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Dr Kathleen Dermody
Committee Secretary
Senate Standing Committees on Foreign Affairs, Defence and Trade
Parliament House
Canberra ACT 2600
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Dear Dr Dermody

Defence Trade Controls Bill (2011) Response

As the national peak organisation representing all 39 of Australia's universities in the public interest, both nationally and internationally, we welcome the opportunity to provide a response to the D*efence Trade Controls Bill (2011)* (the `Bill').

Universities Australia is writing on behalf of our members, many of whom have expressed considerable concern that the Bill does not fully take account of the affect that the Bill will have on Australian universities, notwithstanding its intention to minimise such impacts. We have attached a paper prepared by a group of our member university lawyers setting out in detail their concerns about the Bill.

Key points are outlined below.

Universities Australia would stress at the outset that we are very mindful of the important role that universities do, and should play, in supporting national security priorities, including Australia's obligations under international treaties and other international instruments. We also support the intent of the legislation to update Australia's existing system of export controls to cover 'intangible' transfers of technology and services related to items listed on the Defence and Strategic Goods List (DSGL). In seeking to protect the misuse of sensitive technologies, however, this legislation is to some degree incompatible with universities mission to freely pursue teaching and research. Further, the compliance regime will place a substantial and costly administrative burden on universities contrary to the legislation's intent.

The Explanatory Memorandum (EM) makes explicit the Government's expectation that the controls will apply to only "very specialised and high-end research' conducted by universities and, as such will have a 'minimal impact on university courses or research programs' (p. 21).

As presently drafted, the legislation will have the opposite (and unintended) effect. That this might be possible is implied in the disclaimer that the Department of Defence did not have any statistical data

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regarding "the number of programs to which the DSGL might apply, nor the numbers of foreign researchers or students that are participating in these programs" (p. 21). A closer understanding of the highly devolved nature of Australian university administrations and the relative independence with which academic staff pursue their teaching and research activities, however, would suggest that the number of such programs and personnel is likely to be very large and that the identification of activities involving the supply of information, assistance or training in relation to goods listed on the DGSL would be a complex and resource intensive process.

The Bill prohibits an Australian university from engaging in the supply of information, assistance or training in relation to goods that are listed on the DSGL, to any persons who are not an Australian resident or citizen or corporation. 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 restrict the training and research conducted by universities in these fields.

Australian universities have over 240,000 enrolled students who are not Australian as defined by the legislation – not counting the almost 100,000 expecting to commence in 2012. 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.

Given the serious criminal sanctions for breaching the provisions of the Bill, universities would need to take a cautious approach to the implementation of the legislation. It would need to employ large teams of specialists to identify which activities may require a permit application and seek permit applications for very large numbers of university activities. This would not only be an administrative burden for universities, that would divert significant resources away from core functions, but for government agencies also. The attendant waste of resources and probable delays to key research or teaching activities would be an extremely unfortunate, and presumably unintended, outcome of the Bill.

Again, we stress, that we understand this outcome to be contrary to the intention of the Bill. The EM outlines that to ensure that controls are limited to 'high end and specialised research', a range of exemptions will apply to a defined range of 'technology' and 'services'. These should serve to exempt the application of controls to information that is 'in the public domain'; used for 'basic research' or 'required for patent applications'. We note, however, that the Bill itself does not specify these proposed exemptions, but rather permits the Minister to specify 'information' by way of legislative instrument for the purposes of the definition of 'technology'. This is then intended to clarify the exemptions set out in the EM.

These exemptions are the mechanism by which the legislation will realise its intent. It is important, therefore, that the legislation itself – not just accompanying instruments – make explicit mention of these exemptions. This would bring us more closely into line with our counterparts in the UK whose equivalent legislation provides a section (8) entitled 'Protection of certain freedoms' that explicitly sets out the exemptions that apply. These are then clarified and further defined in the accompanying *Export Control Order (2008*) No similar provision appears in the draft Bill, nor do they appear in the *Draft Defence Trade Controls Regulations 2012* currently subject to consultation.

Universities Australia recommends that the Bill be amended to rectify this omission. At the very least, we consider it important that the Bill not passed by the Senate until after the Regulations and instruments have been issued, and subject to wide and detailed consultation with the university sector and other affected research entities.

Finally, to further strengthen the intent of the Bill, Universities Australia recommends that the Bill set out objects (not uncommon in primary legislation) that explicitly states that it seeks to achieve a balance

between international obligations to control the proliferation of weapons and weapons technology and the pursuit of knowledge in collaborative enterprises, especially in Australian universities. This would require that the Bill be interpreted so as to achieve this balance.

Universities Australia would welcome the opportunity to assist in any way to ensure that the legislation and accompanying regulations and instruments are drafted in a way that will realise our shared objective.

I would draw your attention to these and other matters that have been set out in detail by a group of our member university lawyers, in particular their request for these changes to extend to our members' activities operating campuses overseas, which under the Bill may otherwise have to cease their science or technology activities at these campuses.

Yours sincerely

Belinda Robinson
Chief Executive