

## **EXPLANATORY STATEMENT**

Issued by authority of the Minister for Home Affairs

*Customs Act 1901*

### ***Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement) Regulations 2023***

The *Customs Act 1901* (Customs Act) concerns customs-related functions and is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Subsection 270(1) of the Customs Act provides that the Governor-General may make regulations not inconsistent with the Customs Act prescribing all matters, which by the Customs Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Customs Act.

Section 50 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the importation of goods into Australia and that the power may be exercised by prohibiting the importation of goods absolutely or by prohibiting the importation of goods unless specified conditions or restrictions are complied with.

For section 50 of the Customs Act, the *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations) control the importation into Australia of certain goods by prohibiting importation absolutely, or by making importation subject to a permission or licence. The goods subject to import control includes firearms, weapons and their parts.

Section 112 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the exportation of goods from Australia and that the power may be exercised by prohibiting the exportation of goods absolutely or by prohibiting the exportation of goods unless specified conditions or restrictions are complied with.

For section 112 of the Customs Act, the *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) control the exportation out of into Australia of certain goods by prohibiting importation absolutely, or by making importation subject to a permission or licence. The goods subject to export controls includes goods listed in the *Defence and Strategic Goods List 2021*.

The *Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement) Regulations 2023* (Amendment Regulations) amend the Prohibited Imports Regulations and the Prohibited Exports Regulations to implement Australia's obligations under Article XIV of the Agreement.

On 6 January 2022, the Agreement was signed by the former Prime Minister of Australia and the Prime Minister of Japan, Mr Fumio Kishida. On 1 December 2022, the Joint Standing Committee on Treaties (JSCOT) recommended the Australian Government ratify this

Agreement. The Agreement provides a framework governing the legal status of the visiting force of one Party to the Agreement while present in the territory of the other for the purpose of a mutually determined cooperative activity.

In particular, Article XIV of the Agreement provides that the visiting force may transport, store and handle weapons, ammunition, explosives and dangerous goods, for the conduct of cooperative activities in the Receiving State. It is intended that the visiting force would also be able to export the same goods that was imported in accordance with the obligation under Article XIV of the Agreement.

The purpose of the Amendment Regulations is to exempt equipment, including firearm, weapons and their parts, imported and exported by the Self-Defense Forces of Japan and members of those Forces, for the purposes of conducting mutually determined cooperative activities, from import and export controls that would otherwise apply to those goods. By doing so, the amendments give effect to the obligations under Article XIV of the Agreement.

The Department of Defence led on negotiations with Japan in consultation with the Department of Home Affairs. The Department of Foreign Affairs and Trade facilitated discussions throughout the process of negotiation. The Agreement was subject to public consultation as part of the parliamentary review by the Joint Standing Committee on Treaties (JSCOT). The JSCOT sought submissions from the public after the Agreement was tabled in February 2022 and six submissions were received, which are accessible on the JSCOT website ([https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Treaties](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties)). Public consultation was not considered for the Amendment Regulations as it gives effect to obligations under the Agreement. JSCOT has recommended treaty binding action be taken.

The Amendment Regulations are a disallowable legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations commence on the later of the day after these Regulations are registered on the Federal Register of Legislation, and of the day on which the Agreement enters into force for Australia.

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

The Statement of Compatibility has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is set out at **Attachment B**.

Authority: Subsection 270(1) of the  
*Customs Act 1901*

**Details of the proposed *Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement) Regulations 2023***

**Section 1 – Name**

This section provides that the title of the Regulations is the *Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement) Regulations 2023* (Amendment Regulations).

**Section 2 – Commencement**

This section sets out, in a table, the date on which each of the provisions contained in the Amendment Regulations commence.

Table item 1 provides for the whole of this instrument to commence on the later of the day after the instrument is registered on the Federal Register of Legislation, and of the day the Agreement between Australia and Japan Concerning the Facilitation of Reciprocal Access and Cooperation Between the Australian Defence Force and the Self-Defense Forces of Japan (done at Canberra and Tokyo on 6 January 2022) enters into force for Australia.

Table item 1 also provides that the Minister must announce the day on which the Agreement enters into force for Australia by notifiable instrument. The announcement made in the notifiable instrument does not lead to the commencement of Schedule 1, it merely requires the Minister to announce the commencement of the Agreement for public awareness.

That instrument is not legislative in character, and is declared by the proposed Regulations to be a notifiable instrument for the purposes of the *Legislation Act 2003* (Legislation Act) to ensure it is still required to be made publicly available on the Register. Notifiable instruments are governed by the Legislation Act.

Under paragraph 1 of Article XXIX of the Agreement, the Agreement shall enter into force on the fifth day after the date on which the Parties exchange diplomatic notes informing each other that their respective internal procedures necessary to give effect to this Agreement have been completed.

In 2023, the text of Agreement can be viewed free of charge on the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

**Section 3 – Authority**

This section sets out the authority under which the Amendment Regulations are made, which is the *Customs Act 1901* (Customs Act).

**Section 4 – Schedules**

This section is the enabling provision for the Schedule to the Amendment Regulations and provides that, each instrument that is specified in a Schedule to the Amendment Regulations,

is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedules to this instrument has effect according to its terms.

The instruments that are amended are the *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) and the *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations).

## Schedule 1—Amendments

### **Part 1—Amendments**

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

##### **Item [1] – After subparagraph 13EA(1)(a)(ii)**

This item amends paragraph 13EA(1)(a) of the Prohibited Exports Regulations to add the Self-Defense Forces of Japan to the list of defence forces covered by that paragraph.

Regulation 13E of the Prohibited Exports Regulations prohibits the exportation from Australia of goods specified in the document known as the defence and strategic goods list made under paragraph 112(2A)(aa) of the Customs Act unless a permission or licence has been obtained from or granted by the Minister for Defence or an authorised person. The current defence and strategic goods list is the *Defence and Strategic Goods List 2021* and in 2023 could be viewed free of charge on the Federal Register of Legislation website (<http://www.legislation.gov.au>).

The prohibition on the exportation of relevant goods under regulation 13E of the Prohibited Imports Regulations do not apply to those goods owned and exported by visiting defence forces of countries listed in paragraph 13EA of the Prohibited Exports Regulations provided the conditions set out in under paragraphs 13EA(b) to (e) are satisfied.

Paragraph 13EA(1)(b) of the Prohibition Exports Regulations requires that the goods concerned have been imported into Australia by either the defence force that owns the goods, or a member of that defence force to whom the goods have been issued.

Paragraph 13EA(1)(c) of the Prohibition Exports Regulations requires that the goods concerned are exported from Australia by either the defence force that owns the goods, or a member of that defence force to whom the goods have been issued.

Paragraph 13EA(1)(d) of the Prohibition Exports Regulations requires that the goods concerned are not specified in item ML7, 1C350, 1C351, 1C352, 1C353, 1C354 or 1C450 of the defence and strategic goods list.

Paragraph 13EA(1)(e) of the Prohibition Exports Regulations requires, for goods containing DSSL technology, that the goods concerned contained the DSSL technology when they were imported. The term “DSSL technology” has the meaning given by the *Defence Trade Controls Act 2012* and means a thing that is technology, or software, as defined in the defence and strategic goods list, and a thing that is within the scope of that list.

On 6 January 2022, the Agreement was signed by the former Prime Minister of Australia and the Prime Minister of Japan, Mr Fumio Kishida. On 1 December 2022, the Joint Standing Committee on Treaties (JSCOT) recommended the Australian Government ratify this Agreement. The Agreement provides a framework governing the legal status of the visiting force of one Party to the Agreement while present in the territory of the other for the purpose of a mutually determined cooperative activity.

Paragraph 1 of Article XIV of the Agreement provides that the visiting force may transport, store and handle weapons, ammunition, explosives and dangerous goods, for the conduct of cooperative activities in the Receiving State. It is intended that the visiting force would also be able to export the same goods that was imported in accordance with the obligation under Article XIV of the Agreement.

The Amendment Regulations would give effect to the obligation under Article XIV of the Agreement and related intention, and would operate such that the exportation of goods listed in the *Defence and Strategic List 2021* and are goods owned by the defence force of Japan are not prohibited if the conditions under paragraphs 13EA(b) to (e) are satisfied.

### ***Customs (Prohibited Imports) Regulations 1956***

#### **Item [2] – After subparagraph 3A(a)(ii)**

This item amends paragraph 3A(a) of the Prohibited Imports Regulations to add the Self-Defense Forces Japan to the list of defence forces covered by that paragraph.

Regulation 4F of the Prohibited Imports Regulations prohibits the importation firearms, firearm accessories, firearm parts, firearm magazines, ammunition, components of ammunition and imitations unless the article is an article to which an item in Part 2 of Schedule 6 to those Regulations applies and the importation is in accordance with the requirements set out in column 3 of the item.

Regulation 4H of the Prohibited Imports Regulations prohibits the importation of weapons and weapon parts of the kind mentioned in a table item of Part 2 of Schedule 13 to those Regulations unless the importation is in accordance with the requirements set out in the item. The requirements include various tests with which the importation may comply.

For regulations 4F and 4H of the Prohibited Imports Regulations, regulations 3A of those Regulations set out the criteria with which prohibited firearms, weapons and their parts and accessories must comply in order for the importation of such goods to be not prohibited. Regulation 3A effectively exempts from the reach of the imports controls on those goods which would normally be subject to the controls, where such goods are imported by the defence forces of certain countries.

Regulation 3A of the Prohibited Imports Regulations exempts the goods covered by regulations 4F and 4H of the Prohibited Imports Regulations from the prohibition on importation into Australia. This only applies where the goods are owned by a defence force of a country listed in regulation 3A provided the goods are imported by that defence force, or, a member of that defence force to which the goods were issued, imported the goods into Australia. Regulation 3A effectively exempts weapons and firearms which would normally

be subject to prohibited imports controls where such goods are imported by the defence forces of certain overseas countries.

Per paragraph 1 of Article XIV of the Agreement, the visiting force may transport, store and handle weapons, ammunition, explosives and dangerous goods, for the conduct of cooperative activities in the Receiving State.

The Amendment Regulations give effect to the obligation under Article XIV of the Agreement, and operate such that the importation of goods covered by regulations 4F and 4H of the Prohibited Imports Regulations (owned and imported by the Self-Defense Force of Japan) are not prohibited, provided that the Self-Defense Force of Japan is the owner of the goods, or a member of that defence force to whom the goods have been issued.

## **Part 2—Application and transitional provisions**

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

#### **Item [3] – In the appropriate position in Part 5**

This item amends the Prohibited Exports Regulations to insert new section 23 (Transitional matters—amendments made by the Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement) Regulations 2023) in the appropriate position of Part 5 of those Regulations.

New section 23 has effect that the amendments of the Regulations made by item 1 of Part 1 of the Amendment Regulations apply in relation to goods exported from Australia on or after the commencement of that Part.

### ***Customs (Prohibited Imports) Regulations 1956***

#### **Item [4] – In the appropriate position before Schedule 1**

This item amends the Prohibited Imports Regulations to insert new section 16 (Transitional matters—amendments made by the *Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement) Regulations 2023*) in the appropriate position before Schedule 1 to those Regulations.

New section 16 has effect that the amendment of these Regulations made by item 2 of Part 1 of the Amendment Regulations apply in relation to goods imported into Australia on or after the commencement of that Part.

**Statement of Compatibility with Human Rights**

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

**Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement)  
Regulations 2023**

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 Disallowable Legislative Instrument**

The *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations) control the importation into Australia of certain goods by prohibiting importation absolutely, or by making importation subject to a permission or licence. The goods subject to import control include firearms, weapons and their parts.

The *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) control the exportation out of Australia of certain goods by prohibiting exportation absolutely, or by making exportation subject to a permission or licence. The goods subject to export controls includes goods listed in the *Defence and Strategic Goods List 2021*.

The *Customs Legislation Amendment (Japan—Australia Reciprocal Access Agreement) Regulations 2023* (Amendment Regulations) amends the Prohibited Imports Regulations and the Prohibited Exports Regulations to facilitate Australia to meet its obligation under Article XIV of the *Agreement between Australia and Japan concerning the facilitation of reciprocal access and cooperation between the Australian Defence Force and the Self-Defense Forces of Japan* (Agreement).

On 6 January 2022, the Agreement was signed by the former Prime Minister of Australia and the Prime Minister of Japan, Mr Fumio Kishida. On 1 December 2022, the Joint Standing Committee on Treaties (JSCOT) recommended the Australian Government ratify this Agreement. The Agreement provides a framework governing the legal status of the visiting force of one Party to the Agreement while present in the territory of the other for the purpose of a mutually determined cooperative activity.

In particular, Article XIV of the Agreement provides that the visiting force may transport, store and handle weapons, ammunition, explosives and dangerous goods, for the conduct of cooperative activities in the Receiving State. It is intended that the visiting force would also be able to export the same goods that were imported in accordance with the obligation under Article XIV of the Agreement.

The purpose of the Amendment Regulations is to exempt equipment, including firearms, weapons and their parts, imported and exported by the Self-Defense Forces of Japan and members of that Force, for the purposes of conducting mutually determined cooperative activities, from import and export controls that would otherwise apply to those goods. By

doing so, the amendments would give effect to the obligations under Article XIV of the Agreement.

### **Human rights implications**

The Amendment Regulations may engage the right to life in Article 6(1) of the *International Covenant on Civil and Political Rights* in relation to the duty on a country to take appropriate steps to protect the right to life of those within its jurisdiction.

The Prohibited Imports Regulations and Prohibited Exports Regulations lower the risk and potential harm to life posed by equipment such as firearms, weapons and their parts by limiting their availability in the Australian community. The Amendment Regulations will allow for the importation and exportation of defence equipment by the Self-Defense Forces of Japan including firearms, firearm accessories, firearm parts, firearm magazines, ammunition, components or ammunition and imitations, certain weapons and weapon parts and, as such, will operate as an exemption to the restrictions in the Prohibited Imports Regulations and Prohibited Exports Regulations.

However, the exemption is reasonable and proportionate as it will only apply to the conduct of cooperative defence activities under the Agreement and is necessary for the legitimate objective of facilitating strengthened cooperation between the Australian Defence Force and Self-Defense Forces of Japan, which has been agreed under binding treaty arrangements. The Amendment Regulations will extend pre-existing exemptions, which exempt a defined number of visiting defence forces from limited import and export prohibitions for the purpose of defence exercises, to the Self-Defense Forces of Japan.

### **Conclusion**

The Amendment Regulations are compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Hon Clare O'Neil MP**  
**Minister for Home Affairs**