

EXPLANATORY STATEMENT

Issued by the Minister for Defence

Weapons of Mass Destruction (Prevention of Proliferation) Act 1995

Weapons of Mass Destruction Regulations 2018

The *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (the Act) ensures that goods are not supplied or exported, and services are not provided, in circumstances where they may be used in, or may assist a weapons of mass destruction program.

Section 21 of the Act provides that the Governor-General may make regulations prescribing matters which are required or permitted by the Act to be prescribed or as may be necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Weapons of Mass Destruction Regulations 2018* (the 2018 Regulations) is to repeal and remake the *Weapons of Mass Destruction Regulations 1995* (the 1995 Regulations), which are due to ‘sunset’ on 1 April 2019.

The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed according to the progressive timetable set out in section 50 of that Act. Legislative instruments made in 1995 that were registered on the Federal Register of Legislation on 1 January 2005, including the 1995 Regulations, will be automatically repealed on 1 April 2019.

The 1995 Regulations set out administrative processes that are necessary for the effective operation of the Act and specify the following:

- the particulars that must be included in applications requesting a permit from the Minister or requesting information from the Minister;
- the requirements for notices prohibiting the supply or export of goods or provision of services;
- the procedures for the safe storage of goods seized under the Act, and for the destruction of, or otherwise dealing with, condemned goods; and
- the right of the Minister to delegate the Minister’s powers under the 1995 Regulations, and detail the permissible recipients of any delegation.

The 2018 Regulations remain the same in substance as the 1995 Regulations with minor changes to reflect modern drafting convention. The key changes are:

- section 8 provides that a notice prohibiting supply or export of goods or provision of services under subsection 14(1) of the Act must set out the Minister’s reasons for giving the notice except where it would ‘prejudice the security, defence or international relations of Australia’, which replaces the wording of ‘not in the national interest’ in the 1995 Regulations. This aligns with the language used in other legislation administering Australia’s defence export control framework;

- section 11 has been redrafted to remove a potential ambiguity in subsection 8(1) of the 1995 Regulations. Subsection 11(3) provides that the place and manner in which the condemned goods are destroyed are matters for which the Minister is to be satisfied, rather than a possible misinterpretation of subsection 8(1) that the Minister must be satisfied that the goods have been destroyed;
- section 14 specifies the manner in which a notice may be given as well as when a notice is taken to have been received depending on whether it has been mailed, transmitted electronically or provided in person;
- subsections 15(1)-(2) specify that the Minister may only delegate powers under this instrument where the Minister is satisfied that the person has appropriate expertise. This ensures that the Minister will only delegate to an officer with appropriate training and knowledge to administer export controls. Subsection 15(3) is a transitional provision and clarifies that previous delegations remain in effect.

The new provisions and amendments are considered to be minor and non-controversial in nature. The changes do not change the substantive meaning or operation of the provisions.

The Human Rights Compatibility Statement is at [Attachment A](#). Details of the 2018 Regulations are set out in [Attachment B](#).

The Department has consulted with the Office of Best Practice Regulation and a Regulation Impact Statement is not required on the basis that the 2018 Regulations will have no more than minor or machinery regulatory impacts (reference 24266).

The 2018 Regulations were not publicly consulted. It was not considered necessary to consult externally as the 2018 Regulations contain only minor or machinery amendments that do not fundamentally alter existing legislative arrangements.

The 2018 Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The 2018 Regulations commence on the day after it is registered on the Federal Register of Legislation.

OPC63418 - A

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Weapons of Mass Destruction Regulations 2018

The Weapons of Mass Destruction Regulations 2018 (the 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 Regulations is to repeal and remake the Weapons of Mass Destruction Regulations 1995, which are due to sunset in April 2019. The Regulations remain the same in substance as the previous instrument because they are required for the effective administration and operation of the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (the Act).

The Act ensures that goods are not supplied or exported, and services are not provided, in circumstances where they may be used in, or may assist a weapons of mass destruction program. The Regulations are made under the Act and allow for its effective operation. The Regulations prescribe the particulars that must appear in applications requesting information from the Minister, or requesting permits from the Minister. The Regulations also detail the requirements for notices prohibiting the supply or export of goods or provision of services. The Regulations also prescribe the basic procedures for the safe storage of goods seized under the Act, and for destroying, or otherwise dealing with, condemned goods (which, under the Act, are forfeited to the Commonwealth). The Regulations also establish the right of the Minister to delegate the Minister's powers under the Regulations, and detail the permissible recipients of any delegation.

Human rights implications

The 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*.

The Regulations provide for administrative and procedural matters which are required for the effective operation of the Act and do not have any impact on human rights.

Conclusion

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

The Hon. Christopher Pyne MP
Minister for Defence

ATTACHMENT B

Details of the Weapons of Mass Destruction Regulations 2018

Section 1 – Name

This section provides that the title of the instrument is the Weapons of Mass Destruction Regulations 2018 (the Regulations).

Section 2 – Commencement

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

Section 3 – Authority

This section sets out the authority under which the Regulations are made, which is the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (the Act).

Section 4 – Schedules

This section is the formal enabling provision for the Schedule to the Regulations, providing that each instrument that is specified in a Schedule to the 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.

Section 5 – Definitions

This section provides a number of definitions under the Regulations. It also notes that a number of terms used in the Regulations are defined under the Act.

Section 6 – Request to the Minister for information

Section 6 sets out the particulars that are required to be included in a request for information under subsection 12(1) of the Act. Under that provision, a supplier or exporter of goods or a provider of services may request information as to whether the Minister believes or suspects that the goods or services will or may assist a weapons of mass destruction program.

Section 6 requires the request for information to include the name and address of the person requesting the information, a description of the goods or services to be provided, details of the intended recipient of the goods or services, and any reasons why it is believed or suspected that the goods or services will or may assist a weapons of mass destruction program.

This provision supports the administrative decision-making processes of the Act. Specifically, requiring a person requesting the information to include supporting information in their request, such as information about the activity and details on why the person suspects a connection to the weapons of mass destruction program, assists the Minister to consider and assess whether the Minister has reason to believe or suspect that the goods or services may be

used in, or assist a weapons of mass destruction program. Additionally, the requirement to include contact details assists the Minister to provide the requested information.

Section 7 – Permit to supply or export goods or provide services

Section 7 specifies the particulars that are required to be included in an application under section 13 of the Act for a permit to supply or export goods or provide services. Under that provision, a person may be allowed to supply or export goods or provide services where the Minister has reason to believe or suspect that the goods or services will or may assist a weapons of mass destruction program, if the Minister is satisfied that this would not be contrary to Australia's international or treaty obligations or the national interest.

Section 7 requires the permit application to include the name and address of the person applying for the permit, a description of the goods or services to be provided, details of the intended recipient of the goods or services, and any reasons why the applicant believes that the supply or export of the goods or provision of services would not be contrary to Australia's international or treaty obligations or the national interest.

This provision is important for the effective operation of the Act's administrative framework. Requiring the applicant to include supporting information in a request for a permit, such as information about the activity and reasons for why the applicant considers the activity would not be contrary to Australia's obligations or national interest, assists the Minister to consider and assess whether the Minister is satisfied that they can issue a permit under section 13 of the Act. Additionally, the requirement to include contact details allows the Minister to provide the permit to the applicant.

Section 8 – Notice prohibiting supply or export of goods or provision of services

Section 8 sets out the particulars that are required to be included in a notice by the Minister under subsection 14(1) of the Act prohibiting the supply or export of goods or provision of services. Under that provision, the Minister may give a person a notice prohibiting the supply or export of goods or provision of services where the Minister has reason to believe or suspect that the goods or services will or may assist a weapons of mass destruction program.

Subsection 8(1) provides that a notice by the Minister under subsection 14(1) of the Act must be in writing and must set out the Minister's reasons for giving the notice, except to the extent that disclosure of those reasons would prejudice the security, defence or international relations of Australia. Subsection 8(2) provides that if a notice does not set out the Minister's reasons, or some of the Minister's reasons, for giving the notice because disclosure of those reasons would prejudice the security, defence or international relations of Australia, that fact must be stated in the notice.

Section 8 is intended to prevent the public release of sensitive information, such as information subject to a national security classification, that it is not in the public interest for the information to be publicly released. The inclusion of the Minister's power to withhold reasons is necessary to ensure consistency with other legislation administering Australia's defence export control framework which provide for a similar power, such as the *Defence Trade Controls Act 2012*. The Minister is an appropriate person to assess whether the disclosure of reasons would prejudice the security, defence or international relations of Australia, as the Minister has a strategic understanding of the impact of the disclosure, and has experience with making such an assessment under other defence export control

legislation.

Subsection 8(2) provides that where the Minister considers that reasons cannot be disclosed as their release would prejudice Australia's security, defence or international relations, that fact must be stated in the notice. It is anticipated that the notice would likely provide a general statement setting out the broad nature of the reasons and include as much detail as possible. An applicant is not precluded from seeking judicial review of a decision where the Minister has withheld reasons for a decision under section 8 of the Regulations.

Section 9 – Revocation of notice of prohibition

Section 9 provides that a revocation of a notice under section 14 of the Act prohibiting the supply or export of goods or provision of services must be in writing and notified, without delay, to the person affected by the notice.

Section 9 provides certainty to affected persons that prohibition notices are issued promptly. Because of the potentially significant impact which prohibition notices may have on businesses, this provision ensures efficient processes so as to minimise this impact as much as possible.

Section 10 – Storage of seized goods – prescribed procedures

Section 10 sets out the procedures for the storage of seized goods under subsection 17(6) of the Act. Under that provision, goods that are seized must be stored in accordance with prescribed procedures until a court of summary jurisdiction makes an order either that the goods are condemned under the Act (and therefore forfeited to the Commonwealth) or that they should be returned to their owner.

Section 10 requires seized goods to be stored securely at a place approved by the Minister as suitable for the storage of goods of the kind seized. In approving a storage place, the Minister must have regard to the nature of the goods, the suitability of the place for storing securely goods of that kind and the need to maintain the condition and value of the goods. This provides administrative certainty around the process for storing seized goods. It also ensures that the storage is done safely and in a manner appropriate for the type of good being destroyed. This reduces the likelihood that the goods are stolen or are otherwise damaged, noting that the goods may be returned to their owner or sold.

Section 11 – Destruction of condemned goods – prescribed procedures

Section 11 sets out the procedures for the destruction of condemned goods under subsection 17(7) of the Act. Under that provision, goods that are found to be condemned goods by a court of summary jurisdiction must either be destroyed or otherwise dealt with in accordance with prescribed procedures.

Section 11 provides that if condemned goods are to be destroyed, they are to be destroyed at a place, and in a manner, determined by the Minister. In determining a suitable place for safely destroying the goods, and the manner in which the goods may be destroyed, the Minister must have regard to the nature of the goods, the suitability of the place for safely destroying goods of that kind and the availability of suitable methods for safely destroying the goods. This provision provides administrative certainty around the process for destroying

condemned goods. It also ensures that the destruction process is done safely and in a manner appropriate for the type of good being destroyed.

Section 12 – Dealing with condemned goods – prescribed procedures

Section 12 sets out the procedures for otherwise dealing with condemned goods under subsection 17(7) of the Act. Section 12 enables the Minister to give an authorised person approval to sell the goods where they are not, under another Commonwealth, State or Territory law, required to be destroyed, or illegal to sell, and are of a kind that can be given a use other than in a weapons of mass destruction program or can be readily and safely altered so that they can no longer be used in such a program. A further safeguard is that the authorised person must alter the goods so that they can no longer be used in a weapons of mass destruction program if the Minister so requires. In addition, section 12 provides that a buyer must agree in writing not to use, or cause or allow another person to use, the goods in such a program, and agree that the goods will only be used for a lawful purpose.

Section 12 provides clarity and certainty around the process for ‘otherwise dealing’ (i.e. not destroying) condemned goods. It also ensures that the goods are dealt with responsibly, as it requires the goods to be modified, where necessary, before being sold to prevent them from being used in a weapons of mass destruction program in future, and requires the buyer to guarantee that the goods will only be used lawfully.

Section 13 – Storage of condemned goods – prescribed procedures

Section 13 sets out the procedures for the storage of condemned goods under subsection 17(8) of the Act. Until destroyed or otherwise dealt with, the goods must be stored securely in accordance with the procedures set out in section 13.

This provision ensures that the process for storing condemned goods is clear and that storage is done safely and in a manner appropriate for the type of good being destroyed. This reduces the likelihood that the goods are stolen or are otherwise damaged, noting that the goods may be sold in future.

Section 14 – Notices

Section 14 provides the manner in which notices under the Act and Regulations may be given to a person and details when the notice is taken to be received based on the manner in which it was given. This provision ensures that affected persons are afforded clarity and certainty about the method for giving a notice required or permitted to be given to a person under the Act or the Regulations, as well as the time at which the person is taken to have received the notice.

Subsection 14(3) specifies when a person is taken to have received a notice given under subsection 14(2), that is, where a notice is given in person. Subsection 14(5) specifies when a person is taken to have received a notice given under subsection 14(4) where a notice is sent by mail. Subsection 14(7) specifies when a person is taken to have received a notice given under subsection 14(6) relating to a notice sent by fax, email or other electronic means.

The stipulation of the manner in which notices may be given to a person ensures certainty and consistency. Additionally, by confirming that notices must be posted, faxed or emailed to the

address or number most recently notified to the Minister, this will reduce the likelihood that the intended recipient of the notice does not receive it.

Section 15 – Delegation by Minister

Section 15 provides that the Minister may delegate his or her powers under the Regulations to an officer of the Department of Defence not below Executive Level 2 classification.

Subsection 15(2) provides that the Minister must only delegate powers under this instrument where the Minister is satisfied that the person has appropriate expertise. This provides certainty that powers will be delegated to officers who have the appropriate training to administer export control legislation, including an understanding of export controls and their responsibilities in relation to it, good strategic awareness, and experience in the security or defence environment.

Subsection 15(3) provides that a delegation that was in force under section 12 of the Weapons of Mass Destruction Regulations 1995 immediately before the commencement of the Regulations, will continue in effect as if it had been made under subsection 15(1) and applies from the commencement of the Regulations. This is a transitional provision and has no retrospective effect.

Schedule 1 - Repeals

Item 1

This item repeals the whole of the Weapons of Mass Destruction Regulations 1995.