

EXPLANATORY STATEMENT

Issued by the Minister for Law Enforcement and Cybersecurity

Customs Act 1901

Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018

The *Customs Act 1901* (the Act) concerns customs related functions and is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Subsection 270(1) of the Act provides, in part, that the Governor-General may make regulations not inconsistent with the Act prescribing all matters which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Act.

Section 112 of the Act provides, in part, that the Governor-General may, by regulation, prohibit the exportation of goods from Australia, and that the power may be exercised by prohibiting the exportation of goods absolutely or by prohibiting the exportation of goods unless specified conditions or restrictions are complied with.

Regulation 13E of the Customs (Prohibited Export) Regulations 1958 (the Principal Regulations) prohibits the export from Australia of goods listed on the 'Defence and Strategic Goods List' (the DSGL) unless a licence or permission has been granted by the Defence Minister (or an authorised person) or an exception applies. The DSGL is made by the Defence Minister and sets out certain military goods and dual-use goods that are regulated for export. Regulation 13E gives effect to Australia's obligations and commitments under several international agreements, including the Wassenaar Arrangement, the Missile Technology Control Regime, the Australia Group, the Nuclear Suppliers Group, the Chemical Weapons Convention and the Biological and Toxic Weapons Convention.

The purpose of the Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 (the Amendment Regulations) is to amend regulation 13E of the Principal Regulations to ensure consistency as far as possible with the provisions of the *Defence Trade Controls Act 2012*. Broadly, the amendments include enhanced powers to revoke a permit where it is determined that an export would prejudice the security, defence or international relations of Australia, a specific temporary export exemption for persons (including body corporates) exporting uncontrolled goods containing controlled technology and software and the addition of decision-making criteria and a review of decision process.

The Amendment Regulations amend regulation 13E of the Principal Regulations to:

- explicitly prohibit the export of controlled technology and software stored on an uncontrolled good without a permit from the Defence Minister or a delegate of the Minister;
- include an exemption for the requirement for a permit when controlled technology and software stored on an uncontrolled good, and goods that are controlled technology, is temporarily exported from Australia, but not transferred to another person;
- include an exemption for the requirement for a permit when controlled technology and software stored on an uncontrolled good is exported to the origin of import after it was temporarily imported into Australia;
- provide enhanced powers for the Defence Minister to revoke a permit where it is determined that an export would prejudice the security, defence or international relations of Australia;

- include criteria and matters that the Defence Minister may have regard to in determining whether to grant a permit;
- provide for conditions to be attached to a permit and powers for the Defence Minister to add, vary and revoke permit conditions;
- provide a clear process for applying for permits and granting permits;
- provide mechanisms to review a decision made under regulation 13E; and
- include particular requirements, including notification and the giving of reasons, if a permit is refused.

The Amendment Regulations also make consequential amendments to the Customs (Prohibited Imports) Regulations 1956 (the Prohibited Imports Regulations) and Defence Trade Controls Regulation 2013.

Details of the Amendment Regulations are set out in Attachment B.

The Department of Defence (Defence), as the department that administers regulation 13E of the Principal Regulations, released an exposure draft of the Amendment Regulations for public consultation on 21 August 2017, and a period of three weeks was provided for submission of comments on that draft of the Amendment Regulations. Defence received 21 submissions from the general public, defence industry, the research and university sectors and Commonwealth Departments (including the Attorney-General's Department and the Department of Foreign Affairs and Trade).

Stakeholder submissions were broadly supportive of the changes, with several stakeholders stating that the exception for temporary exports of DSGL technology will significantly reduce administrative burden for their company or organisation.

Two submissions questioned the scope of certain criteria and suggested these be limited. 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.

Following consideration of the public consultation submissions, the Amendment Regulations were re-drafted to incorporate the following changes:

- clarification that the temporary export exception applies to a body corporate as well as an individual;
- the addition of a new exception that allows DSGL technology to be exported without a permit where the technology was temporarily brought into Australia and is being returned to the origin of import by the same person; and
- simplifying the returned goods test provisions for the importation of firearms and weapons in Schedules 6 and 13 respectively of the Prohibited Imports Regulations.

In making the new exception, the Defence Export Controls Working Group, consisting of key stakeholders from industry and academia, was consulted and they were supportive of its inclusion.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations commence on the day after it is registered on the Federal Register of Legislation.

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Statement of Compatibility with Human Rights

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

Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018

The Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 (the Amendment Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The purpose of the Amendment Regulations is to amend regulation 13E of the Customs (Prohibited Exports) Regulations 1958 (the Principal Regulations) to ensure consistency as far as possible with the provisions of the *Defence Trade Controls Act 2012*. Broadly, the amendments include enhanced powers to revoke a permit where it is determined that an export would prejudice the security, defence or international relations of Australia, a specific temporary export exemption for persons (including body corporates) exporting uncontrolled goods containing controlled technology and software and the addition of decision-making criteria and a review of decision process.

The Amendment Regulations amend regulation 13E of the Principal Regulations to:

- explicitly prohibit the export of controlled technology and software stored on an uncontrolled good without a permit from the Defence Minister or a delegate of the Minister;
- include an exemption for the requirement for a permit when controlled technology and software stored on an uncontrolled good, and goods that are controlled technology, is temporarily exported from Australia, but not transferred to another person;
- include an exemption for the requirement for a permit when controlled technology and software stored on an uncontrolled good is exported to the origin of import after it was temporarily imported into Australia;
- provide enhanced powers for the Defence Minister to revoke a permit where it is determined that an export would prejudice the security, defence or international relations of Australia;
- include criteria and matters that the Defence Minister may have regard to in determining whether to grant a permit;
- provide for conditions to be attached to a permit and powers for the Defence Minister to add, vary and revoke permit conditions;
- provide a clear process for applying for permits and granting permits;
- provide mechanisms to review a decision made under regulation 13E; and
- include particular requirements, including notification and the giving of reasons, if a permit is refused.

The Amendment Regulations also make consequential amendments to the Customs (Prohibited Imports) Regulations 1956 and Defence Trade Controls Regulation 2013.

The Amendment Regulations commence on the day after it is registered on the Federal Register of Legislation.

Human rights implications

The Amendment Regulations do not engage, impact on or limit in any way, the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Conclusion

The Amendment Regulations do not raise any human rights issues.

The Hon. Angus Taylor MP
Minister for Law Enforcement and Cybersecurity

Detail of the Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018

Section 1 – Name

This section provides that the title of the Amendment Regulations is the Customs (Prohibited Exports) Amendment (Defence and Strategic Goods) Regulations 2018 (Amendment Regulations).

Section 2 – Commencement

This section provides for the whole of the Amendment Regulations to commence on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section sets out the authority under which the Amendment Regulations are made, which is the *Customs Act 1901*.

Section 4 – Schedules

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

Schedule 1 – Amendments

Part 1 – Main amendments

Customs (Prohibited Exports) Regulations 1958

Item [1]- subregulation 2(1)

This item inserts a definition for the terms ‘defence and strategic goods list’ (DSGL), ‘DSGL technology’ and ‘reviewable defence and strategic good decision’ into subregulation 2(1) of the Customs (Prohibited Exports) Regulations 1958 (the Principal Regulations). ‘DSGL technology’ has the meaning given by the *Defence Trade Controls Act 2012* which includes both technology and software specified in (and within the scope of) the DSGL.

Item [2]- subregulations 13CR(1), 13CS(1) and 13CT(1)

This item repeals the definition of ‘defence and strategic goods list’ from subregulations 13CR(1), 13CS(1) and 13CT(1) of the Principal Regulations. Consequent to the amendments made by item [1], which amongst other things inserts a new definition of ‘defence and strategic goods list’, similar definitions contained in the provisions mentioned are redundant and are repealed.

Item [3]- division 4 of Part 3

This item substitutes the existing heading of Division 4 of Part 3 of the Principal Regulations with the heading ‘Division 4 – Financial goods’.

Item [4]- regulation 13E

This item repeals and substitutes regulation 13E of the Principal Regulations. Item 4 creates a new ‘Division 4A – Defence and strategic goods’ which includes 12 regulations – regulations 13E to 13EK, and provide for regulations 13F and 13G of the Principal Regulations to be contained in a new Division and set out the title of that new Division.

Regulation 13E sets out general matters regarding the export of defence and strategic goods including:

- prohibiting the export of goods specified on the DSSL without a permit (subregulation 13E(1));
- prohibiting the export of goods containing DSSL technology (subregulation 13E(1)). This clarifies that uncontrolled goods, for example a hard drive, containing controlled technology cannot be exported without a permit;
- providing that an export is not prohibited where the Defence Minister has granted permission for that export (subregulation 13E(2));
- providing that the Defence Minister must make a decision on whether to grant permission following receipt of a valid export application (subregulation 13E(3));
- providing the circumstances in which the Defence Minister can grant permission, that is – where the Defence Minister is satisfied that the export of the goods (or DSSL technology contained in the goods) would not prejudice the security, defence or international relation of Australia (subregulation 13E(4));
- the criteria that the Defence Minister may have regard to in determining whether to grant a permission (subregulation 13E(4)); and
- providing the terms on which permission may be granted and that permission may be subject to conditions (subregulations 13E(5) and (6)).

Regulation 13EA lists circumstances in which a permit is not required for exporting defence and strategic goods including:

- where the goods (excluding certain firearms) are owned by the defence force of either Brunei Darussalam, Canada, Malaysia, New Zealand, Papua New Guinea, the Kingdom of Cambodia, the Kingdom of Thailand, the Republic of Fiji, the Republic of Indonesia, the Republic of Singapore, the Republic of the Philippines, the United Kingdom, the United States of America or Tonga, and the goods have been imported by the defence force and are to be exported by the defence force (subregulation 13EA(1));
- where the goods were imported by an air security officer and are to be exported within 3 months (and other specific requirements as set out in the provision are met) (subregulation 13EA(2));
- where the goods, including goods containing DSSL technology, are being exported under, and in accordance with the requirements of the Defence Trade Cooperation Treaty (subregulation 13EA(5));
- where a person (including a body corporate) is temporarily exporting uncontrolled goods containing controlled technology for use by the person only and the goods will be returned to Australia with the person; for example, a laptop or other mobile

device containing controlled technology being exported for personal use will not require a permit (subregulation 13EA(6)); and

- where a person (including a body corporate) is exporting uncontrolled goods containing controlled technology to the origin of import after the person temporarily imported the technology into Australia; for example, a permit is not required where a person temporarily visits Australia with their laptop containing controlled technology, and then returns overseas with the laptop containing the technology (subregulation 13EA(7)).

Regulation 13EB provides a clear process for applying for permits including the form in which an application is made, timeframes for certain types of applications, and the ability for the Defence Minister to request additional information to enable the Defence Minister to decide the application.

Regulation 13EC provides the Defence Minister with the power to impose, vary or remove permission conditions.

- The Defence Minister must, when imposing a new condition, or varying or removing an existing condition, give the permission holder a written notice which includes the reasons for the imposition, variation or revocation of the condition (subregulations 13EC(1) to (3)).
- The imposition, variation or removal of a condition takes effect at the time specified in the notice, which must be a least 14 days after the notice is given, or for reasons of urgency at the time the notice is received (subregulation 13EC(4)).

Regulation 13ED provides the Defence Minister with the ability to revoke a permission.

- A permission may be revoked when a permission holder has failed to comply with a condition of the permission, or where it is determined that an export would prejudice the security, defence or international relations of Australia (subregulation 13ED(1)).
- The Defence Minister must give a permission holder notice of the revocation, including reasons for the revocation (subregulation 13ED(2)).
- The revocation takes effect after the permission holder is taken to have received the notice under regulation 13EG (subregulation 13ED(3)).

Regulation 13EE sets out the internal review process for reviewable decisions made under Division 4A.

- A reviewable decision is a decision to: refuse to grant a permission, to impose a condition or impose a new condition, to vary a condition, or to revoke a permission (subregulation 13EE(1)).
- A person whose interests are affected by a reviewable decision that has been made by a delegate of the Defence Minister may request the Defence Minister to review the decision personally (subregulation 13EE(2)).
- A request for review must be made in writing and within 30 days after the day on which the person is taken to have received the notice of the decision. The request must include the reasons for seeking the review (subregulations 13EE(3) and (4)).
- The Defence Minister must review the decision personally and may affirm, set aside or vary the decision. Where a decision is set aside, the Defence Minister may make such other decision the Defence Minister considers appropriate (subregulations 13EE(5) and (6)).
- A notice of the decision and the reasons for the decision, including the person's further right of review, must be provided (subregulation 13EE(7)).

- Failure to give notice does not affect the validity of the decision (subregulation 13EE(8)).
- The Minister is taken to affirm the decision if the person does not receive notice of the decision within 90 days after the request for review was made (subregulation 13EE(9)).

Regulation 13EF provides that an application for review by the Administrative Appeals Tribunal may be made in respect of a reviewable decision made by the Defence Minister personally or an internal review decision made by the Defence Minister.

Regulation 13EG prescribes the methods by which a notice of decision made under new Division 4A may be given to a person and the time at which the person is taken to have received a notice. This regulation provides that a notice may be issued personally, electronically, or sent by mail and sets out the deemed receipt times for each method.

Regulation 13EH provides the circumstances in which the reasons for a decision must not be disclosed.

- If a decision is made by the Defence Minister personally, the notice of the decision must not disclose the reasons where the Defence Minister believes the disclosure would prejudice the security, defence or international relations of Australia (subregulation 13EH(2)).
- If a decision is made by a delegate and the delegate believes the disclosure would prejudice the security, defence or international relations of Australia, the delegate must refer the case to the Defence Minister for the Defence Minister to decide whether disclosure would be prejudicial (subregulation 13EH(3)).
- Where reasons are not disclosed this must be stated in the decision notice (subregulation 13EH(4)).

Regulation 13EI provides that the Secretary of Defence may disclose information and documents obtained or generated for the purposes of new Division 4A to the persons and entities listed below, for a purpose connected with the administration of that Division:

- to a Minister of the Commonwealth, a State or Territory;
- the head of a Commonwealth entity;
- a State or Territory, or an authority of a State or Territory;
- the government of a foreign country, or part of a foreign country;
- an authority of the government of a foreign country;
- an authority of the government of part of a foreign country; or
- a person or entity specified in an instrument under paragraph 13EI(2).

The Secretary may disclose information or a document, only if the Secretary is satisfied that the recipient of the information will not disclose the information to anyone else without the Secretary's consent (subregulations 13EI(3) and (4)).

Regulation 13EJ provides that the Defence Minister may delegate certain powers to the Secretary of the Department, a Senior Executive Service (SES) or acting SES employee in the Department or an employee holding or acting in an Executive Level 1 position (or an equivalent or higher position)

The powers the Defence Minister may delegate include the following powers:

- the power to grant permission to export goods listed in Part 1 or Part 2 of the DSGL;
- the power to request additional information and to defer consideration of an application;

- the power to impose, remove or vary a condition; and
- the power to approve a form.

The Defence Minister may also delegate the power to grant permission to export goods listed in Part 1 of the DSGL to an officer of Customs (subregulation 13EJ(3)).

The Defence Minister may not delegate the power to refuse to grant permission or the power to revoke a permission to any other person (subregulation 13EJ(4)).

A delegate exercising a delegated power must comply with any direction given by the Defence Minister (subregulation 13EJ(5)).

Regulation 13EK provides that the Secretary of Defence may delegate the powers relating to the disclosure of information or documents to a SES or acting SES employee of the Department administered by the Defence Minister or an employee in the Department holding or acting in an Executive Level 1 position (or an equivalent or higher position).

This item also inserts the heading ‘Division 4B–Environmental goods’ before regulation 13F of the Principal Regulations such that regulations 13F and 13G is contained in new Division 4B.

Item [5]- subregulation 13H(1)

This item substitutes existing subregulation 13H(1) of the Principal Regulations with a new subregulation. New subregulation 13H(1) provides that regulation 13H applies to an application for a permission under subregulation 9(3) or 13G(1) to export goods.

Existing subregulations 13H(1) and (1A) of the Principal Regulations provide for certain applications for permissions and licences, that in the opinion of an authorised person should not be granted, to be referred to relevant Ministers for consideration, and includes applications for a licence or permission under subregulation 13E(2) of the Principal Regulations. Regulation 13E deals with the exportation of goods that are specified in the DSGL.

The amendments in new regulation 13EJ of item 4 above in part sets out the scope for the Defence Minister to delegate his or her powers. This scope expressly excludes the delegation of the power to refuse the grant of an application to export goods specified in the DSGL, or goods that contain DSGL technology.

As the Defence Minister’s power to refuse related applications is not a power that can be delegated, the requirement for such applications to be referred to the Defence Minister would be superfluous, and should be omitted. The purpose of this amendment is to remove the relevant requirement.

Item [6]- subregulations 13H(1A) and (2)

This item omits the words ‘licence or’ from subregulation 13H(1A) and (2) of the Principal Regulations. This amendment is necessary subsequent to the amendments made by item 5 above, which will result in subregulation 13H(1) of the Principal Regulations referring only to permissions, and not licences and permissions.

Item [7]- subregulation 13H(3)

This item substitutes the existing subregulation 13H(3) of the Principal Regulations with a new subregulation. New subregulation 13H(3) provides that regulation 13H does not affect the power of the relevant Minister or an authorised person to grant a permission under subregulation 9(3) subject to conditions or requirements.

This amendment is made consequent to the amendments made by item 5 above and is necessary because regulation 13H as amended will no longer apply to licences or permissions to export goods specified in the DSGL, or goods that contain DSGL technology.

Item [8]- paragraph 13H(4)(a)

This item repeals paragraph 13H(4)(a) of the Principal Regulations.

Similar to the amendments made by the item immediately above, this amendment is made because regulation 13H, as amended by item 5 above, will no longer apply to licences or permissions to export goods specified in the DSGL, or goods that contain DSGL technology.

Item [9]- paragraph 13H(4)(b)

This item substitutes the word ‘Resources’ in paragraph 13H(4)(b) of the Principal Regulations with ‘Resources; or’ to account for the repeal of paragraph 13H(4)(a).

Item [10]- subregulation 13H(5)

This item substitutes the number ‘(1)’ in subregulation 13H(5) of the Principal Regulations with ‘(1A)’ so the subregulation correctly refers to 13H(1A).

Item [11]- after regulation 14

This item inserts the heading ‘Part 5 – Transitional Matters’ to explain that regulation 17 of the Principal Regulations, and new regulation 18 inserted by the item below, provide for transitional matters.

Item [12]- after regulation 17

This item inserts new regulation 18 into the Principal Regulations to set out a transitional provision to ensure the smooth transition from the existing regulation 13E framework to the framework under new Division 4A. The transitional provision addresses:

- the status of licences and permissions granted under regulation 13E before the commencement of the amendments;
- the status of applications for permission made (but not yet decided) prior to the commencement of the amendments;
- the status of authority given by the Defence Minister under regulation 13E to persons employed in the Department of Defence prior to commencement of the amendment; and
- the status of officers of Customs deemed as ‘authorised officers’ prior to commencement of the amendments.

Part 2 – Consequential amendments

Customs (Prohibited Imports) Regulations 1956

The new regulation 13EA of the Principal Regulations sets out circumstances where a person is exporting controlled goods, but is not required to obtain a permission under regulation 13E of those Regulations. Accordingly, the purpose of these amendments is to clarify that a person is only obliged to comply with, produce, or have been granted a permission to export controlled goods where they are required to obtain such a permission under the Principal Regulations.

Item [13] - paragraph 3D(b)

This item makes consequential amendments to paragraph 3D(b) of the Customs (Prohibited Imports) Regulations 1956 (the Prohibited Imports Regulations), which sets out criteria for transshipment of firearms and weapons etc. to a foreign country.

Items [14] - [17] - subparagraphs 2.2(c)(iv), 2.2(d)(iv), 2.2(f)(v) and 2.2(g)(v) of Part 1 of Schedule 6

These items make consequential amendments to subparagraph 2.2 of Part 1 of Schedule 6 to the Prohibited Imports Regulations, which set out the specified purposes test for the importation of firearms, firearm accessories, firearm parts, firearms magazines, ammunition, components of ammunition and imitations.

Items [18] - [20] - subparagraphs 8.2(a)(i), 8.2(a)(iii), 8.2(b)(i) and 8.2(b)(ii) of Part 1 of Schedule 6

These items make consequential amendments to subparagraph 8.2 of Part 1 of Schedule 6 to the Prohibited Imports Regulations, which set out the returned goods test. The amendments clarify which criteria of the test are applied depending on whether the goods have been exported or are yet to be exported.

Item [21] - paragraphs 1.3(a) and (b) of Part 3 of Schedule 6

This item makes consequential amendments to subparagraphs 1.3(a) and (b) of Part 3 of Schedule 6 to the Prohibited Imports Regulations, which address safety requirements for firearms.

Items [22] – [25] - subparagraphs 2.2(b)(iv), 2.2(c)(iv), 2.2(e)(v) and 2.2(f)(v) of Part 1 of Schedule 13

These items make consequential amendments to subparagraphs 2.2(b)(iv), (c)(iv), (e)(v) and (f)(v) of Part 1 of Schedule 13 to the Prohibited Imports Regulations, which set out the specified purposes test for the importation of certain weapons and weapon parts.

Items [26] – [28] - subparagraphs 5.2(a)(i), 5.2(a)(ii), 5.2(a)(iv) and 5.2(b)(i) of Part 1 of Schedule 13

These items make consequential amendments to subparagraphs 5.2(a)(i), (ii) and (iv) and 5.2(b)(i) of Part 1 of Schedule 13 to the Prohibited Imports Regulations, which set out the returned goods test for the importation of certain weapons and weapon parts. The amendments clarify which criteria of the test are applied depending on whether the goods have been exported or are yet to be exported.

Defence Trade Controls Regulation 2013

Item [29]– section 6 (heading)

This item substitutes the existing heading of section 6 of the Defence Trade Controls Regulation 2013 (the DTC Regulations) with the heading ‘6 Exception to offence – permission to export DSGL technology’ to remove the reference to ‘licence’, as this term is no longer used in regulation 13E of the Principal Regulations.

Item [30]- paragraphs 6(b), (c) and (d)

This item omits the words ‘licence or’ from paragraphs 6(b), (c) and (d) of the DTC Regulations as this term is no longer used in regulation 13E of the Principal Regulations.

Part 3 – Amendments of listed provisions

Customs (Prohibited Exports) Regulations 1958

Item [31]- amendments of listed provisions – references to the defence and strategic goods list

This item omits the words ‘mentioned in regulation 13E’ from the following provisions of the Principal Regulations:

- (a) subregulation 13CI(2);
- (b) subregulation 13CK(2);
- (c) subregulation 13CL(2);
- (d) subregulation 13CM(2);
- (e) subregulation 13CN(2) (table item 1);
- (f) paragraph 13CO(2)(a); and
- (g) subregulation 13CP(2).