

Attachment to Universities Australia Submission to the Senate Foreign Affairs, Defence and Trade Committee

9 February 2012

Universities Australia acknowledges that as a result of advances in communication technologies, Australia's existing export controls system require updating. We support the introduction of legislation that will reinforce and underpin Australia's international obligations in this regard and below offer some views about how such legislation can achieve an appropriate balance between ensuring that universities play their part in protecting national security and the misuse of sensitive technology, and allowing them to freely pursue teaching and research in accordance with their mission, and that the compliance regime places unnecessary and expensive administrative burdens on universities. As presently drafted, the Bill does not adequately balance these factors. Below we set out the reasons for this, and some recommended solutions.

How does the Bill impact universities?

The Bill will make it an offence for a university to supply information, assistance or training in relation to goods listed on the Defence and Strategic Goods List (DSGL) in prohibited circumstances without a permit. While current laws regulate the movement of DSGL goods, universities are not particularly impacted by these laws as they do not generally deal in goods. The impact of this Bill on universities is profound as it focuses on the movement of knowledge with respect to DSGL goods. The acquisition and transmission of knowledge goes to the heart of the activities of universities.

The DSGL comprises 353 pages, listing thousands of goods. Many goods listed are routinely held by universities as they are needed to teach students and to conduct research in the fields of science and technology. This includes teaching and research in faculties of information technology, medicine, science, engineering and pharmacy. The outputs of these faculties are qualified doctors, pharmacists, engineers, scientists and computer experts (to name a few), and the research findings in each of these fields that routinely transform our way of life. As currently drafted, the Bill will significantly impact the training and research conducted by universities in these fields.

The Bill prohibits an Australian university engaging in the supply of information, assistance or training to any persons who is not an Australian resident or citizen or corporation (hereafter 'Australian'). In November 2011 Australian universities had 242,478 enrolled students who are not Australian, with a further 96,627 expected to commence in 2012. As presently drafted, and without certainty regarding an exemption that may be provided, the Bill means that for each of these students enrolled in courses in the fields of science or technology, a university will need to apply for a permit to continue or commence their education in this field, or otherwise discontinue their education.

It is impossible to accurately quantify the amount of research conducted by Australian universities with non-Australian collaborators either within or outside Australia. 2006 Australian of the Year, Scottish immigrant Professor Ian Frazer, worked with another naturalised Australian, Dr Jian Zhou, to discover the human papilloma virus vaccine. Such a collaboration would have required a permit under the Bill which may not have been provided, but certainly would have caused undue delay to excellent research. Australia is currently bidding for the rights to build the Square Kilometer Array (SKA) Telescope which requires extensive international research funding and collaborations in order to make the technology possible. The

SKA Telescope will create a new wave of Australian based research collaborations in astronomy and astrophysics.

Without changes to the Bill as discussed in this submission, the ability of Australian universities to educate non-Australian students and engage in research collaborations with non-Australians in the fields of science and technology will not be able to continue as they do now.

Without changes the Bill will impact:

- what may or may not be taught by Australian universities;
- to whom it may be taught by Australian universities;
- with whom Australian researchers may carry out specified research;
- with whom Australian researchers may communicate;
- what may be published by Australian researchers;
- what research materials may be transferred by Australian universities to non-Australian collaborators within or outside Australia.

Decisions concerning these matters will be largely determined at an administrative level within the Commonwealth (under its permit system) without consideration of the effect this will have on academic freedom and the ability of universities to realise their long held core objective: to conduct research to advance the human condition for the public good.

The distinctive purpose of all universities as set out in the Higher Education Support Act (2003)(Cth) are:

- the education of persons, enabling them to take a leadership role in the intellectual, cultural, economic and social development of their communities; and
- the creation and advancement of knowledge; and
- the application of knowledge and discoveries to the betterment of communities in Australia and internationally.

The Bill will interfere with each of these purposes, resulting in a less effective university sector unable to meet the responsibilities the government is placing on it, and put at risk a \$16 billion export industry based on providing high quality training to overseas students.

The benefits of international education to Australia are substantial yet often go unheeded by those outside of the sector. As well as the economic contribution (including over \$16 billion in export dollars and the creation of over 120,000 FTE jobs), international students enhance the social and cultural fabric of the universities at which they study and the communities in which they live. Their presence fosters a mutual appreciation and respect for other cultures and experiences and helps cement Australia's reputation as one of the most innovative and educated nations in the world. As well as advancing conventional diplomacy and trade, international education is a significant driver of public diplomacy, through creating a positive image for Australia and providing means to exert influence.

Similarly at the research level, collaborations with overseas researchers work to the advantage of Australian researchers and improve research quality – as shown by the generally higher rates of citation achieved by papers having Australian and overseas authorship when compared to papers whose authors are all

Australian. Placing unnecessary impediments on international collaborations would disadvantage Australian research and Australian researchers, with longer term impacts on Australian business. Collaboration involves a two way flow of information and ideas and reciprocity is essential to maintain the inward flow of information.

A further problem with the Bill is that it ignores the high level of devolution of management responsibilities and controls within universities and the impact this would have on the need for the university as a corporate whole to collate details about all the teaching, research and collaborative activities of all of its academics and other staff.

Potential economic and other impacts of the Bill on the university sector

If the Bill proceeds in its current form it creates considerable uncertainty for universities about their ability to engage in these teaching and research activities lawfully, leaving universities in a predicament of having to wind down their international engagement (and give up the income associated with this engagement) or explore ways to seek to comply with a law that does not provide enough definition in its terms, to give universities the confidence to undertake core functions. If universities respond by seeking to comply with the Bill, this will absorb scarce resources that were not budgeted for, and expose universities and individual academic staff to the risk of criminal prosecution under a Bill which neither understand. It requires consideration of the citizenship and permanent residency status of staff and students, as well as those they are training or transferring information to, a time consuming undertaking that depends entirely on the voluntary cooperation of the individuals concerned to disclose this information.

The Bill requires each institution to employ a team of specialists to go through the reams of controlled goods, materials and technology listed in the DSGL to work out whether the university needs to apply for a permit, and then apply for them as required. It is extremely wasteful for each university to go through this process separately. If permits are required for any part of the breadth of activities of universities in the fields of science and technology, then the authority will be overburdened with permit applications. The authority will be unlikely to be able to process the applications in an efficient manner required to retain these activities, be it international student recruitment or securing international research collaboration. Both are highly competitive, with many other countries willing to take up the economic benefits of the success currently enjoyed by Australia based on the current level of activity of Australian universities in the international arena.

As a general matter the burden is the wrong way around – the Bill takes a “when in doubt apply for a permit approach” rather than government being clear upfront about what it needs. Instead it is passing onto universities a labour intensive, time consuming, expensive and wasteful exercise of trying to work out what the government wants to control. This work should be done by government prior to enacting this legislation and should be done on a sector wide basis.

The UK Experience

The university sector has looked to how United Kingdom has approached this same issue. The university sector was heartened to see that its approach was to preserve and protect its university sector.

For example in the equivalent legislation, the Export Control Act 2002 (UK), section 8 provides:

8 Protection of certain freedoms

(1) The Secretary of State may not make a control order which has the effect of prohibiting or regulating any of the following activities—

(a) the communication of information in the ordinary course of scientific research;

(b) the making of information generally available to the public; or

(c) the communication of information that is generally available to the public,

unless the interference by the order in the freedom to carry on the activity in question is necessary (and no more than is necessary).

(2) The question whether any such interference is necessary shall be determined by the Secretary of State by reference to the circumstances prevailing at the time the order is made and having considered the reasons for seeking to control the activity in question and the need to respect the freedom to carry on that activity.

The *Export Control Order 2008* contains similar provisions:

Software and technology exceptions

18.—(1) Nothing in article 3, 4 or 5 shall be taken to prohibit the transfer of technology—

(a) that is in the public domain;

(b) that is the minimum technology required for—

(i) the installation, operation, maintenance or repair of goods or software that are not military goods or software or UK controlled dual-use goods or software; or

(ii) a patent application; or

(c) in the course of basic scientific research.

(2) Nothing in article 10, 11 or 12 shall be taken to prohibit the transfer of software or technology in the public domain.

(3) In this article, “basic scientific research” means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts and not primarily directed towards a specific practical aim or objective.

No similar provision appears in the Bill. The university sector cannot continue to perform its statutory functions and contribute to the Australian economy unless this oversight is redressed prior to the passage of the Bill through Parliament. Amendments are required to protect the integrity and continuity of international education and research activity by Australian universities. For example, the Bill could set out objects (as most legislation does) that explicitly states that it seeks to achieve a balance between international obligations to control the proliferation of weapons and weapons technology and to protect the crucial Australian industry of education and research including in the international sphere. This 'objects' clause will recognise its importance and to require that the Bill be interpreted so as to achieve this balance. It is also requested that amendments be carved out from the application of the Bill, for civilian teaching and research activity as contemplated by parallel provisions in the UK law.

These changes should be extended to include our members' activities for overseas campuses, which under the Bill may otherwise have to cease their science or technology activities at these campuses. Australian universities with overseas campuses educate many thousands of and conduct extensive research in the fields of science and technology every year. By reason of other federal laws, almost all students at these campuses are non-Australians.

Moreover, under section 11(7) expansive exemptions should be included in the Defence Trade Control Regulations (Regulations) to exempt their members' teaching activities involving DSGI goods where it forms part of an accredited course, and research conducted that is not otherwise assisting a weapons program or weapons proliferation.

Explicit description of exempt research

The Government says it plans to exempt a range of technology and services from the proposed controls under the Bill. Information that is "in the public domain", "basic scientific research" or information required for patent applications will be exempt. While it is said that these exemptions should significantly reduce the risk of any unintended impact on the academic, research and business communities, universities seek far more extensive protection of their activities as suggested above. The university sector seeks to have explicit clarification in the Defence Trade Controls Regulations (2012)(Regulations). This will help universities to establish best practice guidelines for students and staff to avoid contravening the Bill or Regulations.

Explicit Description of Public Domain Information

The university sector needs better clarity and certainty around the "carve out" of public domain information. Firstly, it is a big job to determine whether prohibited information is in the public domain, and the burden of working this out appears to fall on each university separately, and then apply for a permit if the university determines that the information is not in the public domain and that it needs to apply for a permit. There are a couple of examples below where this seems to be particularly impractical.

Publications

Our academics are being exhorted to increase their publications while at the same time this legislation will require them, prior to publication, to work out whether there is sufficient technical detail in their proposed journal publication to require a permit before submitting it for publication. In the process they will also need to check whether and to what extent the information is already in the public domain. Because the legislation takes a "when in doubt apply for a permit approach", the authority can expect a very large number of requests in relation to proposed journal publications alone if not exempted, and its limited resources are likely to be quickly flooded with requests for permits. The authority has traditionally dealt with

defence supplies or controlled software but not with intangibles such as knowledge transfer, which is also likely to increase delays. Some definitions in the legislation are vague and it would save both the government, as well as universities, significant time and money if there was more clarity about exactly what is proposed to be controlled.

Research Collaborations with Foreign Institutions

If a university wants to send information about controlled information offshore by email or talk on the telephone about it, the relevant academic will have to apply for and receive a permit. This would put unnecessary restrictions on many academics' research collaborations.

The Bill will make it difficult to continue with a number of collaborative research projects and partnerships with foreign institutions focussed on items listed in the DSGL. Bringing in international experts or foreign students will require permits where students or staff are working with controlled information. Again there is a huge administrative burden being imposed on each university to work out whether or not the information is controlled. It would be better if the relevant authority issued detailed rulings about when information is controlled (e.g., when used for a weapons program) for each sector prior to the legislation being enacted so that the amount of work required for borderline cases can be reduced, both for universities and the authority. The ATO issues binding Guidance Notes which are made public and certain. The Bill should be amended to enable similar binding guidance to be provided by the authority.

For certain technologies, it may become very difficult to continue international collaborations without permits. This is potentially an important issue for universities which require research student and staff to make new findings and discoveries to fulfil their candidature/employment duties, and in particular focus increasingly on high end technology and data and need to collaborate more widely with other research institutions overseas. It also appears that under the legislation permits will be required to make controlled software available to download over the internet or online.

Accordingly compliance will be expensive and difficult, but will have to be done thoroughly given the criminal penalties proposed. Of course there is also a risk of not receiving the required permits or finding that there are substantial delays in receiving them. The proposed record keeping requirements are onerous and in many university situations impossible to comply with (for example how is it possible to record every disclosure when many are made informally in telephone calls such as in the example above), and a further administrative burden on universities.

Defences and Compliance Approach

The omission of a standard defence to the criminal offences for breaches (up to 10 years imprisonment and fines) is unusual, especially in light of the government's desire to bring Australian legislation in this area up to international standard such as the United Kingdom where similar legislation has provided adequate defences. Domestically, the Autonomous Sanctions Act is causing similar issues, but at least contains a due diligence defence.

Universities have been informally told that minor breaches will not be prosecuted and breaches taking place in the period after commencement of the Bill will not be prosecuted unless wilful. This compliance approach for serious criminal offences should not be relegated to a Commonwealth DPP policy that is able to be changed or interpreted at whim and does not set out this compliance approach in any event, but should be set out in the Bill itself. Given that the universities and individual academics face criminal penalties (including potential incarceration and certain end of career), the approach to compliance should be set out

in the legislation itself. Furthermore, a sensible approach may be to follow the lead of the Tertiary Education Quality Standards Agency Act (2011) which provides universities with some autonomy in situations where it has been proven that they can self-accredit course quality. In the same respect, the Bill could provide universities, subject to the Department of Defence delegating such power, with the autonomy to provide authorisation to research and teaching staff to undertake work on research or coursework that may normally require a permit.

Transition Period

Universities require a very substantial transition period before the Bill is enforced against universities, so that they and the authority have sufficient time to intelligently deal with the administrative and technical challenges contained in the Bill. Due to the de-centralised nature of universities, it will take considerable time to train staff to a level that is sufficient, as well as provide that training across entire campuses, including overseas campuses where impacted.

Anti-Discrimination

Complying with the Bill will commonly involve breaching Federal or State anti-discrimination laws. The Bill needs to include a section that overrides these laws so that universities will not be required seek individual, case by case, exemptions from these laws to comply with the Bill.

International Impact

While universities are being asked to lift their foreign student numbers, the controls in the Bill will restrict training and knowledge transfers from Australians to non-Australians when dealing with controlled goods and technology. It also restricts non-Australians in Australia from transferring information about such goods or technology to another non-Australian person located overseas. Notably around 50% of PhD students in Australian universities are non-Australians.

As Australia's tertiary education institutions attempt to deal with the loss of international students to the United States and the United Kingdom, as well as the looming retirement of its aging population which will substantially reduce the number of qualified researchers and lecturers, Australia cannot afford to enact legislation which will unduly restrict bona fide foreign students and staff. In order to meet the Australian government's 2030 targets for student enrolment, this legislation must give heed to practical measures in a university setting such that Australian universities can continue to lead the world in research and teaching.

Summary of requests for amendment

In summary, we proposed that the following amendments and inclusions should be made to the Bill and associated documents:

1. Include in the Bill an objects clause that expressly recognises the importance of education and research industry, and the need to protect and preserve its integrity and continuation for the benefit of the Australian community while also complying with international obligations to prevent proliferation of weapons.
2. Include in the Bill exceptions to the application of its prohibition on the transfer of knowledge to allow the continuation of university education and research activities, drawing on the UK situation as an example of a possible approach.
3. Including in the Regulations and exemption for all teaching as part of an accredited course and for all research except where it assist with a weapons program or weapons proliferation.

4. Set out explicit provision defining exempt research, which is sufficiently broad to enable continuation of university teaching and research activity.
5. Set out explicit provision defining exempt public domain information, which is sufficiently broad to enable continuation of university teaching and research activity.
6. Make provision for a new power for the authority to issue binding guidance to the university (and other) sector, drawing on the example of ATO Guidelines.
7. Amend the record keeping obligations where a permit is issued to have regard to compliance in a university context, which they currently do not contemplate.
8. Include a defence to the offence under the Bill where due diligence can be demonstrated.
9. Include in the Bill the touted approach to compliance to provide certainty.

Ms Belinda Robinson

Chief Executive, Universities Australia