

EXPLANATORY STATEMENT

Issued by authority of the Minister for Defence

Defence Trade Controls Act 2012

Defence Trade Controls (Australian Military Sales Program item) Determination 2024

The *Defence Trade Controls (Australian Military Sales Program item) Determination 2024* (the instrument) is made under section 5AA 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 purpose of this instrument is to specify certain *Defence and Strategic Goods List* (DSGL) goods and technology as Australian Military Sales Program items (AMSP items) under section 5AA of the DTC Act. AMSP items encompass Australia's sensitive sovereign DSGL goods and DSGL technologies. The effect of an item being an AMSP item is that those goods or technologies are subject to different regulatory requirements under the DTC Act.

Specifically, subsections 5C(1B) and (2B) of the DTC Act and subsection 13EA(5C) of the *Customs (Prohibited Exports) Regulations 1958* (Customs PE Regulations) provide exceptions from the permitting requirements of the DTC Act and Customs PE Regulations for exporting, supplying or providing DSGL services in relation to DSGL goods or DSGL technology. In order for these exceptions to be enlivened, the DSGL goods or DSGL technology must:

- be specified as an AMSP item in a legislative instrument made by the Minister (or for DSGL services, the services must be in relation to goods or technology that are specified as an AMSP item); and
- be exported or supplied in accordance with an agreement or arrangement between Australia and a foreign country (or for DSGL services relating to AMSP items, the services must be provided in accordance with such an agreement or arrangement).

The effect of this exception is to remove the existing regulatory requirement to have a permit for exports and supplies of certain DSGL goods and technology, as well as the provisions of DSGL services related to those goods and technologies in circumstances where the goods, technologies and related services are being exported or supplied under government agreements or arrangements. These agreements may include, for example, a memorandum of understanding or similar government-to-government arrangement between two countries or government departments thereof containing appropriate provisions and assurances, including those concerning the DSGL goods or DSGL technology's use and limits on access and re-supply.

The instrument specifies five platforms as an AMSP item. These are:

1. Active Electronically Scanned Array (AESA)
2. Ghost Shark Extra-Large Autonomous Undersea Vehicle

3. MQ-28A Ghost Bat Unmanned Aerial Vehicle (UAV)
4. E-7A Wedgetail Airborne Early Warning and Control (AEW&C)
5. Jindalee Operational Radar Network (JORN) high-frequency-over-the-horizon-radar

The instrument also specifies components, software and technology (within the meaning of the DSGL) specially designed, modified or required for these platforms as AMSP items.

Details of the instrument

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

Consultation

To support passage of the *Defence Trade Controls Amendment Act 2024* (DTCA Act), the Department of Defence (Defence) established two Working Groups in January 2024 – the Industry and Investment Working Group and the Higher Education and Research Sector Working Group. These two Working Groups sit alongside the existing Defence Export Controls Working Group. These Working Groups contributed to co-designing the instrument with Defence through a regular process of consultation.

Defence also consulted relevant external stakeholders in defence industry on the development of the instrument and related explanatory statement. Defence also consulted the drafting of the instrument internally across the department. The outcome of this consultation process was that Defence was able to ensure that the scope, structure and content of the instrument was sufficiently fit-for-purpose.

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 consulted in relation to this instrument (OIA24-07845).

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 section 5AA of the DTC Act.

Details of the *Defence Trade Controls (Australian Military Sales Program item) Determination 2024*

Section 1 Name

1. Section 1 provides that the name of the instrument is the *Defence Trade Controls (Australian Military Sales Program item) Determination 2024* (the instrument).

Section 2 Commencement

2. Section 2 provides that the instrument commences on 1 September 2024.

Section 3 Authority

3. Section 3 provides that the instrument is made under section 5AA of the *Defence Trade Controls Act 2012* (the Act).

Section 4 Definitions

4. Section 4 provides the meaning for key terms used throughout the instrument. These comprise:
 - a. **Act** means the *Defence Trade Controls Act 2012*.
 - b. **AEW&C** means Airborne Early Warning and Control. An AWE&C is an airborne radar early warning system designed to detect threats, control a battle space and gathers information from a wide variety of sources for distribution to friendly assets. This definition relates to the E-7A Wedgetail aircraft in item 3 of the table in paragraph 5(1)(a) of the instrument.
 - c. **aircraft** has the same meaning as in the *Defence and Strategic Goods List* (DSGL). In the DSGL, “aircraft” means a fixed wing, swivel wing, rotary wing (helicopter), tilt rotor or tilt-wing airborne vehicle. This is distinct from a ‘civil aircraft’.
 - d. **development** has the same meaning as in the DSGL. In the DSGL, “development” is related to all stages prior to serial production, such as: design, design research, design analyses, design concepts, assembly and testing of prototypes, pilot production schemes, design data, process of transforming design data into a product, configuration design, integration design, layouts.
 - e. **DSGL Reference Number** means the item number in Part 1—Munitions List of the *Defence and Strategic Goods List* that covers the DSGL goods or DSGL technology. Each AMSP item falls under a specific category within the DSGL Munitions List. The purpose of the DSGL Reference Number is to identify that category.
 - f. **production** has the same meaning as in the DSGL. In the DSGL, “production” means all production phases, such as: construction, production engineering, manufacture, integration, assembly (mounting), inspection, testing and quality assurance.

- g. **required** has the same meaning as in the DSGL. In the DSGL, “required” as applied to “technology”, refers to only that portion of “technology” which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions. Such “required” “technology” may be shared by different goods.
 - h. **software** has the same meaning as in the DSGL. In the DSGL, “software” means a collection of one or more “programs” or “microprograms” fixed in any tangible medium of expression.
 - i. **technology** has the same meaning as in the DSGL. In the DSGL, “technology” specifically in relation to Part 1—Munitions List of the DSGL is set out in ML22. of the DSGL.
 - j. **UAV** has the same meaning as in the DSGL. In the DSGL, UAV is an acronym for “Unmanned Aerial Vehicle” which is defined to mean any “aircraft” capable of initiating flight and sustaining controlled flight and navigation without any human presence on board.
5. A note to this section provides that a number of expressions used in this instrument are defined in the Act, including terms like ‘Australian Military Sales Program item’, ‘Defence and Strategic Goods List’, ‘DSGL goods’ and ‘DSGL technology’.

Section 5 Australian Military Sales Program item

6. Subsection 5(1) provides that each of the following DSGL goods and DSGL technology is specified as an Australian Military Sales Program item:
- a. **DSGL goods or DSGL technology** — Paragraph 5(1)(a) specifies as AMSP items DSGL goods or DSGL technology specified in an item of column 2 of the table that are covered by the DSGL Reference Number in column 3. There are five platforms listed in the table, namely:
 - i. Ghost Shark Extra-Large Autonomous Undersea Vehicle (item 1, DSGL Reference Number ML9.);
 - ii MQ-28A Ghost Bat UAV (item 2, DSGL Reference Number ML10.);
 - iii E-7A Wedgetail AEW&C (item 3, DSGL Reference Number ML10.);
 - iv Active Electronically Scanned Array (item 4, DSGL Reference Number ML5.);
 - v Jindalee Operational Radar Network high-frequency-over-the-horizon-radar (item 5, DSGL Reference Number ML5.).

The effect of these platforms being specified as AMSP items is that different regulatory settings apply to them under the DTC Act and *Customs (Prohibited Exports) Regulations 1958* (Customs PE Regulations). Specifically, subsections 5C(1B) and (2B) of the DTC Act and subsection 13EA(5C) of the Customs PE Regulations provide exceptions from the permitting requirements of the DTC Act and Customs PE Regulations for the export, supply or provision of DSGL services in relation to AMSP items covered by a government-to-government agreement or arrangement.

- b. **Components designed for DSGL goods specified in paragraph 5(1)(a)** — Paragraph 5(1)(b) specifies components specially designed for DSGL goods covered by an item of the table in paragraph 5(1)(a) as AMSP items. The purpose of specifying components specially designed for the five platforms specified in paragraph 5(1)(a) as AMSP items is to ensure that the relevant exemptions contained in the DTC Act and Customs PE Regulations extend to cover certain components of the platforms. This is intended to account for circumstances where the components of a platform, rather than the platform as a whole, may need to be exported or supplied under the terms of a government agreement or arrangement. This may be, for example, to facilitate the maintenance of certain parts of a platform, or to enable a collaborative research project conducted under the terms of a bilateral research and development arrangement.

Components should be considered to be ‘specially designed’ if, as a result of “development,” or modification the components have properties peculiarly responsible for achieving or exceeding the performance levels, characteristics, or functions described in the relevant category of the DSGL. However, components should not be considered as being ‘specially designed’ if the component would be covered by a category of the DSGL that does not contain ‘specially designed’ as a control parameter for the components or software. This consideration would be similarly applicable to determining whether software was ‘specially designed’ for the purposes of paragraph 5(1)(c) of the Determination.

- c. **Software designed for DSGL goods (including components) or DSGL technology specified in paragraph 5(1)(a)** — Paragraph 5(1)(c) specifies as AMSP items software covered by DSGL Reference Number ML21. that is specially designed or modified for the development, production, operation or maintenance of:
- i DSGL goods or DSGL technology set out in the table in paragraph 5(1)(a) of the instrument; and
 - ii components covered by paragraph 5(1)(b) of the instrument (i.e. components specially designed for the DSGL goods specified in paragraph 5(1)(a) of the instrument)
- d. The purpose of this is to ensure that the exemptions contained in the DTC Act and Customs PE Regulations for exporting, supplying and providing services for AMSP items cover software specially designed or modified for the platforms set out in paragraph 5(1)(a), as well as for components specially designed for those platforms. This is intended to ensure that any software specifically needed to operate and maintain the platforms listed in paragraph 5(1)(a), as well as their components, are subject to the same regulatory requirements as those platforms and components to which they relate. Examples include on-board software to manoeuvre an AMSP item, ground terminal or test equipment software used to operate or maintain an AMSP item and software relating to the production of a controlled component of an AMSP item.
- e. **Technology required for DSGL goods (including components) or DSGL technology specified in paragraph 5(1)(a)** — Paragraph 5(1)(d) specifies as AMSP items technology covered by DSGL Reference Number ML22. specially required for the development,

production, operation, installation, maintenance (checking), repair, overhaul or refurbishment of:

- i DSGL goods or DSGL technology set out in the table in paragraph 5(1)(a) of the instrument; and
 - ii components covered by paragraph 5(1)(b) of the instrument (i.e. components specially designed for the DSGL goods specified in paragraph 5(1)(a) of the instrument)
- f. The purpose of this is to ensure that the exemptions contained in the DTC Act and Customs PE Regulations for exporting, supplying and providing DSGL services for AMSP items cover technology required for the platforms set out in paragraph 5(1)(a), as well as for components specially designed for those platforms. This is intended to ensure that any technology specifically needed to develop, produce, operate and maintain and repair the platforms listed in paragraph 5(1)(a), as well as their components, are subject to the same regulatory requirements as those platforms and components to which they relate. Examples include specialised tools required for repairs of AMSP items, CAD files that articulate the design particulars of a component of an AMSP item and detailed maintenance or operator training instructions.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Defence Trade Controls (Australian Military Sales Program item) Determination 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 purpose of this instrument is to specify certain *Defence and Strategic Goods List* (DSGL) goods and technology as Australian Military Sales Program items (AMSP items) under section 5AA of the DTC Act. AMSP items encompass Australia's sensitive sovereign DSGL goods and DSGL technologies. The effect of an item being an AMSP item is that those goods or technologies are subject to different regulatory requirements under the DCT Act.

Specifically, subsections 5C(1B) and (2B) of the DTC Act and subsection 13EA(5C) of the Customs (Prohibited Exports) Regulations 1958 (Customs PE Regulations) provide exceptions from the permitting requirements of the DTC Act and Customs PE Regulations for exporting, supplying or providing DSGL services in relation to DSGL goods or DSGL technology. In order for these exceptions to be enlivened, the DSGL goods or DSGL technology must:

- be specified as an AMSP item in a legislative instrument made by the Minister (or for DSGL services, the services must be in relation to goods or technology that are specified as an AMSP item); and
- be exported or supplied in accordance with in accordance with an agreement or arrangement between Australia and a foreign country (or for DSGL services, the services must be provided in accordance with an agreement or arrangement).

The effect of this exception is to remove the existing regulatory requirement to have a permit for exports and supplies of certain DSGL goods and technology, as well as the provisions of DSGL services related to those goods and technologies in circumstances where the goods, technologies and related services are being exported or supplied under government agreements or arrangements. These agreements may include, for example, a memorandum of understanding or similar government-to-government arrangement between two countries or government departments thereof containing appropriate provisions and assurances, including those concerning the DSGL goods or DSGL technology's use and limits on access and re-supply.

The instrument specifies five platforms as AMSP items. These are:

- Active Electronically Scanned Array (AESA)
- Ghost Shark Extra-Large Autonomous Undersea Vehicle

- MQ-28A Ghost Bat Unmanned Aerial Vehicle (UAV)
- E-7A Wedgetail Airborne Early Warning and Control (AEW&C)
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The instrument also specifies components, software and technology (within the meaning of the DSGL) specially designed or required for these platforms as AMSP items.

Human rights implications

This disallowable legislative instrument does not engage any of the applicable rights or freedoms. This is because the primary effect of the instrument is to enliven certain exemptions from the permitting requirements for a limited number of DSGL goods and DSGL technologies declared to be AMSP items. The reason for these exemptions for AMSP items is to eliminate regulatory duplication for exports, supplies and the provision of DSGL services in relation to sovereign Australian military goods and technologies made in accordance with a government-to-government agreement or arrangement. In effect, these exemptions ensure that where an export, supply or provision of DSGL services in relation to these goods or technologies occurs in accordance with the terms of a government-to-government agreement or arrangement, there will no longer also be a requirement to seek a permit authorising the activity. All other procedures will continue to take place consistent with Australia's existing military sales framework.

Conclusion

The disallowable legislative instrument is compatible with human rights, as it does not raise any human rights issues.