

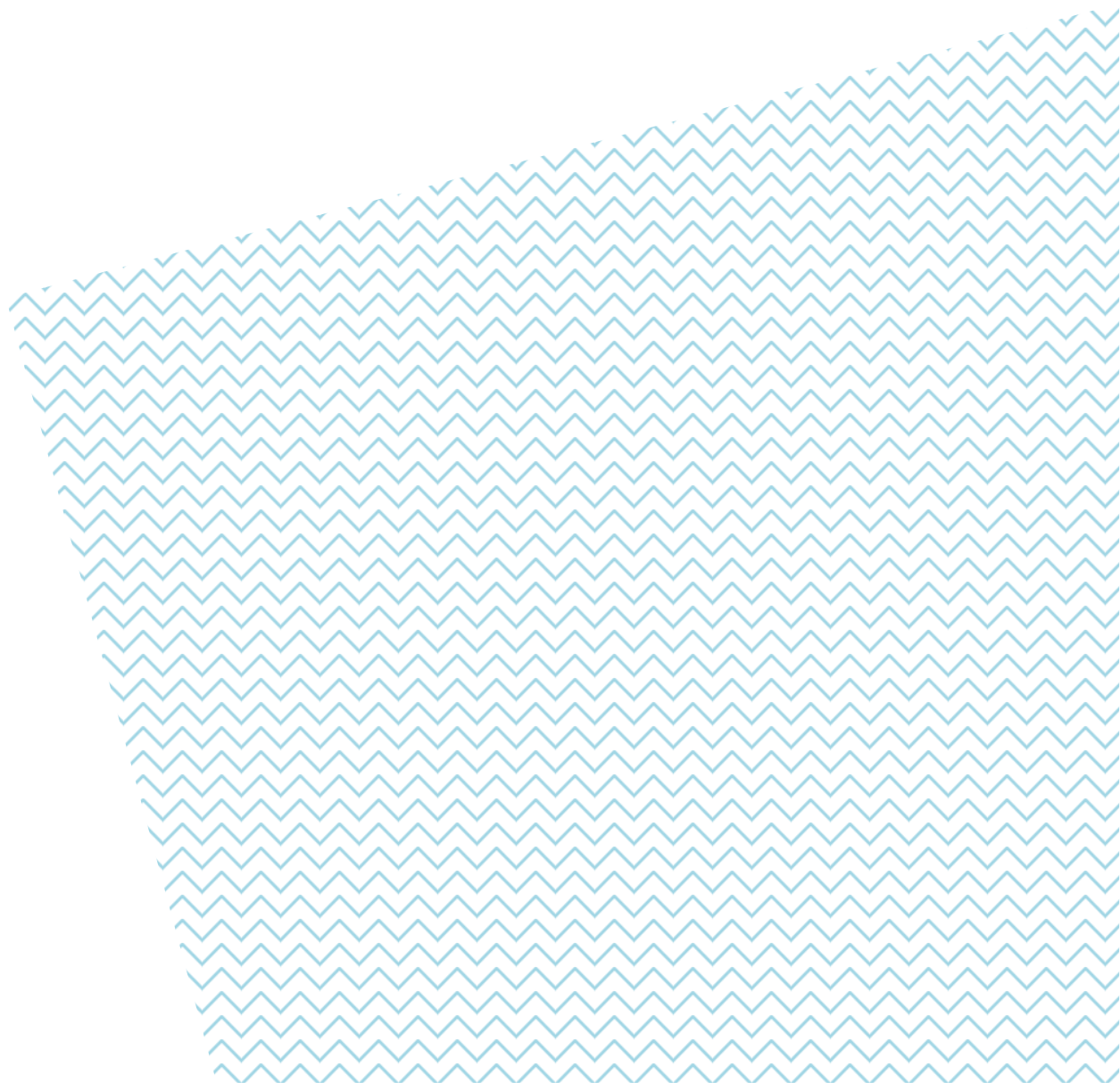


The University of Melbourne

The Defence Trade Controls Amendment Bill 2023

Submission to the Senate Foreign Affairs, Defence
and Trade Legislation Committee

1 February 2024



Submission in response to the Defence Trade Controls Amendment Bill 2023

The University of Melbourne recognises the importance of Australia's Defence Export Controls and acknowledges the policy intent behind the *Defence Trade Controls Amendment Bill 2023*. The Bill seeks to strengthen Australia's export controls framework, access country-based exemptions to the licensing requirements of the *US Arms Export Control Act* and address existing gaps in regulating transfer of controlled goods and technologies.

In earlier consultations, the University has provided submissions to the Australian Government and welcomes the adoption of some of those recommendations in the latest iteration of the Bill. However, the University remains concerned that the Bill could hinder important research collaborations, both domestically and internationally. This could have wide-ranging impacts on the quality and quantity of Australian research outputs across a range of fields – not just those directly related to defence technologies. The extensive reach of the export controls regulations means that a large volume of low-risk (dual use or potentially regulated) research involving low-risk activities and stakeholders may be subject to disproportionate compliance burdens.

In summary, the University is concerned about: the potential for overreach in the application of Section 10B resulting in reduced research collaboration in low-risk disciplines and with low-risk partners; the disadvantage Australian research teams may face in comparison with researchers in the US and UK when engaging with non-Foreign Country List (FCL) individuals; the desirability for inbuilt flexibility in amending the FCL in future; the need for a definition of 'officers and employees' that reflects the various types of engagement forms used by universities; and the need for guidance on what constitutes a 'training activity'. We support the need for a clearly defined fundamental research exemption.

To reduce these risks to Australia's research competitiveness, the University of Melbourne recommends:

- Narrowing the scope or providing additional exemptions under Section 10B to prevent an 'ITAR taint', in which export controls prevent Australia from being at the cutting edge of critical technologies research;
- Allowing the Australian Government to grant exemptions to countries outside of the FCL (for example, through a regulatory instrument or Ministerial declaration), to enable prompt responses to a rapidly changing geopolitical environment;
- Considering a broader definition or categorisation of 'officers and employees' such that there is clarity on how honorary appointees and other individuals in a university context may relate to the definition;
- Providing clarity on the application of the Bill to higher degree by research students;
- Providing further guidance on the threshold for 'training activities' under Section 10C; and
- Including a broadly defined fundamental research exemption in the relevant regulatory instrument.

Purpose and principles

The University of Melbourne understands the Bill's objective is to facilitate freer movement of controlled goods and technologies under Pillar 2 of the AUKUS Agreement, ultimately leading to stronger defence capabilities for Australia and its allies.

The Impact Analysis released by Defence notes that reforms are necessary to access national exemptions under US export control law. The University's submission seeks to outline the impact of the reforms on its activities and to suggest amendments to the Bill that would support the broader objectives of the AUKUS agreement without unduly constraining the wider research effort of the nation's universities.

The University of Melbourne notes the *Breaking the Barriers: Reforming US Export Controls to Realise the Potential of AUKUS* report released by the United States Studies Centre in May 2023. The University recognises the Report's concern that export control reforms contained in the Bill may have detrimental effects on defence innovation across all three AUKUS countries. The report highlights the challenges arising from the existing US regulatory regime and the risk of directly adopting such elements in Australia through export control mechanisms.

In this context, the University advocates for a few key principles that should guide this legislation:

- Australia's export control regime should seek to facilitate, rather than limit, defence innovation that takes place not only *between* AUKUS countries, but also those *benefitting* the AUKUS countries, in alignment with Australia's foreign policy and national interest.
- Export controls regulations should create incentives for the defence industry, including the research sector, to develop and innovate, while mitigating risks of transfer of controlled goods and technologies which may be contrary to Australia's national interest. Regulations should still allow industry to attract and retain the best global talent.
- A successful regulatory regime includes controls that are clear, targeted and predictable where the transfer of technologies presents risks. This regime should have minimal regulatory burden on technologies and activities that do not present significant risks.

While the University of Melbourne acknowledges the Australian Government's legitimate drivers for reform of its export controls regime, we also highlight the need for collaboration across Australia, the UK and the US to ensure that the respective export control regimes are fit for purpose in supporting defence innovation across their jurisdictions.

Topics in the Bill for further consideration

Effect of Section 10B – 'ITAR taints'

The Bill is anticipated to create export control laws comparable to the US. As part of the effect of Section 10B, Australia is also introducing regulations on all Defence and Strategic Goods List (DSGL) goods and technologies that originated or passed through Australia supplied to a foreign country or foreign person. This feature in the US export control regime has been described by critics as 'ITAR taints', where any goods and technologies that contain components originating from the US are subject to export control scrutiny. This has been documented in detail in the *Breaking the Barrier* report referenced above. The University of Melbourne is aware of the risk that the breadth of regulation may disincentivise other countries from collaborating with Australia. Without appropriate amendments or adequate exemptions, the new export control law may prevent Australia from being at the cutting edge of numerous areas of critical technologies including quantum and artificial intelligence.

Such impacts would be broader than the actual regulated areas. The regulatory burden will not only be felt by Defence, but also the research sector and the defence industry. This disincentive for defence innovation can be significant and immediate, including on collaborations solely with FCL countries.

While collaborations will become easier within AUKUS countries under the Bill, we anticipate that researchers may see reduced collaboration with other countries (including FCL countries) and in lower-risk fields of research (including those that are not regulated under Australia's export control regime).

The University of Melbourne recognises the need for comparable laws before Australia can access a national exemption under US export control regulation. However, we encourage the Australian Government to consider further collaboration with its US counterparts to review the effectiveness of their respective export control prohibitions on re-export, re-transfer and re-supply.

Where possible, the University of Melbourne advocates for a narrower scope of application of Section 10B, for example limiting its application only to goods and technologies relating to Part 1 of the DSGL (military and non-military lethal goods), without regulating those in DSGL Part 2 (dual use list).

Australian research teams disproportionately disadvantaged engaging with foreign skilled talent

The current iteration of the Bill would perversely make it harder for a non-FCL individual to collaborate with an Australian research organisation if the individual is in Australia than if they are in the US or UK. In the research sector where global mobility is essential, such a disadvantage could discourage global talent from working in Australia and create a push factor for them to leave.

As a hypothetical example, when an Australian university seeks collaboration with a research team comprising a South Korean (non-FCL) national, the current Bill may result in a disincentive to collaborate with an Australian research team compared with a US research team. Applying the prospective law to common research collaboration scenarios, and

assuming the collaboration requires supply of DSSL goods/technologies to a South Korean national, possible scenarios are set out below.

Scenario of supply of DSSL goods/technologies	Likely outcome as per our interpretation of the Bill
Australian body supplying to a South Korean national in Australia	permit required under Section 10A
Australian body supplying to a South Korean national in the US	permit required under Section 10
Australian body supplying to an Australian body	permit NOT required as it is not a 'relevant supply'
Australian body supplying to a US body	permit NOT required as it is not a 'relevant supply'
Australian body supplying to an Australian body which then supplies to their South Korean national employee	permit required for the second supply as under Section 10A
Australian body supplying to a US body which then supplies to their South Korean national employee	permit NOT required because the first supply is not a 'relevant supply' and therefore the second supply is not regulated under Section 10B(1)(f) which requires the earlier supply to require a permit for the supply to be regulated.

The effect is that the same South Korean national may be disadvantaged by Australian law if they work in Australia on areas that require access to controlled goods and technologies. In comparison, they would not face the same burden under Australian law should they choose to work in the US or the UK. This applies to all non-FCL nationals not eligible for an exemption. Skilled individuals who are not FCL-nationals may choose instead to work in the US or the UK or other countries over Australia as a result of this law, and this may be detrimental to Australia's defence innovation.

The University of Melbourne recommends that Section 10B(1)(f) be amended, such that Australian export controls may apply in the supply outside Australia by a US/UK body to a foreign person or foreign country. The effect in the above scenario would be that the South Korean national would face the same compliance outcome under Australian law regardless of whether they work in Australia, US or UK.

Greater nuances for country risk calibration

The University of Melbourne welcomes the broadened exemption for nationals of countries on the Foreign Country List (FCL). This will enable Australia to continue to benefit from a diverse skilled workforce contributing to the nation's research sector where their research requires access to controlled goods and technologies. The adoption of the Foreign Country List as part of the export controls regulation helps research organisations like universities understand and identify the risks associated with the flow of technology.

The Bill provides three categories of countries:

Category	Anticipated regulatory impact in the Bill
Australia, United States and United Kingdom	Not regulated by export controls regulation
Foreign Country List including 25 countries	Nationals exempted when undertaking duties as an officer or employee of an Australian, US, or UK body
The remaining countries including South Korea, India, Indonesia, Malaysia and Singapore	Regular export controls apply

The export controls regulating the supply of DSSL technologies in Sections 10, 10A, and 10B could limit Australia's research activities and talent attraction. The exemption relating to FCL officers and employees only covers individuals who are both (a) an officer or employee in an Australia-/UK-/US-based organisation, and (b) a national of a FCL country.

Proposed new export controls are likely to stall a broad range of research collaborations in dual-use fields and critical technologies. While the exemptions for FCL nationals may enable officers and employees of organisations based in Australia, the UK and the US to receive DSGL goods and technologies, it is expected to create hurdles for research collaboration with other countries that may be considered like-minded.

A remaining challenge is that some of Australia's close partners in areas including security and defence collaborations, including South Korea and India, are not included in the FCL. Allowing for the creation of exemptions for countries by legislation and regulatory instruments in future would ensure flexibility to respond to changing circumstances and would increase the options for defence innovation.

Definition for 'officers and employees'

Under Section 10 to 10C, the Bill has created an exemption for FCL nationals, who are officers and employees of an Australian/US/UK body and receiving the supply of DSGL goods and technologies. However, the Bill remains silent on the definition of officers and employees.

In the context of the university sector, the scope of 'officers or employees' could include, depending on the definition:

- Honorary appointees who are not holding paid employment at the organisation
- Individuals employed by affiliate organisations
- Individuals holding visiting appointments.

The University of Melbourne recommends including these roles in the definition of 'officers or employees'. If this recommendation is not supported, clear guidance on the intended treatment of each of these categories will be essential to ensure the research sector's compliance.

Application of export controls on supply of DSGL goods and technologies to higher degree by research students

Section 10A regulates supply of DSGL goods and technologies to a foreign person in Australia. While officers and employees are exempted within the same organisation, this exemption may not apply to higher degree by research (HDR) students. HDR students are enrolled as students in the institution. However, they actively conduct research, and their activities resemble those of researchers employed as academic staff. The University recommends that the government provide clarity on the application of the legislation to HDR students.

Interpretation of 'training activities' under Section 10C

Section 10C of the Bill regulates the provision of DSGL services, which includes training, relating to goods and technologies listed on DSGL Part 1. Through initial sector consultation with the government, it is understood that training activities within normal university operations are unlikely to meet the threshold for a DSGL service. While occurrences of training relating to DSGL Part 1 are rare, there have been scenarios where artificial intelligence technologies have been assessed to be on DSGL Part 1. However, the legislation has not provided clarity on what qualifies as 'training' under Section 10C.

The University of Melbourne currently offers a range of teaching subjects as well as research training that may involve DSGL goods and technologies on the dual use list. Some of these training activities involve research on or enhancing these capabilities. With the current definition of 'training' in Section 10C, the impact may be extensive.

The University of Melbourne recommends that, when the new law is implemented, the government provides further guidance on the threshold, such that universities may evaluate whether training activities fall into the scope of Section 10C.

Fundamental research exemption

The US experience in implementing export controls suggests that successful regulation relies heavily on a broadly defined fundamental research exemption. The effect of the exemption is to remove unnecessary regulation on activities that do not present significant national security risks. It also reduces the administrative load for the regulator and research organisations.

The University of Melbourne welcomes the continued consultation that is underway and acknowledges the current proposed wording of the fundamental research exemption:

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

The University of Melbourne understands that the scope and wording of the fundamental research exemption currently sits outside of the legislation and is yet to be finalised as part of a regulatory instrument. The interpretation and application of the exemption will be as important as the legislated text and the University encourages the clear and broad application of this exemption to minimise the regulatory burdens on research activity that is unlikely to present risks and facilitate good faith compliance. Notably, the University of Melbourne understands that the qualifier 'science and engineering' could be subject to alternate interpretations. We would advocate for a definition that leaves minimal room for different understanding.

Impact on research innovation – defining DSGL 'technology'

The Bill removes the exemption for oral supply of technology which currently exists in Subsection 10(1A). The University recognises that the assumption behind this exemption – that information supplied orally may not contain sufficient details to deliver the know-how of a technology – may no longer be valid in an age where verbal communications, presentations, and conference exchanges can easily be recorded. In this submission, however, the University of Melbourne presents the interaction between the legislative change and the core of research innovation.

International research collaboration is of critical importance to a modern academic institution. From 2018 to 2023, more than 54% of research outputs at the University of Melbourne involve some forms of international collaboration. The lifecycle of research begins with genuine, sporadic exchanges between academics at conferences, visits and meetings, in Australia or overseas. Before a project commences, researchers go through stages of ideation, co-design and funding application. These processes involve the sharing of ideas, information and technical concepts, via email, providing access, discussion, screen-sharing and other forms of communication. A range of disciplines with potential dual-use applications (not technologies) do face heightened scrutiny. These include, for example, post-quantum cryptography (needed for future-proofing the Internet, secure communications, and banking systems), blockchain, cybersecurity, and artificial intelligence (the theoretical aspect of which presents a very broad range of applications). Research activities relating to theory and technical application present a broad range of technology readiness. In practical terms, algorithms potentially exchanged in academic collaborations can be abstract mathematics or advanced system codes.

Exchanges of information in the ideation and funding application stages may or may not constitute a technology as defined in the DSGL. The University of Melbourne anticipates that many of these activities are subject to increased regulation through the reform. In most cases, these collaborations would result in publication. Subject to the application of the fundamental research exemption, some research activities may be exempted. The University of Melbourne advocates for a position that the exchange of ideas (rather than actual technologies) which does not substantiate a technology should not be subject to export controls. This calls for further clarity in the regulation of what constitutes a 'technology'.

The University of Melbourne understands that the review of the DSGL is not within the scope of this Bill but is part of the Review of the DTC Act. Taking this opportunity, we seek due consideration by the Australian Government to define 'technology' to cover only substantive know-how, design, rather than mere ideas, preferably to take into consideration the technology readiness level.

We look forward to continued engagement with the Australian Government to assist in ensuring that the exemption is fit for purpose and maximises the benefit for the Australian community our national interest.



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