

Macquarie University Feedback
Defence Trade Controls Amendment Bill 2023 [Provisions]
Senate Standing Committee on Foreign Affairs, Defence and Trade

Background

Macquarie University is a research comprehensive institution that undertakes work across a range of critical technology disciplines. Macquarie is a Level 3 Defence Industry Security Program member. Macquarie University implements the 2021 University Foreign Interference Taskforce Guidelines on Countering Foreign Interference. Macquarie complies with the Australia's Foreign Relations Act 2020, the Foreign Influence and Transparency Scheme, Australian sanctions regimes, and the legislative body that makes up Australia's export controls regime.

Macquarie University notes that the Defence Trade Controls Act 2012 is only one piece of existing legislation that contributes to the body of trade controls in Australia.

Macquarie University notes that AUKUS is driving changes in Australia's export controls settings and how this contributes to the need to legislate new controls for "deemed exports" as a new category of export controls.

Macquarie University notes that the *Safeguarding Australia's Military Secrets Bill* currently before the Australian Parliament, as drafted, has broad implications for academics undertaking business-as-usual work overseas in addition to the changes contemplated in the *Defence Trade Controls Amendment Bill 2023*.

Macquarie University has 2 full time equivalent staff that support the University in complying with national security and defence guidelines, funding criteria, security conditions, and legislation.

Macquarie University's national security and defence team regularly liaise with the Department of Defence; Home Affairs; the Department of Foreign Affairs and Trade; the Department of Education; and the Department of Industry, Science and Resources; as well as other government agencies.

The feedback contained in this document is provided within this context. It is intended to highlight the many different national security and defence regulatory mechanisms that now exist across the Australian Government and how these instruments can duplicate process, policy and procedure. The administration of a single research arrangement at Macquarie University can require communications with the Australian Government across export controls, sanctions, foreign arrangements and Defence Industry Security Program assurance.

Macquarie University has provided feedback over the past six months and has productively engaged with Australian Government efforts to reform export controls legislation.

Macquarie University's previous submissions include:

- Feedback on Defence Trade Controls Act Exposure Draft
- Feedback on Defence Amendment Bill (Safeguarding Australia's Military Secrets)
- Feedback on Defence Trade Controls Act Exemptions
- Feedback on s74B Review of Defence Trade Controls Act 2023

These previous submissions are included as appendices to this document for the Committee's reference.

Macquarie University makes the following observations about the Department of Defence's consultation with the University Sector in 2023 concerning export control changes:

1. The Department of Defence did not consult with the sector on changes considered under the Safeguarding Australia's Military Secrets legislation. Macquarie University supports legislative changes that better protect Australia's military secrets, however, this Bill in its current form has a wider scope than the protection of military secrets and potentially impacts on a vast array of international academic activities (the academic scope).
2. Feedback provided to the Department of Defence on the Defence Trade Controls Act Exposure Draft does not appear to have led to any material changes to the Bill tabled in Parliament and before this Committee for consultation. Macquarie notes that the *Impact Analysis* published by the Department of Defence claims feedback has been incorporated into the Bill (or that it will be incorporated into the Regulations). Macquarie University requests that the Department of Defence consult more closely with the University sector and collaboratively design policy when that policy is intended to impact on the sector.
3. The s74B Review of the Defence Trade Controls Act occurred at the same time as the consultation on Defence Trade Controls Act Exemptions. The current Defence Trade Control Act amendments have been made without the findings of this Review being made public. The number of parallel or overlapping consultations and legislative changes being run by the Department of Defence has made it difficult for the University Sector to productively contribute information, and brings into question whether the information being provided is being used by the Department to improve the policy proposals. Further, it has been difficult to identify the likely impacts on the Sector arising from legislative changes proposed for 2024. Macquarie University suggests that a more coherent and holistic approach to consultation is needed.

Macquarie University notes that due to short consultation timeframes and the lack of publicly available draft Regulations, cohorts of researchers within the University Sector are choosing to actively campaign against the current changes to the Defence Trade Controls Act in their individual capacities. Macquarie University understands that in many cases these researchers undertake Defence research funded by the Department of Defence or foreign defence funders such as the US Department of Defense.

Macquarie University suggests that the Department of Defence needs to work harder at collaboratively engaging with these academic communities as these communities are beginning to take an oppositional stance toward the changes, with some academics now considering halting Defence research in order to avoid dealing with the new regulations. If the Department of Defence

does not begin collaboratively engaging with these communities, the resulting impact could be brain drain for a segment of Australia's defence research base as some academics are turned off undertaking research involving DSGL technology and contributing to DSGL technology advancement. This could negatively impact on Australia's sovereign defence technology development over the medium-to-long term. This type of policy impact was not analysed in the Department of Defence's *Impact Analysis* for the legislation.

Feedback

Macquarie University makes the following observations about the current draft legislation in addition to the feedback already provided through previous consultation processes:

1. The Defence Trade Controls Act amendments do not provide clarity on how regulation exemptions would operate. This information is critical for providing accurate information on potential impacts and the scope of the legislation. Macquarie University recommends that legislating the Amendment be paused until Australian industry and research sectors can consider and provide feedback on both the Amendment [Provisions] and the Proposed Regulations together.
2. The introduction of Absolute Liability to the Legislation appears to go beyond the Strict Liability provisions in Australian Sanctions legislation. Macquarie University questions why the liability provisions are not directly comparable and recommends that the Committee consider changing the Absolute Liability provisions to Strict Liability provisions.
3. If exemptions to "deemed export" permit requirements are intended to be made based on an individual's citizenship of countries on the Foreign Countries List, Macquarie University recommends an expansion of the countries on this list. Macquarie University notes that this list was last published in 2015 by the Minister for Defence Kevin Andrews. Much has changed in Australia's international relations since 2015. A more expansive list based on up-to-date assessments will ensure the impact of this legislative change is targeted only towards citizens of countries that do not have domestic export control measures comparable to Australia's export controls regime.
4. Macquarie University supports the move from a definition for Basic Research to a definition for Fundamental Research as proposed by the Department of Defence for inclusion within the Regulations of the Amended Act. Macquarie University, however, recommends that the definition now be legislated in the Provisions of the Act in order to provide certainty for the Research Sector. Macquarie University recommends the following definition is used for legislating an exemption to the Provisions of the Act based on the undertaking of Fundamental Research.

Fundamental Research: An exception for research considered Fundamental Research, where Fundamental Research is defined to mean basic and applied research in science, technology, engineering, medicine and mathematics, where the resulting information is ordinarily published and shared broadly within the scientific or medical communities, as distinguished from research whose results are restricted for proprietary reasons, medical reasons or national security reasons.

As biomedical research applications are increasingly considered within a dual-use context, Macquarie University proposes that this definition take into account medical research as it would future proof the Defence Trade Controls Act while also providing certainty to the Australian research sector.

5. The *Impact Analysis* published on the Department of Defence website indicates that the transitional arrangements for this legislative change will be one year in duration. Macquarie University notes that the transitional period during the last period of major changes (~2016) to the Defence Trade Controls Act was two years. Macquarie University recommends that the transitional period be increased so that it is two years in duration similar to the last period of major legislative change.
6. Macquarie University supports the changes in delegation levels in the legislation if those changes in delegation increase the speed with which high-quality assessments and decisions on permit applications are made. Macquarie University's experience with permit application durations has been inconsistent, with some permit applications taking one week to reach a decision, and some taking more than a year with a decision still pending. Any changes in delegation levels should be accompanied by legislated maximum decision times after which permits are automatically granted. Macquarie University believes that there should be no administrative incentives for delegates to delay decisions on complex or difficult permit applications and that legislating maximum times for decision by delegates of the Minister is one way to achieve this. Permit applications that do not receive a decision within the maximum period of consideration should be automatically granted unless the Minister of Defence personally intervenes, and the power to personally intervene should not be delegated. As the Amendments to the Act will bring PhD students applications, visiting researcher invitations and academic staff appointments within the ambit of permit requirements, it is critical that universities know the maximum timeframe within which they can expect a permit to be assessed and decided upon. Such information will have implications for student enrolment and staff appointment planning.

Vignettes

This section provides vignettes intended to show potential negative impacts of the legislation that do not appear to have been considered by the *Impact Analysis* published on the Department of Defence website.

Vignette 1: Delays to Commencing Foreign PhD Students

Prospective PhD students from countries that are not on the foreign countries list are likely to require an export permit to commence their studies if they will interact with DSSL technology that does not meet the definition of *fundamental research*. For some critical technologies where a laboratory (or a laboratory proximate to the prospective student's place of research) concurrently undertakes defence research, universities are likely to be cautious and apply for permits even if the research meets the definition of *fundamental research*.

Significant delays to the assessment of PhD enrolments could negatively impact on the desirability of Australia as a location in which foreign students would consider studying. Once a permit is

granted for a prospective foreign PhD commencement, that student would still need to attain a visa approval, and if the student is attending on a cotutelle or joint PhD degree, a Foreign Arrangement notification would also be required. There are potentially three separate Commonwealth Departments that are required to approve or note the enrolment of a single foreign PhD candidate. This is highly likely to lead to enrolment delays and an overall decrease in the attraction of Australia as a location in which to attain a graduate research degree.

Over the medium-to-long term, a decrease in quality foreign PhD commencements could decrease the quality of the Australian research workforce. Lower quality PhD applications will translate to lower quality researchers applying for permanent residency which will translate to lower quality researchers applying for Australian citizenship.

Once a foreign researcher attains Australian citizenship, they can be considered for a Security Clearance and work on Australian defence projects.

The long-term impact of a poorly designed export permit system for foreign PhD enrolments will be a decrease in the quality of Australia's research workforce. This is likely to negatively impact on defence projects. There is an inherent trade-off to be considered when it comes to developing a permit system for foreign PhD enrolment and the likely negative impacts on national innovation for basic, applied and defence outcomes.

Vignette 2: Existing Defence Researchers Choose to Exit Defence Research

It is likely that under the new export control legislation, some proportion of existing defence researchers in academia, or those working on civilian end-use DSSL technologies, will choose to exit defence research, or redirect their work to non-DSSL technologies. Some proportion of civilian researchers will do this to avoid the onerous compliance requirements associated with the new export control legislation.

Without surveying existing cohorts of researchers on defence projects it is difficult to estimate the exact number, however, Macquarie University has anecdotal evidence of this intention and can assure the Committee the number of researchers that will be lost from the existing defence research base is greater than zero.

If this impact is considered in combination with Vignette 1, the potential long-term impact on Australia's research workforce, and in particular that proportion of the research workforce able to attain security clearances and work in universities on defence research priorities, will decrease in both scale and excellence.

A potential consequence of a poorly designed and poorly implemented "deemed exports" system will be a poorer quality defence innovation ecosystem. This is likely to have lasting long-term impacts on Australia's defence preparedness and conflict-ready resilience.

Vignette 3: Impact on Existing Workforce that Cannot Attain Permits

The *Impact Analysis* states that: *disruption caused by permit refusal ... is an intended outcome of the proposed legislation and is not considered a cost.*

This statement assumes that Defence always makes correct assessments in a timely manner (which no organisation does) and that the human, social, organisation and cultural impacts inherent in a

university staff member being unable to attain a permit to undertake work they have been contracted to do are inconsequential. Affected staff may experience visa implications from adverse permit outcomes resulting in potential distress for the individual concerned, as well as their colleagues and their academic community. This could result in disciplines of researchers and entire academic communities taking a negative view of the Department of Defence and actively choosing not to undertake Defence research or civilian DSGL research.

It is at least somewhat likely that the refusal by the Defence Export Controls Office to grant a permit to a researcher may lead to submissions to the Administrative Appeals Tribunal (AAT) or result in legal action. If this occurs in cases where the assessment relied on by the Defence Export Controls Office is incorrect, this could result in long-term damage to the reputation and viability of the Australia Export Controls system, and therefore impact on AUKUS. The necessity for the Defence Export Controls Office to ensure the accuracy of their assessments and decisions during the commencement of the new legislation is likely to lead to permit application delays.

In the event that Defence has made the correct assessment for a permit denial, it is simply wrong to state that this will not result in an impact. The individual affected will likely have their career prospects in Australia altered forever. Defence needs to consider transitional arrangements for the researchers affected. While it may be the case that Australian Government classified information is relied on that indicates the individual refused a permit is seeking to do Australia harm, it is highly unlikely that this information will be publicly releasable. This could create a scenario where the Australian Government is unable to justify an export permit denial that may later be overturned by the AAT or a court.

If this scenario transpires it will negatively affect the reputation of the Department of Defence within the relevant academic discipline and the university defence research community. Even if the Department of Defence's decision ultimately stands, the reputational impact could result in significant acrimony between the Department of Defence and academia. This could lead to a poorer quality defence research base than existed prior to the changes and have generational impacts on Australia's ability to defend itself through developing sovereign advanced technology.

Conclusion

1. It is critical that the Department of Defence engage more closely with the University sector and academic communities to ensure this change to Australia's Defence Export Controls does not negatively affect Australia's ability to defend itself.
2. If the Department of Defence handles this change poorly, it will have generational impacts on Australia's technological preparedness for war.
3. Given that Australia has less than five years to prepare for major conflict, as per the *Defence Strategic Review*, Australia cannot afford such a setback.
4. Macquarie University therefore urges the Department of Defence to authentically engage in meaningful, intentional and productive collaboration with the University sector as an immediate priority.