

## **EXPLANATORY STATEMENT**

Issued by authority of the Minister for Defence and the Minister for Home Affairs

*Defence Trade Controls Act 2012*

*Customs Act 1901*

*Defence Trade Legislation Amendment Regulations 2024*

The *Defence Trade Legislation Amendment Regulations 2024* (Amendment Regulations) are made under the *Defence Trade Controls Act 2012* (DTC Act) and the *Customs Act 1901* (Customs Act). The Amendment Regulations commenced on 1 September 2024 and are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

### ***Purpose***

The Amendment Regulations amend the *Defence Trade Controls Regulation 2013* (DTC Regulation) and the *Customs (Prohibited Exports) Regulations 1958* (Customs PE Regulations) to establish new exceptions from offences and exemptions, as well as to prescribe additional requirements for existing exceptions to offences in the DTC Amendment Act. The Amendment Regulations also modify certain provisions relating to ministerial decision-making criterion, reporting requirements and delegation of ministerial power.

The provisions in Schedule 1 of the Amendment Regulations amends the DTC Regulation to:

- a. prescribe the kinds of security clearances that are covered security clearances;
- b. prescribe the requirements relating to the definitions of relevant supply and relevant DSGL services;
- c. provide an exception to the offences in section 10, section 10A, section 10B and section 10C for supplies or the provision of DSGL services that are, or relate to Australian Defence Articles;
- d. prescribe additional requirements for the exception in subsection 10A(7A) of the DTC Act;
- e. provide an exception to the offence in section 10A of the DTC Act for people who supply DSGL technology in the course of the work or training authorised by a foreign work authorisation issued under Part IXAA of the *Defence Act 1903*;
- f. provide an exception to the offence in section 10 of the DTC Act for supplies that are not a relevant supply, which self-repeals 6 months after the commencement of the *Defence Trade Controls Amendment Act 2024* (DTC Amendment Act);
- g. amend the criteria for deciding whether a thing is prejudicial to the security, defence or international relations of Australia to include certain supplies of DSGL goods or DSGL technology from outside Australia (section 10B) and the provision of DSGL services (section 10C);
- h. prescribe criteria for deciding whether a supply of DSGL technology to a foreign person within Australia (section 10A) is prejudicial to the security, defence or international relations of Australia; and

- i. prescribe the information that must be contained in the record of activities (being supplies of DSGL goods or DSGL technology or the provision of DSGL services) done under a permit a person holds under section 11 of the DTC Act or under other activities.

The provisions in Schedule 2 of the Amendment Regulations amends the Customs PE Regulations to:

- a. establish an exception to the requirement to obtain permission to export DSGL goods and goods containing DSGL technology to the United Kingdom or the United States;
- b. establish an exception to the requirement to obtain permission to export DSGL goods and goods containing DSGL technology that are an Australian Military Sales Program item; and
- c. enable the Defence Minister to delegate the power to grant or revoke a permission under the regulations.

Regulated military and dual-use goods and technology are specified in a legislative instrument, the *Defence and Strategic Goods List 2021* (DSGL), as defined in regulation 2 of the Customs PE Regulations and made under paragraph 112(2A)(aa) of the Customs Act. Goods and technology within the scope of the DSGL require permission to be granted by the Defence Minister or their delegate before the export or supply of those regulated goods or technology can occur.

### ***Policy Background***

Australia's export control system is a key element of Australia's protective security framework. It aims to stop military goods and technology—and goods and technology that can be used in chemical, biological and nuclear weapons—from being transferred to individuals, states or groups with interests prejudicial to Australia's security, defence or international relations.

The Defence Strategic Review made clear that Australia is facing the most difficult set of strategic circumstances since the Second World War. To keep pace with these emerging challenges, it is essential that Australia has a robust protective security environment. It is also critical that Australia works with like-minded partners, especially with the United Kingdom and the United States, to enhance defence trade, deepen military interoperability and enhance defence capabilities.

Realising the full potential of AUKUS will not be possible without major changes to the way that AUKUS partners cooperate on defence industrial and technology issues.

To improve the speed and scale of technology transfer between AUKUS partners, Australia, the United Kingdom and the United States agreed to amend their export control regimes to support the creation of an export licence-free environment among and between AUKUS partners.

This export licence-free environment will revolutionise trade among and between AUKUS partners and encourage industry, higher education and research sectors in all three nations to innovate and cooperate with lower technology transfer barriers and costs of trade. This would provide Australia and our partners a genuine capability development edge.

### ***Details of the instrument***

Details of the Amendment Regulations are set out in **Attachment A**.

### ***Consultation***

A full Impact Analysis was prepared as part of the DTC Amendment Act, which considered the measures being progressed as part of the Amendment Regulations. The full Impact Analysis is available at <https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-amendment-bill-2023>.

On 1 May 2024, Defence released an exposure draft of the Amendment Regulations for public consultation between 1 May 2024 and 31 May 2024. To ensure stakeholders were aware of the proposed amendments, Defence released a departmental media release advising stakeholders that Defence was seeking feedback on the proposed regulatory changes. Defence subsequently held a series of public briefings on the Amendment Regulations to explain the proposed changes and solicit feedback from stakeholders. These briefings were attended by over 1,000 entities.

In parallel, Defence, together with the US Department of State and Department of Defense, as well as the UK's Ministry of Defence undertook trilateral consultation on the establishment of the licence free environment. This consultation included in person and virtual events across the United States, United Kingdom and Australia and was attended by over 800 Australian individuals, business and research entities. The purpose of this trilateral consultation process was to ensure that the licence-free environment is fit-for-purpose and will enable collaboration, cooperation, and co-development among and between the AUKUS trilateral partners.

Twenty-three written submissions were received on the exposure draft of the Amendment Regulations as part of this process. Defence engaged with industry, higher education and research sectors on the feedback, including through working groups.

### ***Parliamentary scrutiny***

The instrument is subject to disallowance under section 42 of the Legislation Act. The instrument 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*. A full Statement of Compatibility with Human Rights is included at **Attachment B**.

The instrument was made by Her Excellency the Honourable Sam Mostyn AC, Governor-General of the Commonwealth of Australia, in accordance with the requirements of section 75 of the DTC Act and section 270 of the Customs Act.

**Details of the *Defence Trade Legislation Amendment Regulations 2024***

**Section 1 Name**

1. Section 1 provides that the name of the instrument is the *Defence Trade Legislation Amendment Regulations 2024* (Amendment Regulations).

**Section 2 Commencement**

2. Section 2 provides that the provisions in the Amendment Regulations commenced in accordance with the commencement information set out in the table. Item 1 of that table provides that the whole of the Amendment Regulations commenced on 1 September 2024.

**Section 3 Authority**

3. Section 3 provides that the Amendment Regulations are made under the *Customs Act 1901* (Customs Act) and the *Defence Trade Controls Act 2012* (DTC Act).

**Section 4 Schedules**

4. Section 4 provides that the instruments specified in a Schedule to the Amendment Regulations are amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Act has effect according to its terms. There are two Schedules to the Amendment Regulations, with each specifying an instrument to be amended:
  - a. Schedule 1—the Defence Trade Controls Regulation 2013 (DTC Regulation); and
  - b. Schedule 2—the Customs (Prohibited Exports) Regulations 1958 (Customs PE Regulations).

## **SCHEDULE 1—AMENDMENT OF THE DEFENCE TRADE CONTROLS REGULATION 2013**

### *Defence Trade Controls Regulation 2013*

#### **Item 1           At the end of Part 1**

5. Item 1 adds new sections 5A and 5B at the end of Part 1 of the DTC Regulation, which relate to the definitions of ‘covered security clearance’, ‘relevant supply’ and ‘relevant DSGL services’ in the DTC Act.

#### **Section 5A—Covered security clearance**

6. Subsection 4(1) of the DTC Act sets out the meaning of a covered security clearance for the purpose of an exception to the offences in sections 10, 10A, 10B and 10C of the DTC Act that is provided for supplies of DSGL goods or technology, or the provision of DSGL services to holders of a covered security clearance. One of the requirements for a security clearance to be a covered security clearance is that the clearance must be of a kind prescribed by regulations.
7. In regard to this requirement, subsection (5A) of the Amendment Regulations prescribes the following security clearances:
  - a. a clearance at the Negative Vetting 1 level or a higher level, issued by the Australian Government Security Vetting Agency (AGSVA) or another Commonwealth Agency;
  - b. a clearance that is suitable for permitting access to information classified as secret, issued by or on behalf of the Government of Canada, New Zealand, the United Kingdom or the United States of America (or an authority of those Governments).
8. These types of security clearances have been prescribed in section 5A of the Amendment Regulations, as holders of these clearances are deemed to be vetted to a sufficiently high level to enable them to have access to certain exceptions to the offences in the DTC Act. For example, under the Australian Government Protective Security Policy Framework, a Negative Vetting level 2 issued by AGSVA would also be a prescribed security clearance for the purpose of this provision, as it is considered a higher level clearance. For an example of a clearance that would meet the requirement set out in paragraph (b), a ‘Secret’ level clearance issued by the Government of Canada is stated as a clearance suitable for permitting access to information classified as secret and as such would satisfy the requirement.
9. These security clearances have been prescribed in section 5A of the Amendment Regulations, as holders of these clearances are deemed to be vetted to a sufficiently high level to enable them to have access to certain exceptions to the offences in the DTC Act. A Secret level clearance is recognised as equivalent across all of the Five Eyes countries. This ensures that security cleared personnel have undergone an acceptably similar process, have acceptably similar security obligations, and have been vetted by their government to an equivalent level.

## **Section 5B—Requirements relating to the definitions of relevant supply and relevant DSGL services**

### *Relevant supply*

10. Under the DTC Act, supplies of DSGL goods or DSGL technologies are, by default, a ‘relevant supply’. Relevant supplies are within the scope of certain offence provisions in Part 2 of the DTC Act (sections 10, 10A, 10B, subsection 15(1), 15(1A)), which means a permit authorising the supply, or an exception allowing for the supply to occur, is required. However, subsection 5C(1) of the DTC Act sets out specific circumstances where a supply will not be a relevant supply, and therefore not subject to the aforementioned offence provisions or permit requirements of the DTC Act. Subsection 5C(1) of the DTC Act provides that the supply must:
  - a. be covered by one of the types of supplies set out in subsections (1A), (1B) or (1C) of the DTC Act; and
  - b. satisfy any requirements prescribed by regulations in relation to that type of supply.
11. The purpose of section 5B of the Amendment Regulations is to prescribe additional requirements that must be satisfied in order for a supply of DSGL goods or DSGL technology to be covered by the circumstances set out in subsections 5C(1A) or 5C(1C) of the DTC Act. Subsection 5B(1) provides that these requirements are set out in subsections 5B(2) and 5B(3).
12. A note to subsection 5B(1) provides that the requirement of this subsection are an element in excluding a supply of DSGL goods or DSGL technology from the definition of relevant supply, and directs readers to subsection 5C(1) of the DTC Act.
13. Subsection 5B(2) of the Amendment Regulations establishes a requirement for a supply of DSGL goods or DSGL technology to be covered by the circumstances in subsection 5C(1A) or 5C(1C) of the DTC Act. This requirement is that the person who makes the supply has been issued a unique identifier described as an “Defence Export Controls Client Registration Number” (DEC CRN) by Defence. In order to receive a DEC CRN, a person will need to complete a registration form. The registration process to obtain a DEC CRN will be the exactly the same as that required by the UK and the US to become an ‘AUKUS Authorised User’. Australia will not be seeking information from exporters that the US and UK are not seeking from their exporters.
14. Subsection 5B(3) of the Amendment Regulations establishes a requirement specifically for a supply of DSGL technology to be covered by the circumstances in subsection 5C(1A) of the DTC Act. The requirement is that a supplier provides Defence with the information prescribed in subsection 5B(4) before the supply is made, if:
  - a. the supply is from a place in Australia to a place outside Australia; or
  - b. the supply is the provision of access to DSGL technology and at the time of the provision of access, the person making the supply is in Australia and the person to whom access is provided is outside Australia.

15. Subsection 5B(4) of the Amendment Regulations provides that the information a person must provide to Defence to satisfy the requirement in subsection 5B(3) requirement is:
  - a. a description of the DSGL technology that is to be supplied;
  - b. the name of any person to whom the supply is to be made;
  - c. the name of the country in which the DSGL technology supplied is to be received.
  - d. either:
    - i. the date on which the supply is to occur; or
    - ii. if there are to be supplies of DSGL technology within that description over a period of time, to the same person, received in that country—the period of time in which such supplies are to occur.
16. Cumulatively, the effect of subsection 5B(1) of the Amendment Regulations and subsection 5C(1A) of the DTC Act is to provide an exemption from the offence provisions in sections 10, 10A and 10B of the DTC Act for certain supplies of DSGL goods and DSGL technology made to the United Kingdom or the United States. This means that where a supply of DSGL goods or DSGL technology satisfies all the relevant requirements of these provisions, a permit issued under the DTC Act authorising the supply will not be required. However, when a supply falls within these circumstances, subsection 58(3A) of the DTC Act still requires a supplier to keep limited records of information relating to these supplies. The information to be contained in these records is prescribed by section 27B of the Amendment Regulations.
17. This form of exemption is duplicated in new subregulation 13EA(5) of the Customs PE Regulations for the export of goods or goods containing DSGL technology. This is required because the export of tangible DSGL goods and goods containing DSGL technology is separately regulated under the legislative framework of the Customs Act.
18. Separately, the effect of subsection 5B(1) of the Amendment Regulations and subsection 5C(1C) of the DTC Act is to provide an exemption from the offence of supplying DSGL technology in Australia to a foreign person, provided that person is from a country specified on an instrument made under subsection 15(4A) of the DTC Act. This means that where a supply of DSGL technology satisfies all the relevant requirements of these provisions, a permit issued under the DTC Act authorising the supply will not be required.

*Relevant DSGL services*

19. Under the DTC Act, the provision of DSGL services are, by default, ‘relevant DSGL services’. Relevant DSGL services are within the scope of the offence provision in section 10C of the DTC Act, which means a permit authorising the provision of DSGL services, or an exception allowing the services to be provided, is required. However, subsection 5C(2) of the DTC Act sets out specific circumstances where a provision of DSGL services will not be relevant DSGL services, and therefore not subject to the aforementioned offence provision or permit requirements of the DTC Act. Subsection 5C(2) of the DTC Act provides that the provision of the DSGL services must:

- a. be covered by one of the types of DSGL services set out in subsections (2A) or (2B) of the DTC Act; and
  - b. satisfy any requirements prescribed by regulations in relation to that type of DSGL services.
20. The purpose of subsection 5B(2) of the Amendment Regulations is to prescribe additional requirements that must be satisfied for a provision of DSGL services to be covered by the circumstances set out in subsection (2A) of the DTC Act. This requirement is that the provider of the DSGL services has been issued a DEC CRN issued by Defence. In order to receive a DEC CRN, a person will need to complete a registration form. The registration process to obtain a DEC CRN will be the exactly the same as that required by the UK and the US to become an ‘AUKUS Authorised User’. Australia will not be seeking information from exporters that the US Department of State is not seeking from their exporters.
21. Cumulatively, the effect of subsection 5B(2) of the Amendment Regulations and subsection 5C(2A) of the DTC Act is to provide an exemption from the offence provision in section 10C of the DTC Act where the DSGL services are provided to five eyes countries. This means that where a provider of DSGL services satisfies all the relevant requirements of these provisions, a permit issued under the DTC Act authorising the provision of the DSGL services will not be required. However, when utilising this exemption, subsection 58(3D) of the DTC Act still requires a provider to keep records of certain information relating to the provision of these exempted DSGL services. The information to be contained in these records is prescribed by section 27B of the Amendment Regulations.
22. A note to subsection 5B(2) provides that the requirement of this subsection are an element in excluding the DSGL services from the definition of relevant DSGL services, and directs readers to subsection 5C(2) of the DTC Act.

**Item 2            Section 7**

23. Item 2 repeals section 7 of the DTC Regulation and inserts new sections 7, 7A, 7B, 7C and 7D. These new sections establish or modify exceptions to the offences in sections 10, 10A, 10B and 10C of the DTC Act.

**Section 7            Exception to offences under sections 10, 10A, 10B and 10C of the Act—  
Australian Defence Article**

24. Section 7 prescribes a circumstance where the offences in sections 10, 10A, 10B and 10C of the DTC Act do not apply. The purpose of this provision is to provide an exception to the offences in the DTC Act for the supply of DSGL goods that are Australian Defence Articles, as well as the supply of DSGL technology and DSGL services related to those articles, between Australian Community members and members of the United States Community done in compliance with the terms of the Defence Trade Cooperation Treaty (DTC Treaty). Australian Defence Article is defined in section 4 of the DTC Regulation to mean goods which:
- a. have been designed, developed, produced, manufactured or assembled in Australia;



- b. have been, or are being, supplied by an Australian Community member in Australia to a member of the United States Community for a DTC Treaty activity;
  - c. are listed in Part 1 and not Part 2 (Exempted Technologies List) of the Defence Trade Cooperation Munition List (DTCML);
  - d. are not an Article 3(1) US Defence Article or an Article 3(3) US Defence Article;
    - i. **Article 3(1) US Defence Articles** refer to goods that initially moved from a member of the United States Community to an Australian Community member or facility for a DTC Treaty activity (detailed below), with the goods being listed in Part 1 and not Part 2 of the DTCML.
    - ii. **Article 3(3) US Defence Articles** refer to goods acquired by, and delivered to, the Government of Australia that are listed on Part 1 and not Part 2 of the DTCML.
  - e. are not limited by a foreign export licence or a foreign export authorisation to which the goods are subject.
25. The provision ensures that members of the DTC Treaty community acting in accordance with their obligations are not subject to multiple regulatory frameworks under the operation of the DTC Act. It prescribes that the offences in the DTC Act will not apply in the circumstance that:
- a. the supply of DSGL goods or DSGL technology, or the provision of DSGL services is between Australian Community members and members of the United States Community under the DTC Treaty for one of the following Article 3(1) activities:
    - i. United States and Australian combined military or counter-terrorism operations as described in the Implementing Arrangements;
    - ii. United States and Australian cooperative security and defence research, development, production, and support programs that are identified pursuant to the Implementing Arrangements;
    - iii. Mutually determined specific security and defence projects where the Government of Australia is the end-user that are identified pursuant to the Implementing Arrangements;
    - iv. United States Government end-use; and
  - b. the DSGL goods being supplied are an Australian Defence Article, or the DSGL technology being supplied, or the DSGL services being provided relate to goods that are an Australian Defence Article.
26. A note to subsections 10(4), 10A(8), 10B(9) and 10C(8) of the DTC Act, under which this exception is prescribed, provides that a defendant bears an evidential burden in relation to the matters in those subsections and refers readers to subsection 13.3(3) of the *Criminal Code Act 1995* (Criminal Code). That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. An evidential burden, in relation

to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

27. The effect of these notes in the DTC Act is that where a defendant seeks to rely on this exception in the Amendment Regulations, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.
28. This exception would be peculiarly within the knowledge of the defendant for several reasons. First, the exception only applies to DTC Treaty Community members—that being members of the Australian Community and the United States Community. An entity will only be part of the DTC Treaty Community if they submit an application and are approved to be a member of either the Australian or United States Communities. As such, a defendant would be uniquely positioned to provide evidence of their membership of the relevant community. Additionally, section 26 of the DTC Regulation requires that the holder of an approval under section 27 of the DTC Act must keep records of the following activities:
  - a. the supply of goods or technology relating to goods that are an Australian Defence Article;
  - b. the provision of defence services in relation to goods that are an Australian Defence Article.
29. Section 27 of the DTC Regulation sets out the information that must be contained in these records. This information relevantly includes matters such as a description of the goods or technology supplied, or the defence services provided and the date and time at which, and the place from which, goods or technology were supplied, or defence services were provided. This relevant information would enable a defendant to accurately and easily adduce evidence that would demonstrate whether the goods, technology or services are being supplied or provided in compliance with the terms of the DTC Treaty.
30. In comparison, it would be significantly more difficult for the prosecution to substantiate evidence of the matters outlined in this exception, noting that the prosecution would have no oversight or access to records of supplies made or services provided by members of the DTC Treaty Community. Accordingly, it is deemed appropriate for a defendant to bear the evidential burden in relation to this exception, as it complies with the principles set out in the Attorney-General's Department's 'A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' (the Guide to Framing Commonwealth Offences).
31. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

#### **Section 7A      Exception to offence under section 10A of the Act—supply to producer of components**

32. Subsection 10A(7A) of the DTC Act provides an exception to the offence provision set out in subsection 10A(1) of the DTC Act. The exception provides that the offence does not apply

where DSGL technology is supplied to a person who produces or is to produce components of DSGL goods (paragraph (a)), and the supply is made in connection with the production of these components (paragraph (b)). Paragraph (c) of the exception in the DTC Act requires that any other requirements prescribed by regulation are satisfied.

33. The purpose of this exception in the DTC Act is to enable manufacturing of components of DSGL goods by manufacturers. “Build-to-print” is a common type of manufacturing covered by subsection 10A(7A). “Build-to-print” refers to the process of building products to client instructions commonly used to manufacture pieces of equipment or other components. This includes assessing and amending designs and manufacturing of the component that may traditionally be considered “co-design” or “participatory design”, for example resolving a defect in the component. The DSGL technology supplied under subsection 10A(7A) for the purposes of manufacturing a component should not include the disclosure of sensitive information, such as design methodology, engineering analysis, detailed process information or manufacturing know-how beyond the minimum reasonably necessary to produce the component, including testing. Only information that is the minimum reasonably necessary to enable the manufacture of the components of DSGL goods should be supplied.
  - a. Design methodology includes the underlying engineering methods and design philosophy utilised (i.e. information that explains the rationale for a particular design decision, engineering feature, or performance requirement); engineering experience (e.g. lessons learned); and the rationale and associated databases (e.g. design allowables, factors of safety, component life predictions, failure analysis criteria) that establish the operational requirements of the component (e.g. performance, mechanical, electrical, electronic, reliability and maintainability).
  - b. Engineering analysis includes the analytical methods and tools used to design or evaluate a DSGL controlled goods’ performance against the operational requirements. Analytical methods and tools include the development and/or use of mockups, computer models and simulations such as input data or software models, and test facilities.
  - c. Manufacturing know-how includes information that provides detailed manufacturing processes and techniques needed to translate or implement a detailed design into a qualified, finished DSGL controlled component or goods. Information may be provided under the exception if it is necessary in order to produce an acceptable component of the controlled DSGL goods.
34. Section 7A of the Amendment Regulations prescribes additional requirements for the purpose of paragraph (c) of this exception of the DTC Act. These requirements are:
  - a. the DSGL technology supplied is limited to that which is reasonably necessary for the person to whom the supply is made to produce the components;
  - b. the DSGL technology supplied is not of a kind that would enable the overall design of the DSGL goods, or any means of producing the DSGL goods as a whole, to be determined.

35. The requirements in both paragraph 7A(a) and (b) of the Amendment Regulations must be satisfied, in addition to subsection 10A(7A) of the DTC Act, for the exception to cover the supply.
36. The purpose of the requirement specified in paragraph (a) of the Amendment Regulations is to limit the supply of DSGL technology under the exception to that technology which is reasonably necessary for the person to produce the components of the DSGL goods. In the context of this paragraph, whether a thing is ‘reasonably necessary’ should be determined by reference to what a person of relevant skill, experience and qualification in the profession, industry or field of endeavour would consider appropriate and required to produce the component(s).
37. For example, an Australian company that designs, assembles and exports firearms from Australia overseas acquires components and parts from three different suppliers in Australia before assembling the firearms in the company’s warehouse. The Australian firearms company has designed and owns the technical specifications for the firearms, including for the firearms’ individual parts. The Australian firearms company needs to replace one faulty component – the trigger – in a line of its revolvers. The Australian firearms company contracts one of its three different suppliers – a components manufacturer that specialises in revolver triggers – to produce new triggers. The Australian firearms company supplies the trigger manufacturer with the DSGL technology needed to produce the new triggers. The firearms company only supplies the manufacturing know-how reasonably necessary to produce the triggers. The firearms company does not supply the technical specifications that would enable the trigger manufacturer to produce the entire revolver. The trigger manufacturer is not able to use the DSGL technology it was supplied to manufacture the entire revolver, because it is limited to only that which is reasonably necessary to produce the triggers.
38. Another example is an Australian researcher who engineers and tests Improvised Explosive Device (IED) removal capabilities. The researcher has recently tested a new IED disposal vehicle prototype that uses specially designed tires to resist explosive projectiles. The vehicle prototype was successful, but the specially designed tires were less resistant than expected to one type of liquid projectiles. As a result, the researcher has updated the design of the tires. The researcher supplies the blueprints for the new design of the tires (DSGL technology) to a tire company (component manufacturer) to produce the new tires. The researcher then incorporates the new tires into the existing prototype to conduct a second test. The supply of DSGL technology for the tires does not enable the tire company to manufacture the entire IED disposal vehicle prototype.
39. A further example is an Australian company that builds a controlled radar. The company uses an Australian contract manufacture, to assemble boards and components into a Printed Circuit Board Assembly (PCBA) which is a component part of the radar. The PCBAs are designed by the Australian radar company. The PCBA has a fault and the Australian radar company and Australian contract manufacturer collaborate to determine the source of the fault and how to repair or upgrade the PCBA to overcome the fault. To accomplish this, the Australian radar company supplies DSGL technology to the Australian contract manufacture, including design

methodology, engineering analysis, detailed process information, and manufacturing know-how that is the minimum reasonably necessary to assess, repair, upgrade and tests the PCBA for production. The supply of DSGL technology falls under subsection 10A(7A) because the DSGL technology that was supplied will not be able to be used to manufacture the entire radar, and was the minimum reasonably necessary to produce the component.

40. The purpose of the requirement specified in paragraph (b) of the Amendment Regulations is to specify that the supply of the DSGL technology of the component(s) cannot be of a kind that would enable the recipient to discern or determine the overall design of the DSGL goods, or any means of producing or reverse engineering the DSGL goods as a whole. Accordingly, the DSGL technology supplied for the purposes of subsection 10A(7A) manufacturing of certain components should not include the disclosure of sensitive information, such as design methodology, engineering analysis, detailed process information or manufacturing know-how in relation to the DSGL goods as a whole.

### **Section 7B      Exception to offence under section 10A of the Act—foreign work authorisation**

41. Subsection 7B(1) of the Amendment Regulations provides that this section sets out circumstances where the offence in subsection 10A(1) of the DTC Act (supplying DSGL technology in Australia to a foreign person) does not apply.
42. Subsection 7B(2) of the Amendment Regulations provides that the offence in subsection 10A(1) of the DTC Act does not apply in circumstances where a supply of DSGL technology constitutes work that is authorised by a ‘foreign work authorisation’ granted for the purposes of performing work. The meaning of foreign work authorisation is defined in section 113 of the *Defence Act 1903* (Defence Act).
43. The purpose of this exception is to ensure that an individual who holds a valid foreign work authorisation to perform work does not commit an offence under subsection 10A(1) of the DTC Act in situations where, as part of undertaking that authorised work, their conduct constitutes a supply of DSGL technology to a foreign person in Australia. For example, an individual may be granted a foreign work authorisation to work for a foreign government-owned company in Australia as a mechanic sustaining armoured vehicles in Australia. As part of performing this work, the individual may need to demonstrate a procedure or communicate technical information relevant to repairing and maintaining the vehicles, which may constitute a supply of DSGL technology. Provided this supply of DSGL technology is done for the purposes of performing the work authorised by the foreign work authorisation, it would be within the scope of this exception, and therefore not subject to the offence provision in subsection 10A(1) of the DTC Act.
44. Similarly, subsection 7B(3) of the Amendment Regulations provides that the offence in subsection 10A(1) of the DTC Act does not apply in circumstances where a supply of DSGL technology constitutes training that is authorised by a ‘foreign work authorisation’ granted for the purposes of providing training.

45. As above, the purpose of this exception is to ensure that an individual who holds a valid foreign work authorisation to provide training does not commit an offence under subsection 10A(1) of the DTC Act in situations where, as part of undertaking that authorised training, their conduct constitutes a supply of DSGL technology to a foreign person in Australia. For example, an individual may be granted a foreign work authorisation to provide training on how to operate and maintain equipment and components of an unmanned aircraft platform to Australian-based members of a foreign military organisation. In order to provide this training, the individual may need to verbally explain or supply schematics or technical information of components or equipment to these personnel, which may constitute a supply of DSGL technology. Provided this supply of DSGL technology is done for the purposes of providing the training authorised by the foreign work authorisation held by the individual, it would be within the scope of this exception, and therefore not subject to the offence provision in subsection 10A(1) of the DTC Act.
46. A note to subsection 10A(8) of the DTC Act, under which this exception is prescribed, provides that a defendant bears an evidential burden in relation to the matters prescribed in this exception and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [26] provides further detail about the application of subsection 13.3 of the Criminal Code. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.
47. These exceptions would be peculiarly within the knowledge of a defendant. This is because under subsection 115(4) of the Defence Act, the Minister is required to give an individual a copy of a foreign work authorisation that specifies the period the authorisation is in force. A defendant would therefore have a copy of the relevant foreign work authorisation that they could provide as evidence in support of this exception. Accordingly, it is appropriate for this offence-specific defence to place the evidential burden on the defendant, as it complies with the principles set out in the Guide to Framing Commonwealth Offences. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

### **Section 7C Exception to offence under section 10B of the Act—elapsed period**

48. Subsection 10B(1) of the DTC Act is an offence provision that regulates certain supplies of DSGL goods or DSGL technology that occur outside of Australia (the ‘current supply’), where those DSGL goods or DSGL technology were previously exported or supplied from within Australia to outside Australia (the ‘earlier export or supply’). Subsection 10B(8C) of the DTC Act provides an exception to this offence that applies once a period of time (prescribed in regulations) has elapsed since the ‘earlier export or supply’ of DSGL goods or DSGL technology was made.
49. Section 7C of the Amendment Regulations prescribes these periods of time that must elapse after the earlier export or supply for the exception in subsection 10B(8C) to apply. The required period of time that must have elapsed since the earlier export or supply will vary depending on

the sensitivity of the DSGL goods or DSGL technology that were the subject of that earlier export or supply.

50. Subsection 7C(2) provides that for DSGL goods or DSGL technology within the scope of Part 1 of the DSGL, the prescribed period of time that must have elapsed after the earlier export or supply is 12 months. This period of time is prescribed based on the level of sensitivity of the DSGL goods, technology or services on Part 1 of the DSGL.
51. Subsection 7C(3) provides that for DSGL goods or DSGL technology within the scope of the Sensitive List of Dual-use Goods and Technologies in Part 2 of the DSGL, the prescribed period of time that must have elapsed after the earlier export or supply is 6 months. This period of time is prescribed based on the level of sensitivity of the DSGL goods, technology or services on the Sensitive List.
52. Subsection 7C(4) provides that for DSGL goods or DSGL technology within the scope of the Very Sensitive List of Dual-use Goods and Technologies in Part 2 of the DSGL, the prescribed period of time that must have elapsed after the earlier export or supply is 12 months. This period of time is prescribed based on the level of sensitivity of the DSGL goods, technology or services on the Very Sensitive List.
53. The purpose of section 7C is to ensure that, after a sufficient period of time has elapsed since the initial export or supply of DSGL goods or technology from Australia, a person intending to further supply those Australian-origin DSGL goods or DSGL technology outside Australia does not need to keep seeking authorisation to make the further supply.

**Section 7D      Exception to offence under section 10B of the Act—supply of DSGL goods or DSGL technology from the United Kingdom or the United States of America**

54. Subsection 10B(1) of the DTC Act is an offence provision that regulates certain supplies of DSGL goods or DSGL technology that occur outside of Australia (the ‘current supply’), where those DSGL goods or DSGL technology were previously exported or supplied from within Australia to outside Australia (the ‘earlier export or supply’).
55. Section 7D of the Amendment Regulations establishes an exception from the offence in subsection 10B(1) of the DTC Act that applies where the ‘current supply’ of DSGL goods or DSGL technology is made from a place in the United Kingdom or the United States of America. The purpose of this exception is to de-conflict the export control frameworks of the United Kingdom and the United States with that of Australia’s. This is because the export control systems of these countries impose substantially similar regulatory requirements on supplies of DSGL goods and DSGL technology. Accordingly, it is not necessary for the offence provision at section 10B(1) of the DTC Act to impose duplicative regulatory requirements on supplies of DSGL goods or DSGL technology being made from a place in the United Kingdom or the United States.
56. A note to subsection 10B(9) of the DTC Act, under which this exception is prescribed, provides that a defendant bears an evidential burden in relation to the matters prescribed in this exception

and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [26] provides further detail about the application of subsection 13.3 of the Criminal Code. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.

57. This exception would be peculiarly within the knowledge of the defendant for several reasons. First, the exception applies to a defendant acting in their capacity as a supplier of DSGL goods or DSGL technology. The defendant would be reasonably expected to have knowledge of the geographical location where the supply is occurring, noting that they would be the one making the supply. It is also reasonable to assume that entities supplying DSGL goods or DSGL technology will undertake a basic level of due diligence in their dealings, including maintaining records about the supply. This is because a defendant would likely be required to comply with United Kingdom or United States domestic regulatory systems when making a supply of DSGL goods or DSGL technology from within those countries to another country. For example, section 122.5 of the United States' *International Traffic in Arms Regulation* establishes a requirement for a person to maintain records concerning exports of defense articles and technical data.
58. In comparison, it would likely be more difficult for the prosecution to establish evidence of this matter, as the relevant conduct would be occurring in a legal jurisdiction outside Australia. This factor may frustrate the prosecution's ability to provide sufficient evidence of this exception in a timely manner. Accordingly, for these reasons, it is appropriate for this offence-specific defence to place the evidential burden on the defendant, as it complies with the principles set out in the Guide to Framing Commonwealth Offences. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

**Section 7E      Exception to offence under section 10 of the Act—supply of DSGL technology that is not a relevant supply**

59. Section 7E establishes an exception from the offence set out in subsection 10(1) of the DTC Act (supplies of DSGL technology from in Australia to outside Australia) that applies to supplies of DSGL technologies that are not relevant supplies under section 5C of the DTC Act. The purpose of this exception is to ensure that a supply of DSGL technology to outside of Australia that is not a relevant supply is exempt from the offence provision in subsection 10(1) from the day of commencement of the *Defence Trade Controls Amendment Act 2024* (DTC Amendment Act). This exception is required because, as currently structured, the offence in subsection 10(1) of the DTC Act will not be amended to enable utilisation of the relevant supply exemptions contained in section 5C until 6 months after the commencement of the Amendment Act. As such, this provision gives effect to a temporary exception until amendments to subsection 10(1) of the DTC Act are in effect.
60. Subsection 7E(2) provides that this section is repealed at the end of the period of 6 months beginning on the day Schedule 1 to the DTC Amendment Act commences. This provision ensures that the exception remains in effect from the commencement of the DTC Amendment



Act until the commencement of the amendments to the offences in the DTC Act, at which point the relevant supply exemption will be enlivened for all offences in the DTC Act and this provision is repealed.

61. A note to subsection 10(4) of the DTC Act, under which this exception is prescribed, provides that a defendant bears an evidential burden in relation to the matters prescribed in this exception and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [26] provides further detail about the application of subsection 13.3 of the Criminal Code. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.
62. This exception would be peculiarly within the knowledge of the defendant, as subsection 58(3A) of the DTC Act requires that an individual must keep records of certain information relating to a supply covered by an exemption. The information to be contained in these records is prescribed by section 27B of the Amendment Regulations and includes things such as:
  - a. a description of the DSGL goods or DSGL technology supplied;
  - b. the name of the country in which the DSGL goods or DSGL technology supplied were received in relation to that supply;
63. In comparison, it would arguably be more complex for the prosecution to provide evidence of this matter, noting that suppliers may regularly be making large numbers of intangible supplies of DSGL technology outside of Australia, which may make ascertaining evidence of singular transactions difficult. Accordingly, for these reasons, it is appropriate for this offence-specific defence to place the evidential burden on the defendant, as it complies with the principles set out in the Guide to Framing Commonwealth Offences. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

### **Item 3            Section 8**

64. Item 3 amends section 8 into a new subsection 8(1). This amendment reflects that item 6 and 19 of the Amendment Regulations inserts new subsections (2) and (3) into section 8 of the DTC Regulation.

### **Item 4            Section 8**

65. Item 4 amends section 8 to reflect that subsection 8(3) of the Amendment Regulations prescribes separate criteria to which the Minister must have regard to when deciding whether a supply of DSGL technology to a foreign person within Australia is prejudicial to the security, defence or international relations of Australia. Accordingly, this item amends the language of section 8 to reflect that the whole section now prescribes criteria to which the Minister must have regard, rather than a single table.

**Item 5            Section 8**

66. Item 5 amends section 8 to include consideration of the following types of supplies and services now regulated by the DTC Act:
- a. supplies of DSGL goods or DSGL technology;
  - b. arranging for other persons to supply DSGL goods or DSGL technology;
  - c. the provision of DSGL services.
67. The purpose of this is to ensure that the Minister has regard to the decision criterion in the table in section 8 when deciding whether these things are prejudicial to the security, defence or international relations of Australia, as part of relevant decision-making processes.

**Item 6            Section 8 (before the table)**

68. Item 6 inserts new subsection (2) into section 8, the purpose of which is to provide that the decision criterion in the table immediately following this subsection do not apply to supplies mentioned in new subsection 8(3). These sorts of supplies have decision-making criterion set out in a separate table under subsection 8(3), inserted by item 19 of the Amendment Regulations.

**Item 7            Section 8 (table item 1, column headed “Criterion”)**

69. Item 7 expands the scope of the decision criterion in table item 1 to include the supply of DSGL goods or DSGL technology, or the DSGL services or information provided through those services, as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 8            Section 8 (table item 2, column headed “Criterion”)**

70. Item 8 expands the scope of the decision criterion in table item 2 to include the supply of DSGL goods or DSGL technology, or the DSGL services or information provided through those services, as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 9            Section 8 (table item 3, column headed “Criterion”)**

71. Item 9 expands the scope of the decision criterion in table item 3 to include the supply of DSGL goods or DSGL technology, or the DSGL services or information provided through those services, as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 10           Section 8 (table item 4, column headed “Criterion”)**

72. Item 10 expands the scope of the decision criterion in table item 4 to include the supply of DSGL goods or DSGL technology and the provision of DSGL services as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 11      Section 8 (table item 5, column headed “Criterion”)**

73. Item 11 expands the scope of the decision criterion in table item 5 to include the supply of DSGL goods or DSGL technology, or the DSGL services or information provided through those services, as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 12      Section 8 (table item 6, column headed “Criterion”)**

74. Item 12 expands the scope of the decision criterion in table item 6 to include the supply of DSGL goods or DSGL technology and the provision of DSGL services as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 13      Section 8 (table item 7, column headed “Criterion”)**

75. Item 13 expands the scope of the decision criterion in table item 7 to include the supply of DSGL goods or DSGL technology, or the DSGL services or information provided through those services, as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 14      Section 8 (table item 8, column headed “Criterion”)**

76. Item 14 expands the scope of the decision criterion in table item 8 to include the supply of DSGL goods or DSGL technology and the provision of DSGL services as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 15      Section 8 (table item 9, column headed “Criterion”)**

77. Item 15 expands the scope of the decision criterion in table item 9 to include the supply of DSGL goods or DSGL technology, or the DSGL services or information provided through those services, as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 16      Section 8 (table item 10, column headed “Criterion”)**

78. Item 16 expands the scope of the decision criterion in table item 10 to include the supply of DSGL goods or DSGL technology and the provision of DSGL services as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 17      Section 8 (table item 11, column headed “Criterion”)**

79. Item 17 expands the scope of the decision criterion in table item 11 to include the supply of DSGL goods or DSGL technology, or the DSGL services or information provided through those services, as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 18      Section 8 (table item 12, column headed “Criterion”)**

80. Item 18 expands the scope of the decision criterion in table item 12 to include the supply of DSGL goods or DSGL technology and the provision of DSGL services as part of the criterion. The substantive consideration of the criterion remains unchanged.

**Item 19      Section 8 (table item 12, column headed “Criterion”)**

81. Item 19 of the Amendment Regulations inserts the word ‘research’ after ‘adverse effect on Australian’ for the decision criterion in table item 12 at section 8. The purpose of this amendment is to clarify that the criterion, used by the Minister to decide whether a matter is prejudicial to security, defence or international relations of Australia, is expanded to include Australian research industry, as well as Australian industry more broadly.

**Item 20      At the end of section 8**

82. Item 20 adds new subsection 8(3) at the end of section 8. The purpose of this new provision is to prescribe separate decision-making criterion that the Minister must have regard to when deciding whether a supply of DSGL technology to a foreign person within Australia would, or would not, be prejudicial to Australia’s security, defence or international relations. This conduct is regulated under section 10A of the DTC Act. Separate criterion are required to be specifically prescribed for this decisions relating to this conduct because the existing decision-making criterion cover supplies made from a place inside of Australia to a place outside of Australia, or supplies or services that occur completely outside Australia. As such, they are not appropriate for assessing the risk of a supply of DSGL technology within Australia to a foreign person within Australia. It is important that the Minister have regard to criterion tailored to the specific risk and context of the supply.

**Item 21      Section 24**

83. Item 21 repeals section 24 of the DTC Regulation and replaces it with a new section 24.

**Section 24      Section 11 permit holders—information to be contained in records**

84. Section 24 prescribes the information to be contained in the record of activities done under a permit a person holds under section 11 of the DTC Act. Relevantly, this section has been expanded to include recordkeeping requirements for the new types of activities introduced in the DTC Amendment Act, these being supplies of DSGL goods (section 10B) and the provision of DSGL services (section 10C). The information required to be contained in records of these activities done under a section 11 permit remains substantively the same.

**Item 22      At the end of Part 6**

85. Item 22 adds new Division 3 at the end of Part 6 of the DTC Regulation, the purpose of which is to set out the recordkeeping requirements under the DTC Act for other activities. These other activities primarily include those where a permit was not required for the supply of DSGL

goods or DSGL technology, or the provision of DSGL services, such as those done under the circumstances set out in section 5C of the DTC Act.

### **Division 3—Records for certain other activities**

#### **Section 27A Circumstances in which records are not required for other activities**

86. Subsection 58(3A) and (3D) of the DTC Act establish a mandatory recordkeeping requirement for supplies of DSGL goods and DSGL technology and the provision of DSGL services that are not made under a permit. A supply of DSGL goods or DSGL technology, or a provision of DSGL services will not be made under a permit in several circumstances, including:
- a. where the supply of DSGL goods or DSGL technology, or the provision of DSGL services is made under circumstances set out in section 5C of the DTC Act (i.e. the supply is not a relevant supply, or provision of DSGL services are not relevant DSGL services);
  - b. where the supply, or the provision of DSGL services is made under an exception to one of the offences in sections 10, 10A, 10B or 10C of the DTC Act.
87. In these circumstances, the recordkeeping obligation in subsections 58(3A) and (3D) of the DTC Act would apply. However, section 27A of the Amendment Regulations prescribes circumstances in which records of these other activities will not be required to be kept.
88. Subsection 27A(1) of the Amendment Regulations sets out circumstances where a person will not need to keep a record of a supply of DSGL goods or DSGL technology that are not made under a permit (e.g. under an exception to an offence). These circumstances are that:
- a. the person providing the current supply has previously supplied DSGL goods or DSGL technology (the earlier supply) for which records were required to be kept under that subsection; and
  - b. the information contained in those records would also apply in relation to the current supply; and
  - c. the current supply is provided to the same person as the earlier supply.
89. Similarly, subsection 27A(2) of the Amendment Regulations sets out circumstances where a person will not need to keep a record of a provision of DSGL services that are not made under a permit (e.g. under an exception to an offence). These circumstances are that:
- a. the person providing the current services has previously provided DSGL services (the earlier services) for which records were required to be kept under that subsection; and
  - b. the information contained in those records would also apply in relation to the current services; and
  - c. the current services are provided to the same person as the earlier services.

90. Collectively, the purpose of these provisions is to ensure that there is not a requirement to keep records of supplies of DSGL goods or DSGL technology, or a provision of DSGL services, in instances where the same supply or service is being provided on multiple occasions to the same recipient and a record has previously been made. This is intended to ensure that multiple identical records documenting essentially the same supply or service is not required to be made and kept by the supplier or provider.

**Section 27B Other activities—information to be contained in records**

91. Section 27B of the Amendment Regulations prescribes the information that must be contained in a record of a supply of DSGL goods or DSGL technology, or provision of DSGL services, that is required to be kept under subsection 58(3A) or (3D) of the DTC Act. As mentioned above, these subsections of the DTC Act set out recordkeeping requirements for ‘other activities’—these being supplies of DSGL goods and DSGL technology and the provision of DSGL services done without a permit, such as under an exception to an offence or in one of the circumstances set out in section 5C of the DTC Act.
92. The information that must be contained in a record of such an activity is:
- a. a description of the DSGL goods or DSGL technology supplied, or the DSGL services provided;
  - b. the name of the country in which the DSGL goods or DSGL technology supplied, or the DSGL services provided, were received in relation to that supply or that provision of DSGL services.
93. Due to section 27A of the Amendment Regulations, there will be certain circumstances where these records may not be required to be kept for a supply of DSGL goods or DSGL technology, or the provision of DSGL services.

## **SCHEDULE 2—AMENDMENT OF THE CUSTOMS (PROHIBITED EXPORTS) REGULATIONS 1958**

### *Customs (Prohibited Exports) Regulations 1958*

#### **Item 1 Subregulation 13E(4) (table item 12, column headed “Criterion”)**

94. Item 1 of the Amendment Regulations inserts the word ‘research’ after ‘adverse effect on Australian’ for the decision criterion in table item 12 at subregulation 13E(4). The purpose of this amendment is to clarify that this criterion for deciding whether to grant a permission to an applicant for the exportation of defence and strategic goods is expanded to include Australian research industry, as well as Australian industry more broadly.

#### **Item 2 After subregulation 13EA(5)**

95. Item 2 of the Amendment Regulations inserts new subregulations (5A) and (5B) into regulation 13EA of the Customs PE Regulations. The purpose of these new subregulations is to establish two new exceptions from the prohibition on exporting goods specified in the DSGL and goods containing DSGL technology, as set out in regulation 13E of the Customs PE Regulations.

#### *Certain exports to the United Kingdom or the United States of America*

96. Subregulation (5A) establishes a national exception for the United Kingdom and the United States from the prohibition on exporting goods specified in the DSGL and goods containing DSGL technology in regulation 13E of the Customs PE Regulations. The exportation of these goods is not prohibited under subregulation 13E(1) of the Customs PE Regulations if the conditions set out in both paragraphs (5A)(a) and (5A)(b) are met. Where a person meets these requirements, they will not require the Defence Minister to grant permission for the exportation of the goods under regulation 13E of the Customs PE Regulations.
97. Paragraph (5A)(a) of the Amendment Regulations requires that the goods are exported from Australia in the course of a supply covered by subsection 5C(1A) of the DTC Act. A supply will be covered by subsection 5C(1A) of the DTC Act if it satisfies all of the following requirements:
- a. Paragraph 5C(1A)(a) of the DTC Act requires that the supply is made to any of the following:
    - i. an Australian person;
    - ii. a citizen or permanent resident of the United Kingdom or United States;
    - iii. a body corporate incorporated by or under a law of the United Kingdom or United States, or of a part of either of those countries;
    - iv. the Government of the United Kingdom or United States, or the government of a part of either of those countries; or

- v. an authority of the Government of the United Kingdom or United States, or the government of a part of either of those countries.
- b. Paragraph 5C(1A)(b) of the DTC Act also requires that either:
- i. the supply must be to, or occur wholly at, a place in Australia, the United Kingdom or the United States; or
  - ii. if the supply is the provision of access to DSGL technology—at the time of the provision of access, the person to whom the access is provided is in Australia, the United Kingdom or the United States.

As this exception specifically deals with the exportation of tangible DSGL goods and goods containing DSGL technology from Australia to outside Australia, only exports made in the course of a supply ‘to’ the United Kingdom or the United States will meet the requirements of paragraph 5C(1A)(b). A supply that ‘occurs wholly at’ a place in Australia, the United Kingdom or the United States would not constitute an export of DSGL goods or goods containing DSGL technology, as exports occur from within Australia to outside Australia. Similarly, the act of providing point-in-time access to DSGL technology, as set out in subparagraph 5C(1A)(b)(ii), does not constitute an export for the purposes of this exception.

An example of an export made in the course of a supply ‘to’ a place in the United Kingdom or the United States could be a supply of an unmanned aerial vehicle and related components by company A incorporated and located in Australia to company B incorporated and located in the United States.

- c. Paragraph 5C(1A)(c) of the DTC Act requires that the DSGL goods or DSGL technology is not:
- i. an Australian Military Sales Program item; or
  - ii. excluded by a determination under force under subsection 5C(3) of the DTC Act.

Australian Military Sales Program items are DSGL goods or DSGL technologies that are specified in a legislative instrument made by the Minister under section 5AA of the DTC Act, and are intended to include Australia’s sovereign goods and technologies which are deemed to require greater regulatory control. As such, they cannot be exported without a permit under this exception. Similarly, under subsection 5C(3) of the DTC Act the Minister may, by legislative instrument, determine DSGL goods or DSGL technology that are excluded for the purposes of a supply under subsection 5C(1A), among other provisions. The purpose of this instrument is to enable the Minister to specify certain DSGL goods and DSGL technology that will continue to be subject to the regulatory framework of the DTC Act, which may be required for compliance with Australia’s obligations under international law or other international commitments. Similar to AMSP items, these excluded DSGL goods cannot be exported under this exception.

98. Paragraph (5A)(b) of the Amendment Regulations requires that the exporter has been issued a Defence Export Controls Client Registration Number (DEC CRN) by Defence. In order to



receive a DEC CRN, an exporter will need to complete the registration form. The registration process to obtain a DEC CRN will be the exactly the same as that required by the UK and the US to become an ‘AUKUS Authorised User’. Australia will not be seeking information from exporters that the US and UK are not seeking from their exporters.

99. Paragraph (5A)(c) of the Amendment Regulations requires that the exporter has provided Defence with the information mentioned in subregulation (5B) about the export before it is made. Paragraph (5B) sets out the following information that the exporter must have provided for the purposes of paragraph (c):
- a. a description of the goods that are to be exported;
  - b. the name of any person to whom the supply mentioned in paragraph (5A)(a) of the regulations is to be made;
  - c. the name of the country to which the goods are to be exported;
  - d. either:
    - i. the date on which the goods are to be exported; or
    - ii. if there are to be supplies mentioned in paragraph (5A)(a) of this regulation of goods within that description over a period of time, to the same person, in circumstances where the goods are to be to exported from Australia to that country—the period of time in which such supplies are to occur.
100. The intended effect of this exception in the Customs PE Regulations is to enhance and expedite collaboration between and among AUKUS partners to help maintain Australia’s capability edge, while also strengthening the capability to protect goods and sensitive technologies that underpin our security.
101. The purpose of the note to this subregulation is to clarify that certain DSGL goods and goods containing DSGL technologies cannot be exported as part of a supply made under subsection 5C(1A) of the DTC Act, and therefore cannot rely on this exception. These are Australian Military Sales Program (AMSP) items, and DSGL goods and goods containing DSGL technologies excluded by a determination made under subsection 5C(3) of the DTC Act.

#### *Australian Military Sales Program items*

102. Subregulation (5C) of the Amendment Regulations establishes an exception from the prohibition on exporting goods specified in the DSGL and goods containing DSGL technology for certain sovereign military technologies exported in accordance with an agreement or arrangement between Australia and one or more foreign countries. It provides that the exportation of these goods is not prohibited under subregulation 13E(1) of the Customs PE Regulations if the conditions set out in both paragraphs (5C)(a) and (5C)(b) are met.
103. Paragraph (5C)(a) requires that the DSGL goods, or goods containing DSGL technology, are an AMSP item. AMSP items are DSGL goods or DSGL technologies that are specified in a legislative instrument made by the Minister for Defence under section 5AA of the DTC Act,

and are intended to encompass Australia's sovereign goods and technologies that are deemed to require greater regulatory control and scrutiny.

104. Paragraph (5C)(b) requires that the goods are exported in the course of a supply (within the meaning of the DTC Act) made in accordance with an agreement or arrangement between Australia and one or more foreign countries, including an agreement, arrangement or understanding between a Minister and an official or authority of one or more foreign countries.
105. Goods being supplied and transferred under agreements or arrangements with a foreign country will include the transfer of goods from Australia (owner) to a foreign government (purchaser) where the foreign government has requested a transfer and/or is accepting a transfer. They will also include circumstances where Australia has received a request for the transfer of goods that may or may not be the property of the Commonwealth (including intellectual property) and the Commonwealth deems that the transfer may proceed only on a government-to-government transfer basis. Examples of when this may occur could be where technology developed by a commercial company is classified as sensitive, or where goods or technology are subject to an international regime which requires government-to-government assurances. In such cases, a transfer could occur with an appropriate agreement or arrangement in place. These agreements or arrangements would be determined on a case-by-case basis, however could include, for example, a memorandum of understanding or similar government-to-government arrangements between two countries or government departments thereof containing appropriate provisions and assurances, including those concerning the use and limits on access and retransfer of the goods.

### **Item 3            After subregulation 13EJ(2)**

106. Item 3 of the Amendment Regulations inserts new subregulation 13EJ(2A) into regulation 13EJ of the Customs PE Regulations.
107. Subregulation 13EJ(2A) sets out a specific provision enabling the Defence Minister to delegate certain powers they hold under the Customs PE Regulations to specified senior officers in the Department of Defence. Specifically, this new provision enables the Defence Minister to delegate the following powers:
  - a. the power to refuse to grant a permission under subregulation 13E(3) for the export of goods specified in the DSGL or goods containing DSGL technology;
  - b. the power to revoke a permission under subregulation 13ED(1) to export goods specified in the DSGL or goods containing DSGL technology.
108. Under new subregulation 13EJ(2A), the Defence Minister may delegate these powers to the Secretary of the Department or a Senior Executive Service (SES) employee, or acting SES employee in the Department. This level of delegation is deemed appropriate because the revocation of a permit is typically subject to certain sensitive considerations. This level of delegation also mirrors those prescribed in the DTC Amendment Act. Accordingly, it would be appropriate that these powers only be delegated to this level. The purpose of this provision

is to enable a suitably senior and qualified departmental official to be able to exercise the Minister's powers on their behalf.

**Item 4            Subregulation 13EJ(4)**

109. Subregulation 13EJ(4) of the Customs PE Regulations specified that the Defence Minister must not delegate the powers in subregulations 13E(3) or 13ED(1) to any person. Item 4 of the Amendment Regulations repeals subregulation 13EJ(4) of the Customs PE Regulations, thereby removing this restriction on the Defence Minister from delegating these powers. The purpose of this amendment is to enable administrative processes to keep pace with the changing strategic environment by removing restrictions on the delegation of powers related to permit decisions.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### **Defence Trade Legislation Amendment Regulations 2024**

This Disallowable Legislative Instrument 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 Instrument**

Australia's export control system is a key element of Australia's protective security framework. It aims to stop military goods and technology—and goods and technology that can be used in chemical, biological and nuclear weapons—from being transferred to individuals, states or groups with interests prejudicial to Australia's security, defence or international relations.

The Defence Strategic Review made clear that Australia is facing the most difficult set of strategic circumstances since the Second World War. To keep pace with these emerging challenges, it is essential that Australia has a robust protective security environment. It is also critical that Australia works with like-minded partners, especially with the United Kingdom and the United States, to enhance defence trade, deepen military interoperability and enhance defence capabilities.

Realising the full potential of AUKUS will not be possible without major changes to the way that AUKUS partners cooperate on defence industrial and technology issues. To improve the speed and scale of technology transfer between AUKUS partners, Australia, the United Kingdom and the United States agreed to amend their export control regimes to support the creation of an export licence-free environment among and between AUKUS partners.

This export licence-free environment will revolutionise trade among and between AUKUS partners and encourage industry, higher education and research sectors in all three nations to innovate and cooperate with lower technology transfer barriers and costs of trade. This would provide Australia and our partners a genuine capability development edge.

The purpose of the Defence Trade Legislation Amendment Regulations 2024 (Amendment Regulations) is to give effect to specific elements of the *Defence Trade Controls Amendment Act 2024* (DTC Amendment Act). The Amendment Regulations amend the *Defence Trade Controls Regulation 2013* (DTC Regulation) and *Customs (Prohibited Exports) Regulations 1958* (Customs PE Regulations). The provisions in Schedule 1 of the Amendment Regulations amend the DTC Regulation to:

- a. prescribe the kinds of security clearances that are covered security clearances;
- b. prescribe the requirements relating to the definitions of relevant supply and relevant DSGL services;

- c. provide an exception to the offences in section 10, section 10A, section 10B and section 10C for supplies or the provision of DSGL services that are, or relate to Australian Defence Articles;
- d. prescribe additional requirements for the exception in subsection 10A(7A) of the DTC Act;
- e. provide an exception to the offence in section 10A of the DTC Act for people who supply DSGL technology in the course of the work or training authorised by a foreign work authorisation issued under Part IXAA of the *Defence Act 1903*;
- f. provide an exception to the offence in section 10 of the DTC Act for supplies that are not a relevant supply, which self-repeals 6 months after the commencement of the *Defence Trade Controls Amendment Act 2024* (DTC Amendment Act);
- g. amend the criteria for deciding whether a thing is prejudicial to the security, defence or international relations of Australia to include certain supplies of DSGL goods or DSGL technology from outside Australia (section 10B) and the provision of DSGL services (section 10C);
- h. prescribe criteria for deciding whether a supply of DSGL technology to a foreign person within Australia (section 10A) is prejudicial to the security, defence or international relations of Australia; and
- i. prescribe the information that must be contained in the record of activities (being supplies of DSGL goods or DSGL technology or the provision of DSGL services) done under a permit a person holds under section 11 of the DTC Act or under other activities.

The provisions in Schedule 2 of the Amendment Regulations amend the Customs PE Regulations to:

- a. establish an exception to the requirement to obtain permission to export DSGL goods and goods containing DSGL technology to the United Kingdom or the United States;
- b. establish an exception to the requirement to obtain permission to export DSGL goods and goods containing DSGL technology that are an Australian Military Sales Program item; and
- c. enable the Defence Minister to delegate the power to grant or revoke a permission under the regulations.

Regulated military and dual-use goods and technology are specified in a legislative instrument, the *Defence and Strategic Goods List 2021* (DSGL), as defined in regulation 2 of the Customs PE Regulations and made under paragraph 112(2A)(aa) of the Customs Act. Goods and technology within the scope of the DSGL require permission to be granted by the Defence Minister or their delegate before the export or supply of those regulated goods or technology can occur.

### **Human rights implications**

This Disallowable Legislative Instrument engages the following rights:

- the presumption of innocence in Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the right to privacy and reputation in Article 17 of the ICCPR.

## Legitimate objective of the Disallowable Legislative Instrument

The presumption of innocence and the right to privacy are not absolute rights. This means that the Legislative Instrument can permissibly limit these rights, provided the limitation is prescribed by law for the purpose of achieving a legitimate objective and the limitation is reasonable, necessary and proportionate to achieving that objective. Whether a measure limiting a right is aimed at a legitimate objective depends on whether it addresses a pressing or substantial concern, and not simply seeking an outcome regarded as desirable or convenient.

The legitimate objective of the Legislative Instrument is to regulate identified gaps in Australia's defence export controls regime for the purposes of safeguarding Australia's defence, security and international relations and creating a robust, fit-for-purpose export control regime that engenders confidence in industry, the United States and United Kingdom, to enable the creation of a licence-free environment amongst AUKUS partners.

Gaps in Australia's existing defence export controls have been identified as a problem over the last five years where, in a rapidly changing and deteriorating geostrategic environment, military and dual-use technical data has become more vulnerable to being obtained by foreign entities with intentions prejudicial to Australia's interest. The risk of military and dual-use goods and technology being acquired by entities not aligned with Australia's interests has the potential to significantly undermine Australia's security and defence, as well as Australia's reputation and cooperation with international partners.

The purpose of the Legislative Instrument is to give effect to specific elements of the DTC Amendment Act by prescribing certain exceptions and exemptions from elements of the expanded defence export controls regulations framework. These amendments are necessary to establish a defence export controls framework that meets the preconditions in the United States' *National Defence Authorisation Act 2024* for Australia to receive a national exemption from the United States' *Arms Export Control Act*. These preconditions require that Australia be certified as administering a defence export controls framework comparable to that of the United States, and have implemented an exemption from our defence export controls framework for the United States.

### ***Presumption of innocence***

Article 14(2) of the ICCPR provides that 'everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty'. In General Comment No. 32 (CCPR/C/GC/32), the United Nations Human Rights Committee states that the presumption of innocence 'imposes on the prosecution the burden of proving the charge'. In effect, the presumption of innocence imposes on the prosecution the burden of proving the charge and requires that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

The presumption of innocence may be limited provided the limitation 'is reasonable in the circumstances' and reasonable, necessary and proportionate to achieve a legitimate objective. The Legislative Instrument establishes certain offence-specific defences in sections 7, 7B, 7D and 7E that may limit the presumption of innocence by placing an evidentiary burden on a defendant. The purpose of these offence-specific defences is to prescribe certain circumstances where the offence provisions

in the DTC Act do not apply. This includes circumstances such as where an individual holds a ‘foreign work authorisation’ to perform work or provide training issued under the *Defence Act 1903* (section 7B), or where the supply of goods or technology is being made from a place in the United States or the United Kingdom (section 7D). These offence-specific defences are required to ensure that the enhanced defence export controls regulatory framework introduced by the *Defence Trade Controls Amendment Act 2024* is robust, fit-for-purpose and does not impose unnecessarily onerous requirements on industry in all circumstances. Accordingly, the inclusion of these offence-specific defences is rationally connected to the legitimate objective of the Legislative Instrument.

It is reasonable for a defendant to be required to adduce some evidence to establish the existence of these offence-specific defences, as the defences go to matters that would be peculiarly within the knowledge of the defendant. For example, the offence-specific defence in section 7 of the Legislative Instrument, which relates to supplies of Australian Defence Articles, would be peculiarly within the knowledge of the defendant for several reasons. First, the exception only applies to members of the DTC Treaty Community—that being members of the Australian Community and the United States Community. An entity will only be part of the DTC Treaty Community if they submit an application and are approved to be a member of either the Australian or United States Communities. As such, a defendant would be uniquely positioned to provide evidence of their membership of the relevant community. Additionally, section 26 of the DTC Regulation requires that the holder of an approval under section 27 of the DTC Act must keep records of the following activities:

- The supply of goods or technology relating to goods that are an Australian Defence Article;
- The provision of defence services in relation to goods that are an Australian Defence Article.

Section 27 of the DTC Regulation sets out the information that must be contained in these records. This information relevantly includes matters such as a description of the goods or technology supplied, or the defence services provided and the date and time at which, and the place from which, goods or technology were supplied, or defence services were provided. This relevant information would enable a defendant to adduce accurate evidence that would demonstrate whether the goods, technology or services were supplied in compliance with the terms of the DTC Treaty. In comparison, it would be more difficult for the prosecution to substantiate evidence of the matters outlined in this exception, noting that the prosecution would not have oversight or access to records of supplies made or services provided by members of the DTC Treaty Approved Community, as they are not an approved community member. Accordingly, it is appropriate for a defendant to bear the evidential burden in relation to this exception.

The explanatory statement to the Legislative Instrument sets out detailed justifications in line with the requirements of the ‘Attorney-General’s Guide to Framing Commonwealth Offences’ for all of the offence-specific defences. These justifications demonstrate that placing an evidentiary burden of proof on a defendant for these matters is justifiable, as the relevant facts are peculiarly within the knowledge of the defendant, making it more practical for them to adduce evidence of the exception than for the prosecution to disprove these matters.

Accordingly, to the extent that the provisions of the Legislative Instrument limit the presumption of innocence under Article 14(2) of the ICCPR, the limitations are reasonable, necessary and proportionate to achieving the legitimate objective of the Instrument.

### ***Right to privacy***

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on their honour and reputation. The United Nations Human Rights Committee have interpreted the right to privacy as comprising freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The right to privacy may be limited where the limitation is lawful and not arbitrary, and where it is reasonable, necessary and proportionate to achieve a legitimate objective.

The measures of the Legislative Instrument may limit the right to privacy under Article 17 of the ICCPR, as the Instrument requires that, in order for a person to have the benefit of certain exemptions from the export controls framework, they are required to hold an ‘Defence Export Controls Client Registration Number’ (DEC CRN) issued by Defence. In order to be issued with a DEC CRN, an applicant may be required to provide certain identifying information to the Defence Export Controls Branch. Additionally, prior to making supplies or providing DSGL services under certain exemptions in the Legislative Instrument, a person may also be required to provide Defence with additional information, including the name of any person to whom the supply is to be made or the services are to be provided.

The collection and use of personal information in these instances may therefore limit the prohibition on arbitrary interference with privacy. However, this limitation is necessary to achieve the legitimate objective of the Legislative Instrument, as it will ensure that the Government maintains a sufficient level of control and oversight over who has access to certain exemptions contained in the Legislative Instrument. Without this information, Government would not have sufficient oversight over who was utilising exemptions in the Legislative Instrument to supply DSGL goods and DSGL technology and provide DSGL services without a permit.

The interference with privacy is not arbitrary in these circumstances, as the Legislative Instrument clearly prescribes the information that must be provided to the Department by a person. Additionally, these requirements in the Legislative Instrument are limited so that they only apply to people that supply DSGL goods or DSGL technology or provide DSGL services under certain exceptions in section 5C of the DTC Act. People who do not intend to utilise these exceptions will not have to comply with these requirements. Furthermore, the powers and functions set out in the Legislative Instrument are required to be exercised in compliance with the *Privacy Act 1988*. On this basis, to the extent that the measures in the Legislative Instrument limit the prohibition on arbitrary interference with privacy under Article 17 of the ICCPR, these measures are prescribed by law and not arbitrary.

For these reasons, the limitation on the right to privacy under Article 17 of the ICCPR is reasonable, necessary and proportionate to achieve the legitimate objective of regulating identified gaps in Australia’s defence export controls regime for the purpose of safeguarding Australia’s defence, security and international relations.



## **Conclusion**

The Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objective.