

2022-2023

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**DEFENCE TRADE CONTROLS AMENDMENT BILL 2023**

EXPLANATORY MEMORANDUM

EXPOSURE DRAFT

## GLOSSARY

The following abbreviations and acronyms are used throughout this Explanatory Memorandum.

<b>Abbreviation</b>	<b>Definition</b>
Criminal Code	<i>Criminal Code Act 1995</i>
The Guide to Framing Commonwealth Offences	the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers published by the Attorney-General's Department
DTC Act	<i>Defence Trade Controls Act 2012</i>
the Bill	Defence Trade Controls Amendment Bill 2023
DSGL	<i>Defence and Strategic Goods List 2021</i>
Minister	Minister for Defence

# DEFENCE TRADE CONTROLS AMENDMENT BILL 2023

## GENERAL OUTLINE

### Purpose of the Bill

1. The Defence Trade Controls Amendment Bill 2023 (the Bill) amends the *Defence Trade Controls Act 2012* (DTC Act) through the insertion of provisions which:
  - a. regulate the supply of certain *Defence and Strategic Goods List* (DSGL) military or dual-use technology to foreign persons within Australia;
  - b. regulate the supply of certain DSGL military or dual-use goods and technology from a place outside of Australia to another place outside of Australia, or to a foreign person;
  - c. regulate the provision of services in relation to certain DSGL military or dual-use goods and technology to foreign persons or entities; and
  - d. remove the requirement to obtain a permit for supplies of certain DSGL goods and technology and the provision of certain DSGL services to the United Kingdom or the United States.
2. Regulated military and dual-use goods and technology are specified in a legislative instrument, the DSGL, as defined in regulation 2 of the *Customs (Prohibited Exports) Regulations 1958* and made under paragraph 112(2A)(aa) of the *Customs Act 1901*. Goods and technology within the scope of the DSGL require a permit issued by Defence before the supply of those regulated goods or technology can occur.
3. The effect of the Bill is that:
  - a. A person would commit an offence if they transfer technology listed on the DSGL to a foreign person or entity within Australia without a permit.
  - b. A person would commit an offence if goods or technology on the DSGL that were previously exported or supplied out of Australia, are then supplied (or provided access to, in the case of technology) from a foreign country to:
    - i. a person outside Australia (whether an Australian person or a foreign person); or
    - ii. a foreign person (whether they are outside Australia or within Australia).
  - c. A person would commit an offence if they provide DSGL services in the form of assistance (including training) to foreign persons, whether in Australia or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing, or use of Part 1 DSGL goods or technology without a permit.
4. The Bill will provide for an exemption from the need for a person to obtain a permit for certain supplies of goods and technology on the DSGL, or for the provision of certain

services related to goods and technology on the DSGL, made to the United Kingdom or the United States.

### **Policy background**

5. Australia's export control system is a key element of Australia's protective security framework. It aims to stop military goods and technology—and goods and technology that can be used in chemical, biological and nuclear weapons—from being transferred to individuals, states or groups with interests prejudicial to Australia's security, defence or international relations.
6. The Defence Strategic Review made clear that Australia is facing the most difficult set of strategic circumstances since the Second World War. To keep pace with these emerging challenges, it is essential that Australia has a robust protective security environment. It is also critical that Australia works with like-minded partners, especially with the United Kingdom and the United States, to enhance defence trade, deepen military interoperability and enhance defence capabilities.
7. Realising the full potential of AUKUS will not be possible without major changes to the way that AUKUS partners cooperate on defence industrial and technology issues.
8. To improve the speed and scale of technology transfer between AUKUS partners, Australia, the United Kingdom and the United States are reviewing their export control regimes to support the creation of an export licence-free environment among and between AUKUS partners.
9. This export licence-free environment will revolutionise trade among and between AUKUS partners and encourage industry, higher education and research sectors in all three nations to innovate and cooperate with lower technology transfer barriers and costs of trade. This would provide Australia and our partners a genuine capability development edge.
10. The purpose of this Bill is to strengthen Australia's export control framework in order to establish an export control regime that is comparable to the one the United States administers. Further, if implemented, these legislative proposals will create a licence-free environment for the supply of DSGL goods and technology and the provision of DSGL services from Australia to the United Kingdom and the United States.

### **FINANCIAL IMPACT STATEMENT**

11. The financial implications associated with the implementation of this legislation will be included in the 2024-2025 Budget.

## NOTES ON CLAUSES

### Clause 1 Short title

1. This clause would provide for the short title of the Act to be enacted by the Bill to be the *Defence Trade Controls Amendment Act 2023*.

### Clause 2 Commencement

2. This clause would provide for the commencement of the provisions in the DTC Amendment Act in accordance with the table.
3. Item 1 of the table provides that sections 1 to 3, as well as anything else in the DTC Amendment Act not covered by an item in the table, commences on the day the Act receives the Royal Assent.
4. Item 2 of the table provides that the provisions contained in Schedule 1 of the DTC Amendment Act would commence on a single day to be fixed by Proclamation. However, if the provisions of the Act do not commence within the period of 6-months following the day this Act receives the Royal Assent, they commence on the day after the end of that period. In effect, this would mean that if the DTC Amendment Act were to receive the Royal Assent on, for example, 1 January 2024, then the provisions of the Act would commence on 2 July 2024 if no Proclamation commencing the Act was made.
5. Item 3 of the table provides that the provisions contained in Schedule 2 of the DTC Amendment Act would commence on the later of:
  - a. Immediately after the commencement of the provisions covered by item 2 of the table (see paragraph [4]); and
  - b. Immediately after the commencement of the *Defence Amendment (Safeguarding Australia's Military Secrets) Act 2023* (SAMS Act).
6. This would mean, for example, that if the provisions in item 1 commenced on 1 July 2024 and the SAMS Act commenced on 1 September 2024, then item 3 of the Act would also commence on 1 September 2024, noting that this is the later of the two dates. However, if the SAMS Act does not commence, item 3 will not commence. This is because the amendments being commenced by item 3 require the SAMS Act to be in force.

### Clause 3 Schedules

7. This clause would provide that the legislation that is specified in a Schedule to the Bill 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.
8. The only legislation that is specified in a Schedule to the Bill is the DTC Act, as this is the only primary legislation that the Bill would amend.

## SCHEDULE 1—AMENDMENTS

### *Defence Trade Controls Act 2012*

#### **Item 1           Section 3**

9.     Item 1 of the Bill amends the simplified outline of the DTC Act to expand the reference to DSGL technology to include reference to DSGL goods and services related to DSGL goods and technology.

#### **Item 2           Subsection 4(1)**

10.    Item 2 of the Bill inserts the following definitions into section 4 of the DTC Act.
11.    ***Australian person*** means the Commonwealth, a State or a Territory or an authority of the Commonwealth, a State or a Territory, an individual who is an Australian citizen; an individual who is a permanent resident of Australia, or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory. The purpose of this definition is to establish who is a foreign person, through the process of exclusion, by defining who is an Australian person. The definition is also used to establish the classes of persons and entities who fall within the application of subparagraph 10C(1)(d)(i) and are therefore subject to the offence provisions within subsection 10C(1). The intent of this definition and its use in subparagraph 10C(1)(d)(i) is to limit the offence provision to persons with sufficient connection to Australia.
12.    ***constitutional DSGL services*** references subsection 5B(2) (inserted by item 3 of the Bill) for its meaning.
13.    ***constitutional supply*** references subsection 5B(1) (inserted by item 3 of the Bill) for its meaning.
14.    ***covered security clearance*** means a security clearance that:
- a.    is given by the Australian Government Security Vetting Agency or by another Commonwealth, State or Territory agency that is authorised or approved by the Commonwealth to issue security clearances; and
  - b.    is of a kind prescribed by the regulations for the purposes of this definition.
15.    This definition is relevant to an exception that would be provided for the existing offence in section 10 of the DTC Act, as well as the new offences at sections 10A, 10B and 10C inserted by item 11 of the Bill.
16.    ***DSGL goods*** means goods within the scope of the *Defence and Strategic Goods List*.
17.    ***DSGL services*** means the giving of assistance (including training) in relation to the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing or use of:
- a.    DSGL goods or DSGL technology that are within the scope of Part 1 of the DSGL; or

- b. any other DSGL goods or DSGL technology that are prescribed by the regulations; or
  - c. technology relating to DSGL goods to which (a) or (b) applies.
18. This definition is relevant to item 11 of the Bill, which inserts new section 10C to the DTC Act. This new section would establish an offence where a person provides DSGL services to a foreign person in certain circumstances without a permit issued under section 11 of the DTC Act.
19. **foreign person** means a person other than an Australian person. This definition is relevant for certain elements of the new offence provisions inserted by item 11 of the Bill, which concern the supply of DSGL technology to a foreign person within Australia, certain supplies of DSGL goods or DSGL technology from outside Australia to another place outside of Australia or to a foreign person, and the provision of DSGL services.
20. **permanent resident of Australia** means a person who is a permanent resident within the meaning of the *Australian Citizenship Act 2007*.
21. **relevant DSGL service** references subsection 5C(3) (inserted by item 3 of the Bill) for its meaning. All DSGL services will be a ‘relevant DSGL service’ unless they meet the criteria set out in subsection 5C(2) of the Bill.
22. **relevant supply** references subsection 5C(1) (inserted by item 3 of the Bill) for its meaning. All supplies of DSGL goods, or DSGL technology, will be a ‘relevant supply’ unless they meet the criteria set out in subsection 5C(1) of the Bill.

**Item 3            After section 5A**

23. Item 3 of the Bill inserts new sections 5B and 5C into the DTC Act. Section 5B defines the meaning of ‘constitutional supply’, ‘constitutional DSGL service’ and other associated definitions. Section 5C defines the meaning of ‘relevant supply’ and ‘relevant DSGL service’ for the purposes of the Act.

**Section 5B    Constitutional supplies and constitutional DSGL services**

24. Section 5B defines the concept of ‘constitutional supply’ and ‘constitutional DSGL service’. The purposes of this provisions are to set out the Commonwealth constitutional heads of power that are being relied on for the offences contained in Part 2 of the Bill.

*Constitutional supply*

25. Subsection 5B(1) sets out the meaning of a **constitutional supply**. The purpose of this definition is to set out what types of supplies of DSGL goods or DSGL technology are regulated by the Bill. As such, the following types of supplies of DSGL goods and DSGL technology are regulated:
- a. a supply of DSGL goods or DSGL technology made by, or on behalf of, or to a ‘constitutional corporation’ or a body corporate incorporated or registered in a

Territory. The meaning of ‘constitutional corporation’ is provided in paragraph [31].

- b. a supply of DSGL goods or DSGL technology made by, or on behalf of, or to:
    - i. the government of a foreign country or of part of a foreign country
    - ii. an authority of the government of a foreign country
    - iii. an authority of the government of part of a foreign country
  - c. a supply of DSGL goods or DSGL technology made by or to an ‘alien’. A person is typically considered to be an ‘alien’ at law if they are not an Australian citizen.
  - d. a supply of DSGL goods or DSGL technology:
    - i. that wholly occurs outside Australia
    - ii. that is to or from a place outside Australia
    - iii. that is supplied or received outside of Australia—where the supply is the provision of access to DSGL technology
  - e. a supply of DSGL goods or DSGL technology that occurs in the course of constitutional trade or commerce. The meaning of ‘constitutional trade or commerce’ is provided in paragraph [34].
  - f. a supply of DSGL goods or DSGL technology that occurs wholly or partly within a Territory (of Australia)
  - g. a supply of DSGL goods or DSGL technology made by way of postal, telegraphic, telephonic or other like service. ‘Other like services’ typically include things such as the internet and telecommunications networks.
26. Subparagraph 5B(1)(d)(iii) also introduces the concept of a supply through the provision of access. This can occur in any situation where a person does not affect the actual transfer of DSGL technology to the recipient, but may instead enable, facilitate or otherwise give rise to the means by which another person can view, make use of or otherwise derive the benefit of the relevant DSGL technology.
27. The effect of a supply of DSGL goods or DSGL technology falling into one of the categories above and being a **constitutional supply** is that the supply will be subject to the relevant offence provisions in section 10, 10A and 10B. It also means that a supplier would be required to apply for a permit under section 11 to authorise the making of the **constitutional supply**, unless an exception applies.

#### *Constitutional DSGL service*

28. Subsection 5B(2) sets out the meaning of a **constitutional DSGL service**. The purpose of this definition is to set out what types of DSGL services are regulated by the Bill. As such, the following types of DSGL services are regulated:
- a. DSGL services provided by, or on behalf of, or to a constitutional corporation or a body corporate incorporated or registered in a Territory. The meaning of ‘constitutional corporation’ is provided in paragraph [31].



- b. DSGL services provided by, or on behalf of, or to:
    - i. the government of a foreign country or of part of a foreign country
    - ii. an authority of the government of a foreign country
    - iii. an authority of the government of part of a foreign country
  - c. DSGL services provided by or to an alien. A person is typically considered to be an ‘alien’ at law if they are not an Australian citizen.
  - d. DSGL services provided wholly or partly outside Australia.
  - e. DSGL services that occur in the course of constitutional trade or commerce. The meaning of ‘constitutional trade or commerce’ is provided in paragraph [34].
  - f. DSGL services that occurs wholly or partly within a Territory (of Australia).
  - g. DSGL services made by way of postal, telegraphic, telephonic or other like service. ‘Other like services’ typically include things such as the internet and telecommunications networks.
29. The effect of a DSGL service falling into one of the categories above and being ***constitutional DSGL services*** is that the DSGL services will be subject to the relevant offence provision in section 10C. It also means that a provider would be required to apply for a permit under section 11 to authorise the provision of those ***constitutional DSGL services***, unless an exception applies.

*Definitions*

30. Subsection 5B(3) provides definitions for several terms used in section 5B.
31. In this section, the term ***constitutional corporation*** is defined to mean a corporation to which paragraph 51(xx) of the Constitution applies. Paragraph 51(xx) of the Constitution applies to ‘foreign corporations’ and ‘trading or financial corporations formed within the limits of the Commonwealth’.
32. An entity may be a ‘foreign corporation’ depending on whether the corporation has been formed outside of Australia.
33. An entity may be a ‘trading or financial corporation’ depending on the activities undertaken by the entity. ‘Trading’ is the activity of providing, for reward, goods or services, and typically extends to business activities carried on with a view to earning revenue. ‘Financial’ activities are generally commercial dealings in finance, including transactions in which the subject is inherently financial in nature, such as banking, financial services, etc.
34. In this section, the term ***constitutional trade or commerce*** is defined to mean trade or commerce:
  - a. between Australia and places outside Australia; or
  - b. among the States; or
  - c. within a Territory, between a State and a Territory or between 2 Territories.

35. The effect of this definition is to set out when a supply of DSGL goods or DSGL technology, or the provision of DSGL services between two or more persons constitute conduct arising in the course of ‘constitutional trade or commerce’.
36. Subsection 5B(3) also provides that the meaning of *place* (for the purposes of this section) includes: a vehicle, vessel or aircraft; and an area of water; and a fixed or floating structure or installation of any kind. The use of the word ‘includes’ in the definition of this term is to make it clear that the term is not limited to its ordinary meaning of a fixed geographic place.

### **Section 5C Relevant supply and relevant DSGL services**

37. Section 5C defines the concept of a ‘relevant supply’ and a ‘relevant DSGL service’.

#### *Relevant supply*

38. By default, supplies of DSGL goods or DSGL technologies will be a *relevant supply*. For the existing offence in section 10 of the DTC Act, as well as the new offences inserted by item 11 (sections 10A and 10B), one of the elements of these offences will be that the supply is a ‘relevant supply’. The effect of this is that when a person makes a ‘relevant supply’ of DSGL goods or DSGL technologies (as defined by the Bill) they will fall within the scope of the offence provisions.
39. However, paragraph 5(1)(a) provides that a supply of DSGL goods or DSGL technology will not be a ‘relevant supply’, and therefore not subject to the requirement of a permit, where the supply is made to any of the following:
- a. an Australian person;
  - b. a citizen or permanent resident of the United Kingdom or United States of America;
  - c. a body corporate incorporated by or under a law of the United Kingdom or United States of America, or of a part of either of those countries;
  - d. the Government of the United Kingdom or United States of America, or the government of a part of either of those countries; or
  - e. an authority of the Government of the United Kingdom or United States of America, or the government of a part of either of those countries.
40. Paragraph 5C(1)(b) also requires that the supply must be to, or occur wholly at, a place in Australia, or the United Kingdom or the United States. An example of a supply of DSGL technology being made ‘to’ a place in one of the three countries could be a supply of DSGL controlled unmanned aerial vehicle technology made from company A incorporated and located in Australia to company B incorporated and located in the United States. An example of a DSGL supply that ‘occurs wholly’ at a place in Australia, the United Kingdom or the United States could be a conference that occurs in the United Kingdom, where an Australian citizen shows a colleague who is a citizen of the United Kingdom DSGL technology related to the development, production or use of a hydrophone.

41. Paragraph 5C(1)(c) requires that the supply cannot include certain DSGL goods or DSGL technology that have been excluded by a determination made by the Minister and in force under subsection 5C(3). This requirement has the effect of placing certain specified limitations on specified types of DSGL goods or DSGL technology that can otherwise be supplied to the United Kingdom or the United States without a permit.
42. Paragraph 5C(1)(d) provides that any other requirements prescribed by regulations in relation to that paragraph must also be satisfied. The effect of this provision is to provide the Government with the power to set out any ancillary requirements that a person must meet when making a supply of DSGL goods or DSGL technology in order for that supply to not be considered a 'relevant supply' the purposes of this section.

#### *Relevant DSGL services*

43. Similar to a *relevant supply* in paragraph [38], by default, the provision of DSGL services will be *relevant DSGL services*. For the new offence inserted by item 3 (section 10C), one of the elements of the offence will be that the DSGL services are 'relevant DSGL services'. The effect of this is that when a person provides a 'relevant DSGL service' (as defined by the Bill), they will fall within the scope of the offence provision.
44. However, paragraph 5(2)(a) provides that DSGL services will not be 'relevant DSGL services' where the DSGL services are provided to any of the following:
  - a. an Australian person
  - b. a citizen or permanent resident of the United Kingdom or United States of America;
  - c. a body corporate incorporated by or under a law of the United Kingdom or United States of America, or of a part of either of those countries;
  - d. the Government of the United Kingdom or United States of America, or the government of a part of either of those countries;
  - e. an authority of the Government of the United Kingdom or United States of America, or the government of a part of either of those countries.
45. Paragraph 5C(2)(b) also requires that the DSGL services are received at a place in Australia, or the United Kingdom or the United States. An example of a DSGL services being 'received' at a place in Australia, the United Kingdom or the United States could be where a person is engaged to assist a company located and incorporated in the United Kingdom with designing and developing an Aircraft Missile Protection System.
46. Paragraph 5C(2)(c) requires that the DSGL services must not be in relation to DSGL goods and DSGL technology that have been excluded by a determination made by the Minister and in force under subsection 5C(3). Additionally, the DSGL services must not be in relation to technology that relates to the DSGL goods that have been excluded by the determination. This requirement has the effect of placing certain specified limitations on the DSGL services that can be provided to the United Kingdom or the United States without a permit.

47. Paragraph 5C(2)(d) provides that any other requirements prescribed by regulations in relation to that paragraph must also be satisfied. The effect of this provision is to provide the Government with the power to set out any ancillary requirements that a person must meet when providing DSGL services in order for those services to not be considered ‘relevant DSGL services’ for the purposes of this section.
48. The cumulative effect of subsections 5(1) and 5(2) of the Bill is to establish a targeted exemption to the requirement to hold a permit for certain supplies of DSGL goods or DSGL technology, or for certain provisions of DSGL services, to the United Kingdom and the United States. The purpose of this exemption is to enhance and expedite collaboration between and among AUKUS partners to help maintain Australia’s capability edge, while strengthening the capability to protect sensitive technologies that underpin our security.

*Excluded DSGL goods or DSGL technology*

49. Subsection 5C(3) provides that the Minister may, by legislative instrument, determine DSGL goods or DSGL technology that are excluded for the purposes of paragraph 5C(1)(c) or 5C(2)(c). The effect of this provision is to enable the Minister to specify certain DSGL goods and DSGL technology that will continue to be a ‘relevant supply’ and ‘relevant DSGL services’ and subject to the permit requirements and conditions, irrespective of whether the supply is being made to the United Kingdom or the United States. This will ensure that certain technologies will not be transferred to the United Kingdom or the United States without appropriate controls and restrictions.

*Definition*

50. Subsection 5C(3) also provides the meaning of *place* for the purposes of this section. The details of this definition are previously set out in paragraph [36].

**Item 4            Section 9A**

51. Item 4 of the Bill amends the simplified outline for Part 2 of the DTC Act to omit current paragraph (a) and insert new paragraphs (a) and (aa). The purpose of this amendment is to reflect that the Bill will establish new offences in Part 2 that will not only apply to the supply of DSGL technology, but also to the supply of DSGL goods and the provision of services relating to certain DSGL goods or DSGL technology.

**Item 5            Section 9A (after the paragraph beginning “There are offences for persons”)**

52. Item 5 of the Bill amends the simplified outline for Part 2 of the DTC Act to clarify that the Act will contain offences for the following types of supplies:
- a. supplies of DSGL technology from a person in Australia to another person outside Australia;
  - b. supplies of DSGL technology from a person in Australia to a foreign person;
  - c. supplies of DSGL goods or DSGL technology, that were previously exported or supplied from Australia, from a foreign country to another country, or within the same foreign country.

**Item 6            Section 10 (at the end of the heading)**

53. Item 6 of the Bill adds the words ‘from in Australia to outside Australia’ to the section heading for section 10 of the DTC Act.
54. The purpose of this amendment is to clarify that this offence is concerned with the supply of, or provision of access to, DSGL technology from within Australia to outside Australia. This is in contrast to one of the new offences being inserted by item 11 of the Bill, which is concerned with the supply of DSGL technology within Australia to a foreign person.

**Item 7            After paragraph 10(1)(b)**

55. Item 7 of the Bill inserts new paragraphs (ba) and (bb) as elements of the offence contained in subsection 10(1) of the DTC Act.
56. Paragraph (ba) requires that the supply of DSGL technology must be a ‘constitutional supply’. Paragraph [25] provides further details when a supply of DSGL technology will be a ‘constitutional supply’. The effect of this provision is to ensure that there is a sufficient connection between the conduct regulated by the offence and the legislative head of power under which the offence is established.
57. Paragraph (bb) requires that the supply of DSGL technology must be a ‘relevant supply’. As outlined in paragraphs [38]-[42], by default, all supplies of DSGL goods and DSGL technology will be a ‘relevant supply’, unless they meet the conditions set out in subsection 5C(1). In effect, this provision ensures that the offence provision in section 10 applies to all supplies of DSGL technology unless they fall within the category of supplies intended to be excluded from the operation of the DTC Act.

**Item 8            Subsection 10(1A)**

58. Item 8 of the Bill repeals existing subsection (1A) of the DTC Act and inserts new subsections (1A) and (1B).

*Absolute liability*

59. Subsection 10(1A) provides that absolute liability applies to paragraph 10(1)(ba). This paragraph establishes the requirement for a supply of DSGL technology to be a ‘constitutional supply’ as an element of the offence in section 10 of the Bill. The meaning of ‘constitutional supply’ is set out in paragraphs [25]-[27].
60. Subsection 6.2(2) of the Criminal Code provides that if absolute liability applies to a particular physical element of an offence, there are no fault elements for that physical element of the offence. Additionally, the defence of mistake of fact is not available to a defendant in relation to that element of the offence.
61. The effect of this is that, for paragraph 10(1)(ba), the prosecution will only be required to show that the physical element was engaged in, or existed (i.e. that the supply was a ‘constitutional supply’). They would not have to prove a corresponding fault element (i.e. that the supplier knew or was reckless as to whether it was a ‘constitutional supply’). The application of absolute liability to this element of the offence is

reasonable and appropriate, as the element does not relate directly to the substance of the offence, but rather is a matter of fact.

*Application to supplies to employees etc.*

62. Subsection 10(1B) sets out the application of the offence provision in subsection 10(1) in circumstances where the supply of DSGL technology is made to employees or officers of a supplier. The purpose of this provision is to clarify that where such a supply occurs, the entity supplying the DSGL technology to its employees or officers will be considered the *supplier*, and the recipient employee or officer will be considered another person, for the purpose of the offence in subsection 10(1). This recognises that there will be instances where DSGL technology will be supplied by companies to their employees or officers in the course of business.

**Item 9 Before subsection 10(2)**

63. Item 9 of the Bill inserts the subheading ‘Exceptions’ within section 10 of the DTC Act. The purpose of this inclusion is to clarify for a reader that all the provisions following the heading are exceptions to the offence set out in subsection 10(1) of the DTC Act.

**Item 10 Subsections 10(3) and (3A)**

64. Item 10 of the Bill repeals subsections 10(3) and (3A) of the DTC Act and substitutes them with new subsections (3), (3A) and (3B). These subsections set out exceptions that will apply to the offence contained in subsection 10(1) of the DTC Act.

*Exception (supply to an employee or officer)*

65. Subsection (3) provides that the offence in subsection 10(1) does not apply if:
- a. the supplier is not an individual; and
  - b. the DSGL technology is supplied to an employee or officer of the supplier; and
  - c. the employee or officer is an Australian citizen or permanent resident of Australia; and
  - d. the supply occurs in the course of the person’s duties as such a person.
66. The purpose of this provision is to provide an exception to the offence in circumstances where a non-natural person (e.g. a body corporate) supplies DSGL technology to one of their employees or officers as part of their duties, provided that they are an Australian citizen or permanent resident. An example of circumstances that could engage this exception is where Company X located in Australia supplies files containing DSGL technology on guided missiles to an employee (Australian citizen) employed in country A outside Australia to review. This exception recognises that, in some instances, the risk posed by the supply of DSGL technology may be reasonably mitigated by other factors.
67. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. That subsection provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating

an offence bears an evidential burden in relation to that matter. An *evidential burden*, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

68. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists. It is appropriate for a defendant to bear the evidential burden when seeking to rely on this exception because information such as citizenship status and employee duties would typically be peculiarly within a defendant's knowledge.
69. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (supply to or by a class of person in the course of their duties)*

70. Subsection (3A) provides that the offence in subsection 10(1) does not apply if the DSGL technology is supplied by or to a person who is:
  - a. a member of the Australian Defence Force, an APS employee, an employee of ASIO, an employee of ASIS, an employee of ASD, a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; and
  - b. the supply occurs in the course of the person's duties as such a person; and
  - c. the supply is made solely or primarily for a purpose prescribed by regulations.
71. The purpose of this provision is to provide an exception to the offence in circumstances where a supply is made either by or to certain cohorts of people, such as employees of Australian intelligence agencies and members of an Australian police force, provided that the supply is made as part of the duties of their role. This recognises that certain professions and occupations may necessarily be required to deal with DSGL technology within the course of their duties.
72. The exception requires that the supply of DSGL technology must also be solely or primarily for a purpose prescribed by regulations. The reason for this is to specify the circumstances wherein a supply of DSGL technology to a person within one of the mentioned cohorts will fall within the scope of this exception, as well as when it will not.
73. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the application of subsection 13.3 of the Criminal Code, as well as the evidential burden.
74. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.

75. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (supply to a holder of a covered security clearance)*

76. Subsection (3B) provides that the offence in subsection 10(1) does not apply if the DSGL technology is supplied to a person who holds a ‘covered security clearance’ and the supply is made solely or primarily for a purpose prescribed by the regulations.
77. The purpose of provision is to provide an exception to the offence in circumstances where a supply is made to a person who has been assessed and found suitable by a Commonwealth, State or Territory security vetting agency to hold a security clearance prescribed to be a ‘covered security clearance’. Due to the various assessments a person must undertake before being deemed suitable to hold a security clearance, it is reasonable that a supply made to a clearance holder can be subject to an exception from the offence, given the overall lower risk profile of the supply.
78. The exception requires that the supply of DSGL technology to a clearance holder must also be solely or primarily for a purpose prescribed by regulations. The reason for this is to specify the circumstances wherein a supply of DSGL technology to a clearance holder will fall within the scope of this exception, as well as when it will not.
79. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the application of subsection 13.3 of the Criminal Code.
80. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

**Item 11      After section 10**

81. Item 11 of the Bill inserts new sections 10A, 10B and 10C into the DTC Act. These three sections establish offence, which regulate:
- a. the supply of DSGL technology within Australia to a foreign person;
  - b. the supply of DSGL goods or DSGL technology from a place outside Australia to a foreign country or foreign person;
  - c. the provision of DSGL services to a foreign person.
82. Each of these sections also set out several exceptions where these offences will not apply.

**Section 10A    Offence—supply of DSGL technology in Australia to foreign person**



83. Section 10A establishes an offence provision for the supply of DSGL technology in Australia to a foreign person. This section also sets out several exceptions to the offence—these being circumstances where the offence will not apply.

*Offence*

84. The offence in subsection 10A(1) is relevant to people who supply DSGL technology to a foreign person within Australia without a permit authorising the supply.
85. The offence is structured so that a person only commits the offence if every physical element and corresponding fault element of the offence, as set out in paragraphs (a)-(g), are proved. Section 13.1 of the Criminal Code establishes that the prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. Section 13.2 of the Criminal Code provides that the standard to which the prosecution must prove every element of the offence is beyond reasonable doubt.
86. Paragraph (a) of the offence requires that the **supplier** supplies DSGL technology to another person. The term ‘supply’ is defined in the DTC Act to include:
- a. supply by way of sale, exchange, gift, lease, hire or hire-purchase; and
  - b. in relation to DSGL technology—includes providing access to DSGL technology.
87. As the definition of supply uses the word ‘includes’, it is intended to enlarge the scope of the ordinary meaning of the word to additionally encompass the matters listed above. However, these matters are not intended to be exhaustive.
88. Paragraph (b) of the offence requires that the other person (to whom the **supplier** supplies DSGL technology) is a ‘foreign person’. A ‘foreign person’ is defined in subsection 4(1) (as inserted by item 2) to mean a person who is not an ‘Australian person’. An Australian person is defined to mean:
- a. the Commonwealth, a State or a Territory; or
  - b. an authority of the Commonwealth, a State or a Territory; or
  - c. an individual who is an Australian citizen; or
  - d. an individual who is a permanent resident of Australia; or
  - e. a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.
89. Therefore, a supply of DSGL technology that is not made to an ‘Australian person’ listed above would be a supply to a ‘foreign person’, due to the construction of that term.
90. Paragraph (c) of the offence requires that the supply (made by the **supplier** to a foreign person) is a constitutional supply. Paragraphs [25] provides the meaning of a ‘constitutional supply’. The effect of this provision is to ensure that there is a sufficient connection between the regulated conduct and the legislative head of power under which the offence is established.

91. Paragraph (d) of the offence requires that the supply (made by the *supplier* to a foreign person) is a relevant supply. As set out in paragraphs [38]-[42], all supplies of DSGL goods and DSGL technology are a relevant supply, unless they meet the conditions set out in subsection 5C(1) (inserted by item 3). Paragraph [48] provides further detail as to the purpose for excluding certain supplies from being ‘relevant supplies’ under the DTC Act. This is broadly to establish a national exemption to the requirements of the DTC Act for the United Kingdom and United States to optimise technology transfer among and between AUKUS partners.
92. Paragraph (e) of the offence requires that **any of** subparagraphs (i)-(iii) apply. Subparagraphs (i)-(iii) set out where the supply of DSGL technology from a *supplier* to a ‘foreign person’ must occur.
- a. Subparagraph (e)(i) is intended to cover supplies where the supplier and the foreign person are both located in Australia, but the supply of DSGL technology is not made in the same place (e.g. in the same building). An example of this could be a supplier of military hardware based in South Australia emailing a copy of DSGL controlled technical schematics to a foreign person located in New South Wales.
  - b. Subparagraph (e)(ii) is intended to cover supplies where the *supplier* and the foreign person are both located in Australia and are both in the same place when the supply is made. An example of this could be a *supplier* of military hardware attending a conference in Queensland and providing a foreign person at the conference with a copy of DSGL controlled technical schematics for a new weapons system.
  - c. Subparagraph (e)(iii) is intended to cover supplies where the *supplier* provides a foreign person with access to the DSGL technology. An example of this could be where the *supplier* and a foreign person are at a conference in Victoria and the *supplier* provides the foreign person with the relevant password to access a secure server on which is stored DSGL controlled software being developed for military use.
93. Paragraph (f) of the offence requires that **either of** subparagraphs (i) or (ii) must apply. These provisions provide the following:
- a. Subparagraph (f)(i) requires that the supplier does not hold a permit under section 11 of the DTC Act authorising the supply of DSGL technology to the foreign person.
  - b. Subparagraph (f)(ii) requires that the *supplier* does hold a permit issued under section 11 of the DTC Act, but the supply of DSGL technology to a foreign person breaches a condition of that permit.
94. Under section 11 of the DTC Act, the Minister may issue a permit to a person authorising certain supplies of DSGL technology. The purpose of paragraph (f)(i) and paragraph (f)(ii) therefore, is to ensure that a *supplier* who holds, and complies with the conditions of a permit issued under the DTC Act is not committing an offence if that permit authorises a supply of DSGL technology within Australia to a foreign person.

As mentioned in paragraph [85], this is because all elements of the offence must be satisfied for the offence to apply.

95. Paragraph (g) of the offence requires that there is no notice in force under subsection 14(1) of the DTC Act in relation to the *supplier* and the supply. The purpose of this element of the offence is to ensure that, where there is a prohibition notice in force that applies, the offence under section 14 of the DTC Act will apply rather than this offence. Subsection 14(1) of the DTC Act (as amended by item 18) provides that the Minister may give a person a notice prohibiting them from doing certain activities (including a supply of DSGL technology) altogether or until the notice is complied with, if the Minister reasonably believes that the activity would prejudice the security, defence or international relations of Australia. The offence of contravening a prohibition notice in force contained in subsection 14(10) of the DTC Act is imprisonment for 10 years or 2,500 penalty units, or both.
96. The following is an example of how this offence may operate in practice.

**Example—a supplier supplies DSGL technology to a foreign person in Australia**

Person A, who is an Australian citizen, has a permit to present information constituting DSGL technology at company presentation located in Australia. Person A applied for and obtained this permit because they were aware that there would be foreign attendees at the company presentation. A condition of the permit is that the DSGL technology must not be provided to a person from country B. One of the invited attendees (Person B) at the company presentation is a citizen of country B, and Person A presented the information even though they were aware that Person B was in attendance.

97. The penalty for committing the offence set out in subsection 10A(1) is imprisonment for 10 years or 2,500 penalty units, or both.
98. The penalty amount imposed for this offence is intended to provide an effective deterrent and reflects the seriousness of the conduct contemplated by the offence. The penalty imposed for this offence is consistent with the established principals of Commonwealth criminal law policy as set out in the Attorney-General's Department's '*A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*'.
99. The penalty amount also complements comparable offences in other Commonwealth legislation. For example, the offence of exporting of non-regulated goods in contravention of Minister's prohibition notice issued under subsection 112BA(12) of the *Customs Act 1901* carries a penalty of imprisonment for 10 years or 2,500 penalty units, or both.

*Absolute liability*

100. Subsection 10A(2) provides that absolute liability applies to paragraph 10A(1)(c). This paragraph establishes the requirement for a supply of DSGL technology to be a

‘constitutional supply’ as an element of the offence in section 10A of the Bill. The meaning of ‘constitutional supply’ is set out in paragraphs [25]-[27].

101. Subsection 6.2(2) of the Criminal Code provides that if absolute liability applies to a particular physical element of an offence, there are no fault elements for that physical element of the offence. Additionally, the defence of mistake of fact is not available to a defendant in relation to that element of the offence.
102. The effect of this for paragraph (1)(c) is that the prosecution will only be required to show that the physical element of the offence was engaged in, or existed (i.e. that the supply was a ‘constitutional supply’). They would not have to prove a corresponding fault element (i.e. that the supplier knew it was a ‘constitutional supply’).
103. The application of absolute liability to this element of the offence is reasonable and appropriate for this element of the offence. This is because it does not relate directly to the substance of the offence, but rather is a matter of fact.

*Application to supplies to employees etc.*

104. Subsection 10A(3) sets out the application of the offence provision in subsection 10A(1) in circumstances where the supply of DSGL technology is made to employees or officers of a supplier (where that supplier is not an individual).
105. The purpose of this provision is to clarify that where such a supply occurs, the entity supplying the DSGL technology to its employees or officers will be considered the supplier, and the recipient employee or officer will be considered another person, for the purpose of the offence in subsection 10A(1). This recognises that there will be instances where DSGL technology will be supplied by companies to their employees or officers in the course of business.

*Exception (supply made under the Defence Trade Cooperation Treaty)*

106. Subsection 10A(4) provides that the offence in subsection 10A(1) does not apply to certain supplies of DSGL technology that are made in compliance with the terms of the *Australia-United States Defence Trade Cooperation Treaty*. The purpose of this exception is to ensure that supplies of technology made under the Treaty are not affected by the requirements set out in Part 2 of the DTC Act (as amended by the Bill).
107. The exception also ensures that supplies of DSGL technology regulated by the terms of the Treaty are not inadvertently subject to a legal ‘double jeopardy’ by also being captured by the offence provision in subsection 10A(1).
108. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code.
109. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (supply to or by a class of person in the course of their duties)*

110. Subsection 10A(5) provides that the offence in subsection 10A(1) does not apply if the DSGL technology is supplied by or to a person who is:
- a. a member of the Australian Defence Force, an APS employee, an employee of ASIO, an employee of ASIS, an employee of ASD, a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; and
  - b. the supply occurs in the course of the person's duties as such a person; and
  - c. the supply is made solely or primarily for a purpose prescribed by regulations.
111. The operation and general purpose of this exception is previously detailed in paragraphs [70]-[72].
112. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3 of the Criminal Code. The effect of this note on the operation of this type of exception is also previously outlined in paragraph [74].
113. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (supply to a holder of a covered security clearance)*

114. Subsection 10A(6) provides that the offence in subsection 10A(1) does not apply if the DSGL technology is supplied to a person who holds a 'covered security clearance' and the supply is made solely or primarily for a purpose prescribed by the regulations.
115. The operation and general purpose of this exception is previously detailed in paragraphs [76]-[78].
116. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code. The effect of this note on the operation of this type of exception is previously outlined in paragraph [80].
117. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (supply to an employee or officer of a body corporate)*

118. Subsection 10A(7) provides that the offence in subsection 10A(1) does not apply in circumstances where the supply of DSGL technology is made to an employee or officer of a body corporate as part of their duties in their role. Additionally, the employee or officer to whom the supply is made must be a citizen or permanent resident of a foreign country that is specified in the *Defence Trade Control Act 2012 - Foreign Country List*—made under subsection 15(4A) of the DTC Act. This exception recognises that,

in some instances, the risk posed by the supply of DSGL technology may be acceptably mitigated.

119. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code.
120. The effect of this note on the operation of this exception is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists. It is appropriate for a defendant to bear the evidential burden when seeking to rely on this exception because information such as an employee's citizenship and employment duties would be peculiarly within their knowledge.
121. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (prescribed by the regulations)*

122. Subsection 10A(8) provides that the offence in subsection 10A(1) does not apply in circumstances prescribed by the regulations for the purposes of this subsection. The effect of this provision is to provide the Government with a level of flexibility to legislate additional exceptions to the offence provision in subsection 10A(1) by way of regulations made by the Governor-General in council. This ensures that, in the event that the legislation should for some reason, provide an exception to the offence, but does not, the Government has the option to address this without requiring an amendment to the primary legislation.
123. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code.
124. The effect of this note on the operation of this exception is that where a defendant seeks to rely on an exception prescribed by the regulations, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.
125. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Definition*

126. Subsection 10A(9) provides the meaning of *place* for the purposes of this section. The details of this definition are previously set out in paragraph [36].

**Section 10B Offence—certain supplies of DSGL goods or DSGL technology from outside Australia**

127. Section 10B establishes an offence provision for certain supplies of DSGL goods or DSGL technology from a place outside of Australia to:
- a. a foreign person; or
  - b. a foreign country

where those DSGL goods or DSGL technology were previously exported or supplied from within Australia to a place outside Australia. This offence is intended to regulate the secondary supply of goods and technology after they have been supplied to a recipient outside of Australia.

128. The section also sets out several exceptions to the offence—these being circumstances where the offence will not apply.

#### *Offence*

129. The offence in subsection 10B(1) is relevant to people who receive DSGL goods or DSGL technology from Australia while outside Australia, and subsequently supply or transfer those goods or technology to a foreign person or another foreign country without a section 11 permit authorising the activity.
130. The offence is structured so that a person only commits the offence if every applicable element of the offence, as set out in paragraphs (a)-(j), are proved. The various sub-elements of paragraphs (g) and (h) of the offence will be enlivened depending upon the relevant factual circumstances and accordingly, will only need to be proved when they are engaged. Section 13.1 of the Criminal Code establishes that the prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. Section 13.2 of the Criminal Code provides that the standard to which the prosecution must prove every element of the offence is beyond reasonable doubt.
131. Paragraph (a) of the offence requires that the *supplier* supplies DSGL goods or DSGL technology to another person. The term ‘supply’ is defined in the DTC Act; this is previously set out in paragraphs [86]-[87].
132. This supply of goods or technology is referred to as the *current supply*. The reason for using this term is because one of the elements of this offence is that the supplier obtained the goods or technology from Australia by way of an *earlier* export or supply. As such, the use of the term *current supply* is to clarify that this offence applies to the *current supply*, rather than the earlier export or supply.
133. Paragraph (b) of the offence requires that the *current supply* (made by the *supplier* to another person) is a ‘constitutional supply’. Paragraphs [25]-[27] details the meaning of a ‘constitutional supply’. The effect of this provision is to ensure that there is a sufficient connection between the conduct regulated by the offence and the legislative head of constitutional power under which the offence is established.
134. Paragraph (c) of the offence requires that the *current supply* (made by the *supplier* to another person) is a ‘relevant supply’. As set out in paragraphs [38]-[42], all supplies of DSGL goods and DSGL technology are a relevant supply, unless they meet the conditions set out in subsection 5C(1) (inserted by item 3). Paragraph [48] provides

further detail as to the purpose for excluding certain supplies from being relevant supplies under the DTC Act. This is to establish a national exemption to the requirements of the DTC Act for the United Kingdom and United States to optimise technology transfer among and between AUKUS partners.

135. Paragraph (d) of the offence requires that the **supplier** must have obtained the DSGL goods or DSGL technology (for the **current supply**) as a direct or indirect result of an **earlier** export or supply of the goods or technology from within Australia. For the purposes of this paragraph, **either** subparagraphs (i) or (ii) must apply:
- a. Subparagraph (i) requires that the **earlier** export or supply of goods or technology to the **supplier** is made from a place **in** Australia to a place **outside** Australia.
    - i. This earlier export or supply of goods or technology is **not** the same as the **current supply** that is regulated by this offence. However, depending on the export or supply coming out of Australia, this earlier export or supply could still be subject to other regulatory provisions (e.g. the offence in section 10 of the DTC Act, which regulates the supply of DSGL technology outside Australia).
  - b. Subparagraph (ii) requires that if the **earlier** supply was the provision of access to DSGL technology, then at the time the access was provided to the **supplier**, the person providing the access was **in** Australia and the **supplier** was outside Australia.
    - i. Similar to subparagraph (i), this earlier provision of access is **not** the same as the **current supply** that is regulated by this offence. However, this earlier provision of access could still be subject to other regulatory provisions (e.g. the offence in section 10 of the DTC Act).
136. For paragraph (d), it is intended that a **supplier** will receive an **earlier** export or supply as a ‘direct result’ where it is clear that the **supplier** was the intended recipient of the earlier export or supply. Conversely, it is intended that a **supplier** will receive an **earlier** export or supply as an indirect result where someone received DSGL goods or DSGL technology in circumstances where they were not the intended recipient of the initial supply or export out of Australia. For example, where a person obtains the technology by virtue of:
- a. an unauthorised subsequent supply by a party who originally received the DSGL goods or technology by reason of a validly issued permit; or
  - b. an unauthorised supply by a third party who unlawfully had the DSGL goods or technology in their possession; or
  - c. an erroneous supply by a party who mistakenly supplied DSGL goods or technology to a recipient, not intending to do so.
137. Paragraph (e) of the offence requires that **either** of the requirements in subparagraphs (i) or (ii) must have applied in relation to the **earlier** export or supply mentioned in paragraph (d) (irrespective of whether the requirements were complied with). The requirements of the subparagraphs are as follows:



- a. Subparagraph (i) provides that the **earlier** export required permission (however described) under regulations made under the *Customs Act 1901*.
- b. Subparagraph (ii) provides that the **earlier** supply required a permit under section 11 of the DTC Act.

The purpose of these requirements are to ensure that the **current supply** is required to be regulated as a re-export or resupply. If the **earlier** supply or export was not subject to permit requirements upon leaving Australia, this offence would not be relevant, as it regulates re-exports and re-transfers.

138. Paragraph (f) of the offence requires that **any of** subparagraphs (i), (ii), or (iii) must apply. Subparagraphs (i)-(iii) set out where the **current supply** of DSGL goods or DSGL technology from a **supplier** to another person must occur. All of these subparagraphs require that the supply of DSGL goods or DSGL technology originates from a place outside Australia.

- a. Subparagraph (f)(i) applies in circumstances where the **current supply** wholly occurs outside of Australia. ‘Wholly outside’ Australia would cover circumstances where the supplier and the other person to whom the supply is being made are both in the same geographical place that is outside Australia when the supply takes place.

**Example—the *current supply* wholly occurs outside Australia**

Company 1 is located in Foreign Country A and is in possession of DSGL technology (designs for a quantum navigation system) pursuant to a permit. An employee of that company provides a copy of that design without a permit to a Foreign Country A national who is visiting Company 1’s laboratory in Foreign Country A.

- b. Subparagraph (f)(ii) applies in circumstances where the **current supply** is from a place outside Australia to either of the following:
  - i. **To a place outside Australia:** subparagraph (g)(i) requires that the **current supply** is made from a place outside Australia to a place outside Australia. This would cover circumstances where the supplier and the other person to whom the **current supply** is being made are in two separate geographical places outside Australia when the supply takes place.

**Example—the *supplier* makes the *current supply* from a place outside Australia to a place outside Australia**

Company 1 is located in Foreign Country A and is in possession of DSGL technology (designs for a quantum navigation system) pursuant to a permit. An employee of Company 1 emails a copy of that design without a permit to a national of Foreign Country B who is located in Foreign Country B at the time of the supply.

- ii. **To a foreign person:** subparagraph (g)(ii) requires that the **current supply** is made from a place outside Australia to a foreign person. This would

cover circumstances where the *supplier* makes the *current supply* to a foreign person who is located either outside or within Australia. Paragraphs [88]-[89] provides detail as to the meaning of a foreign person.

**Example—the *supplier* makes the *current supply* from a place outside Australia to a foreign person**

Company 1 is located in Foreign Country A and is in possession of DSGL technology (designs for a quantum navigation system) pursuant to a permit. An employee of Company 1 emails a copy of that design without a permit to a national of Foreign Country B who is located in Australia.

- c. Subparagraph (f)(iii) applies in circumstances where the *current supply* is ‘access to DSGL technology’ and the *supplier* provides this access from a place outside Australia to either of the of the following:
- i. **To a person located outside Australia:** subparagraph (h)(i) requires that the other person to whom the access to DSGL technology is provided is located outside Australia at the time the access is provided by the *supplier*.

**Example—at the time of providing access to DSGL technology, the *supplier* and the other person are both outside Australia**

Person A is a national of Foreign Country A and works for Company 1, located in Foreign Country A. Person A has DSGL technology (designs for a missile guidance system) pursuant to a permit. Person A places the designs on a share point site and without a permit, emails Person B who is located in Foreign Country B, the login details to access the designs.

- ii. **To a foreign person:** subparagraph (h)(ii) requires that *supplier* provides access to DSGL technology to a foreign person. This would cover circumstances where the *supplier* provides access to DSGL technology to a foreign person who is located either outside or within Australia at the time the access to the technology is provided by the *supplier*. Paragraphs [88]-[89] provides detail as to the meaning of a foreign person.

**Example—at the time of providing access to DSGL technology, the *supplier* is outside Australia and the other person (to whom the access is provided) is a foreign person**

Person A is a national of Foreign County A and works for Company 1, located in Foreign Country A. Person A has DSGL technology (designs for a missile guidance system) pursuant to a permit. Person A places the designs on a share point site and without a permit, emails Person B, who is a national of Foreign Country B but is located in Australia, the login details to access the designs.

139. Paragraphs (g) and (h) are set out above, noting that they only apply if the relevant subparagraphs in paragraph (f) apply to the *current supply* by the supplier.

140. Paragraph (i) of the offence requires that **either of** subparagraphs (i) or (ii) must apply. These provisions require that:
- a. the supplier does not hold a permit under the DTC Act authorising the supply of DSGL technology to the foreign person; or
  - b. the supplier holds a permit issued under the DTC Act, but the supply of DSGL goods or DSGL technology to the foreign person contravenes a condition of that permit.
141. The requirement to hold and comply with the conditions of a permit is common to all three of the offences inserted by the Bill. Accordingly, the purpose and effect of this element of the offence is intended to be the same as what is already set out at paragraph [94].
142. Paragraph (j) of the offence requires that there is no notice in force under subsection 14(1) of the DTC Act in relation to the *supplier* and the supply of DSGL goods or DSGL technology. This offence element is also common to all three of the new offences inserted by the Bill. Accordingly, the purpose and effect of this provision is intended to be the same as what is already set out at paragraph [95].
143. The penalty for committing the offence set out in subsection 10B(1) is imprisonment for 10 years or 2,500 penalty units, or both.
144. The penalty amount imposed for this offence is intended to provide an effective deterrent and reflects the seriousness of the conduct contemplated by the offence. The penalty imposed for this offence is consistent with the established principals of Commonwealth criminal law policy as provided for in the Guide to Framing Commonwealth Offences. As set out in paragraph [99], this penalty amount also complements comparable offences in other Commonwealth legislation.

*Application to supplies to employees etc.*

145. Subsection 10B(2) sets out the application of the offence provision in subsection 10B(1) in circumstances where the supply of DSGL goods or DSGL technology is made to employees or officers of a supplier (where that supplier is not an individual).
146. The purpose of this provision is to clarify that where such a supply occurs, the entity supplying the DSGL goods or DSGL technology to its employees or officers will be considered the supplier, and the recipient employee or officer will be considered another person, for the purpose of the offence in subsection 10B(1). This recognises that there will be instances where DSGL goods or DSGL technology will be supplied by companies to their employees or officers in the course of business.

*Absolute and strict liability*

*Subsection 10B(3)—absolute liability*

147. Subsection 10B(3) provides that absolute liability applies to paragraph 10B(1)(b).

148. This paragraph establishes the requirement for a supply of DSGL goods or DSGL technology to be a ‘constitutional supply’ as an element of the offence in section 10B. The meaning of ‘constitutional supply’ is set out in paragraphs [25]-[27].
149. Subsection 6.2(2) of the Criminal Code provides that if absolute liability applies to a particular physical element of an offence, there are no fault elements to be proved for that physical element of the offence. Additionally, the defence of mistake of fact is not available to a defendant in relation to that element of the offence.
150. The effect of absolute liability for paragraph (1)(b) is that the prosecution will only be required to show that the physical element of the offence was engaged in, or existed (i.e. that the supply was a ‘constitutional supply’). They would not have to prove a corresponding fault element (i.e. that the supplier knew it was a ‘constitutional supply’).
151. The application of absolute liability to this element of the offence is reasonable and appropriate for this element of the offence. This is because it does not relate directly to the substance of the offence, but rather is a matter of fact.

*Subsection 10B(4)—strict liability*

152. Subsection 10B(4) provides that strict liability applies to paragraph 10B(1)(c).
153. This paragraph establishes the requirement for the **earlier** export or supply of DSGL goods or DSGL technology to have required permission under the *Customs Act 1901* or a permit under the DTC Act. This is to ensure that the **current supply** that is the subject of the offence is actually a re-export or re-supply of regulated goods or technology.
154. Subsection 6.1(1) of the Criminal Code provides that if strict liability applies to a particular physical element of an offence, there are no fault elements to be proved for that physical element of the offence. However, the defence of mistake of fact under section 9.2 of the Criminal Code is available to a defendant in relation to that element of the offence.
155. Similar to paragraph (1)(b), the effect of strict liability for paragraph (1)(c) is that the prosecution will only be required to show that the physical element of the offence was engaged in, or existed (i.e. that the **earlier** export or supply was subject to regulatory requirements). They would not have to prove a corresponding fault element (i.e. that the **current supplier** knew that the **earlier** export or supply was subject to regulatory requirements).
156. The application of strict liability to this element of the offence is reasonable and appropriate for this element of the offence. This is because the **earlier** export or supply being regulated is an essential precondition to the conduct that this offence addresses.

*Exception (supply made under the Defence Trade Cooperation Treaty)*

157. Subsection 10B(5) provides that the offence in subsection 10B(1) does not apply to the current supply where it is made in compliance with the terms of the *Defence Trade Cooperation Treaty*. The purpose of this exception is to ensure that supplies of goods

or technology made under the Treaty are not affected by the requirements set out in Part 2 of the DTC Act (as amended by the Bill).

158. The exception also ensures that supplies of goods or technology regulated by the terms of the Treaty are not inadvertently subject to a legal ‘double jeopardy’ by also being captured by the offence provision in subsection 10B(1).
159. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code.
160. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (supply to or by a class of person in the course of their duties)*

161. Subsection 10B(6) provides that the offence in subsection 10B(1) does not apply if the current supply of DSGL technology is supplied by or to a person who is:
  - a. a member of the Australian Defence Force, an APS employee, an employee of ASIO, an employee of ASIS, an employee of ASD, a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; and
  - b. the supply occurs in the course of the person’s duties as such a person; and
  - c. the supply is made solely or primarily for a purpose prescribed by regulations.
162. The operation and general purpose of this exception is previously detailed in paragraphs [70]-[72].
163. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code. The effect of this note on the operation of this type of exception is also previously outlined in paragraph [74].
164. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (supply to a holder of a covered security clearance)*

165. Subsection 10B(7) provides that the offence in subsection 10B(1) does not apply if the current supply of DSGL goods or DSGL technology are supplied to a person who holds a ‘covered security clearance’ and the supply is made solely or primarily for a purpose prescribed by the regulations.
166. The purpose of this exception is previously detailed in paragraphs [76]-[78].

167. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code. The effect of this note on the operation of this type of exception is also previously set out in paragraph [80].
168. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (prescribed by the regulations)*

169. Subsection 10B(8) provides that the offence in subsection 10B(1) does not apply in circumstances prescribed by the regulations for the purposes of this subsection. The purpose of this exception is previously detailed in paragraph [122].
170. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code.
171. The effect of this note on the operation of this exception is that where a defendant seeks to rely on an exception prescribed by the regulations, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.
172. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Geographical jurisdiction*

173. Subsection 10B(9) provides that section 15.4 of the Criminal Code (extended geographical jurisdiction—category D) applies to an offence against subsection 10B(1). Under section 15.4 of the Criminal Code, the effect of category D jurisdiction is that the offence applies:
- a. whether or not the conduct constituting the alleged offence occurs in Australia; and
  - b. whether or not a result of the conduct constituting the alleged offence occurs in Australia.
174. The effect of this subsection is that the offence of making certain supplies of DSGL goods or DSGL technology from outside Australia extends to conduct by a person located outside Australia.
175. Category D jurisdiction is appropriate to ensure that this offence appropriately applies to further supplies of DSGL goods and DSGL technology made to foreign countries and foreign people after the goods and technology have been supplied to a place outside of Australia. To regulate these supplies of DSGL goods and DSGL technology outside of Australia, it is necessary for section 15.4 of the Criminal Code to apply to the offence.

### *Definition*

176. Subsection 10B(10) provides the meaning of *place* for the purposes of this section. The details of this definition are previously set out in paragraph [36].

### **Section 10C Offence—provision of DSGL services**

177. Section 10C establishes an offence provision for the provision of certain DSGL services within or outside Australia to a foreign person. The section also sets out several exceptions to the offence—these being circumstances where the offence will not apply.

### *The offence*

178. The offence in subsection 10C(1) is relevant to people who provide ‘DSGL services’—called *providers*. The offence is structured so that a person only commits the offence if **every** element of the offence, as set out in paragraphs (a)-(g) of subsection (1), is proved. Section 13.1 of the Criminal Code establishes that the prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged. Section 13.2 of the Criminal Code provides that the standard to which the prosecution must prove every element of the offence is beyond reasonable doubt.
179. Paragraph (a) of the offence requires that the *provider* ‘provides’ DSGL services to another person. The terms *provider* and ‘provides’ are not defined in the Bill or the DTC Act. Therefore, these terms take on their ordinary meaning in the context of the legislation.
180. Paragraph (b) of the offence requires that the DSGL services (provided by the *provider* to a foreign person) are constitutional DSGL services. Paragraphs [28]-[29] details the meaning of a ‘constitutional DSGL services’. The effect of this provision is to ensure that there is a sufficient connection between the conduct regulated by the offence and the legislative head of power under which the offence is established.
181. Paragraph (c) of the offence requires that the DSGL services (provided by the *provider* to a foreign person) are ‘relevant DSGL services’. As set out in paragraphs [43]-[47], all provisions of DSGL services are a relevant DSGL service, unless they meet the conditions set out in subsection 5C(2) (inserted by item 3). Paragraph [48] provides further detail as to the purpose for excluding certain supplies from being relevant supplies under the DTC Act. This is to establish a national exemption to the requirements of the DTC Act for the United Kingdom and United States to optimise technology transfer among and between AUKUS partners
182. Paragraph (d) of the offence requires that **either** subparagraphs (i) or (ii) apply. These provisions require that:
- a. the *provider* is an ‘Australian person’; or
  - b. the DSGL services are provided at or from a place in Australia
183. The purpose of paragraph (d) is to create the requisite jurisdictional connection between Australia and the classes of people committing an offence under this section. Subparagraph (i) provides that the *provider* is an Australian person (as defined in paragraph [11]) while subparagraph (ii) provides that the DSGL services are provided

at or from a place in Australia. The effect of this is that, if the *provider* is an Australian person, they can commit this element of the offence both within and outside Australia. Alternatively, if the *provider* is not an Australian person, then the person can only commit this element of the offence if the DSGL services are provided at or from a place in Australia.

184. Paragraph (e) of the offence requires that the other person (to whom the *provider* provides DSGL services) is a foreign person. A ‘foreign person’ is defined in subsection 4(1) (as inserted by item 2) to mean a person who is not an ‘Australian person’. An Australian person is defined to mean:
- a. the Commonwealth, a State or a Territory; or
  - b. an authority of the Commonwealth, a State or a Territory; or
  - c. an individual who is an Australian citizen; or
  - d. an individual who is a permanent resident of Australia; or
  - e. a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.
185. Therefore, a provision of DSGL services that is not made to an ‘Australian person’ as listed above would be considered a provision of DSGL services to a ‘foreign person’, due to the construction of that term.
186. Paragraph (f) of the offence requires that **either of** subparagraphs (i) or (ii) apply. These provisions require that:
- a. the supplier does not hold a permit under the DTC Act authorising the supply of DSGL technology to the foreign person; or
  - b. the supplier holds a permit issued under the DTC Act, but the supply of DSGL technology to the foreign person contravenes a condition of that permit.
187. This element of the offence is common to all three of the new offences inserted by the Bill. Accordingly, the purpose of this provision is intended to be the same as what is set out at paragraph [94].
188. Paragraph (g) of the offence requires that there is no notice in force under subsection 14(1) of the DTC Act in relation to the *provider* and the provision of DSGL services. This offence element is also common to all three of the new offences inserted by the Bill. Accordingly, the purpose of this provision is intended to be the same as what is set out at paragraph [95].
189. The following is an example of how this offence may operate in practice.



**Example—a provider provides DSGL services to a foreign country**

A surveillance aircraft containing Part 1 DSGL technology crashes in international waters and is recovered by Company 1, which is an entity located and incorporated in Foreign Country A. Company 1 approaches an Australian person and requests their professional services to understand the operational capabilities of that aircraft. The Australian person provides DSGL services to Company 1 in relation to the surveillance aircraft without a permit to do so.

190. The penalty for committing the offence set out in subsection 10C(1) is imprisonment for 10 years or 2,500 penalty units, or both.
191. The penalty amount imposed for this offence is intended to provide an effective deterrent and reflects the seriousness of the conduct contemplated by the offence. The penalty imposed for this offence is consistent with the established principals of Commonwealth criminal law policy as set out in the Guide to Framing Commonwealth Offences. As mentioned in paragraph [99], the penalty amount is also complements comparable offences in other Commonwealth legislation.

*Absolute liability*

192. Subsection 10C(2) provides that absolute liability applies to paragraph 10C(1)(b). This paragraph establishes the requirement for a provision of DSGL services to be ‘constitutional DSGL services’ as an element of the offence in section 10C of the Bill. The meaning of ‘constitutional DSGL services’ is set out in paragraphs [25]-[27].
193. Subsection 6.2(2) of the Criminal Code provides that if absolute liability applies to a particular physical element of an offence, there are no fault elements for that physical element of the offence. Additionally, the defence of mistake of fact is not available to a defendant in relation to that element of the offence.
194. The effect of this is that, for paragraph (1)(b), the prosecution will only be required to show that the physical element was engaged in, or existed (i.e. that the provision of DSGL services were ‘constitutional DSGL services’). They would not have to prove a corresponding fault element (i.e. that the supplier knew they were providing ‘constitutional DSGL services’).
195. The application of absolute liability to this element of the offence is reasonable and appropriate, as the element does not relate directly to the substance of the offence, but rather is a matter of fact.

*Exception (provision of services made under the Defence Trade Cooperation Treaty)*

196. Subsection 10C(3) provides that the offence in subsection 10C(1) does not apply to the provision of DSGL services where the services are provided in compliance with the terms of the *Defence Trade Cooperation Treaty*. The purpose of this exception is to ensure that DSGL services provided under the Treaty are not affected by the requirements set out in Part 2 of the DTC Act (as amended by the Bill).

197. The exception also ensures that the provision of DSGL services regulated by the terms of the Treaty are not inadvertently subject to a legal ‘double jeopardy’ by also being captured by the offence provision in subsection 10C(1).
198. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code.
199. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (provision of services in support of a supply of DSGL goods or DSGL technology)*

200. Subsection 10C(4) provides that the offence in subsection 10C(1) does not apply in circumstances where:
- a. DSGL services are provided in support of a supply of DSGL goods, DSGL technology, or technology relating to DSGL goods; and
  - b. the DSGL services provided in relation to the above mentioned goods or technology solely consists of:
    - i. performing maintenance; or
    - ii. training to perform maintenance; and
  - c. the maintenance or training is limited to:
    - i. inspection, testing, calibration or repair (including overhaul, reconditioning, and one-to-one replacement of any defective items, parts or components); and
    - ii. the maintenance or training does not include any modification, enhancement, upgrade or other form of alteration or improvement that:
      - i. enhances the performance or capability of the goods or technology mentioned above; and
      - ii. is not merely an alteration or improvement to the reliability or maintenance of the goods or technology mentioned above.
201. The purpose of this exception is to ensure that a person who provides limited specified support by way of training or maintenance of a supply of DSGL goods or DSGL technology, or technology relating to DSGL goods, is not subject to the offence provision in section 10C. The exception is limited by paragraph (d) to ensure that maintenance or training does not extend to authorise a supply of DSGL goods or DSGL technology by allowing for modifications or alterations that would provide an enhancement or upgrade to existing goods or technology.
202. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Once a defendant has discharged the evidential burden of proof in relation to this

exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (provision of services made to or by a class of person in the course of their duties)*

203. Subsection 10C(5) provides that the offence in subsection 10C(1) does not apply if the DSGL services are provided by or to a person who is:
- a. a member of the Australian Defence Force, an APS employee, an employee of ASIO, an employee of ASIS, an employee of ASD, a member or special member of the Australian Federal Police or a member of the police force of a State or Territory; and
  - b. the provision of DSGL services occurs in the course of the person's duties as such a person; and
  - c. the provision of DSGL services is made solely or primarily for a purpose prescribed by regulations.
204. The operation and general purpose of this exception is previously detailed in paragraphs [70]-[72]. The difference with this exception is that it concerns the provision of DSGL services, rather than the supply of DSGL goods or DSGL technology.
205. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code. The effect of this note on the operation of this type of exception is also previously outlined in paragraph [74].
206. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (provision of services made to a holder of a covered security clearance)*

207. Subsection 10C(6) provides that the offence in subsection 10C(1) does not apply if the DSGL services are provided to a person who holds a 'covered security clearance' and the services are provided solely or primarily for a purpose prescribed by the regulations.
208. The operation and general purpose of this exception is previously detailed in paragraphs [76]-[78]. The difference with this exception is that it concerns the provision DSGL services, rather than the supply of DSGL goods or DSGL technology.
209. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code. The effect of this note on the operation of this type of exception is also previously outlined in paragraph [80].
210. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Exception (prescribed by the regulations)*

211. Subsection 10C(7) provides that the offence in subsection 10C(1) does not apply in circumstances prescribed by the regulations for the purposes of this subsection. The effect of this provision is set out in paragraph [122].
212. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the operation of subsection 13.3(3) of the Criminal Code.
213. The effect of this note on the operation of this exception is that where a defendant seeks to rely on an exception prescribed by the regulations, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists.
214. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

*Geographical jurisdiction*

215. Subsection 10C(8) provides that section 15.4 of the Criminal Code (extended geographical jurisdiction—category D) applies to an offence against subsection 10C(1). Paragraph [173] previously sets out the application of this jurisdiction of the Criminal Code.
216. The effect of this subsection is that the offence of providing DSGL services extends to conduct by a person located outside Australia, as well as conduct within Australia.
217. Category D jurisdiction is appropriate to ensure that this offence appropriately applies to the provision of DSGL services that are made outside Australia. To regulate the provision of DSGL services outside of Australia, it is necessary for section 15.4 of the Criminal Code to apply to the offence in subsection 10C(1).

*Definition*

218. Subsection 10C(9) provides the meaning of *place* for the purposes of this section. The details of this definition are previously set out in paragraph [36].

**Item 12      Section 11 (heading)**

219. Item 12 of the Bill repeals the existing section 11 heading and substitutes a new heading that reads ‘Permits for the purposes of sections 10 to 10C’. This amendment reflects the requirement that the offence provisions in sections 10A, 10B and 10C require a person to hold and comply with a permit in order to engage in the regulated conduct.

**Item 13      Subsections 11(1) to (6)**

220. Item 13 of the Bill repeals and replaces subsections 11(1) to (6) of the DTC Act. These new subsections set out the requirements for a person to apply for a permit authorising certain activities under the Act.

221. Subsection (1) provides that a person may apply to the Minister for a permit under section 11 of the DTC Act to do an activity that is:
- a. a constitutional supply of DSGL goods; or
  - b. a constitutional supply of DSGL technology; or
  - c. the provision of constitutional DSGL services
222. The purpose of this provision is to set out what sorts of supplies a person may apply to the Minister for a permit for. Paragraphs [25]-[29] set out when a supply or provision of services will relevantly be a constitutional supply or a provision of constitutional DSGL services.
223. A note to this subsection provides that section 66 of the DTC Act sets out the requirements for an application.
224. Subsection (2) sets out matters that an application for a permit made under subsection (1) may do. An application may do one or more of the following:
- a. cover 2 or more activities by the person;
  - b. cover one or more activities by the person for a period described in the application;
  - c. cover one or more activities by the person for a project described in the application.
225. As mentioned in subsection (1), an ‘activity’ is a constitutional supply of DSGL goods or DSGL technology or the provision of constitutional DSGL services, which are explained in paragraphs [25]-[29].
226. Subsection (2A) provides that an application made under subsection (1) may cover a ‘project’ described in the application. An application for a ‘project’ can cover all of the following:
- a. One or more activities by the applicant for the ‘project’
  - b. One or more activities by one or more other persons for that project (each of whom are a *project participant*)

*Minister’s decision*

227. Subsection (3) provides that the Minister must decide an application for a permit to cover certain activities made under subsection (1) in accordance with section 66 of the DTC Act. Subsection (3)(a) specifically provides that if the application concerns a project with *project participants*, the Minister must decide whether to give each participant a permit for each activity covered by the application.
228. Subsection (4) provides that the Minister may give the person a permit for a specified activity if the Minister is satisfied that the activity would not prejudice the security, defence or international relations of Australia. It is necessary for the Minister to be satisfied that the activity would not prejudice the security, defence or international

relations of Australia to ensure that a permit is not granted to an individual or entity that holds interests that are adverse to Australia's.

229. A note to this subsection provides that section 67 of the DTC Act deals with giving permits under the Act.
230. Subsection (5) provides that a permit given by the Minister may cover the following:
- a. 2 or more activities;
  - b. one or more specified activities for a period specified in, or worked out in accordance with the permit;
  - c. one or more specified activities for a specified project.
231. Subsection (6) provides that if the Minister refuses to give the person a permit for an activity covered by the application, the Minister must give the person a notice of the refusal and the reasons for the refusal. There are two notes to this subsection. Note 1 provides that section 67 of the DTC Act deals with giving notices. Note 2 provides that section 68 of the DTC Act deals with disclosing reasons for decisions.

**Item 14      After subsection 11(7)**

232. Item 14 of the Bill inserts new subsections (7A) and (7B) into section 11 of the DTC Act.
233. Subsection (7A) provides that the conditions on a permit issued under section 11 of the DTC Act may impose obligations on a permit holder that the Minister considers reasonably necessary for the purposes of:
- a. promoting compliance with this Act, whether by the person to whom the permit is given or any other person; or
  - b. managing risks associated with persons contravening this Act.
234. The purpose of this provision is to provide Defence with additional assurances, mitigate/manage risks, or increase visibility of an entity's export compliance.
235. Subsection (7B) provides that an obligation set out in a permit (as mentioned in subsection (7A) above) may apply before, at or after the time an activity covered by the permit is done. The effect of this provision is that certain obligations of a permit could require a permit holder to do certain things prior to, during and after they make a supply of DSGL goods or DSGL technology or provide a DSGL service.

**Item 15      At the end of section 11**

236. Item 15 of the Bill adds new subsections (11), (12) and (13) at the end of section 11 of the DTC Act.
237. Subsection (11) provides that a notice under subsection (10) of the DTC Act must set out the effect of subsections (12) and (13). Subsection (10) provides that the Minister must give a person notice of the revocation of a permit and the reasons of the revocation.

*Certain obligations continue after revocation*

238. Subsection (12) provides that if the Minister revokes a permit that specifies obligations that apply after an activity covered by the permit is done, then the permit continues in force for the purposes of:
- a. section 12 (changing permit conditions)
  - b. section 13 (breaching permit conditions)
  - c. any other provisions of the DTC Act to the extent they relate to section 12 or 13
239. The purpose of this section is to ensure that, even after a person is no longer permitted to do the activities authorised by the revoked permit, they are still required to comply with any permit obligations that apply after doing the activities. This could, for example, keeping relevant records of a supply of provision of service made under the permit.
240. Subsection (13) provides that the Minister must not impose new permit conditions in relation the permit under subsection 12(1) of the DTC Act after the permit has been revoked. Subsection 12(1) of the DTC Act enables the Minister to impose new permit conditions.

**Item 16          Subsection 13(3)**

241. Item 16 of the Bill repeals the current subsection 13(3) of the DTC Act and substitutes it with a new subsection. The new subsection 13(3) provides that section 15.4 of the Criminal Code (extended geographic jurisdiction—category D) applies to an offence against subsection (1) of this section).
242. The effect of extended geographic jurisdiction—category D is set out in paragraph [173]. The reason for applying this jurisdiction to the offence of breaching permit conditions set out in subsection 13(1) is because the Bill introduces new offence provisions where the regulated entity will be located outside of Australia. Where that entity is the holder of a permit under section 11 of the DTC Act, it is necessary that they are able to be subject to an offence if they breach a condition of their permit, even when they are located outside of Australia.

**Item 17          Section 14 (heading)**

243. Item 17 of the Bill repeals the current heading for section 14 of the DTC Act and substitutes it with the heading ‘Minister’s notice prohibiting activities’. This change is to reflect that the Minister will be able to issue prohibition notices in relation to other matters within the scope of the DTC Act, noting that it will not only regulate the supply of DSGL technology. Paragraph [221] previously details what an ‘activity’ is.

**Item 18          Subsection 14(1)**

244. Item 18 of the Bill repeals subsection 14(1) of the Bill and inserts new subsections (1), (1A), (1B) and (1C).
245. Subsection (1) provides that the Minister can issue a person a notice prohibiting them from doing an activity mentioned in subsection (1A) in any circumstances or in particular circumstances if they reasonably believe the activity would prejudice the

security, defence or international relations of Australia. Paragraph [248] sets out the activities covered by this subsection.

246. The purpose of this provision is to ensure that the Minister can prohibit people from engaging in certain supplies of DSGL goods or DSGL technology or the provision of DSGL services. This is necessary to ensure that these exports, supplies or services do not prejudice the security, defence or international relations of Australia.
247. A note to this section provides that section 67 of the DTC Act deals with giving notices under this Act.
248. Subsection (1A) sets out the activities that may be the subject of a prohibition notice issued under subsection (1). These are as follows:
- a. a constitutional supply of particular DSGL goods at or from a place outside Australia to a foreign person;
  - b. a constitutional supply to another person of particular DSGL technology;
  - c. the provision of particular constitutional DSGL services.
249. Subsection (1B) provides that the activities that can be subject to a prohibition notice do not include an activity that would wholly occur outside Australia, except in certain circumstances. These circumstances are:
- a. where the activity is done by or on behalf of an Australian person
  - b. where the activity relates to:
    - i. DSGL goods or DSGL technology; or
    - ii. technology relating to DSGL goods or DSGL technologywhere the DSGL goods or DSGL technology were obtained as a direct or indirect result of an export, supply or provision of access (to technology) from a place within Australia to a place outside Australia.
250. The purpose of this provision is to create the requisite jurisdictional connection between Australia and the classes of people committing an offence under this section.
251. Subsection (1C) sets out the application of subsection (1A) in circumstances where a supply is made to employees or officers of a supplier (where that supplier is not an individual). The purpose of this provision is to clarify that where such a supply occurs, the entity making a supply to its employees or officers will be considered the supplier for the purpose of the offence in subsection 14(10).

**Item 19      Paragraph 14(10)(a)**

252. Item 19 of the Bill repeals and substitutes the current paragraph 14(10)(a) of the DTC Act. This paragraph currently sets out the first element of the offence for supplying DSGL technology in contravention of a prohibition notice (or a condition of a notice) issued by the Minister under section 14 of the DTC Act.



253. The purpose of the new paragraph (a) is to expand the first element of the offence to encompass where a person supplies DSGL goods or provides DSGL services, in addition to where person supplies DSGL technology, which is already covered.

**Item 20            Subsection 14(11)**

254. Item 20 of the Bill repeals the current subsection 14(11) of the DTC Act and substitutes it with new subsections (11) and (12).
255. Subsection 14(11) provides that section 15.4 of the Criminal Code (extended geographic jurisdiction—category D) applies to an offence against subsection (1) of this section).
256. The effect of extended geographic jurisdiction—category D is set out in paragraph [173]. The reason for applying this jurisdiction to the offence of contravening a prohibition notice set out in subsection 14(10) is because the Bill introduces new offence provisions where the regulated entity will be located outside of Australia. Where that entity conducts an activity that breaches a prohibition notice (or a condition of one) issued by the Minister under section 14 of the DTC Act, it is necessary that they are subject to an offence, even when they are located outside of Australia.
257. Subsection 14(12) provides the meaning of *place* for the purposes of this section. The details of this definition are previously set out in paragraph [36].

**Item 21            After paragraph 15(1)(a)**

258. Item 21 of the Bill inserts paragraph (aa) into subsection 15(1) of the DTC Act. This amendment establishes a new element for the offence of brokering involving supplies of Part 1 goods and technology on the *Defence and Strategic Goods List*. The new paragraph (aa) requires that the supply is, or is to be, a ‘relevant supply’.
259. As set out in paragraphs [38]-[42], all supplies of DSGL goods and DSGL technology are a relevant supply, unless they meet the conditions set out in subsection 5C(1) (inserted by item 3). Paragraph [48] provides further detail as to the purpose for excluding certain supplies from being relevant supplies under the DTC Act. This is to establish a national exemption to the requirements of the DTC Act for the United Kingdom and United States to optimise technology transfer among and between AUKUS partners. This amendment would extend the ‘relevant supply’ exemption to arranging of supplies for the purpose of this subsection.

**Item 22            After paragraph 15(1A)(b)**

260. Item 22 of the Bill inserts paragraph (ba) into subsection 15(1A) of the DTC Act. This amendment establishes a new element for the offence of brokering involving certain supplies of Part 2 goods and technology on the *Defence and Strategic Goods List*. The new paragraph (aa) requires that the supply is, or is to be, a ‘relevant supply’.
261. As set out in paragraphs [43]-[47], all supplies of DSGL goods and DSGL technology are a relevant supply, unless they meet the conditions set out in subsection 5C(1) (inserted by item 3). Paragraph [48] provides further detail as to the purpose for excluding certain supplies from being relevant supplies under the DTC Act. This

amendment would extend the ‘relevant supply’ exemption to arranging of supplies for the purpose of this subsection.

**Item 23            Section 25A (note)**

262. Item 23 of the Bill repeals the current note at the end of section 25A of the DTC Act and substitutes it with a new note. This note provides general clarification as to how a delegate may deal with a matter if they are satisfied that it would prejudice the security, defence or international relations of Australia.

**Item 24            Subsection 58(1)**

263. Item 24 of the Bill amends subsection 58(1) to reflect that a permit holder under Part 2 must keep records of ‘activities’ that they are authorised to do under a permit given under section 11.

264. This is because the amended scope of the DTC Act will regulate services as well as supplies. For ease of reference, when referring collectively to all these different types of regulated conduct, the term ‘activity’ is used. Paragraph [221] provides further details as to what constitutes an ‘activity’.

**Item 25            Paragraph 63(1)(a)**

265. Item 25 of the Bill amends paragraph 63(1)(a) to omit the reference to a ‘supply’ and replace it with ‘an activity’. As set out above, this is because the amended scope of the DTC Act will regulate services as well as supplies. Paragraph [221] provides further details as to what constitutes an ‘activity’.

**Item 26            Subsection 73(2)**

266. Item 26 of the Bill omits references to subsection 11(8) and section 14 in subsection 73(2) of the DTC Act and replaces them with references to ‘section 11, 12 or 14’.

267. Subsection 73(2) of the DTC Act limits the powers or functions that the Minister may delegate under subsection 73(1) of the Act. The purpose of the amendment to this provision is to specify that the Minister cannot delegate powers or functions under this section in relation to:

- a. issuing permits
- b. changing permit conditions
- c. Ministerial prohibition notices

268. Due to potential sensitivities related to issuing permits and changing permit conditions, the Bill provides for these powers and functions to be delegated separately (see item 27 and 28).

**Item 27            After subsection 73(2)**

269. Item 27 of the Bill inserts new subsection subsections (2A) and (2B) in section 73 of the DTC Act.

270. Subsection (2A) sets out a specific provision to enable the delegation of functions or powers of the Minister under section 11 or 12 of the DTC Act. The purpose of this provision is to enable a suitably senior and qualified departmental official to exercise the Minister's powers on their behalf and to create an avenue of review to the Minister, where the decision is reviewable.

271. Subsection (2B) provide that the Minister may only delegate the Minister's functions or powers under subsection 11(8) to the Secretary or an SES employee (including an acting SES employee) within the Department of Defence. Subsection 11(8) of the DTC Act concerns the power to, by writing, revoke a permit given to a person. Because the revocation of a permit will likely be subject to certain sensitive considerations, it is appropriate that this power to only be delegated to this level.

**Item 28            Subsection 73(4)**

272. Item 28 of the Bill inserts '14' into subsection 73(4) of the DTC Act. The purpose of this amendment is to ensure that only the Secretary or an SES employee (including an acting SES employee) within the Department of Defence can be delegated the powers and functions under section 14 of the DTC Act.

**Item 29            Subsection 73(7) (table item 1)**

273. Item 29 of the Bill repeals item 1 of the table set out in subsection 73(7) of the DTC Act.

**Item 30            At the end of section 73**

274. Item 30 of the Bill inserts new subsections (9) and (10) at the end of section 73 of the DTC Act.

275. Subsection (9) provides that a delegate mentioned in paragraph (2A)(c) must not make a decision under section 11 to refuse to give a person a permit for an activity covered by an application for a permit, if the delegate is satisfied that the activity would prejudice the security, defence or international relations of Australia.

276. Subsection (10) provides that if subsection (9) applies, the delegate must refer the case to either the Minister or one of the delegates mentioned in subsection 73(2A)—these being the Secretary of the Department or an SES employee (including an acting SES employee). Depending on who the case is referred to, the Minister or the relevant delegate will be required to decide the case.

277. The purpose of these provisions is to ensure that the decision maker's level of seniority is proportionate to the consequences of the decision.

**Item 31            Application of amendments—offences etc.**

278. Item 31 of the Bill sets out how the amendments of the Bill will apply in relation to the *start day*. The *start day* means the day after the end of the period of 6 months beginning on the day this item commences. For example, if this item of the Bill commenced on 1 July 2024, then the start day would be 2 January 2025.

279. Subsection (1) provides that the amendments to section 10 of the DTC Act will apply to conduct occurring on or after the start day.
280. Subsection (2) provides that sections 10A, 10B and 10C will apply to conduct occurring on or after the start day.
281. Subsection (3) provides that the amendments to section 14 of the DTC Act will apply to an activity done on or after the start day.
282. Subsection (4) provides that the amendments to section 15 of the DTC Act will apply to conduct occurring on or after the start day.
283. Subsection (5) defines the *start day*, as mentioned above.

**Item 32      Saving provision—permits**

284. Item 32 of the Bill has the effect of saving permits that were given to people under section 11 of the DTC Act before this item of the Bill commences. The effect of this provision is that permits given under section 11 of the DTC Act before it is amended by the Bill will continue to be valid and in force after the Bill commences, and may be dealt with under section 11 as if it was not amended.

**Item 33      Saving provision—prohibition notices**

285. Item 33 of the Bill has the effect of saving prohibition notices in force under section 14 of the DTC Act before the commencement of the Bill. This ensures that any prohibition notices issued and in force under section 14 of the DTC Act prior to the Bill commencing are not invalidated once the Bill commences and the amendments to section 14 take effect.

**Item 34      Saving provision—delegations**

286. Item 34 of the Bill has the effect of saving delegations in force under section 73 of the DTC Act before the commencement of the Bill. This ensures that any delegations made under section 73 of the DTC Act prior to the Bill commencing are not invalidated once the Bill commences and the amendments to section 73 take effect.

## SCHEDULE 2—CONTINGENT AMENDMENTS

### *Defence Trade Controls Act 2012*

#### **Item 1**      **After the heading to subsection 10C(3)**

1. Item 1 of Schedule 2 to the Bill inserts subsections (2A) and (2B). These subsections are exceptions to the offence of providing a DSGL service set out in section 10C (as inserted by item 11 of Schedule 1 of the Bill).

#### *Subsection (2A)*

2. Subsection (2A) provides that the offence in subsection 10C(1) does not apply where a person holds an in force ‘foreign work authorisation’ to perform work, and provides DSGL services in the course of performing that work for, or on behalf of:
  - a. a military organisation of a foreign country; or
  - b. a government body of a foreign country
3. The meaning of ‘foreign work authorisation’ is defined in Part IXAA of the *Defence Act 1903*. The purpose of this exception is to ensure that a person who holds a valid foreign work authorisation to perform work does not commit an offence under subsection 10(1) of the DTC Act. This is because a person who already holds a foreign work authorisation issued under Part IXAA of the Defence Act is deemed to be sufficiently approved under that Act to engage in the provision of DSGL services as regulated by section 10C of the DTC Act.
4. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the application of subsection 13.3 of the Criminal Code.
5. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

#### *Subsection (2B)*

6. Subsection (2B) provides that the offence in subsection 10C(1) does not apply where a person holds an in force ‘foreign work authorisation’ to provide training and provides DSGL services that only consist of that training to:
  - a. a military organisation of a foreign country; or
  - b. a government body of a foreign country
7. The purpose and reasons for this exception to the offence are the same as those set out in paragraph [3] of Schedule 2. The only difference is this exception applies to a foreign work authorisation that is provided to a person for training, rather than for the performance of work.

8. A note to this subsection provides that a defendant bears an evidential burden in relation to the matters in this subsection and refers readers to subsection 13.3(3) of the Criminal Code. Paragraph [67] provides further detail about the application of subsection 13.3 of the Criminal Code.
9. The effect of this note is that where a defendant seeks to rely on this exception, they will need to adduce or point to some evidence that suggests there is a reasonable possibility it exists. Once a defendant has discharged the evidential burden of proof in relation to this exception, the prosecution will bear the legal burden of disproving the exception beyond a reasonable doubt.

EXPOSURE DRAFT