A guide to the Defence Trade Controls Amendment Bill 2015

Introduction

This guide has been produced to support public consultation on the Defence Trade Controls Amendment Bill 2015 (the Amendment Bill). It outlines obligations introduced under the Defence Trade Controls Act 2012 (the Act), with amendments as proposed through the Defence Trade Controls Amendment Bill 2015. Where this guide refers to ‘the Act’, it is referring to the Act as amended by the Amendment Bill.

The Act will introduce new regulation impacting on the defence industry, dual-use industries, and the science and research sector.

Acknowledging significant issues raised by stakeholders about the impact of the Act as originally written, Defence has been working with stakeholders through a Strengthened Export Controls Steering Group to balance the interests of legitimate transactions related to sensitive goods and the risks that these goods may be diverted for illicit uses, and to ensure that Australian industry and researchers are not disadvantaged in comparison with their international counterparts in likeminded countries, including the United States. This work is reflected in the Defence Trade Controls Amendment Bill 2015. Information about the Steering Group’s work is available at www.exportcontrols.govspace.gov.au.

This guide is not intended to provide detailed implementation guidance. Defence is working with stakeholders through the Strengthened Export Controls Steering Group to produce training, detailed guidance and tools. These will help industry, university and research organisations to understand their obligations and to implement appropriate internal compliance arrangements to meet these obligations before the offence provisions of the Act come into force. Information about implementation activities and schedule will be provided at www.defence.gov.au/deco.

Why did we need new legislation?

Australia’s export control system aims to stop goods and technology that can be used in chemical, biological and nuclear weapons, or military goods and technologies, from being transferred to individuals, states or groups of proliferation concern. As a member of international export control regimes, Australia is part of a global effort to regulate the export of items listed by these regimes, which have military or WMD applications. This legislation will form part of a wider export control framework. Information about Australia’s existing export controls is available at www.defence.gov.au/deco.

Australia already regulates the physical export of military and dual-use items listed by the international regimes, under Regulation 13E of the Customs (Prohibited Exports) Regulations 1958. However, there are significant gaps that will be closed by this amended legislation. For example:

- If an Australian organisation physically exports a controlled virus, a licence is required under Regulation 13E (in addition to any biosafety obligations). However, if they email instructions on how to produce or enhance that virus, no permit is required, and the Australian Government has no visibility or control over the electronic export of this information, including whether it is potentially destined for a biological weapons program. The export of
sensitive information in electronic or other non-physical form is referred to as intangible supply. As well as emails, other examples of intangible supply include supply via the internet and social media etc.

- If an Australian or a person in Australia were to arrange for weapons to be sent from one destination outside Australia to another destination outside Australia, no brokering permit is required, and the Australian Government has no visibility or control over this brokering activity, including whether it is potentially destined for uses that may abuse human rights.

In 2003 and 2006, member states of the Wassenaar Arrangement agreed to address these gaps. The Defence Trade Controls Act 2012 is the means through which Australia is doing so.

**The Defence Trade Control Act 2012 (the Act)**

The Act regulates three main activities:

- The intangible supply (transmission by non-physical means) of controlled technology from a person in Australia to a person outside Australia;
- Publishing controlled military technology; and
- Brokering controlled military goods and technology.

The following table summarises how the Act, incorporating changes proposed in the Amendment Bill, applies to different stakeholders, depending on whether their activities involve military or dual-use items listed in the DSGL. This is explained in detail in the rest of this document.

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<th>Controlled military technology</th>
<th>Controlled dual-use technology</th>
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<td>Permit required</td>
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<tr>
<td>Publishing</td>
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<tr>
<td>Brokering</td>
<td>Permit required</td>
<td>No permit required (unless for a WMD or military end-use)*</td>
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* In specific cases the Minister for Defence may issue a notice to prohibit a dual-use publication or brokering activity if they reasonably believe that it would prejudice Australia’s security or international obligations.

The Act separately implements the Defence Trade Cooperation Treaty between Australia and the United States of America. As the Amendment Bill has not changed the Treaty provisions, the Treaty is not discussed further in this document.

**Defence and Strategic Goods List (DSGL)**

The DSGL is a legislative instrument that is a compilation of military and dual-use goods and technology that Australia controls for export as a member of international counter-proliferation regimes. The DSGL is split into two parts:

- **Part 1** lists military items.
- **Part 2** lists dual-use items that may be used for commercial and research purposes, but may also be used in military systems or for weapons of mass destruction, such as nuclear, biological or chemical weapons. Part 2 of the DSGL is further split into the following categories:

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International export control regimes are conscious of the impact of export controls, and so the controls are designed only to capture what is considered necessary. For example, the DSGL lists computers that are specially designed to operate below -45°C or above 85°C. The controls only apply to the technology which is necessary for the computer to operate at these extreme temperatures. Technology that does not influence the computer’s ability to function at these extreme temperatures is not controlled.

If you are unable to determine whether particular goods or technology are controlled, you can ask the Defence Export Control Office (DECO). If the goods or technology are not listed in the DSGL, the Act will not apply. If the goods or technology are listed in the DSGL, a permit or approval may be required, depending on:

- The activity being undertaken (supply, brokering, publication); and
- Whether it is a military or a dual-use DSGL good or technology; and
- Whether an exemption applies (such as ‘basic scientific research’ or material that has been lawfully placed in the ‘public domain’)

Supply of controlled military or dual-use technology (Sections 10-14)

The provisions in the Act that relate to supply of DSGL technology apply equally to military and dual-use technology, but streamlined permits are being developed to expedite lower-risk activities, such as supplying items on the general dual-use list to member states of the four main international export control regimes.

| Supply of controlled military technology | Permit required |
| Supply of controlled dual-use technology | Permit required |

Definition of Supply

For the purposes of the Act, intangible supply is when a person in Australia provides DSGL technology in a non-physical form (e.g. electronically) to another person outside Australia. Intangible supply includes providing access to DSGL technology – for example providing a password to access electronic files.

Similar to existing Australian export controls on physical exports, the focus of intangible controls is when the supply occurs across Australia’s borders. Therefore, the controls do not apply to supply of DSGL technology wholly within Australia, or wholly outside Australia. It is important to note that supply of these technologies wholly outside Australia may be subject to other countries’ export control regulations.

Permits for the supply of DSGL technology (Section 11)

DECO can issue permits for the supply of DSGL technology. Only the Minister for Defence can deny a permit for the supply of DSGL technology.

When issuing a permit, DECO must be satisfied that the supply will not compromise Australia’s security or international obligations. As part of the implementation of the Act, DECO will extend maximum permit duration from the current two years to up to five years or the life of a project, with provisions tailored to the nature and scope of the activity.

Supply of DSGL technology must be made in line with any conditions set out in the permit. Records must be kept and retained for 5 years.

DECO already has a range of permits which can be tailored to meet exporters’ needs. These can cover multiple supplies to multiple destinations. As part of the implementation of the Act, DECO is developing additional streamlined permit arrangements to expedite lower-risk activities such as the export or supply of dual-use DSGL items to member states of the four main international export control regimes, or return of an item for repair or replacement. Further information about streamlined permit arrangements will be provided on the DECO website.
Notice to prohibit supply of DSGL technology (Section 14)

The Minister may issue a notice prohibiting the supply of DSGL technology in any circumstance where the Minister reasonably believes that the supply would compromise Australia’s security or international obligations. Such a notice comes into force when the person receives the notice and may remain in force for 12 months. It is an offence for any person to knowingly breach such a notice.

Offence for supply of DSGL technology without a permit (Section 10)

It is an offence to supply DSGL technology without a permit or outside the conditions of a permit.

Exceptions to the offence to supply DSGL technology (Section 10)

*Verbal Supply* - Under the proposed Amendment Bill, telephone conversations and other forms of verbal supply (such as discussions at video conferences) are not regulated, because this is impractical and imposes disproportionate burden on stakeholders. This exception does not extend to electronic recordings of verbal communication, or to providing access to controlled technology, for example by verbally providing a person with a password enabling them to access controlled technology via the internet. The exception also does not extend to verbal supply of DSGL Technology where it is for a military end-use or for use in a WMD program.

*Pre-publication supply* - Under the proposed Amendment Bill, publication of dual-use DSGL technology is not regulated. As the final publication would not be controlled under the Amendment Bill, it was considered inappropriate to regulate pre-publication activity, such as supplying a draft publication to a publisher or an international peer reviewer. Therefore, under the proposed Amendment Bill, pre-publication supply of dual-use DSGL technology is not regulated.

*Supply to government and security agency employees* - Any person in Australia may make an intangible supply of DSGL technology to someone outside Australia without approval if the person receiving the technology is a member of the Australian Defence Force (ADF), an Australian Public Service (APS) employee, a member of the Australian Federal Police (AFP) or police force of an Australian State or Territory, or a member of the Australian Intelligence Community (AIC) where its receipt is in the course of his or her official duties.

*Supply by government and security agency employees* - A member of the ADF, APS, AFP, member of a State or Territory police force, or a member of the AIC, may supply DGSL technology to anyone outside Australia without approval, provided that it is supplied in the course of his or her duties.

**Publication of controlled military or dual-use technology (Sections 14 A-C)**

Publication under the Act includes publication on the internet or otherwise to the public or to a section of the public. Once DSGL technology is in the public domain, it is no longer possible to control who has access to it. As publishing DSGL technology can put sensitive and potentially dangerous information into the wrong hands, there is limited prospect of regulating that information in Australia, or elsewhere in the world, once it is published.

The provisions in the Amendment Bill that relate to publication are not applied equally across the DSGL. The need for approval by the Minister for Defence or his delegate to publish applies only to
military DSGL technology. Approval is not required to publish dual-use DSGL technology. This amendment was proposed in recognition that the incidence of controlled technology in Australian research publications is low, and in recognition that other countries have exceptions in place for dual-use research publications.

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**Offence for publishing controlled military technology without approval (Section 14A)**

It is an offence to publish military DSGL technology without approval. This includes any publication of military DSGL technology made within or outside Australia. The publishing offence extends to Australian citizens, Australian bodies corporate and Australian residents anywhere in the world.

**Approval to publish controlled military technology (Section 14A)**

A person may apply to the Minister for Defence through DECO for approval to publish military DSGL technology, and the Minister may give his approval if the publication would not prejudice Australia’s security or international obligations.

**Publishing controlled dual-use technology (Section 14B and 14C)**

A person does not need approval to publish dual-use DSGL technology. However, the Minister for Defence may issue a notice prohibiting a person from publishing dual-use DSGL technology, if the publication would prejudice Australia’s security, or international obligations. As outlined in the Explanatory Memorandum, the Minister for Defence would consult with the Minister responsible for research when considering whether to prohibit a publication. It is an offence for any person to knowingly contravene such a notice.

**Difference between Supply and Publication**

To determine whether the activity is a supply or a publication under the Act, a person should ask “Will the DSGL technology be made available ‘in the public domain’?”

- If the DSGL technology is published by placing ‘in the public domain’, even if it can only be accessed by a payment, it will be a publication.
  - Therefore, if DSGL technology is being made available to the public, for example via a website or a journal, where there are no access restrictions (paying is not an access restriction) and the DSGL technology is being placed ‘in the public domain’ then the activity is considered to be publication.

- If access to the DSGL technology is controlled or restricted to particular users or groups, it has not been placed ‘in the public domain’ and it will be a supply.
  - If the website or database has restricted access, for example, a closed conference website where only members from a select organisation(s) or group can access the
conference papers, or a website or database where a login and password is required to access the DSGL technology, then the activity is considered to be supply.

A conference without published papers would not be publication as there is no resulting publication (e.g. on the web or in a journal) ‘in the public domain’ for people to access.

**Brokering of controlled military and dual-use items (Sections 15 – 25)**

Brokering of military DSGL items is regulated and requires a permit from DECO before that brokering can occur.

Brokering of dual-use DSGL items is not regulated unless the person believes or suspects the items may be for a military or WMD end-use. Additionally, the Minister for Defence or an authorised delegate has the power to require a particular dual-use broker to seek a permit.

The Minister for Defence may issue a notice to prohibit any brokering if they reasonably believe the brokered supply would prejudice Australia’s security or international obligations.

Defence and dual-use industries should note that activities such as intra-company transfers, freight forwarding, providing financial services, insurance, reinsurance, promotion or advertising are not captured under the Act’s brokering controls.

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**Definition of Brokering**

A **broker** is a person located in Australia (or an Australian citizen or permanent resident located outside Australia) who acts as an agent or intermediary to arrange the transfer of DSGL items between two or more persons located outside Australia, and who receives money or non-cash benefit for the brokering activity, or advances their political, religious or ideological cause through the brokering activity. A non-cash benefit means property or services in any form other than money.

The Act controls the activity of a broker arranging the supply of physical goods or intangible technologies from one person outside Australia to another person outside Australia.

**Permits for brokering controlled technology (Section 15)**

A permit is required to broker the supply of military DSGL goods and technology.

A person must first register as a broker before they can apply for a permit. Once registered, the broker can apply to DECO for permits to broker the supply of military DSGL goods or technology. A decision to refuse or revoke a permit can only be made by the Minister for Defence.

In issuing a permit for brokering, DECO must be satisfied that the arrangement would not compromise Australia’s security or international obligations.
Brokering must be done in accordance with any conditions set out in the permit. Records must be kept and retained for 5 years.

**Offence for brokering controlled military technology (Section 15)**

It is an offence to broker military DSGL items without a permit, or outside the conditions specified in the permit.

**Exceptions to the brokering offence for controlled military technology (Section 15)**

Under changes proposed in the Amendment Bill it is not an offence to broker the supply of military DSGL goods and technologies where the supply is from, or the broker is located in, a country that is a member of the four main export control regimes and is listed in a legislative instrument. This is because the brokering controls would duplicate the member states’ own domestic export controls.

It is not an offence to broker the supply of military DSGL technology if the broker is a member of the Australian Defence Force, an Australian Public Service employee, a member of the Australian Federal Police or police force of an Australian State or Territory, or a member of the Australian Intelligence Community and is making the arrangement in the course of his or her official duties. These exceptions also apply to brokering dual-use goods or technology for a military end use.

**Brokering dual-use technology (Sections 15A)**

Under changes proposed in the Amendment Bill, a permit is not required for a person who acts as a broker for the supply of dual-use DSGL goods or technology unless they know or suspect that the goods or technology will be used for a weapons of mass destruction program or a military end use. However, the Minister for Defence may:

- Issue a notice that requires a person to obtain a permit before brokering the supply of dual-use DSGL goods or technology.
- Issue a notice prohibiting a person from brokering either military or dual-use DSGL goods or technologies, if the Minister reasonably believes that the brokering activity would compromise Australia’s security or international obligations.

It is an offence for a person to knowingly contravene a notice.

**Legislative Review (Section 74B)**

The Amendment Bill proposes legislative review of the Act after two years of operation. This is in recognition that the Act’s provisions may require further adjustment based on experience gained through its practical operation.

Thereafter, the Act would continue to be reviewed in five-yearly cycles to ensure continuous improvement and so that Australia’s export controls can reflect international developments and best practice over time.