

# SUBMISSION TO THE 2023 REVIEW OF THE *DEFENCE TRADE CONTROLS ACT 2012*

3 November 2023

Universities Australia (UA) welcomes the opportunity to make a submission to the *Defence Trade Controls Act 2012* Review (the Review) and also wishes to acknowledge the other critical ongoing work within the Department of Defence such as strengthening Australia's export control legislation in the context of AUKUS as well as the *Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023*.

At the outset, UA acknowledges the importance of the *Defence Trade Controls Act 2012* Act (the Act) as a safeguard of Australia's national interests and in meeting the obligations we have to our key strategic partners. Further, we recognise that the elements of the Act subject to this review are, generally speaking, fit for purpose with the caveat that we understand the likely need for AUKUS related amendments which are out of scope for this review.

UA also acknowledges that universities are more mature and better equipped to ensure the protection of knowledge and technology today compared to 2018 (when the Thom Review was undertaken). We recognise the important and ongoing role of the University Foreign Interference Taskforce (UFIT) in providing guidance and raising awareness in the sector.

## UNIVERSITY RESEARCH IS CRITICAL TO DEFENCE OBJECTIVES

Australia needs to leverage its research sector to full effect to meet its significant Defence challenges (including those presented by AUKUS). This requires an inclusive approach which addresses the barriers to participation in defence research (at both institutional and individual research level). It also requires consideration of (and genuine efforts to include) all current and potential international collaborators. In broad terms, this Review could support this aim through:

### *Simplicity and streamlining*

In principle, **UA considers that any legislative and/or policy change stemming from this Review should be aimed at reducing complexity**. Noting that this may be in scope for other ongoing Defence processes, a key component of this would be a functional and clear 'basic research' exemption which supports collaboration both in the context of AUKUS as well as globally.

Pragmatically, more efficient and transparent processes (including with respect to permit applications) would also be welcomed.

### *Enhanced clarity and greater certainty*

The need for clear guidance materials and case studies is critical in such a complex and high stakes context. UA members have indicated that additional clarity is necessary to assist researchers and universities to understand their obligations and to better navigate processes surrounding the Act.

Any changes to legislation or policy should also recognise the unique barriers and challenges faced by institutions of varying size and scale. This may include consideration of targeted support, training, and resources to support compliance – supporting more inclusive participation of universities in defence research.

The Australian Government should make a commitment to ongoing conversation and consultation in addition to 5-yearly reviews of the Act. This could include planned, regular sectoral engagements with Department of Defence and the co-design of support and guidance materials.

The Co-leads of the Review have expressed a view favouring an approach which is preventative rather than the punitive. To this end, compliance processes (and associated guidance materials) should reflect this, fostering cooperation and compliance and supporting researchers to make informed decisions. UA strongly supports this approach.

## **SINCE THE LAST REVIEW**

In 2018, the Thom Review made a range of legislative recommendations aimed at ‘closing gaps’. Ultimately there were no changes to the Act stemming from the Thom Review.

There have, however, been significant changes in the university research landscape. The university sector has matured significantly in its approach to countering foreign interference, including increased risk awareness and mitigation capabilities and with respect to due diligence in assessing potential international collaborators.

The 2019 establishment of the University Foreign Interference Taskforce and subsequent Guidelines to Counter Foreign Interference in the Australian University Sector (the Guidelines) refreshed in 2021 represent key steps on this ongoing journey. Importantly, the Guidelines were designed in partnership between the Australian Government and the sector. As such, they have been universally adopted and are increasingly supported by a range of other important resources including risk management and due diligence frameworks, case studies and a growing range of tools and templates. International partners are looking to Australia as an example of best practice collaboration between the sector and the government in countering foreign interference.

Essentially, the sector (in partnership with government) has been engaged in an increasingly effective form of principles-based regulation which will continue to support capability building across all institutions. While not diminishing the important role of the Act as an effective and necessary foundation for this collaborative work, UA considers that there is minimal need for any further ‘rules based’ regulation (i.e. prescriptive legislation) to be imposed with respect to university research.

## **RESPONSE TO PROPOSAL PUT FORWARD BY THE REVIEW CO-LEADS**

UA was pleased to attend the 2023 Review of the *Defence Trade Controls Act 2012* Academia and Industry Roundtable on 24 October 2023.

At that event the Review Co-leads outlined a proposal which UA understands as follows (See Box 1).

### **Box 1: A possible emerging technologies catch all prohibition**

- The Co-leads may recommend to Government the inclusion of what was described as a ‘catch all prohibition’ to account for the fact that it is increasingly difficult for the Defence Strategic Goods List (DSGL) to keep pace with emerging technology.
- It has not been determined how such a prohibition may be included in legislation – which would be a matter for Government in response to the Review.
- The current intention is that this would be supplemental to current triggers aimed at capturing non-DSGL technology which has the potential to enhance the capability of a foreign military. The reviewers indicated that this would be supported by:
  - » a granular list of criteria of perhaps 30-40 to be included in either the Regulation or guidelines associated with DTCA,
  - » a comprehensive compendium of case studies, guidelines, and other tools (potentially deidentified case outcomes). As described, this would represent a significant increase in the depth and breadth of support products, and
  - » a network of ‘trusted agents’ embedded within universities and/or peak bodies and accredited by Defence to act as advisors to the sector (but not as decision-makers).

A primary concern with respect to such a provision would be the potential for it to truly ‘catch all’ technologies and developments (including ‘non-goods’ such as Intellectual Property). The result of this would be to impose significant additional regulatory burden on individuals and institutions engaged in defence research. This burden would only serve to increase the barriers to participation, particularly among smaller institutions. There may also be additional resource implications with such a prohibition which could lead to unintended consequences if not addressed.

If designed and implemented appropriately, UA considers that this is potentially a way of addressing a clear and increasing gap in our export controls, especially relating to new and emerging technologies where the DSGL cannot always keep pace, while adding to clarity and certainty for university researchers. Placed in an appropriate contextual framework such a provision may lead to deeper consideration by individuals and institutions of the potential implications of their research.

In this sense, it may provide a kind of litmus test for a broad range of research on the periphery of the defence sphere – supporting researchers to give greater thought to dual-use potential at an earlier stage. The converse of this, as flagged above, is the potential for the inadvertent and unnecessary capturing of a broad range of research in DTCA processes.

UA understands that this risk would be mitigated by criteria designed to provide clarity around what may be in or out of scope – getting this element right would therefore be of critical importance. However, specifying circumstances of non-compliance may inadvertently set an expectation that any list of criteria will be exhaustive. An incomplete, or otherwise incorrect, set of criteria may provide a false sense of security and in so doing could expose institutions to risk, rather than to assist in identifying them.

### **UA RECOMMENDATION: A PRINCIPLES-BASED APPROACH**

An alternate approach to a long list of criteria may be a smaller number of ‘principles’ – statements which assist in conceptualising possible negative outcomes/breaches as a guide to determining the potential for any technology (or knowledge) to benefit a foreign military.

The use of criteria implies testing propositions against well-defined thresholds which may be cleared or not cleared. They also tend to have a focus on a point in time (i.e., the time at which a proposition is tested against them), whereas principles have the benefit of being forward looking – provoking consideration of hypothetical future circumstances. They also allow for the human elements of experience, understanding and judgement.

Regardless of whether it is a matter of criteria or principles – UA considers that it would be critical that they be determined via a co-design process with key stakeholders (including universities).

A key theme espoused by the Co-leads at the 24 October roundtable was that of “awareness, understanding and acceptance”. A co-design process (potentially leveraging UFIT) would address all three components of this approach.

Awareness would be served by the inclusion of stakeholders in a such a genuine consultation. The process itself would create a nucleus of key individuals with deep understanding, not only of the outcomes, but how they were reached. The mere fact that outcomes were co-designed with impacted sectors would go a long way towards generating broader acceptance, just as it did across the university sector when the Countering Foreign Interference Guidelines were formulated.

If a recommendation of this kind is pursued, UA would be supportive of the idea of a comprehensive compendium of guidance materials – noting that such products would need to be in place as foundational pieces to support any legislative changes – not bolted on (or forgotten about) after the passage of legislation. As appropriate, UA would also support the co-design of new materials to ensure that are effective in providing clarity and certainty for stakeholders.

UA also supports the idea of a network of ‘trusted agents’. This may be the critical element to this proposal, however UA envisages a range of potential challenges and implementation issues. For instance, a model whereby institutions (for instance, universities) each have such an agent would engender high levels of trust and would likely be effective - but may be too resource intensive to be practicable. In a model with fewer trusted agents (for example in peak bodies or through the Australian Defence Science and Universities Network, operating independently and/or only embedded in some institutions) access would likely be disparate, potentially favouring larger institutions.

Should an appropriate model be implemented, with an adequate number of individuals trained and accredited by the Department of Defence then this has the potential to rapidly add significant capability across the sector – providing researchers with equitable levels of direct access to expertise and trusted advice would go a long way towards reducing the barriers to broader participation in defence research.

This is an idea worthy of consideration by government even if there are no changes to the current legislative framework stemming from this review. This could include support for a community of practice among trusted agents to ensure their continued professional development and further enhance the value of the network.

## CONCLUSION

Australia’s universities are actively engaged in supporting the Australian Government’s Defence objectives and are committed to proactively ensuring compliance with our Defence Trade Controls. Achieving the right balance between fulfilling national security requirements and supporting research and international collaboration is in our mutual interest.

UA considers the Act, as it stands, to be generally fit for purpose. We acknowledge the potential utility of amendments which consider the risks associated with the emergence of technologies not covered by the DSGL.

We reiterate that any amendments or policy changes should be based on the principles of reduced complexity and increased clarity and with consideration of the risks and concerns highlighted above – in particular the need for appropriate support mechanisms to be established prior to any legislative change coming into effect.

UA is happy to work directly with the Co-leads of this Review, and to bring together experts from the university sector, to ensure that we are able to achieve this balance while also leveraging the full potential of our national research capacity. UA looks forward to ongoing engagement with respect to this Review and how its recommendations intersect with other critical work in the defence trade controls space.