA. This includes undoing core elements of the compromise that was achieved to reduce the burden of the DTCA on the academic sector.

As discussed above, the 2023 Amendment Bill will overturn the compromise secured through lengthy negotiations between Defence and the academic community. As in 2011, national security and defence imperative are driving both the design of legislation and its timing. Hopefully, as in 2011 and 2012, this Committee can play a significant role in ensuring that other interests – such as supporting Australian research, respecting academic freedom and promoting public health objectives (see below) are taken into account.

My research identified the need for pragmatism when it comes to legislation related to the Australia-US security Alliance. Support for the Alliance is absolute across both major parties.[10] The current and previous Government committed Australia to the AUKUS partnership and will likely not accept amendments to the 2023 Amendment Bill that are inconsistent with Australia's obligations under AUKUS.

However, this does not mean that all legislative proposals put forward by Defence in the 2023 Amendment Bill should be accepted. There are likely to be measures which go beyond those required by AUKUS which should be contested. For example, those which implement findings from the *Defence Strategic Review*, the 2018 review of the DTCA and even those which are intended to make administration of the Act easier for Defence officials. For example, Defence's Impact Analysis refers to the 2023 Amendment Bill as shifting from a before-and-at-the-border focus on security threats (ie, the current approach in the DTCA), to a full spectrum approach that creates a 'protective environment continuum' (extracted below).[11]

Image 2: Complementary reforms underway to bolster Australia's protective environment continuum



Establishing this continuum is positioned as justifying regulating intangible knowledge transfers within Australia. But is it? And what is the opportunity cost on Australia's research activity and

[10] How this played out in 2012 is examined in *Breakers and Borders* and *Securitization*. It is sufficient to quote one individual who sought to push back on the Defence Trade Controls Bill: 'we were battling two governments' (p 172, fn 594). See also the political and diplomatic interventions: *Securitization* pp 164, 172.

[11] Department of Defence, *Impact Analysis Strengthening Australia's Export Control Framework* (2023) p 47, Image 2.

competitiveness in adopting this new environment? How does this environment compare to comparator nations, including our AUKUS partners? Why aren't Australia's normal visa-control processes sufficient when they have previously been used to restrict people of concern studying in Australia? And why should everyone be regulated, when more targeted controls can be imposed under existing 'catch-all' security and arms-controls laws?

If AUKUS is the driver for implementing reforms *now* and with only limited consultation, then only those amendments should be progressed quickly. Defence should be asked to provide advice on:

- the minimum changes to the DTCA required to meet Australia's obligations under AUKUS; and
- whether Amendment Bill uses the least restrictive measures to achieve these obligations.

In answering the other questions, I believe it is also important for a more enduring mechanism to be established to ensure that Defence's policy objectives (however noble) do not go untested. As I have argued, Parliament's amendment of the Defence Trade Controls Bill 2011 to establish the Strengthened Export Controls Steering Group (Steering Group) provided a powerful mechanism to achieve better legislative and policy outcomes for all parties.

Key to the success of the Steering Group (and acceptance by many of the opponents of the DTCA) was that:

1) it was enshrined in legislation (including its membership);
2) it was chaired by an individual who was respected by Government and the academic sector;
3) it was accountable to the Defence Minister *and* the Research Minister for its work;
4) its reports had to be made public; and
5) it had also an express remit to look at – for example – 'whether [the DTCA], the regulations and the implementation arrangements are not more restrictive than United States export control regulations in relation to university activities.'

The 'working group' referred to in Defence's Impact Analysis document offers none of these safeguards or features. Given the scale of changes implemented by this Bill, it is essential that section 74A of the DTCA is amended to revise the Steering Group, possibly with refreshed terms of reference.

In relation to this issue, **I would recommend that the Committee**:

- Ask Defence officials to provide advice on:
  - the minimum changes to the DTCA required to meet Australia's obligations under AUKUS; and
  - whether Amendment Bill uses the least restrictive measures to achieve these obligations;
  - why the wider objectives of the 2023 Amendment Bill cannot be achieved through normal visa controls (eg, for international students) and existing 'catch-all' legislation such as the *Autonomous Sanctions Act 2011* and *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*?
- Seek feedback from Defence, industry and academic and research sector stakeholders on refreshed terms of reference for a renewed Strengthened Export Controls Steering Group.
  - A term of reference for the Steering Group should include advice on the comparative restrictiveness of the 2023 Amendment Bill compared to other AUKUS members.

- Amend the 2023 Amendment Bill to re-establish the Strengthened Export Controls Steering Group
- Delay the commencement of provisions in the 2023 Amendment Bill that are not absolutely essential to implementing the AUKUS agreement until after the Steering Group has reported.

Third – in undoing the compromise of the current DTCA, it is now necessary for Parliament to propose amendments to the DTCA that would, at a minimum, entrench a recognition of the value and importance of fundamental research in the DTCA.

A key part of the debate over the Defence Trade Controls Bill 2011 was that it lacked an explicit exemption for 'fundamental' or 'basic' research. Opponents to the legislation pointed to equivalent protections in UK export control legislation as a model for Australia. An opposition amendment to the 2011 Bill was passed by the Senate but then overturned by the House of Representatives the following day – with the Opposition voting against its own, successful amendment.[12]

In many respects, the amendments made to the DTCA in 2015 – including an exception for certain 'oral' supplies of technology (section 10(1A) of the DTCA) and restricting the most serious offences to transfers of information on Part 1 of the Defence and Strategic Goods List (DSGL) – meant that a legislated protection was less necessary. Or, at least, that its absence was easier to accept. That the DSGL, itself, also included a reference to 'basic scientific research' was a further assurance.

However, with the undoing of the compromises of 2015 (see discussion above), and the proposed dramatic increase in the scope and reach of the DTCA, the arguments *against* including a legislated protection for fundamental research are no longer compelling. For example, 2023 Amendment Bill will repeal section 10(1A) of the DTCA and the oral exemption. It also appears to require more onerous permit and reporting requirements for normal academic activities involving technology on Part 2 of the DSGL.

It is noted that Defence have promised an exemption for fundamental research will be included in future regulations. This is not considered sufficient for three main reasons:

1) A protection in secondary legislation is not comparable to equivalent protections in the UK and US, the latter of which also benefits from constitutional protections for speech;
2) The Parliament will have a limited ability to critique and contest any exemption developed by the Department of Defence. The disallowance power leaves Parliament in a take-it-or-leave it approach. Protection would, therefore, be on Defence's terms;
3) While Defence have stated in their Impact Analysis that they will use a 'working group' to develop the terms of the exemption, the weaknesses of this consultation model have already been noted. If an exemption is to be left to secondary legislation, it should be an express term of a legislated Steering Group.

The above considerations also apply to any exemption that is implied through language in the DSGL itself or language in the DTCA which refers, obliquely, to things being 'in scope' of the DSGL.

Preferably, this Committee should recommend the delay of the commencement of the 2023 amendments until the Government can prepare an amendment to the DTCA which would implement a protection for fundamental research. This exemption should be in addition to other,

[12] This episode is explored more fully in *Beakers and Borders* and *Securitization*, pp 164, 182-183.

more nuanced exemptions that could be more appropriately set out in secondary legislation, such as one related to public health.

Protecting the rights of Australian researchers should not be seen as antithetical to the requirements of AUKUS. Indeed, it should be seen as achieving Defence's stated aim of introducing an export controls regime that is 'comparable' to the United States.[13]

In relation to this issue, **I would recommend that the Committee**:

- Amend the 2023 Amendment Bill to insert a provision to the DTCA providing for the recognition and protection of fundamental freedom.
  - Language for the amendment should be developed in consultation with Government, industry and academic stakeholders – followed by discussions with Australia's AUKUS partners if necessary.
  - The passage of the 2023 Amendment Bill should be delayed until the wording of the exemption has been finalised.
- *Alternatively*, and if it is not considered politically acceptable to amend the DTCA, the terms of the fundamental research exemption should be set out in secondary legislation that is developed by a legislated Steering Group. This Committee should retain an oversight role of this process.
- Defence officials should provide advice on how the new regime will apply to oral communications involving technology on Part 2 of the DSGL by Australian academics:
  - to international students in Australia
  - to international academics in Australia (including Visiting and other non-employee arrangements)
  - as part of a virtual conference panel where some attendees are in Australia, and some are oversees
  - In pre-publication activities.

Fourth – tightening controls on the sharing of information (ie, 'technology') on goods listed on Part 2 of the DSGL may create unintended consequences for Australia's ability to prepare for pandemics and disease outbreaks and contribute to global preparedness activities.

Part 2 of the DSGL includes several biological agents, including pathogens, viruses and toxins. Many of these biological agents are also controlled under other biosecurity legislation, including the *National Health Security Act 2007*.[14] Australia has obligations under international treaties to regulate these agents to prevent the proliferation and use of biological weapons. This aim is laudable, and my research found that Australian officials see Australia as an 'exemplar' nation in arms control.

The malevolent use and release of biological agents is one part of the "dual-use" dilemma associated with life science research. However, it is a *duality*, and the other 'uses' in 'dual-use' include the peaceful use of research to develop new prophylactics, treatments and detection methods for diseases and their causative agents. Often these peaceful uses are sidelined in discussions about how to control access to technology associated with biological agents.

So, too, it seems here. While biological agents listed on the DSGL include those which warrant tight control (eg, plague, ricin, anthrax) the DSGL also includes biological agents responsible for ongoing or recent public health emergencies – including mPox virus and Henra virus. My research into the

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[13] Department of Defence, *Impact Analysis Strengthening Australia's Export Control Framework* (2023).
[14] For a comparison of which agents are regulated where see: *Securitization* Appendix 4.

impacts of the DTCA and the *National Health Security Act 2007* found that both pieces of legislation had unintended consequences on Australian agencies and researchers involved in public health activities or research involving these agents.

As well as being a signatory to various arms-control treaties and defence partnership agreements, Australia is also a signatory to several international instruments related to public health. These include the *International Health Regulations*, the *Pandemic Influenza Preparedness Framework* and The *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*.

All these instruments encourage (if not require) that member states have measures in place facilitating the sharing of information related to biological agents, including virus samples. Indeed, Australia is currently engaged with other countries in strengthening a number of these instruments, and developing a new Pandemic Treaty, to address issues that arose during COVID-19.

Making it harder to conduct, share and disseminate life science research through an overly restrictive permit system (as proposed in the 2023 Amendment Bill) risks making these activities more difficult to undertake and less timely when speed matters most. While the 2023 Amendment Bill will streamline research activity involving citizens and residents of the US and the UK these two countries are unlikely to be the originator countries for future pandemics. Rather, health emergencies (including large outbreaks of known diseases) are more likely to start in developing nations, countries experiencing conflict or those with less comparable export-control regimes.

In implementing the 2023 Amendment Bill, including the development of any exemptions, it will be important to adopt sensible and reasonable measures which provide, at a minimum, the ability for employees of the Department of Health and the Department of Foreign, Affairs and Trade to share technology related to DSGL during a health emergency, without fear of breaching the DTCA.

In relation to this issue, **I would recommend that the Committee**:

- Seek advice from the Department of Health and Department of Foreign Affairs and Trade on what exemptions to arms-control legislation might be required to enable Australia to fulfil its obligation under international virus sharing instruments and the international health regulations.
- Require Defence officials to work with Health officials and life-science researchers to develop an appropriate exemption to the DTCA that enables and supports the sharing of viruses and DSGL technology with international counterparts and WHO collaborative centres.

Conclusion

Thank you again for the opportunity to provide a written submission on the Defence Trade Controls Amendment Bill 2023. This Bill continues an unfortunate trend over the past 10 years that has seen ever higher and tighter borders placed around scientific inquiry and the sharing of knowledge.[15] It is telling that Defence's Impact Analysis and 'Feedback Aid' refers to 'sovereign technology and information'. While some scientific research is conducted under the auspices of, and in aid of, the nation's defence, most of it is not. Many researchers consider their research a gift to the wider community, even a global community. However, the changes implemented in the 2023 Amendment

[15] Including the *Defence Trade Controls Act 2012*, *Foreign Influence Transparency Scheme Act 2018* and the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020*.

Bill treat all research involving DSGL goods as the same, with the sovereign interest prevailing over any other interests.

It may be, as Defence argue, that the strategic environment demands these kinds of laws. I do not suggest some naïve approach to academic freedom be adopted. But the essential request in this submission is that the policy objectives advanced by Defence, and the means to achieve them that are adopted in this Bill should be tested. Openly, with enough time for all interested parties to engage, and with this debate occurring via forums that allow all parties to meaningfully advance their views on how research and academic freedom should be understood in the 21st Century.

I would be happy to provide additional information to the Committee should it be required. I wish the Committee all the best with its deliberations and important work.

Kind regards

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