

## **EXPLANATORY STATEMENT**

Issued by authority of the Minister for Defence

*Defence Act 1903*

### ***Defence (Non-foreign work restricted individual) Amendment Determination 2024***

The *Defence (Non-foreign work restricted individual) Amendment Determination 2024* (the instrument) is made under the *Defence Act 1903* (Defence Act). The instrument commences on the day after registration and is a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

#### ***Purpose***

The instrument amends the *Defence (Non-foreign work restricted individual) Determination 2024* to:

- amend section 5 of the instrument to clarify that an individual who falls within the scope of multiple job roles, positions or functions mentioned in a table in Schedule 1, and satisfies the ‘time elapsed’ condition for one of them, is not exempt from the foreign work authorisation requirements for all other roles, positions or functions they previously performed (item 1);
- amend the ‘time elapsed’ requirement in column 5 of some of the tables in Schedule 1 for certain job roles, positions and functions (items 2, 3, 4, 5 and 8); and
- insert separate, less onerous requirements in Part V of Schedule 1 for a person who previously performed the ‘Air Traffic Controller’ job role (items 6 and 7).

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

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

#### ***Consultation***

Consultation was undertaken with relevant stakeholders throughout the drafting and development of the *Defence (Non-foreign work restricted individual) Determination 2024*. This included consultation internally with representatives from the three Services (i.e. Navy, Army and Air Force) and Defence Groups, multiple Commonwealth agencies and departments including the Department of Foreign Affairs and Trade, the Department of Veterans’ Affairs, the Department of Industry, Science and Resources, the Department of the Prime Minister and Cabinet, the Attorney-General’s Department and national intelligence agencies; and external stakeholders including veteran groups, unions and industry representative groups. The purpose of this consultation was to ensure that those having relevant expertise, or those likely affected by the instrument, were consulted and that the conditions of the instrument only imposed the minimum necessary regulatory impost on former defence staff members.

Additionally, relevant job family sponsors within the Department of Defence were consulted on updating the conditions for certain ‘job families’ in Schedule 1 of this amending instrument. These job family sponsors were consulted on these amendments on behalf of people likely to be affected by this instrument. Due to the limited scope of the amendments made by the instrument, this level of targeted consultation was considered both appropriate and reasonably practicable, in accordance with the requirements of the Legislation Act.

The Department of Defence consulted the Office of Impact Analysis in relation to the impact analysis requirements for this instrument (OIA24-07767).

### *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 is made by the Honourable Richard Marles MP, Minister for Defence, in accordance with the requirements of section 115 of the Defence Act.

## Details of the *Defence (Non-foreign work restricted individual) Amendment Determination 2024*

### Section 1 Name

1. Section 1 provides that the name of the instrument is the *Defence (Non-foreign work restricted individual) Amendment Determination 2024* (the instrument).

### Section 2 Commencement

2. Section 2 provides that the instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

### Section 3 Authority

3. Section 3 provides that the instrument is made under subsection 115(1) of the *Defence Act 1903* (Defence Act). That provision provides that the Minister may, by legislative instrument, determine a class of individuals for the purposes of subsection 114(2). Subsection 114(2) provides that an individual is not a foreign work restricted individual if the individual is included in a class of individuals covered by an instrument in force under subsection 115(1).

### Section 4 Schedules

4. Section 4 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 Act has effect according to its terms. There is one instrument specified in a schedule to the instrument. That instrument is the *Defence (Non-foreign work restricted individual) Determination 2024* (the Determination), and the effect of the schedule is to amend that instrument according to the terms of the schedule.

## SCHEDULE 1—AMENDMENTS

### *Defence (Non-foreign work restricted individual) Determination 2024*

#### Item 1 Section 5

5. Item 1 of the instrument replaces the current section 5 of the Determination with a new section 5. The purpose of the amended section 5 is to clarify that an individual who falls within the scope of multiple roles, positions, functions, ranks or appointments in Schedule 1 to the Determination, and satisfies the ‘time elapsed’ condition for one of them, is not exempt from the foreign work authorisation requirements for all other roles, positions or functions they previously performed.

#### Item 2 Schedule 1, Part I, table item 41, column 5

6. Item 2 of the instrument amends the ‘time elapsed’ condition for the ‘Geospatial Function’ Defence APS Job Family function from ‘5 years or more’ to ‘10 years or more’. The purpose

of this amendment is to align the time requirement for this function with similar intelligence functions included in Schedule 1.

**Item 3            Schedule 1, Part I, table item 43, column 5**

7. Item 3 of the instrument amends the ‘time elapsed’ condition for the ‘Legal Officer Function’ from ‘1 year or more’ to ‘5 years or more’. The purpose of this amendment is to harmonise the time requirements for Legal Officer roles included in Schedule 1.

**Item 4            Schedule 1, Part III, table item 60, column 5**

8. Item 3 of the instrument amends the ‘time elapsed’ condition for the ‘Band’ role from ‘10 years or more’ to ‘1 year or more’. The purpose of this amendment is to correct a technical error.

**Item 5            Schedule 1, Part III, table item 62, column 5**

9. Item 4 of the instrument amends the ‘time elapsed’ condition for the ‘Legal Officer’ role from ‘10 years or more’ to ‘5 years or more’. The purpose of this amendment is to harmonise the time requirements for Legal Officer roles included in Schedule 1.

**Item 6            Schedule 1, Part V, table item 1, column 4**

10. Item 6 of the instrument omits the reference to ‘Air Traffic Controller’ in item 1 of the table in Part V of Schedule 1. The purpose of this omission is to enable separate, less burdensome requirements to be specified for Air Traffic Controllers as requested by the job family sponsor. These requirements are set out in item 7 below.

**Item 7            Schedule 1, Part V, table**

11. Item 7 of the instrument inserts new item 1A into the table in Part V of Schedule 1 to the instrument. The purpose of this item is to specify that an individual who previously worked in an ‘Air Traffic Controller’ job role with the Royal Australian Air Force will not be a foreign work restricted individual once 1 year or more has elapsed since the individual last worked in that job role. Once this period of time has elapsed, the individual will no longer need to apply for a foreign work authorisation under section 115C of the Defence Act to perform certain types of restricted work or training to foreign governments or militaries, unless the individual has performed another role for which the restriction period still applies.

**Item 8            Schedule 1, Part V, table item 48, column 5**

12. Item 8 of the instrument amends the ‘time elapsed’ condition for the ‘Legal Officer’ role from ‘1 years or more’ to ‘5 years or more’. The purpose of this amendment is to harmonise the time requirements for Legal Officer roles included in Schedule 1.

## Statement of Compatibility with Human Rights

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

### ***Defence (Non-foreign work restricted individual) Amendment 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 instrument amends the *Defence (Non-foreign work restricted individual) Determination 2024* (the Determination) to:

- amend section 5 of the instrument to clarify that an individual who falls within the scope of multiple job roles, positions or functions mentioned in a table in Schedule 1, and satisfies the ‘time elapsed’ condition for one of them, is not exempt from the foreign work authorisation requirements for all other roles, positions or functions they previously performed (item 1);
- amend the ‘time elapsed’ requirement in column 5 of some of the tables in Schedule 1 for certain job roles, positions and functions (items 2, 3, 4, 5 and 8); and
- insert separate, less onerous requirements in Part V of Schedule 1 for a person who previously performed the ‘Air Traffic Controller’ job role (items 6 and 7).

#### **Human rights implications**

This disallowable legislative instrument engages the following rights:

- 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 rights of an individual 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.

Similar to the provisions of the Determination, the measures in this amending instrument positively engage the right to work as set out in Article 6(1) of the ICESCR. This is because the Determination this instrument amends has the effect of specifying that certain foreign work restricted individuals will not be required to apply for a foreign work authorisation under section 115C of the *Defence Act 1903* after specified periods of time have elapsed. After this time has elapsed, these individuals will fall into a class of individuals that are not foreign work restricted individuals. Where a person is part of this class of individuals set out in the instrument, that person is excluded from the scope of the offence provision in subsection 115A(1) of the Act, since that offence only applies to foreign work restricted individuals. The effect of this is that such an individual is not required to apply for, hold or comply

with a foreign work authorisation enabling them to engage in the conduct of the offence under subsection 115A(1)—this being to perform work for, or on behalf of, a military organisation, or government body, of a relevant foreign country. Collectively, these factors contribute to enhancing the right of work for the individual.

### **Conclusion**

The disallowable legislative instrument is compatible with human rights because, to the extent it engages human rights, it positively engages those rights.