Customs (Prohibited Exports) Regulations (Amendment) 1993 No. 322

EXPLANATORY STATEMENT

STATUTORY RULES 1993 No. 322

Issued by the Authority of the Minister for Science and Small Business

Customs Act 1901

Customs (Prohibited Exports) Regulations (Amendment)

Section 112 of the *Customs Act 1901* (the Act) provides in part that:

"1) The Governor-General may, by regulation, prohibit the exportation of goods from Australia.

2) The power conferred by subsection (1) maybe exercised - ... (c) by prohibiting the exportation of goods unless specified conditions or restrictions are complied with.

2A) Without limiting the generality of paragraph (2)(c), the Regulations - ...(a) may provide that the exportation of the goods is prohibited unless a licence, permission, consent or approval to export the goods or a class of goods in which the goods are included has been granted as prescribed by the regulations; and..."

The Customs (Prohibited Exports) Regulations (the Pro-export Regulations) control the exportation of the goods specified in the various regulations or the Schedules to the Regulations, by prohibiting exportation absolutely, or making exportation subject to the permission of a Minister or a specified person.

The Regulations implement two reforms to the prohibited exports regime.

The first reform takes into account comments made by the Senate Standing Committee on Regulations and Ordinances that the delegation power provided by Statutory Rules 1992, No. 412 in respect of regulation 13E of the Pro-export Regulations is too broad and should be narrowed. Regulation 13E prohibits the exportation of certain goods unless the permission of the Minister for Defence or an authorised person is first obtained. Authorised person is then defined as a person authorised in writing by the Minister. The Senate Standing Committee on Regulations and Ordinances considered this power of authorisation to be too wide. and recommended did it should be limited to persons employed in the Department of Defence. Regulation 2 implements this recommendation.

The second reform concerns the introduction of controls on the exportation of human, animal and plant biological agents and toxins in accordance with agreed control lists of the Australia Group which is an informal group of 24 mainly Western industrialised countries chaired by Australia which seeks to harmonise member's non-proliferation controls relating to chemical and biological weapons.

In fulfilment of Australia's non-proliferation objectives, export controls have already been introduced pursuant to the Pro-export Regulations on goods and technologies which international proliferation control regimes, such as the Australia Group, the Nuclear Suppliers Group and the Missile Technology Control Regime, have agreed are of a high proliferation risk.

At its meetings in December 1992 and June 1993, the Australia Group adopted control lists for human, animal and plant biological agents and toxins. Regulations 3, 4 and 5, together with Schedule 16 implement these control fists.

The Regulations implement these reforms as follows:

Regulation 1 provides that the Pro-export Regulations are amended by the Regulations.

Regulation 2 Emits the delegation power of the Minister for Defence in respect of regulation 13E of the Pro-export Regulations by ensuring an authorised person for the purposes of the regulation is both authorised in writing by the Minister and is employed in the Department of Defence (subregulations 2.1 and 2.4 refer).

Subregulations 2.2, 2.3 and 2.5 all provide for minor amendments to update the drafting style of regulation 13E in order to increase its readability as well as ensuring that the references "Minister of State" are replaced by a reference to "Minister".

Regulation 3 inserts new regulations 13F and 13G into the Pro-export Regulations.

New regulation 13F gives effect to the control fists proposed by the Australia Group with regard to the exportation of human, animal and plant pathogens and toxins, provided those pathogens or toxins are not intended for use as vaccines.

The prohibition provides that the exportation of goods specified in Schedule 16 is prohibited (new subregulation 13F(2) refers) unless a permission to export the goods is granted by the Minister for Foreign Affairs or a person authorised by the Minister to grant such permissions (new subregulation 13F(4) refers).

- It should be noted that the definition of "authorised person" is not limited to persons employed in the Department of Foreign Affairs and Trade (new subregulation 13F(3) refers) because the Government is proposing that the body responsible for granting permits or licences for the exportation of chemical and biological weapons and their precursors is to be centralised and it may not be located in the e Department of Foreign Affairs and Trade.

When the location of the body is known, the Pro-export Regulations will be amended to reflect this administrative arrangement.

As with most permission regimes contained in the Pro-export Regulations the permission may specify conditions and restrictions to which the exportation is to be subject (new subregulation 13F(5) refers) and that if a holder of a permission contravenes such a condition or restriction then the Minister may revoke the permission (new subregulation 13F(6) refers).

New regulation 13G provides a mirror control for the exportation of human, animal and plant pathogens and toxins provided those pathogens or toxins are intended for use as vaccines, with the exception that an exporter may be granted a licence to export such goods rather than being granted a permission.

The reason for this distinction is that the Government recognises that there is a legitimate trade in the exportation of certain of the listed pathogens and toxins where those pathogens and toxins are used as vaccines. To ensure appropriate controls are maintained whilst also ensuring the legitimate trade is not impeded, the Government has decided to adopt a licence regime for the exportation of the goods intended for use as vaccines.

This will mean that an intending exporter will need only apply once for a licence to export and not for each exportation as would need to occur with a permission regime.

As with new regulation 13F, the prohibition effected by new regulation 13G provides that the exportation of goods specified in Schedule 16 is prohibited (new subregulation 13G(2) refers) unless a licence to export the goods is granted by the Minister for Foreign Affairs or a person authorised by the Minister to grant such permissions (new subregulation 13G(4) refers).

- As with new subregulation 13F(3) above the definition of "authorised person" is not limited to persons employed in the Department of Foreign Affairs and Trade (new subregulation 13G(3) refers) because the Government is proposing that the body responsible for granting permits or licence for the exportation of chemical and biological weapons and their precursors is to be centralised and it may not he located in the Department of Foreign Affairs and Trade.

When the location of the body is known, the Pro-export Regulations will be amended to reflect this administrative arrangement.

The licence may specify conditions and restrictions to which the exportation is to be subject (new subregulation 13G(5) refers) and that if a holder of a licence contravenes such a condition or restriction then the Minister may revoke the licence (new subregulation 13G(6) refers).

Regulation 4 amends regulation 13H of the Pro-export Regulations to provide that where an authorised person refuses to grant either a permission under new regulation 13F or a licence under new regulation 13G then the application for the permission or licence must be referred to the Minister for a final decision. This style of 'Ministerial' review is considered appropriate as the issue of granting permissions and licences for the goods in question is considered to be a sensitive issue of high Government policy and therefore it is appropriate that the Minister makes the final decision and that the Minister's decision is not to be subject to any external merits review. Regulation 4 also amends regulation 13H of the Pro-export Regulations to ensure that the references to "Minister of State" are replaced by a reference to "Minister".

Regulation 5 inserts new Schedule 16 which lists the human, animal and plant pathogens and toxins that are proposed to be prohibited under new regulations 13F and 13G.