

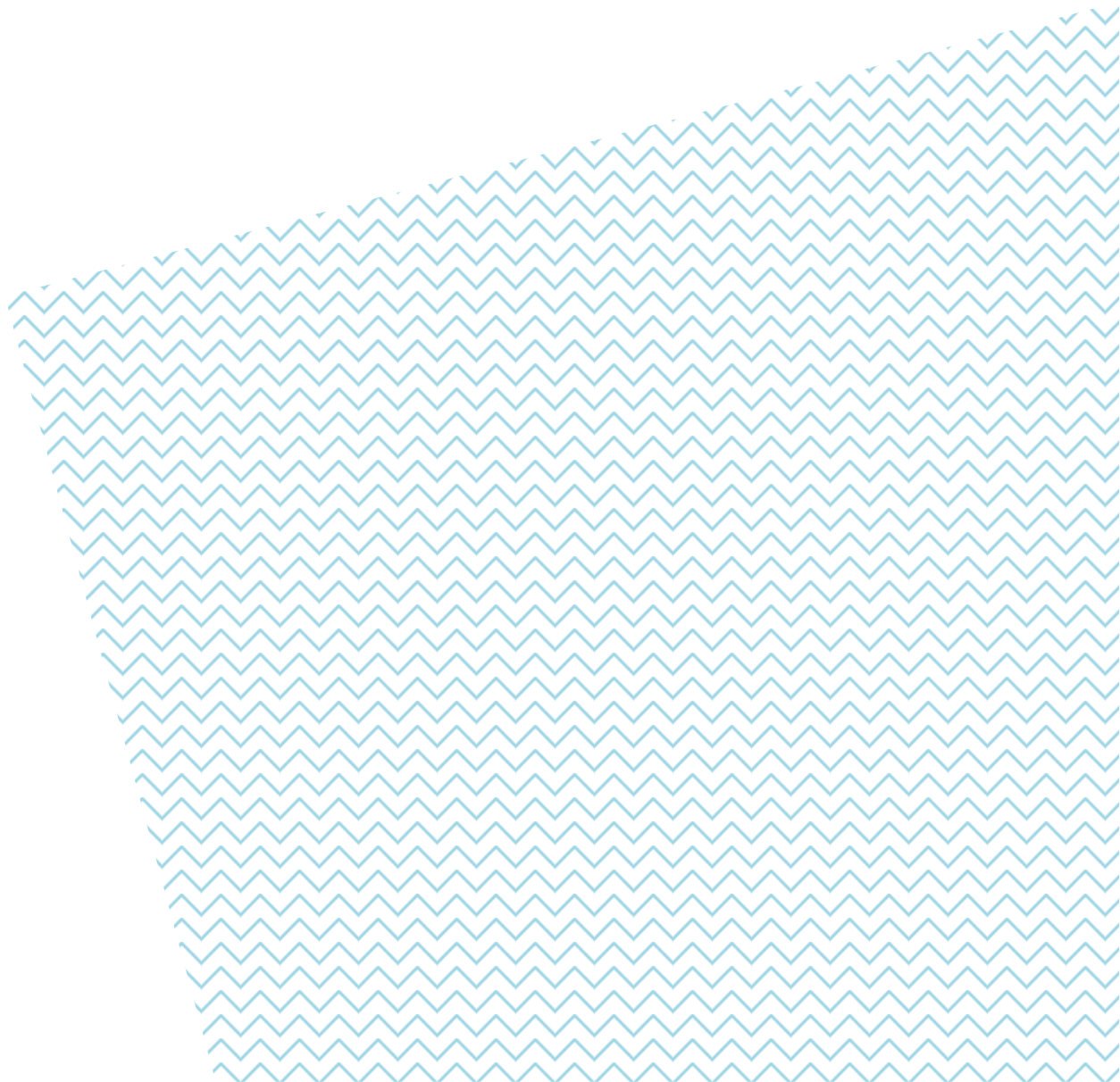


The University of Melbourne

The Defence Trade Controls Amendment Bill 2023

Submission in response to the Exposure Draft

17 November 2023



Submission in response to the Exposure Draft of The Defence Trade Controls Amendment Bill 2023

The University of Melbourne recognises the importance of Defence Export Controls. These controls ensure that Australia's exports of military and dual-use technologies support the national interest and Australia's security and capability. As a leading research university, we have a strong relationship with Defence which has been built over many years. We engage in a wide range of advanced and cutting-edge research, some of which involves technologies relevant to Defence Export Controls. As such, ensuring that the regulation of this activity is aligned to its objectives and facilitates compliance, the University provides the following feedback on the exposure draft of The Defence Trade Controls Amendment Bill 2023. In summary:

- Greater clarity is essential to fully assess the impact of the draft Bill, including treatment of dual nationals under the proposed reforms, and the scope of the proposed exemption relating to fundamental research.
- The proposed legislation is likely to extensively impact staff, students and affiliate members of the University of Melbourne including honorary, visiting and guest academics. Without appropriate exemptions, there may be significant challenges in implementing the new export controls legislation, curtailing the appeal of Australia in attracting and recruiting the best talent, and new regulatory burdens that may hinder domestic and international research collaborations.
- The research sector will benefit from further clarification on details including:
 - The scope of 'employee' or 'officer' in Sections 10, 10A, and 10C
 - Interpretation of a DSSL technology recipient as a foreign person individual or a body corporate in the context of domestic research across different institutions
 - Legal liability and requirements for research organisations to manage re-supply pursuant to Section 10B
 - The scope of 'training' and its possible application on research training activities in academia
- Defence is encouraged to consider:
 - reassessing the impact and strengthening support through Defence Export Controls (DEC)
 - broadening the applicability of the Foreign Country List national employee exemption from Section 10A to potentially also cover Section 10, Section 10B and Section 10C.

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4. Which sector, country, organisation, or other group do your views represent?

Research and Higher Education sector

5. How will the proposed Defence Trade Controls Amendment Bill 2023 affect you/your organisation?

The University of Melbourne anticipates that the proposed legislation is likely to have significant impact on its operations and the legislation may benefit from further refinement and clarity. In making this preliminary assessment, the University notes that key definitions and exemptions may be included in regulations or the DSGL, and it is not possible to definitively assess impacts until these elements are crystallised, as these will have very significant influence on the impact of the reforms on day-to-day operations. As stated in its previous submission, the University of Melbourne recommends ensuring that regulatory settings are as targeted as possible to protect Australia's strategic interests while still allowing important international research collaboration to continue.

These impacts are outlined below:

Impact on staff members, graduate researchers and the attracting the best talent

Section 10A establishes the offence of supplying DSGL technologies in Australia to a foreign person. An exemption is available to cover citizens or permanent residents of one of the 25 countries on the Foreign Country List. The scope of the exemption means that a substantial number of employees with regular access to DSGL technologies may be captured.

Global mobility is a norm for personnel within an academic institution where researchers are recruited internationally. Academics newly joining the Australian higher education sector may not have a permanent residency status in the first few years. Among those who access controlled technologies, there will be a number of research staff who are not citizens or permanent residents of countries on the Foreign Country List or AUKUS countries. Imposing these types of controls may create a significant regulatory burden on Defence Export Controls and the research sector, and may impact Australia's interests in seeking to attract and recruit the best talent irrespective of nationality.

At the University of Melbourne, it is estimated that close to 10% of the University's staff population are likely considered a foreign person. Among the graduate research students, approximately two thirds (more than 3,600) are from engineering, science and health disciplines, and of these around half are unlikely to be AUKUS persons. A large fraction of this cohort would access DSGL technologies during their research training at the University; preventing them from doing so would have the effect of slowing or completely stalling research in a wide range of fields.

Greater clarity is essential to be able to fully assess the impact of the draft Bill, including information regarding:

- (a) the treatment of dual nationals under the proposed reforms; and
- (b) the scope of proposed exemptions relating to fundamental research.

Some dual-use technology regulated by the DSGL is commonly accessible at the University. As an example, high performance computers meeting the threshold of the DSGL are widely available to researchers at our Melbourne campus. When considering supply of DSGL technologies in Australia, we may assume that a large majority of staff members already have access to certain DSGL technologies by virtue of their employment at the University of Melbourne.

Impact on individuals who may or may not be considered an employee or officer

The proposed Sections 10, 10A and 10C provide being an 'employee or officer' to an Australian body corporate as one of the factors that may qualify for an exemption from offences of supplying DSGL technologies from Australia to outside of Australia, to a foreign person in Australia and to provide DSGL services. It is unclear whether honoraries, guests, or other affiliates (including Australia-based and overseas based ones) may benefit from this exemption.

In the university sector, individuals may hold honorary and guest appointments, or be enrolled as graduate researchers or other forms of affiliation which do not constitute paid employment. Honorary titles are given to retired academics, connected institutions or businesses, or individuals who have made an outstanding contribution to the

field and to the University. Guest appointments facilitate short term collaborations. For example, an academic employed by Australian Research Organisation A may concurrently hold an honorary (typically unpaid) or guest position by Australian University B for their research collaboration. The draft Bill has not provided full clarity on whether ‘employee or officer’ may or may not cover these individuals. We note further that the total number of honoraries may exceed the total number of employed academic staff.

Example - Collaboration between the University of Melbourne and affiliate institutions

Sizeable research operations are conducted jointly by University personnel and researchers from affiliate organisations including medical research institutes such as the Walter and Eliza Hall Institute for Medical Research, the Peter Doherty Institute for Infection and Immunity, the Peter MacCallum Cancer Centre, and the Florey Institute of Neuroscience and Mental Health. Individuals employed by a partner organisation may hold an honorary title (a form of non-paid contractual arrangement), guest appointment or an ‘IT Access’ user profile but may not be a paid employee. As such, non-Australian persons (of which the number can be substantial) among them may be captured by the new export control regulations unless care is taken to exempt these personnel, where appropriate.

Greater clarity is needed regarding:

- (a) the treatment of dual nationals under the proposed reforms; and
- (b) the scope of proposed exemptions relating to fundamental research.

This information will inform the extent to which honorary staff and graduate researchers may be eligible for exemptions.

Impact on domestic research collaborations involving a foreign person

Domestic academic collaborations, which are common across institutions within the Australian research sector, may be disrupted under the prospective legislation due to the lack of clarity on whether an individual is considered a person or part of their organisation. The Bill has clearly indicated that individuals and body corporates are considered different persons when a DSGL technology is supplied in Australia by an Australian body corporate to its employee or officer. However, universities will benefit from greater clarity when applying the proposed legislation to situations which involve transfer of controlled technical information from one institution to another. The Bill has not clarified, when an Australia-based ‘foreign person’ individual receives DSGL technology from another Australian research organisation, whether they are considered (a) a body corporate as part of their duty or (b) a person in their own right. If (b) applies, the new export control legislation could significantly disrupt collaborations that currently take place between the University and its affiliates and partner organisations. If so, this would mean that supplying a DSGL technology domestically to a foreign person based at an Australian based partner could face greater regulatory burden than supplying to a research organisation (which may involve a foreign person) based in an AUKUS country because the latter case may not be considered a ‘relevant supply’.

Example – Collaboration between domestic research organisations

When Australia University A supplies a DSGL technology to Academic B (non-FCL foreign person) who is employed by Australian University B, the Bill does not provide clarity whether Academic B is considered a foreign person or an officer of Australia University B. It is common that Australian universities jointly apply for research grants from domestic and international funding bodies to support their research activities. Such collaborations – including at the stage of grant application – may involve transfer of DSGL technologies within Australia. The Bill suggests that such transfer may require a permit.

Example - Collaboration between academia and industry partners – balancing security with precinct benefits

There are co-location arrangements within Melbourne’s innovation precinct, whereby the University and industry organisations share the same premises and collaborate in research activities, including research commercialisation. Such arrangements include Melbourne Connect which may involve defence-related or dual use research. Employees of some industry organisations may face additional permit requirements before they can access these goods and technologies, which could potentially undermine the benefits of the physical proximity of these research activities.

Impact on ‘training’ services related to DSGL technologies in Australia

The Bill establishes that provision of services, including ‘training’, related to a DSGL technology to a foreign person in Australia may constitute an offence. In the Explanatory Memorandum that accompanied the Bill, paragraph 3c seems

to suggest that the offence, where a person provides DSSL services including training, is only related to Part 1 DSSL goods and technology. However, the Bill does not appear to limit the applicability of this offence to DSSL Part 1 technology transfer. These provisions may limit Australia's capability to recruit skilled researchers to work or undertake further research training.

At the University of Melbourne, a large majority of the DSSL technologies relate to Part 2. The proportion of STEMM researchers working on sensitive technologies compared to defence technologies at the University of Melbourne is approximately 16:1. As such, clarity on the scope of the offence is critical to the University understanding the impact on its research enterprise, with impacts being exponentially higher if this restriction on training extends to Part 2 of the DSSL.

Impacted researchers include international graduate research students at the University of Melbourne, especially those whose research projects focus on, or requires access to, dual use technologies.

Australian academic institutions, including the University of Melbourne, host a large number of international students including graduate research students. In certain disciplines, including ones that may potentially fall within the scope of DSSL, there is a high concentration of researchers from non-FCL countries because of the research and educational strengths in their countries of origin, their preference for Australia as a desirable destination for study and research and, in some technology areas (e.g. with strong employment prospects) a shortage of qualified Australian candidates with appetite to undertake higher degrees.

As of October 2023, more than 45% (or over 1,800) of the research higher degree (RHD) students enrolled in one of the STEMM disciplines, which are more likely to interact with controlled goods and technologies, at the University of Melbourne are international students, i.e. non-Australian persons.

Impact of Section 10B on international research collaborations

Section 10B establishes an offence where, following a supply of DSSL technology, such DSSL technology is further supplied to a foreign country or a foreign person in Australia. It does not seem clear whether the liability of such offence lies with the supplier of the 'earlier supply' or the 'current supply'.

If the legal liability is borne by the earlier supplier, this begs the question of what a research organisation, such as the University of Melbourne, can practically do to prevent unauthorised re-supply from taking place. When considered in conjunction the absolute liability in the common event of a constitutional supply, the potentially disproportionate penalty may discourage any international research collaboration outside AUKUS including with like-minded countries.

Regulatory compliance burden

The University welcomes the extended delegation of permit issuance to EL1 APS staff which may hopefully reduce the time required in processing permit applications.

However, while it has been surmised that the new law is expected to reduce regulatory burden for the science community, this assessment is based on an estimate, judging from the number of past permits. The University would advocate caution with this type of assessment as historical data on permit volumes may not be a reliable indication when considering the level of maturity of Australia's export controls regime. The University has previously made submissions relating to the relative immaturity of the Australian context, relative to the UK and USA with reference to the supply of export controls compliance professionals.

6. What additional guidance or support from the Australian Government would assist you/your organisation to meet the proposed changes?

The University of Melbourne would benefit from further guidance and support in the areas below:

Guidance on Section 10A – broad interpretation of 'employees or officers'

The University of Melbourne advocates for clarity in the regulation and the broadest possible application of the definition of 'employees or officers', which ideally can then cover individuals who are affiliated with the University without paid employment. This will enable honorary, visiting/guest academics, and graduate research students to pursue domestic collaborations involving DSSL technologies with minimal regulatory requirements.

Guidance on Section 10A – favourable interpretation of ‘individual’ v. ‘body corporate’

The University recommends that, in the context of domestic research collaboration, a foreign person who is a recipient of the supply of DSGL technology should be considered for the purposes of their employment as an Australian body corporate where applicable, such that they can benefit from the exemption in Section 10A.

Guidance on Section 10B – clarity on legal liability and requirement for research organisations to manage re-supply

The University seeks guidance on how the research sector is expected to manage the legal obligations arising from activities that inadvertently or deliberately involve a resupply of DSGL technology. This will benefit from practical examples about how the new regulations are to be enforced. Clarity in legal liability and best compliance practice can facilitate the assurance to the research sector that the new regulations, while promoting collaborations with AUKUS countries, will not unnecessarily limit collaborations with like-minded nations and the rest of the world.

Guidance on Section 10C – training services related to DSGL technologies

Through earlier informal engagement, the University understands that it is unlikely that graduate research training would meet the threshold for regulation. This understanding however has not been made explicitly clear in the legislation. We would benefit from guidance in the regulation that makes clear whether graduate research training may be considered a DSGL service.

Consideration of regulatory burden and strengthening Defence Export Controls’ capability

The community will benefit from strengthened capability by Defence Export Controls (DEC) in processing permit applications and guiding the sector on the implementation of the new law. The University’s assessment, judging from the framing of the current Bill, is that the new law will significantly increase the number of permit applications submitted to DEC. We anticipate that a large volume of new permits may be required each year for the University of Melbourne’s activity alone, especially given the extensive availability of some DSGL capabilities to University personnel and affiliates who will likely be considered foreign persons.

Designated support contact at Defence Export Controls

Establishing a Point of Contact at senior levels within universities and DEC (for example, at EL2 level) respectively would improve the efficiency of administration and build trusted relationships. We understand these Points of Contact relationships exist with some defence industry corporations, and it would be very helpful to extend this to Group of Eight universities.

7. What other comments do you have on the draft Bill?

Applicability of the Foreign Country List exemption

The University advocates for broader application of the exemption beyond Section 10A. Currently the exemption relating to the Foreign Country List exists only in Section 10A which regulates supply of DSGL technologies in Australia to a foreign person.

This means that a FCL national employed by the University of Melbourne may be able to access DSGL technologies as part of their employment, but the same individual will require a permit to access technologies, for example, when they travel. We recommend creating similar exemptions for FCL nationals affiliated with the Australian research sector to have the unregulated ability to receive DSGL technologies while overseas (Section 10), by way of resupply following an earlier supply (Section 10B), and receiving DSGL services (Section 10C)

Country-based exemptions additional to the Foreign Country List

Defence and the University have a shared interest in ensuring the Bill delivers a regulatory framework that supports Australia’s national interest and protects its sensitive assets. Currently the Foreign Country List contains 25 countries only and it does not include some members of Australia’s regional partnerships. This presents an opportunity, and the University supports options to expand the scope of the exemption to cover some of Australia’s like-minded nations with which the Australian higher education sector collaborates on dual use or defence research. This could potentially be implemented through an additional list of exemptions that consider Australia’s foreign policy and strategic interest.

Connection with other legislative and regulatory instruments

From informal engagement channels, the University acknowledges that the implementation of the export controls legislation will be impacted by other regulatory instruments including updates to the Defence and Strategic Goods List. These changes, such as the scope of the fundamental research exemption contained in the DSGL, would materially impact the extent of the impact arising from this legislation. We look forward to receiving further information in relation to further regulatory changes and contributing to the consultation processes.

Fundamental research exemptions

While acknowledging that changes relating to a fundamental research exemption may not be within the scope of this Bill, the University reiterates that a broadly defined exemption for fundamental research is of critical importance for successful implementation of the proposed legislation and the AUKUS export controls regime.

Under the existing regulations, researchers and research organisations have not been able to rely on the basic research exemption when undertaking research activity, even when intended for publication. As such, Export Controls may apply to any potentially dual use research, even where it is intended for sharing in the public domain. While controlling transfer of such technology through permits arguably has no significant strategic implications to the national interest, it dilutes the focus of both universities and regulators, who must screen, assess and process permits for this scenario.

The University supports definitions that fully align export controls with Australia's defence strategic requirements. This would mean enacting definitions that yield an exemption for research activity that is as clear, broad and predictable as possible, while still protecting the national interest.

Implementation timeframe

After the Bill is passed into law, the University will greatly benefit from as much notice and detail as possible to understand the full spectrum of regulatory requirements (for both updates to regulations and to the DSGL). Considering a previous example such as the implementation of the Foreign Arrangements Scheme, the detail in the regulations meant there was significant impact in practice. We would like to have the best opportunity to manage this process in a sufficient timeframe in order to design and implement an updated compliance program with an effective change management process. Subject to the extent of the regulatory impact, it is estimated that the re-designed compliance program may take a year, subject to DEC assessing and issuing permits within 30 days of applications being submitted. This would be contingent on the availability of support from DEC, expert resources to support the compliance and implementation of export controls regulations. The University of Melbourne is committed to supporting the implementation of Australia's strengthened export control regulations.



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International Safeguards

Office of Research Ethics and Integrity