

EXPLANATORY STATEMENT

Issued by authority of the Minister for Defence

Defence Trade Controls Act 2012

Defence Trade Controls (Foreign Country) Instrument 2024

The *Defence Trade Controls (Foreign Country) Instrument 2024* (the instrument) is made under subsection 15(4A) of the *Defence Trade Controls Act 2012* (DTC Act). The instrument commences on 1 September 2024 and is a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act).

Purpose

The success of global export controls relies on the strength of the regulatory systems of individual countries from around the world, and the cooperation of those like-minded countries working together to support the international export control system more broadly.

In recognition of the regulation imposed by members of the international export control system and taking into consideration Australia's national security, foreign relations and economic well-being, legislative exemptions have been created in the DTC Act for countries specified in the instrument. The intent of the legislative exemptions is to reduce Australian export control regulation in circumstances where the country's export control regime would reliably regulate the activity, removing the need for duplicate Australian regulation, where the country is a like-minded partner and trusted to conduct the activity in accordance with the interests of Australia's national security, foreign relations and economic well-being.

For a foreign country to be specified in this instrument, either of the following must apply:

- a. the country is a member of four of the major international export control regimes (the Wassenaar Arrangement, the Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group); or
- b. the Minister is satisfied that their inclusion in the instrument is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.

The first criterion recognises the reliability of these foreign countries' export control regulation and aims to remove a double layer of regulation. Countries who are members of the four major international export control regimes are considered to have export control regimes that will protect and regulate Defence and Strategic Goods List (DSGL) goods and technology in a similar way to Australia's. This enables cooperation with like-minded countries in the international export control system and reduces the regulatory compliance burden on Australian stakeholders.

The second criterion recognises the strategic importance of international cooperation, trade and collaboration to Australia and aims to remove regulation from activities with close, trusted and reliable partners. Countries who meet this criterion are considered by the Minister to be a like-minded partner that will cooperate, trade and collaborate on DSGL goods and DSGL technology in a way consistent

with Australia's interests. This enables the Minister to include countries on the instrument that the Minister determines will provide a national security, foreign relation or economic benefit to Australia. For example, the Minister may be satisfied that a large portion of a country's citizens make up the Australian workforce for research and development of a particular technology, and this country's inclusion on the instrument and the resulting reduction in regulatory burden for Australian stakeholders would benefit Australia's economic well-being.

Details of the instrument

Details of the instrument are set out in **Attachment A**.

Consultation

Consultation was undertaken with a range of relevant stakeholders throughout the drafting and development of the instrument. Through regular meetings, Defence consulted the industry, higher education and research sectors regarding changes to the instrument. These meetings built on earlier consultation processes with stakeholders through the dissemination of two Feedback Aids, which facilitated early discussions about the instrument, as well as public engagements.

Defence also undertook public consultation throughout May 2024 on amendments to the *Defence Trade Legislation Amendment Regulations 2024*, engaging with over 300 entities. As part of this public consultation, Defence sought advice from stakeholders on the names of countries to be added to the instrument.

Defence also consulted amendments to the instrument among Federal Government agencies. From June to November 2023, Defence held a series of Interdepartmental Committee meetings with Federal Government agencies, including the Department of Foreign Affairs and Trade, the Department of the Prime Minister and Cabinet, the Department of Education, the Department of Industry, Science and Resources and the Attorney-General's Department. Defence has also facilitated personalised briefings to many Government agencies that suggested the names of additional countries to be added to the instrument. Defence also consulted the instrument with relevant internal stakeholders, including the Defence Intelligence Organisation.

A full Impact Analysis was prepared as part of the *Defence Trade Controls Amendment Act 2024*, which considered the measures being progressed as part of this instrument (OIA23-05246). The full Impact Analysis is available at <https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-amendment-bill-2023>.

The Office of Impact Analysis was also consulted in relation to this instrument (OIA24-07846).

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 Statement of Compatibility with Human Rights is included at **Attachment B**.

The instrument was made by the Honourable Richard Marles MP, Minister for Defence, in accordance with the requirements of subsections 15(4A) and 15(4AA) of the DTC Act.

Details of the *Defence Trade Controls (Foreign Country) Instrument 2024*

Section 1 Name

1. Section 1 provides that the name of the instrument is the *Defence Trade Controls (Foreign Country) Instrument 2024* (the instrument).

Section 2 Commencement

2. Section 2 provides that the provisions in the instrument commence on 1 September 2024.

Section 3 Authority

3. Section 3 provides that the instrument is made under subsection 15(4A) of the *Defence Trade Controls Act 2012* (DTC Act).

Section 4 Schedules

4. Section 4 of the instrument provides that each instrument specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the instrument has effect according to its terms. The only instrument specified in a Schedule to the instrument is the *Defence Trade Controls Act 2012 – Foreign Country List*. The only item in that Schedule has the effect of wholly repealing that instrument.

Section 5 Specified foreign countries

5. Section 5 specifies 31 foreign countries for the purposes of paragraph 15(4)(c) of the DTC Act.
6. Paragraphs 15(4AA)(a) and (b) of the DTC Act set out two circumstances in which a foreign country may be specified in the instrument. Paragraph 15(4AA)(a) provides that a foreign country may be specified if the country is a member of the four multilateral non-proliferation and export control regimes (of which Australia is a participating state), these being:
 - i the Wassenaar Arrangement;
 - ii the Australia Group;
 - iii the Missile Technology Control Regime; and
 - iv the Nuclear Suppliers Group.
7. Paragraph 15(4AA)(b) provides that a foreign country may be specified if the Minister is satisfied that doing so is in the interests of Australia's national security, foreign relations or national economic well-being.
8. The purpose of specifying the foreign countries listed in section 5 of this instrument is to enliven certain exemptions and exceptions to the offences in sections 10, 10A, 10B and 10C

and subsections 15(1) and 15(1A) of the DTC Act for those specified foreign countries. For example, subsection 5C(1C) of the DTC Act provides an exemption from the offence in subsection 10A(1) of the Act of supplying DSSL technology within Australia to a foreign person in circumstances where, among other things, the supply is made to a foreign person from a country that is specified in this instrument.

Schedule 1—Repeals

Defence Trade Controls Act 2012 – Foreign Country List

Item 1 The whole of the instrument

9. Item 1 of Schedule 1 to the instrument has the effect of repealing the *Defence Trade Controls Act 2012 – Foreign Country List* upon commencement of the instrument.
10. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence Trade Controls (Foreign Country) Instrument 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

The success of global export controls relies on the strength of the regulatory systems of individual countries from around the world, and the cooperation of those like-minded countries working together to support the international export control system more broadly.

In recognition of the regulation imposed by members of the international export control system and taking into consideration Australia's national security, foreign relations and economic well-being, legislative exemptions have been created in the DTC Act for countries specified in the instrument. The intent of the legislative exemptions is to reduce Australian export control regulation in circumstances where the country's export control regime would reliably regulate the activity, removing the need for duplicate Australian regulation. It also intends to reduce Australian export control regulation in circumstances where the country is a like-minded partner and trusted to conduct the activity in accordance with the interests of Australia's national security, foreign relations and economic well-being.

For a foreign country to be specified in this instrument, either of the following must apply:

- a. the country is a members of four of the major international export control regimes (the Wassenaar Arrangement, the Australia Group, the Missile Technology Control Regime, and the Nuclear Suppliers Group); or
- b. the Minister is satisfied that their inclusion in the instrument is in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being.

The first criterion recognises the reliability of these foreign countries' export control regulation and aims to remove a double layer of regulation. Countries who are members of the four major international export control regimes are considered to have export control regimes that will protect and regulate Defence and Strategic Goods List (DSGL) goods and technology in a similar way to Australia's. This enables cooperation with like-minded countries in the international export control system and reduces the regulatory compliance burden on Australian stakeholders.

The second criterion recognises the strategic importance of international cooperation, trade and collaboration to Australia and aims to remove regulation from activities with close, trusted and reliable partners. Countries who meet this criterion are considered by the Minister to be a like-minded partner that will cooperate, trade and collaborate on DSGL goods and DSGL technology in a way consistent

with Australia's interests. This enables the Minister to include countries on the instrument that the Minister determines will provide a national security, foreign relation or economic benefit to Australia. For example, the Minister may be satisfied that a large portion of a country's citizens make up the Australian workforce for research and development of a particular technology, and this country's inclusion on the instrument and the resulting reduction in regulatory burden for Australian stakeholders would benefit Australia's economic well-being.

Human rights implications

This Disallowable Legislative Instrument engages the following right:

- the right to work in Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Right to work

Article 6(1) of the ICESCR recognises the right to work, including the right of individuals to take the opportunity to gain their living by work which they freely choose or accept, and requires appropriate steps to be taken to safeguard this right.

The measures of the instrument positively engage the right to work as set out in Article 6(1) of the ICESCR. This is because the instrument has the effect of specifying certain foreign countries for the purposes of various exceptions and exemptions to the offences in the DTC Act. One of these exemptions is set out in subsection 5C(1C) of the DTC Act, which provides an exemption from the offence in subsection 10A(1) DTC Act of supplying DSGL technology to a foreign person within Australia, provided that, among other things, the person to whom the supply is being made is from a foreign country specified in the instrument. The effect of this is that a permit issued under section 11 of the DTC Act would not be required to undertake these types of supplies of DSGL technology within Australia to people from these foreign countries, therefore removing a layer of regulatory burden. For these reasons, the instrument can be said to contribute to enhancing the right of work of those people from the foreign countries listed in the instrument.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.