

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Customs Act 1901

Customs (Prohibited Exports) Amendment (Defence Trade Controls) Regulations 2025

The *Customs Act 1901* (the 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 Act, provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters, which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the Act.

Section 112 of the 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. The *Customs (Prohibited Export) Regulations 1958* (Prohibited Exports Regulations) control the exportation of goods from Australia in accordance with section 112 of the Customs Act.

The *Customs (Prohibited Exports) Amendment (Defence Trade Controls) Regulations 2025* (Regulations) are made under subsections 112(1) and 270(1) of the Act. The Regulations commenced on the day after they were registered on the Federal Register of Legislation and are a legislative instrument for the purposes of the *Legislation Act 2003* (Legislation Act).

Purpose

The Regulations amend the exception set out at subregulation 13EA(5C) of the Prohibited Exports Regulations. This exception currently provides that the prohibition on exporting defence and strategic goods does not apply to the exportation of Defence and Strategic Goods List (DSGL) goods or goods containing DSGL technology that are an Australian Military Sales Program item (AMSP item), provided that the goods are exported in the course of a supply made in accordance with an agreement or arrangement between Australia and one or more foreign countries. DSGL goods, DSGL technology and AMSP items are all defined in the *Defence Trade Controls Act 2012* (DTC Act) and constitute items listed on the DSGL. The DSGL is a legislative instrument specifying goods, technology and software regulated under Australian export control laws. The DSGL is amended to reflect changes in the various multilateral non-proliferation and export control regimes of which Australia is a member.

The Regulations expand this exception to cover any DSGL goods and goods containing DSGL technology that are not excluded by a determination in force under subsection 5C(3) of the DTC Act. The effect of this is that these additional goods are not subject to the prohibition on exportation and do not require a permission for exportation from Australia in circumstances where these goods are

exported in the course of a supply made in accordance with an agreement or arrangement between Australia and one or more foreign countries.

Details of the instrument

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

Consultation

The amendments to the Prohibited Exports Regulations were triggered by a need for the exception in the regulations to align in scope with the same exception in subsection 5C(1B) of the DTC Act which relates to supply. This amendment would expand the exceptions available to the regulated community and remove the requirement to obtain a permit for not only the supply of, but also the export of, DSGL goods and DSGL technology made in accordance with an agreement or arrangement between Australia and one or more foreign countries. The Department of Defence undertook targeted public engagement on the amendments with members of the Defence Industry and Investment Working Group who were directly impacted by the misalignment between the Prohibited Exports Regulations and DTC Act, to ensure the changes are fit-for-purpose. The Working Group is made up of representatives from peak bodies, individuals and organisations who have engaged with Defence during the development of the legislation.

The exemption in subsection 5C(1B) of the DTC Act, that is now reflected in the Prohibited Exports Regulations, was consulted as part of *Defence Trade Controls Amendment Act 2024* (DTC Amendment Act). Defence undertook extensive public consultation on the amendments in the DTC Amendment Act from late 2022 through until passage of the Defence Trade Controls Amendment Bill 2023 on 27 March 2024. This consultation included in person and online briefings and meetings as well as provision of materials to government, industry, higher education and research sectors for consideration and comment. The purpose of consultation was to ensure legislative amendments to the DTC Act were fit-for-purpose and addressed the policy problem and objectives of the Australian Government.

A full Impact Analysis was prepared as part of the DTC Amendment Act, which considered the measures being progressed as part of the Regulations. The full Impact Analysis is available at <https://www.defence.gov.au/about/reviews-inquiries/defence-trade-controls-amendment-bill-2023>.

Parliamentary scrutiny

The Regulations are a legislative instrument for the purposes of the Legislation Act and are subject to disallowance under section 42 of the Legislation Act.

Division 1 of Part 3 of Chapter 3 of the Legislation Act operates to automatically repeal a legislative instrument that has the sole purpose of amending or repealing another instrument. That Division would apply to automatically repeal the Regulations. As the Regulations would be automatically repealed, the sunseting framework under Part 4 of the Legislation Act would not be engaged. Additionally, the provisions of the Regulations are exempt from sunseting, as they amend the Prohibited Exports Regulations, which are exempt from sunseting under section 12, item 21 of the *Legislation*

(Exemptions and Other Matters) Regulation 2015. The Prohibited Exports Regulations relate to intergovernmental schemes or have a primary purpose of giving effect to an international obligation of Australia. Subjecting the Prohibited Exports Regulations to sunset may conflict with Australia's international obligations and with ongoing intergovernmental arrangements.

The Regulations are 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 full Statement of Compatibility with Human Rights is included at **Attachment B**.

Details of the *Customs (Prohibited Exports) Amendment (Defence Trade Controls) Regulations 2025*

Section 1 Name

1. Section 1 provides that the name of the instrument is the *Customs (Prohibited Exports) Amendment (Defence Trade Controls) Regulations 2025* (the Regulations).

Section 2 Commencement

2. Section 2 provides that the provisions in the Regulations commenced in accordance with the commencement information set out in the table. Item 1 of that table provides that the whole of the Regulations commenced on the day after this instrument was registered on the Federal Register of Legislation.

Section 3 Authority

3. Section 3 provides that the Regulations are made under the *Customs Act 1901* (Customs Act).

Section 4 Schedules

4. Section 4 provides that the instruments specified in a Schedule to the Regulations are amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Customs Act has effect according to its terms.

SCHEDULE 1—AMENDMENTS

Customs (Prohibited Exports) Regulations 1958

Item 1 Subregulation 13EA(5C)

5. Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations) prohibits the export of goods specified in the Defence and Strategic Goods List (DSGL) and goods containing DSGL technology without permission. Subregulation 13EA(5C) currently provides an exception from this prohibition in relation to exports of specified sovereign military technologies defined in the *Defence Trade Controls Act 2012* (DTC Act) as ‘Australian Military Sales Program items’ (AMSP items). This exception applies provided the exportation occurs in the course of a supply made in accordance with an agreement or arrangement between Australia and one or more foreign countries.
6. Item 1 repeals the existing exception at subregulation 13EA(5C) and substitutes it with an amended exception titled ‘*Goods exported in the course of certain supplies*’. Paragraph 5C(a) of the amended exception requires that the goods are:
 - DSGL goods (within the meaning of the DTC Act); or

- goods containing DSGL technology.

7. Paragraph 5C(b) of the amended exception requires that the DSGL goods or DSGL technology is:
 - an AMSP item (within the meaning of section 5AA of the DTC Act (subparagraph (i)); or
 - any other DSGL goods or DSGL technology not excluded by a determination in force under subsection 5C(3) of the DTC Act (subparagraph (ii)).
8. Paragraph 5C(c) of the amended exception requires that the exportation of these goods occurs in the course of a supply (within the meaning of the DTC Act) made in accordance with an agreement or arrangement between Australia and one or more foreign countries, including an agreement, arrangement or understanding between a Minister and an official or authority of one or more foreign countries. An agreement means a treaty status agreement, binding under international law, as between countries; whereas, an arrangement is a written understanding between governments of less than treaty status, such as a memorandum of understanding or exchange of letters.
9. The purpose of this amendment is to expand the coverage of the current exception at subregulation 13EA(5C) to additionally cover any DSGL goods and goods containing DSGL technology, excluding those covered by a determination in force under subsection 5C(3) of the DTC Act. Previously, this exception only covered DSGL goods and goods containing DSGL technology that were an AMSP item. The effect of expanding the exception to cover these additional goods is that permission under regulation 13E of the Prohibited Exports Regulations is not required to authorise the export of these goods from Australia, provided that the exportation occurs in the course of a supply (within the meaning of the DTC Act) made in accordance with an agreement or arrangement between Australia and one or more foreign countries.

Statement of Compatibility with Human Rights

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

Customs (Prohibited Exports) Amendment (Defence Trade Controls) Regulations 2025

This 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 *Customs (Prohibited Exports) Amendment (Defence Trade Controls) Regulations 2025* amend the exception set out at subregulation 13EA(5C) of the *Customs (Prohibited Exports) Regulations 1958* (Prohibited Exports Regulations). This exception currently provides that the prohibition on exporting defence and strategic goods does not apply to the exportation of *Defence and Strategic Goods List* (DSGL) goods or goods containing DSGL technology that are an Australian Military Sales Program item, provided that the goods are exported in the course of a supply made in accordance with an agreement or arrangement between Australia and one or more foreign countries.

The amendment Regulations expand this exception to cover any DSGL goods and goods containing DSGL technology that are not excluded by a determination in force under subsection 5C(3) of the *Defence Trade Controls Act 2012*. The effect of this is that these additional goods are not subject to the prohibition on exportation and do not require a permission for exportation from Australia in circumstances where these goods are exported in the course of a supply made in accordance with an agreement or arrangement between Australia and one or more foreign countries.

Human rights implications

This instrument does not engage any of the applicable rights or freedoms.

Conclusion

This instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon Tony Burke MP
Minister for Home Affairs**