

EXPLANATORY STATEMENT

Select Legislative Instrument No. 67, 2015

Defence Trade Controls Amendment (Decision Criteria) Regulation 2015

Section 75 of the *Defence Trade Controls Act 2012* (the Act) provides that the Governor-General may make regulations prescribing matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The Act includes measures to strengthen Australia's export controls over defence and dual-use goods (goods that have a legitimate civil application but that can also be adapted for use in military or weapons of mass destruction programs) to eliminate identified gaps in Australia's export controls and to meet Australia's obligations as a member of various international counter-proliferation regimes. The Act also gives effect to the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation*.

The Act, which received Royal Assent on 13 November 2013, introduces new export controls on the intangible supply of technology listed in the Defence and Strategic Goods List (DSGL), the publication of DSGL technology, and the regulation of brokering activities.

Due to stakeholder concerns about the impact of these new export controls, the commencement of the controls was delayed by a two-year transition period. During the transition period, the Department of Defence, in partnership with the Strengthened Export Controls Steering Group (established under the Act) and the Department of Industry and Science, conducted extensive consultation on the potential impacts of the Act and proposed measures to reduce these impacts. These measures are reflected in the *Defence Trade Controls Amendment Act 2015* which was passed by Parliament on 18 March 2015 and received Royal Assent on 2 April 2015.

The *Defence Trade Controls Regulation 2013* (the Principal Regulation) was made on 30 May 2013 to prescribe particular matters required by the Act. The *Defence Trade Controls Amendment (Decision Criteria) Regulation 2015* (the Regulation) amends the Principal Regulation to:

- (a) replace the criteria in section 8 to which the Minister must have regard under section 25A of the Act, when deciding whether the supply and publication of DSGL technology or the brokering of DSGL goods or technology would prejudice the security, defence or international relations of Australia; and
- (b) amend the information that is required to be contained in records to be kept by section 11 permit holders supplying DSGL technology.

Details of the Regulation are set out in the Attachment.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation will commence at the same time as item 48 of Schedule 1 to the *Defence Trade Controls Amendment Act 2015* – that being the later of the start of the day after that Act received Royal Assent and immediately after the commencement of section 16 of the *Defence Trade Controls Act 2012*.

Consultation

An exposure draft of the Amendment Regulation was released for public consultation on 17 December 2014 and a period of six weeks was provided for submission of comments on the draft Regulation. As expected, given the minor nature of the amendments, and that the amendments are consequential to the amendments made to the Act, few comments were received on the draft Regulation:

- Two comments suggested that the criteria should be broadened to include consideration of whether a decision will affect an institution or individual researcher. This amendment is not possible as the criteria must fit within the regulation-making power of the Act which requires the criteria to be relevant to whether the activity will prejudice Australia's security, defence or international relations.
- Two comments criticised the breadth of the criteria, in particular the criteria requiring consideration of Australia's international relations, as an overreach of Australia's treaty obligations. The criteria have not been altered in light of these comments as they are based on the criteria agreed by Government as relevant to Australia's security, defence and international relations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence Trade Controls Amendment (Decision Making Criteria) Regulation 2015

This Regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Regulation

The *Defence Trade Controls Act 2012* (the Act) includes measures to strengthen Australia's export controls over defence and dual-use goods (goods that have a legitimate civil application but that can also be adapted for use in military or weapons of mass destruction programs) to eliminate identified gaps in Australia's export controls and to meet Australia's obligations as a member of various international counter-proliferation regimes. Specifically, the Act strengthens Australia's export controls by regulating:

- the supply of (or provision of access to) DSGL technology from Australia to place outside Australia; and
- the brokering of goods or technology listed on the DSGL; and
- the publication of DSGL technology.

The Act also gives effect to the *Treaty Between the Government of Australia and the Government of the United States of America Concerning Defense Trade Cooperation*.

The *Defence Trade Controls Regulation 2013* (the Regulation) contains provisions in relation to a range of matters that are necessary to give effect to particular provisions of the Act. The *Defence Trade Controls Amendment (Decision Criteria) Regulation 2015* amends two sections of the Regulation to:

- (a) replace the criteria in section 8 to which the Minister must have regard under section 25A of the Act, when deciding whether the supply and publication of DSGL technology or the brokering of DSGL goods or technology would prejudice the security, defence or international relations of Australia; and
- (b) amend the information that is required to be contained in records to be kept by section 11 permit holders supplying DSGL technology.

Human rights implications

This instrument does not engage any of the applicable rights or freedoms.

Conclusion

This instrument is compatible with human rights as it does not raise any human rights issues.

Kevin Andrews
Minister for Defence

Details of the Defence Trade Controls Amendment (Decision Criteria) Regulation 2015

Section 1 – Name of Regulations

This section provides that the title of the proposed Regulation is the *Defence Trade Controls Amendment (Decision Criteria) Regulation 2015*.

Section 2 – Commencement

This section provides for the commencement of the proposed Regulation at the same time as item 48 of Schedule 1 to the *Defence Trade Controls Amendment Act 2015*.

Section 3 – Authority

This section provides that the *Defence Trade Controls Amendment (Decision Criteria) Regulation 2015* is made under the *Defence Trade Controls Act 2012*

Section 4 - Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 - Amendments

Item 1 – Section 8

Section 8 of the Principal Regulations prescribes the criteria to which the Minister must have regard when giving a permit for the supply of DSGL technology under subsection 11(4) of the Act or when giving a permit under subsection 16(4) of the Act for arranging the supply of DSGL goods or technology.

Section 25A of the Act requires the Minister to have regard to the criteria prescribed by the regulations when deciding whether an activity (the supply or publication of DSGL technology or the brokering of DSGL goods or technology) would or would not prejudice the security, defence or international relations of Australia. This item substitutes revised criteria to ensure that, where appropriate, the criteria are relevant and applicable to each type of activity.

An additional criteria has been included (item 12) which requires the Minister to have regard to whether preventing the supply of the DSGL technology or the goods, or the publication of the DSGL technology, may have an adverse effect on Australian industry, trade and economic prosperity to the extent that it may adversely affect the security, defence or international relations of Australia

Item 2 – Section 24 (table item 4)

Section 24 of the Principal Regulation sets out in a table the information that must be contained in the record of supplies made under a section 11 permit.

This item substitutes a new item 4 into the table to require:

- (a) the date of each supply to be recorded where a permit covers one or more supplies of DSGL technology; or
- (b) where a permit covers the supply of DSGL technology for a period or time or for a project - the period or periods of time during which the DSGL technology was supplied to be recorded.

This amendment is required to address amendments recently made to section 11 which provide for permits to be issued for the supply of DSGL technology for a project.