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Defence Export Controls Guidance and Examples



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Glossary

Term	Definition			
AMSP	Australian Military Sales Program			
Build-to-Print	Build-to-Print is a common type of manufacturing that refers to the process of building products to client instructions, commonly used to manufacture pieces of equipment or other components.			
DSGL	Defence and Strategic Goods List			
DTC Act	Defence Trade Controls Act 2012 (Cth)			
DTC Regulation	Defence Trade Controls Regulation 2013 (Cth)			
Dual-use	Commercially available items that may be used for commercial and research purposes, but may also have a military utility or use in chemical, biological, radiological or nuclear weapons of mass destruction.			
EAR	Export Administration Regulations			
FCL	Foreign Country List			
Grandfathering	'Grandfathering' is where an old rule continues to apply in some situations, while a new rule will apply in all future cases.			
ITAR	International Traffic in Arms Regulations			
MTCR	Missile Technology Control Regime			
OGEL	Open General Export Licence			



1. The Trilateral Licence-Free Environment

The AUKUS trilateral partners have made significant and tangible progress to streamline their export control regimes by establishing a trilateral export licence-free environment.

- A licence-free export environment will enable the export, re-export, supply and re-supply of most DSGL controlled goods and technology among and between Australia, the United Kingdom (UK) and United States (US) and without the need for a permit or licence.
- This will enable collaboration at the speed and scale required to meet our challenging strategic circumstances.
- The creation of this licence-free environment, among and between the AUKUS partners, will enable unprecedented levels of scientific, technological and industrial cooperation and co-development.

The results of this collaboration have the potential to be a 'once-in-a-generation' change, and will help Defence field the technologies and capabilities needed to deliver effective deterrence.

In order to access this licence-free environment, activities must meet the relevant respective requirements under Australia, US and UK export controls legislation, as applicable.

2. Defence Trade Controls Amendment Act 2024 Overview

The *Defence Trade Controls Amendment Act 2024* (DTC Amendment Act) was passed by the Australian Parliament on 27 March 2024 and received Royal Assent on 8 April 2024.

The DTC Amendment Act strengthens Australia's export control framework by creating three new criminal offences in the Defence Trade Controls Act 2012 to regulate:

- the supply of DSGL technology in Australia to a non-exempt foreign person;
- certain supplies of DSGL goods or DSGL technology from outside Australia; and
- the provision of DSGL services outside Australia.

The DTC Amendment Act also provides a national exemption to the United Kingdom (UK) and the United States (US) from Australia's export control permit requirements under the Defence Trade Controls Act 2012.

The DTC Amendment Act commenced 1 September 2024. The Act's offence provisions incur criminal penalties from 1 March 2025.

The intent of the DTC Amendment Act is to prevent controlled defence and dual-use goods, services and technologies from being provided to foreign nationals or entities in a manner that may harm Australia's interests.



Much of the existing collaboration and trade between Australia and non-AUKUS partners will be unaffected by these changes.

3. AU Export Control Legislative Framework

Defence Export Controls (DEC) is responsible for administering Australia's export control legislation on behalf of the Minister for Defence (the Minister). Australia's export control legislation regulates the movement of military and dual-use goods and technology by requiring a permit to be in place for the export, supply, brokering or publishing activity of certain 'controlled' military or dual-use goods, software and technology or to provide certain services to a foreign person.

Those goods, software, technologies, and services, which are controlled are specified in a legislative instrument, the Defence and Strategic Goods List (DSGL).

The Minister or their delegate may only grant permission to the applicant if satisfied that the export, supply, publication, brokering or provision of services would not prejudice the security, defence or international relations of Australia, having regard to the certain legislative criteria.

The specific legislative criteria include:

- 3 legislative criteria (and any other matters the Minister considers appropriate) for supplying DSGL technology to a foreign person within Australia; or
- 12 legislative criteria (and any other matters the Minister considers appropriate) for all other regulated activities.

Australia's export control legislation also provides the Minister with a discretionary power to regulate activities which do not involve DSGL goods, software, technology or services and would not ordinarily require a permit. These are often referred to as 'catch-all' controls, which include:

- The Minister's discretionary power to prohibit the physical export of uncontrolled goods that may be for a military end-use that would prejudice Australia's security, defence or international relations; and
- The Minister's discretionary power to prohibit the supply of any goods, or the export of uncontrolled goods that may be used in a Weapons of Mass Destruction (WMD) program of concern, as well as the provision of services that may assist in a WMD program of concern.

The DSGL does not list all items that may have possible military or WMD utility, and it is recommended that individuals or companies who may have concerns that their uncontrolled goods, software or technology have military or WMD utility. In the first instance, it is recommended to undertake your own due diligence checks to identify any red flags. For example:

- Are the goods, software or technology going to a destination where the government has a history of human rights abuse?
- Is there a known WMD program?



Are the goods, software or technology in line with the business you are sending it to?

If you answer 'yes' to any of these, apply for a DEC export controls assessment, as catch-all legislation could still apply.

Only the Minister, or a delegated Senior Executive Service official, may refuse to grant or revoke a permit for an export, supply, brokering, publishing or service.

4. Defence Trade Controls Act 2012

The Defence Trade Controls Act 2012 (DTC Act) regulates:

- the intangible supply of DSGL technology from Australia to a person outside of Australia;
- the supply of DSGL technology to a foreign person in Australia;
- certain supplies of DSGL goods and technology, that were previously exported or supplied from Australia, from a place outside of Australia to another;
- the provision of DSGL services (related to Part 1 DSGL goods and technology) by an Australian person to a foreign person outside of Australia;
- brokering of DSGL Part 1 goods and technology, as well as DSGL Part 2 goods and technology where that DSGL Part 2 goods and technology will or may be used for a military end-use or WMD program; and
- the publication of DSGL Part 1 technology.

The DTC Act also gives effect to the *Treaty between the Government of Australia and the Government of the United States of America concerning Defense Trade Cooperation*, which entered into force on 16 May 2013.

The DTC Act requires a review to be completed two years after the new offence provisions were introduced, and every 5 years following to ensure the legislation remains fit-for-purpose, balancing appropriate safeguards with a rapidly evolving strategic environment. As such, Mr Peter Tesch and Professor Graeme Samuel AC released the Independent Review of the *Defence Trade Controls Act 2012* in December 2023.



5. Defence Trade Controls Regulation 2013

Section 75 of the DTC Act provides that the Governor-General may make regulations prescribing matters, which are required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

These regulations are the Defence Trade Controls Regulations 2013 which, amongst other things, provide the criteria used to assess whether an activity regulated by the DTC Act may prejudice Australia's security, defence or international relations.

6. Four Multilateral Export Control Regimes

Australia is a member of a number of international arms control and non-proliferation treaties and an active member of four multilateral export control regimes. These regimes aim to establish best practice and consistency in the export control frameworks of participating states.

The Australia Group

The Australia Group was established by Australia in 1985. Participating states use export controls to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment do not contribute to the development of chemical or biological weapons. Australia is the permanent chair of the group.

As at May 2024, participants are:

Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, European Union, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Turkiye, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States.

Kazakhstan is an adherent.

The Missile Technology Control Regime

The Missile Technology Control Regime (MTCR) was established in 1987 to restrict the proliferation of missiles, complete rocket systems and uncrewed air vehicles capable of delivering weapons of mass destruction, and related technology.

As at May 2024, participants are:

Argentina, Australia, Austria, Belgium, Bulgaria, Brazil, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Italy, Japan, Luxembourg, the Netherlands, New



Zealand, Norway, Poland, Portugal, Republic of Korea, Russian Federation, South Africa, Spain, Sweden, Switzerland, Turkiye, Ukraine, the United Kingdom and the United States.

Adherents are:

Cyprus, Estonia, Kazakhstan and Latvia.

The Nuclear Suppliers Group

The Nuclear Suppliers Group (NSG) was established in 1974. The NSG aims to ensure that nuclear trade for peaceful purposes does not contribute to the proliferation of nuclear weapons or other nuclear explosive devices, and that international trade and cooperation in the nuclear field is not hindered unjustly in the process.

As at May 2024, participants are:

Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Kazakhstan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Republic of Korea, Russian Federation, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkiye, Ukraine, the United Kingdom and the United States.

The Wassenaar Arrangement

The Wassenaar Arrangement was established in 1995 to provide best practice guidance, international consistency and coordination of controls for transfers of conventional weapons and military and dual-use goods and technologies.

As at May 2024, participants are:

Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkiye, Ukraine, the United Kingdom and the United States.



7. Legislative Criteria for Assessing Permit Applications

The export, supply, brokering, publication or provision of services of military and dual-use goods, software or technology listed on the DSGL requires a permit from DEC before the activity occurs. A permit may only be issued if the decision maker is satisfied that the activity would not prejudice the security, defence or international relations of Australia. DEC assesses the proposed activity against legislative criteria (and any other matters the Minister considers appropriate).

The relevant legislative criteria are specified under the Defence Trade Controls Regulation 2013 and Customs (Prohibited Exports) Regulations 1958. The criteria are listed below and can be accessed through the regulations on the Federal Register for Legislation.

Link: Federal Register of Legislation - Home Page

Defence Trade Controls Regulation 2013

The below criteria are used by DEC decision makers to assess permits for the supply of DSGL goods, technology and services under sections 10, 10B and 10C of the DTC Act.

Criteria	Criteria for deciding whether things prejudicial to security, defence or international relations of Australia					
Item	Criterion					
1	The risk that the DSGL technology or the goods may go to or become available to a country upon which the Security Council of the United Nations or Australia has imposed a sanction					
2	The risk that the DSGL technology or the goods may go to or become available to a country where it may be used in a way contrary to Australia's international obligations or commitments					
3	The risk that the DSGL technology or the goods may be used to commit or facilitate serious abuses of human rights					
4	Whether the supply of the DSGL technology or the goods, or the publication of the DSGL technology: (a) may aggravate: (i) an existing threat to international peace and security or to the peace and security of a region; or (ii) a particular event or conflict of concern to Australia; or (b) may otherwise contribute to political instability internationally or in a particular region					
5	Whether the DSGL technology or the goods may: (a) be used for conflict within a country or for international conflict by a country; or (b) further militarise conflict within a country					
6	Whether the supply of the DSGL technology or the goods, or the publication of the DSGL technology, may compromise or adversely affect Australia's defence or security interests, its obligations to its allies or its international obligations and responsibilities					
7	Whether the DSGL technology or the goods may go to or become available to a country that has policies or strategic interests that are inconsistent with the policies and strategic interests of Australia or its allies					
8	The risk that the supply of the DSGL technology or the goods, or the publication of the DSGL technology, may: (a) adversely affect Australia's military capability; or (b) substantially compromise an Australian defence operation; or (c) increase the military capability of a country that is a potential adversary of Australia					



Criteria for deciding whether things prejudicial to security, defence or international relations of Australia				
Item	Criterion			
9	The risk that the DSGL technology or the goods may go to or become available to a country:			
	(a) that is developing, or is reasonably suspected of developing:			
	(i) weapons that may be capable of causing mass destruction; or			
	(ii) the means of delivering such weapons; or			
	(b) that supports, or is reasonably suspected of supporting, terrorism; or			
	(c) whose actions or foreign policies pose a risk of major disruption in global stability or the stability of a particular region			
10	Whether the supply of the DSGL technology or the goods, or the publication of the DSGL technology, may lead to a reaction by another country that may damage Australia's interests or relations with the other country or with a particular region			
11	Whether the DSGL technology or the goods may be used for mercenary activities or a terrorist or other criminal activity			
12	Whether preventing the supply of the DSGL technology or the goods, or the publication of the DSGL technology, may have an adverse effect on Australian research, industry, trade and economic prosperity to the extent that it may adversely affect the security, defence or international relations of Australia			

The below criteria are used to assess permits for the supply of DSGL technology to a foreign person in Australia under section 10A of the DTC Act.

Criteria for deciding whether things prejudicial to security, defence or international relations of Australia—supply of DSGL technology to foreign person in Australia						
Item	Criterion					
1	The risk that the supply of the DSGL technology may:					

- The risk that the supply of the DSGL technology may:

 (a) adversely affect Australia's military capability; or
 - (a) adversery arrest rustiana s inintary capability, or
 - (b) substantially compromise an Australian defence operation; or
 - (c) increase the military capability of a country or organisation that is a potential adversary of Australia
- 2 The risk that the DSGL technology may go to or become available to a country or organisation:
 - (a) that is developing, or is reasonably suspected of developing:
 - (i) weapons that may be capable of causing mass destruction; or
 - (ii) the means of delivering such weapons; or
 - (b) that supports, or is reasonably suspected of supporting, terrorism; or
 - (c) whose actions, or foreign policies (if applicable), pose a risk of major disruption in global stability or the stability of a particular region
- Whether preventing the supply of the DSGL technology may have an adverse effect on Australian research, industry, trade and economic prosperity to the extent that it may adversely affect the security, defence or international relations of Australia



Customs (Prohibited Exports) Regulations 1958

The below criteria are used to assess permits for the export of DSGL goods, software or technology under the *Customs Act 1901*.

Criteri	a for permissions						
Item	Criterion						
1	The risk that the goods or the DSGL technology may go to, or become available to, a country upon which the Security Council of the United Nations or Australia has imposed a sanction						
2	The risk that the goods or the DSGL technology may go to, or become available to, a country where they may be used in a way contrary to Australia's international obligations or commitments						
3	The risk that the goods or the DSGL technology may be used to commit or facilitate serious abuses of human rights						
4	Whether the export of the goods or the DSGL technology:						
	(a) may aggravate:(i) an existing threat to international peace and security or to the peace and security of a region; or						
	(ii) a particular event or conflict of concern to Australia; or						
	(b) may otherwise contribute to political instability internationally or in a particular region						
5	Whether the goods or the DSGL technology may:						
	(a) be used for conflict within a country or for international conflict by a country; or						
	(b) further militarise conflict within a country						
6	Whether the export of the goods or the DSGL technology may compromise or adversely affect Australia's defence or security interests, its obligations to its allies or its international obligations and responsibilities						
7	Whether the goods or the DSGL technology may go to, or become available to, a country that has policies or strategic interests that are inconsistent with the policies and strategic interests of Australia or its allies						
8	The risk that the export of the goods or the DSGL technology may:						
	(a) adversely affect Australia's military capability; or						
	(b) substantially compromise an Australian defence operation; or						
	(c) increase the military capability of a country that is a potential adversary of Australia						
9	The risk that the goods or the DSGL technology may go to, or become available to, a country:						
-	(a) that is developing, or is reasonably suspected of developing:						
	(i) weapons that may be capable of causing mass destruction; or (ii) the means of delivering such weapons; or						
	(b) that supports, or is reasonably suspected of supporting, terrorism; or						
	(c) whose actions or foreign policies pose a risk of major disruption in global stability or the stability of						
	a particular region						
10	Whether the export of the goods or the DSGL technology may lead to a reaction by another country tha may damage Australia's interests or relations with the other country or with a particular region						
11	Whether the goods or the DSGL technology may be used for mercenary activities or a terrorist or other criminal activity						
12	Whether preventing the export of the goods or the DSGL technology may have an adverse effect on Australian research, industry, trade and economic prosperity to the extent that it may adversely affect the security, defence or international relations of Australia						



8. Defence and Strategic Goods List (DSGL)

What is the DSGL?

- The DSGL specifies the goods, software and technologies that are regulated under Australia's export control legislation.
- These are commonly referred to as 'controlled' items.
- A permit is required when exporting, brokering or publishing DSGL items, or supplying DSGL goods, technology or services, unless an exemption or exception applies.
- The DSGL is a legislative instrument made under the Customs Act 1901.

What controlled items are on the DSGL?

The DSGL specifies controlled items under two categories:

- Part 1 (Military) covers items that are designed or adapted for military use, including their parts and accessories, and non-military lethal goods, software and technology.
- Part 2 (Dual-Use) covers items that are generally used for commercial purposes but that could be
 used as military components or for the development or production of military systems or weapons of
 mass destruction.

Who maintains the DSGL?

DEC is responsible for administering Australia's export controls for military and dual-use goods, software and technology.

DEC regulates the following:

- The export of military and dual-use DSGL goods, software and technology;
- The supply and publication of DSGL technology;
- The provision of DSGL services; and
- The brokering of DSGL goods, software and technology.

How does DEC decide which items are controlled on the DSGL?

- The DSGL is reviewed regularly and updated to reflect the controls list which have been agreed to by the four aforementioned (see relevant factsheet) multilateral export control regimes of which Australia is a member.
- The DSGL also contains Australia-specific controls relating to firearms and explosives.

To access the DSGL, please visit the Federal Register of Legislation:

https://www.legislation.gov.au/F2024L01024/asmade



9. Transition Period for the Defence Trade Controls Amendment Act 2024

When does the DTC Amendment Act 2024 commence?

• The DTC Amendment Act 2024 commences on 1 September 2024.

When do the new offences commence?

The 10A, 10B and 10C offences commence on 1 September 2024. There is however a transitional
period of six months from when the *DTC Amendment Act 2024* comes into effect to when the
offence provisions incur criminal penalties, from 1 March 2025.

Why does the DTC Amendment Act 2024 commence months after it received Royal Assent?

 A delay to when the DTC Amendment Act 2024 commenced provided affected stakeholders with time to account for the amendments and implement new processes to reflect these changes.

Why do the offences not incur any criminal penalties until six months after the commencement of those new offences under the Act?

The criminal offence provisions for the new offences (sections 10A, 10B and 10C) will begin to apply
to activities from 1 March 2025 to give affected stakeholders time to understand their obligations,
and the potential penalties, arising from the new criminal offences.

10. Constitutional Supply

The definition of 'constitutional supply' outlined in subsection 5B(1) of the *DTC Amendment Act 2024* sets out what types of supplies of DSGL goods and technology are regulated by the Act. The effect of a supply of DSGL goods or DSGL technology falling into one of the categories of 'constitutional supply' is that it will be subject to the relevant offence provisions in sections 10, 10A, 10B and 10C of the Amended Act, and that a supplier would need to apply for a permit under section 11 to authorise the making of a constitutional supply (unless an exemption or exception applies).

The following types of supplies of DSGL goods and DSGL technology are regulated by the *DTC Amendment Act 2024*:

- A supply of DSGL goods or technology made by, or on behalf of, or to a 'constitutional corporation'
 or a body corporate incorporated or registered in a Territory.
- A supply of DSGL goods or DSGL technology made by, or on behalf of, or to:
 - the government of a foreign country or of part of a foreign country,
 - o an authority of the government of a foreign country, or
 - an authority of the government of part of a foreign country.



- A supply of DSGL goods or 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.
- · A supply of DSGL goods or DSGL technology:
 - that wholly occurs outside Australia
 - o that is to or from a place outside Australia
 - that is supplied or received outside of Australia—where the supply is the provision of access to DSGL technology
- A supply of DSGL goods or technology that occurs in the course of constitutional trade or commerce.
- A supply of DSGL goods or technology that occurs wholly or partly within a Territory of Australia.
- A supply of DSGL goods or 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.

11. Reporting and Record Keeping Requirements

Requirements under the Defence Trade Controls Act 2012 as amended

The DTC Act and DTC Regulation sets out the information that people who supply DSGL goods or technology, provide DSGL services, or broker DSGL goods or technology, must include in the records that they are required to keep. The Act and Regulation does not prescribe the form the records must take but rather the information the records must include.

Information to be contained in records of activities done under section 11 permits:

- A description of the DSGL goods or technology supplied, or DSGL services provided, under the permit
- The unique identifier given to the permit under which the permit holder supplied DSGL goods or technology, or provided the DSGL services
- The name of any person/entity to whom the permit holder supplied DSGL goods or technology, or provided DSGL services, under the permit
- Either:
 - o if the permit covers one or more activities—the date or dates of each activity; or
 - if the permit covers activities for a period of time or for a project—the period, or periods, of time during which the permit holder conducted the activities



Information to be contained in records of arrangements made by brokers under section 16 (brokering) permits:

- A description of the DSGL goods or DSGL technology the registered broker arranges to be supplied under the permit
- The unique identifier given to the permit under which the registered broker arranged a supply
- The name of any person the registered broker arranges to supply DSGL goods or DSGL technology, and the place from which the DSGL goods or DSGL technology will be supplied
- The date any arrangement under the permit is made
- The name of any person that the registered broker arranges will be supplied DSGL goods or DSGL technology under the permit, and the place at which the DSGL goods or DSGL technology are to be received by that person

Records must be retained for five years, as outlined in section 58 of the DTC Act. Failure to retain or produce records upon request carries offences under the DTC Act.

The Secretary of the Department of Defence, or a delegate, can request in writing that you produce your records.

Provided that all of the relevant information is captured in accordance with section 27B of the DTC Regulation, it is possible for exporters to be able to make a single record that covers a number of activities over a period of time where the same activity is taking place multiple times.

12. Absolute Liability

The DTC Amendment Act provides that absolute liability will apply to a certain element of the criminal offences in sections 10, 10A, 10B and 10C of the amended Act. Absolute liability applies to the requirement for a supply of DSGL goods or technology, or provision of DSGL services, (depending on the criminal offence) to be a 'constitutional supply' as defined in the Amendment Act.

What is absolute liability?

Absolute liability is when the fault element of the offence does not need to be proven.

If absolute liability applies to a physical element of an offence (e.g. 'constitutional supply' of DSGL technology:

- there are no fault elements for that physical element of the offence; and
- the defence of mistake of fact under section 9.2 of the Criminal Code Act 1995 is unavailable.

This means that in legal proceedings, the prosecution is only required to show that the physical element of the criminal offence has been satisfied (e.g. that the supply of DSGL technology was a constitutional supply).



The prosecution is not required to prove a corresponding fault element (e.g. that the supplier intended, knew or was reckless as to whether the supply was a 'constitutional supply).

Absolute liability has been applied only to the 'constitutional supply' element in each criminal offence. The prosecution is required to prove all other physical and fault elements in each criminal offence.

Why has absolute liability been applied to the 'constitutional supply' element of the criminal offences?

- It is appropriate for absolute liability to apply to this element of the criminal offences in the DTC Act and the DTC Amendment Act because the element does not relate directly to the substance of the offence it is a matter of fact.
- A supplier of DSGL goods or technology, or provider of DSGL services, may act in complete ignorance of whether the supply in question is a 'constitutional supply'. But mistake of fact on this score – however common, expected or reasonable – is not an excuse.

Does this mean I have no legal defence if I am prosecuted for non-compliance under the DTC Amendment Act?

- No, if you are prosecuted for an offence under the DTC Act or the DTC Amendment Act, you may still have the opportunity to raise a defence or defences.
- Applying absolute liability to the 'constitutional supply' element of the criminal offences only removes
 the defence of reasonable mistake of fact in relation to that element of the criminal offence.
- The DTC Amendment Act, and the Commonwealth Criminal Code, provide a range of other general and specialised defences that may be relevant in a particular case.

How are Australian citizens who are also citizens or permanent residents of other countries treated under the DTC Amendment Act?

Australian citizens are subject to the same requirements under the DTC Act and the DTC Amendment Act regardless of whether they are also citizens or permanent residents of other countries.

As an example, a 'foreign person' for the purposes of the criminal offence in section 10C (provision of DSGL services outside Australia) is defined as a person who is not an 'Australian person'. An 'Australian person' is defined to mean, among other things, an individual who is an Australian citizen or permanent resident. This means that the provision of DSGL services to an Australian person (including an Australian citizen or permanent resident that is a citizen or permanent resident of another country) outside Australia would not be considered provision of a DSGL services to a 'foreign person' and would not require a permit.



13. Customs Act 1901

The Customs Act 1901 provides for regulations to be made to control the physical export of DSGL goods. These regulations are the Customs (Prohibited Exports) Regulations 1958 (Customs PE Regulations).

14. Customs (Prohibited Exports) Regulations 1958

The Customs (PE) Regulations give effect to, carry out and regulate prescribed matters required or permitted by the Customs Act 1901.

The Customs (PE) Regulations allows the Minister for Defence, or a delegate, to grant permission to export goods listed on the DSGL.

15. Excluded DSGL Goods and Technology List

Certain DSGL goods and technologies are not eligible for exceptions under the DTC Amendment Act from the requirement to hold a permit.

- This means that certain exemptions and exceptions from sections 10, 10A, 10B and 10C of the DTC
 Act and the DTC Amendment Act and from regulation 13E of the Customs PE Regulations do not
 apply for DSGL goods and technology listed on the Excluded Technologies List (ETL)
- A person will still require a permit for exports, supplies or the provision of services to the UK or the US, where the DSGL goods and technology are listed on the ETL.
- This might be because it is necessary to exclude such goods or technology for certain reasons, such
 as compliance with Australia's obligations under international law, or other international
 commitments.

These DSGL goods and technologies are excluded from the scope of the exceptions by a Ministerial determination, the Defence Trade Controls (Excluded DSGL goods and DSGL technology) Determination 2024.

The items on this instrument largely mirror those excluded under the national exemption for Australia from the US Export Administration Regulations and the International Traffic in Arms Regulations, and the national exemption provided by the UK.



16. Australian Military Sales Program

Under the DTC Amendment Act, the Minister may, by legislative instrument, specify certain DSGL goods or technologies as Australian Military Sales Program (ASMP) items.

The consequences of being specified as an AMSP item is that the DSGL goods or technologies will have different regulatory controls placed on them.

- The supply of, or the provision of DSGL services for, AMSP items is a regulated supply/service, meaning that the criminal offences in sections 10, 10A, 10B and 10C will apply to such supply/service except where the supply or provision is provided in accordance with an agreement or arrangement between Australia and a foreign country.
- Various exceptions to the offences in sections 10, 10A, 10B and 10C will not apply to the supply of DSGL goods or technology that are AMSP items, or the provision of DSGL services in relation to AMSP items.

The different regulatory controls applicable to AMSP items are due to the intent for AMSP items to include Australia's sovereign DSGL goods and technologies.

Supplying AMSP items, or providing DSGL services related to AMSP items, will be authorised in more limited and specific circumstances, such as where a supply is made in accordance with an agreement or arrangement between Australia and a foreign government.

The Defence Trade Controls (Australian Military Sales Program item) Determination 2024 is available here: Federal Register of Legislation - Defence Trade Controls (Australian Military Sales Program item)

Determination 2024

Additional Information on the Australian Military Sales Program

Additional information regarding the Australian Military Sales Program can be found at https://www.defence.gov.au/business-industry/export/australian-defence-export-office



17. Summary of exceptions to selected criminal offences under the DTC Act as amended and the Customs (Prohibited Exports) Regulations as amended

	Section 10 (Offence – intangible supply of DSGL technology)	Section 10A (Offence – supply of DSGL technology in Australia to foreign person)	Section 10B (Offence – certain supplies of DSGL goods or DSGL technology from outside Australia)	Section 10C (Offence – provision of DSGL services outside Australia)	Regulation 13E prohibition (physical export of DSGL goods or technology)
	DTC	Act as amended		ıstoms (Prohibite Regulations as a	
AUKUS Trilateral Partners Exception	✓	✓	✓	✓	✓
Supply DSGL goods or technology or DSGL services in accordance with a government-to- government agreement or arrangement	✓	✓	✓	✓	×
Foreign Persons from Countries on the Foreign Country List	√	✓	✓	×	×
Australia-US Defence Trade Cooperation Treaty	✓	✓	✓	✓	✓
Fundamental Research	✓	✓	✓	✓	×
Intra-company supply to an Australian or FCL employee	✓	×	✓	✓	×
Build-to-Print	×	✓	×	*	×
DSGL Part 2 'Sensitive List' or 'Very Sensitive List' goods or technology where the supply in, from or to a foreign country on the Foreign Country List	*	×	✓	×	×
Supply to the original manufacturer	*	×	✓	×	×
Elapsed time since the earlier export or supply	*	×	✓	×	×
Conduct in accordance with permissions, permits, agreements or arrangements done before 1 September 2024	×	×	✓	✓	×



	Section 10 (Offence – intangible supply of DSGL technology)	Section 10A (Offence – supply of DSGL technology in Australia to foreign person)	Section 10B (Offence – certain supplies of DSGL goods or DSGL technology from outside Australia)	Section 10C (Offence – provision of DSGL services outside Australia)	Regulation 13E prohibition (physical export of DSGL goods or technology)
Supplies to persons who hold a covered security clearance	✓	✓	✓	✓	×
Certain government employees	✓	✓	✓	✓	*
Supply by a person with a foreign work authorisation	×	✓	*	✓	*
Provision of DSGL services in support of a lawful supply of DSGL goods or technology	×	×	×	✓	×

18. Section 10A Offence - Supply of DSGL Technology in Australia to a foreign person

Section 10A creates a criminal offence for the supply of DSGL technology in Australia to a foreign person without a permit.

- "DSGL technology" is defined in the DTC Amendment Act 2024 to be technology and software as
 defined in the DSGL. Technology is defined in the DSGL as specific information necessary for the "
 development", "production" or "use" of a product. This information takes the form of technical data or
 technical assistance. For the purposes of this offence, DSGL technology excludes technology that
 has been produced in the course of, or for the purposes of, fundamental research.
- Technical assistance may take forms such as instruction, skills, training, working knowledge and consulting services and may involve the transfer of technical data.
- Technical data may take forms such as blueprints, plans, diagrams, models, formulae, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as disc, tape or read-only memories.

A foreign person is defined as a person other than an Australian person.

 However, as mentioned below, this offence will not apply where the DSGL technology is supplied to certain types of recipients.



Penalties will apply from 01 March 2025¹.

Exceptions

There are a number of exceptions to the section 10A offence. These exceptions are:

- An exception for certain supplies to the AUKUS trilateral partners.
- An exception for certain supplies made in accordance with an agreement or arrangement between Australia and a foreign country.
- An exception for supply to a citizen, permanent resident, body corporate, government or authority of a country on the Foreign Country List.
- An exception for a supply made under the Australia-US Defense Trade Cooperation Treaty.
- An exception for a supply to or by a government employee in the course of their duties.
- An exception for the supply of DSGL technology to a person who holds a covered security clearance.
- An exception for Build-to-Print.
- An exception for people who hold a foreign work authorisation

A person who supplies DSGL technology to a foreign person must keep records of all such supplies.

Examples

A supplier supplies DSGL technology to a foreign person within Australia

Person A, who is an Australian citizen, has a permit to present information constituting DSGL technology at a 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. Person A has committed a Section 10A offence.

Source: 2022-2023-2024, The Parliament of the Commonwealth of Australia, Senate, para 138

Intra-company transfer

Company B is based in Australia and is a subsidiary of Company A. Company A is based both offshore and within Australia. Company B supplies DSGL technology to representative within Company A who, at the time, were located in Australia without a valid permit. Company B may have committed an offence unless they have determined that exceptions apply.

¹ The penalty is a maximum of 10 years' imprisonment or a fine of up to 2,500 penalty units, or both.



19. Section 10B Offence - certain supplies of DSGL goods or technology from outside Australia

Section 10B creates a criminal offence for certain supplies of DSGL goods or technology that occur outside of Australia, where the DSGL goods or technology were previously exported or supplied from within Australia to outside Australia.

This offence regulates the secondary supply of goods and technology after they have been supplied to a recipient outside of Australia.

- To be clear, this section does not create liability for the person making the initial lawful supply or export from Australia to a place outside Australia.
- This offence creates liability for a person who receives the lawful supply or export outside Australia
 and subsequently supplies the DSGL goods or technology without a permit under the circumstances
 set out in the section.

The penalty is a maximum of 10 years' imprisonment or a fine of up to 2,500 penalty units², or both.

DSGL goods or technology to which the offence in section 10B applies

The Section 10B offence does not apply to the whole DSGL. In order for the offence to apply, the DSGL goods or technology must fall within one of the following categories:

- Part 1 of the DSGL (Munitions list), other than firearms;
- Sensitive List in Part 2 of the DSGL; or
- Very Sensitive List in Part 2 of the DSGL.

DSGL goods are goods within the scope of the DSGL other than goods constituting technology that has been produced in the course of, or for the purposes of, fundamental research.

DSGL technology similarly excludes technology that has been produced in the course of, or for the purposes of, fundamental research.

Supplies to which the offence in section 10B applies

In order for the offence in section 10B to apply, the secondary supply (referred to as 'current supply' in the DTC Act) of DSGL goods or technology must occur outside Australia (i.e. wholly outside Australia, or from a place outside Australia to a different place outside Australia, or where the supplier and recipient are both outside Australia).

In addition, the earlier export or supply by which the secondary supplier obtained the DSGL goods or technology (whether directly or indirectly) must have originated in Australia.

² See CRIMES ACT 1914 - SECT 4AA Penalty units (austlii.edu.au)



Exceptions

There are a number of exceptions to the section 10B offence. These exceptions are:

- An exception for certain supplies to AUKUS trilateral partners.
- An exception for certain supplies made in accordance with an agreement or arrangement between Australia and a foreign country.
- An exception for supply to a citizen, permanent resident, body corporate, government or authority of a country on the Foreign Country List.
- An exception for a supply made under the Australia-US Defense Trade Cooperation Treaty.
- An exception for intra-company supply to an Australian or FCL employee.
- An exception for a supply to or by a government employee in the course of their duties.
- An exception for the supply of DSGL technology to a person who holds a covered security clearance.
- An exception where the current or any earlier supply or export is to the original manufacturer.
- An exception for certain supplies occurring wholly in, from or to an FCL country.
- An exception after a certain time has elapsed since the earlier export or supply.
- An exception where the earlier export or supply is made in accordance with a permission granted before 1 September 2024.

Examples

The current supply wholly occurs outside Australia

Company 1 is located in Foreign Country A and is in possession of Part 1 DSGL technology provided from Australia pursuant to a permit. Person A, an employee of company provides a copy of that design without a permit to a Foreign Country B national who is visiting Company 1's laboratory in Foreign Country A Person A has committed a Section 10B offence.

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 Part 1 DSGL provided from Australia pursuant to a permit. Person A, 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. Person A has committed a Section 10B offence.

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) provided from Australia 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. Person A has committed a Section 10B offence.

Source: 2022-2023-2024, The Parliament of the Commonwealth of Australia, Senate, para 188

20. Section 10C Offence - provision of DSGL services outside Australia

Section 10C of the DTC Amendment Act creates a criminal offence for the provision of certain DSGL services outside Australia by an Australian person to a foreign person.

A DSGL service is defined as the provision 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 DSGL goods and technology within the scope of Part 1 (Munitions List) of the DSGL.

This offence does not apply to DSGL services provided within Australia.

The penalty is a maximum of 10 years' imprisonment or a fine of up to 2,500 penalty units, or both.

Exceptions

There are several exceptions to the section 10C offence. These exceptions are:

- An exception for certain supplies to the AUKUS trilateral partners.
- An exception for certain supplies made in accordance with an agreement or arrangement between Australia and a foreign country.
- An exception for a supply made under the Australia-US Defense Trade Cooperation Treaty.
- An exception for intra-company supply to an FCL employee.
- An exception for the provision of certain DSGL services in support of a lawful supply of DSGL goods or technology.
- An exception for a supply to or by a government employee in the course of their duties.
- An exception for the supply of DSGL technology to a person who holds a covered security clearance.
- An exception where the supply of DSGL services is in connection with a lawful supply of DSGL goods or technology made before 1 September 2024 and provided under a contract, agreement or arrangement entered into before 1 September 2024.



Examples

A service 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 at Company 1's headquarters located outside of Australia without a permit to do so. If no exemptions or exceptions apply, the Australian person has committed a section 10C offence.

Source: 2022-2023-2024, The Parliament of the Commonwealth of Australia, Senate, para 277

21. AUKUS Partners Exception

The DTC Amendment Act includes a number of provisions that give effect to the Trilateral Licence-Free Environment.

One of those provisions excludes certain supplies of DSGL goods and technology and relevant DSGL services from the application of the offences in sections 10, 10A, 10B and 10C of the DTC Act (as amended) when:

- the supply is to a citizen, permanent resident, body corporate, government or government authority of Australia, the US or UK,
- the supply occurs in Australia, the US or the UK, and
- the DSGL goods or technology are not, or the DSGL services do not relate to, goods or technology that are AMSP items, or Excluded DSGL goods or DSGL technology (see factsheets).

This means that a permit would not be required for such supplies or services.

There are other exceptions to the criminal offences in sections 10, 10A, 10B and 10C that apply to supplies or services involving US and UK citizens, or occurring in the US or UK (see factsheets on the Foreign Country List Exception and the Security Clearance Exception).

These exceptions apply in parallel to the dedicated AUKUS exception.

The Defence Trade Legislation Amendment Regulations mirror the AUKUS exception by excluding from the prohibition in regulation 13E of the Customs (Prohibited Exports) Regulations certain exports to the UK or US.

Treatment of Australian citizens who are also citizens or permanent residents of other countries

- Can you access the trilateral licence-free environment if you are an Australian citizen who is also a citizen or permanent resident of another country or other countries?
 - Yes, you can access the licence-free environment as long as you are an Australian citizen.



22. Foreign Country List (FCL) Exception

The DTC Act includes an exception from the brokering offence (section 15) where the broker is from or brokering occurs from a country listed on the FCL.

The DTC Amendment Act provides an exception for certain people and entities whose country is listed on the FCL. These exemptions include are:

- The supply of DSGL technology to a foreign person within Australia who is a citizen or permanent resident, a body corporate, the government or a government authority of a country that is listed on the Foreign Country List (Offence 10A).
- The supply of goods or technology listed on the 'Sensitive' or 'Very Sensitive' list in Part 2 (Dual Use List) of the DSGL, if the goods or technology is re-supplied within, from, or to a country on the Foreign Country List (Offence 10B).

This exception will not apply to:

- · Australian Military Sales Program items; or
- Items excluded by a determination in force under subsection 5C(3) (Excluded DSGL goods and DSGL technology)

Examples

A supply of DSGL goods or technology is made to, or from, a place in a FCL country

A supplier, located in New Zealand (FCL country), supplies sensitive or very sensitive Part 2 DSGL goods or technology originally provided from Australia with a valid permit to a company incorporated in a non-FCL country. This supply is exempt from section 10B.

The supplier and the recipient are both located in a FCL country and are both in the same location when the supply is made

A supplier provides a permanent resident of an FCL country with a copy of DSGL (sensitive or very sensitive Part 2) controlled technical schematics originally provided from Australia with a valid permit while attending a business meeting in that FCL country. This supply is exempt from section 10B.

The supplier provides the recipient with access to DSGL technology while either person is located in a FCL country

An example of this could be where a supplier (Australian citizen) and recipient (German permanent resident) are located in Australia and Denmark (FCL country) respectively, and the supplier provides the recipient with the relevant password to access a secure server on which is stored DSGL controlled software that is being developed. This supply is exempt from section 10.

Source: 2022-2023-2024, The Parliament of the Commonwealth of Australia, Senate, paras 242-244



23. Fundamental Research Exception

What is fundamental research?

Fundamental research means basic or applied research conducted in circumstances where the results of the research:

- are intended for public disclosure, or would ordinarily be published or shared broadly; and
- are not subject to any restrictions on disclosure (however imposed) for purposes connected with the security or defence of Australia or any foreign country.

What does basic or applied research mean?

The meaning of the terms 'basic research' and 'applied research' are taken from the Organisation for Economic Co-operation and Development Frascati Manual (2015), titled 'Guidelines for Collecting and Reporting Data on Research and Experimental Development'. This is the internationally recognised methodology for collecting and using research and development statistics.

In this manual, 'basic research' means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundation of phenomena and observable facts, without any particular application or use in view.

'Applied research' means original investigation undertaken in order to acquire new knowledge. Applied research is directed primarily towards a specific, practical aim or objective.

What is the meaning of 'not subject to any restrictions (however imposed)'?

The definition of 'fundamental research' requires that the research not be subject to any restrictions on disclosure for purposes connected with the security or defence of Australia or any foreign country.

Research will typically be considered to have restrictions on its disclosure for purposes connected with the security or defence of Australia or a foreign country, where there is an arrangement in place limiting its disclosure for security or defence reasons.

An arrangement would be any written agreement, contract, arrangement, understanding or undertaking (both those that are publicly available or confidential as between the parties), entered into by an Australian party or individual authorised to consent to the arrangement, irrespective of whether that commitment is ongoing or legally binding.

Examples of these types of arrangements may include commercial contracts, strategic partnerships, joint initiatives and memoranda of understanding.

Oral arrangements, such as oral contracts, are not intended to constitute an arrangement that would establish restrictions on the disclosure of research for purposes connected with the security or defence of Australia or any foreign country.



Note: The definition of fundamental research that has been used for the exception was consulted with representatives from across the industry, higher education and research sector working group to ensure it is fit-for-purpose.

What are examples of fundamental research?

Research that would be considered fundamental research:

- Basic and applied research conducted in Australia, where the resulting information is ordinarily published and shared broadly within the scientific community.
- Research that is captured by the public domain exclusion (e.g. readily available in libraries open to the public, or at university libraries, published patents and open conferences, trade shows or exhibitions).
- Education and teaching (e.g. instruction in catalogue courses and associated teaching laboratories of academic institution).

What is not fundamental research?

Research that would not be considered fundamental research:

- University-based research where there is a written arrangement in place with the Australian Department of Defence, that restricts the publication of the research due to its connection with matters that concern the security or defence of Australia.
- If a university had a written collaborative research agreement in place with a foreign country, and that research agreement places certain restrictions on the use or disclosure of the research, due to the connection between the research work and the security or defence of that foreign country.
- A company releases its proprietary DSGL technology, which has implications for the security or defence of Australia, to a university to conduct research. As part of sharing the DSGL technology with the university, the company and the university enter into a written contract, which stipulates that the technology cannot be released to the public and requires the university to agree to a non-disclosure agreement.
- Technology for the development, production or use of a controlled technology that is not intended for publication.

What offences does the fundamental research exception apply to?

The fundamental research exception is applicable to all DTC offences (including sections 10, 10A, 10B and 10C) but not to Customs (prohibited exports) Regulations 1958 exports of DSGL goods or technologies.

How does the fundamental research exception apply to the 10A offence?

- The section 10A offence regulates the supply of DSGL technology, as defined in the DSGL, to a nonexempt foreign person within Australia.
- The fundamental research exception applies if the DSGL technology provided to the non-exempt foreign person constitutes fundamental research (i.e. it is intended for public disclosure or not subject to any restrictions on disclosure for purposes connective with the security of defence of Australia (however imposed)).



• Conducting research outside of the scope of the fundamental research definition would mean you would not be eligible for the fundamental research exception and may need a permit.

How does the fundamental research exception apply to the 10B offence?

- The section 10B offence regulates the supply of DSGL goods and technology that are listed in Part 1
 (Munitions) of the DSGL and the 'Sensitive' and 'Very Sensitive' Lists in Part 2 (Dual Use) of the DSGL,
 that were previously exported or supplied from Australia, from a foreign country to another country, or
 within the same foreign country.
- The fundamental research exception applies to the section 10B offence if the re-supplied or reexported DSGL goods or technology constitutes fundamental research (i.e. it is intended for public disclosure or not subject to any restrictions on disclosure for purposes connected with the security or defence of Australia (however imposed)).
- Conducting research outside of the scope of the fundamental research definition would mean you would not be eligible for the fundamental research exception.

How does the fundamental research exception apply to the 10C offence?

- The section 10C offence regulates the provision of DSGL services related to Part 1 (Munitions List) of the DSGL to foreign persons or entities offshore.
- DSGL services is defined as 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 DSGL goods that are, or DSGL technology that is, within the scope of Part 1 of the DSGL.
- The fundamental research exception applies if the DSGL service provided to the foreign person
 constitutes fundamental research (i.e. it is intended for public disclosure or not subject to any
 restrictions on disclosure for purposes connected with the security or defence of Australia (however
 imposed)).
- Conducting research outside of the scope of the fundamental research definition would mean you would not be eligible for the fundamental research exception.

What is a restriction on disclosure that may mean research is not 'fundamental'?

- The definition of 'fundamental research' requires that the research is not subject to any restriction on disclosure for purposes connected with the security or defence of Australia or any foreign country.
- Research will typically be considered to have restrictions on its disclosure where there is an arrangement in place limiting its disclosure for security or defence reasons.
- An arrangement is any written agreement, contract, understanding or undertaking, regardless of whether publicly available or whether it is legally binding.
- In order to qualify, an arrangement must be entered into by an Australian party or individual authorised to consent to that arrangement.
- Oral arrangements (such as oral contracts) would not constitute arrangements for the purposes of the definition of fundamental research.



24. Australian Government Employees Exception (Sections 10A, 10B and 10C)

What is the Australian Government employees exception?

The DTC Amendment Act provides an exception to the new section 10A, 10B and 10C offences for certain Australian Government employees when DSGL goods, technologies or services are supplied to or by Australian Government employees in the course of their duties.

Australian Government Employees are:

- Members of the Australian Defence Force (ADF)
- An employee of the Australian Public Service (APS)
- An employee of the Australian Security intelligence organisation (ASIO)
- An employee of the Australian Secret Intelligence Service (ASIS)
- An employee of the Australian Signals Directorate (ASD)
- A member or special member of the Australian Federal Police (AFP)
- A member of the police force of a State or Territory

This exception will not apply to:

- Australian Military Sales Program items; or
- Items excluded by a determination in force under subsection 5C(3) (ETL)

This means that a permit will still be required for the supply of the items listed above when made by or to such Australian Government employees.

What offences does the Australian Government employee exception apply to?

The exception for certain Australian Government employees applies to the new section 10A, 10B and 10C offences, as well as the existing section 10 offence.

25. Security Clearances Exception

What is the security clearance exception?

This exception from the criminal offences in sections 10A, 10B and 10C means that it is not an offence to supply DSGL goods or technology or provide DSGL services to a person who holds a covered security clearance, without a permit under certain circumstances.



This exception does not apply if the relevant DSGL goods or technology are an AMSP item, have been specified in a determination under subsection 5C(3) (see Excluded Technology List) or are prescribed by regulations.

What is the definition of a covered security clearance?

A covered security clearance is a clearance that is given:

- a Commonwealth agency in Australia that is authorised to issue security clearances, such as the Australian Government Security Vetting Agency, or
- by or on behalf of the Government of Canada, New Zealand, the UK or the US, or any authority of those governments.

Security clearances given by a Commonwealth Agency must be at Negative Vetting 1 (NV1) level or a higher.

Security clearances given by or on behalf of another government must be suitable for permitting access to information classified as secret.

Why did you set the level at NV1 or Secret?

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, Canadian, New Zealand, UK or US security vetting agency to hold 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.

Each of the countries included in the exception have an equivalent for NV1 or SECRET level security clearance.

26. Build-To-Print Exception (Section 10A)

What is the build-to-print exception?

The offence in section 10A is relevant to people who supply DSGL technology to a foreign person within Australia without a permit authorising the supply.

This offence will not apply if:

- the DSGL technology is being supplied to a person who produces, or is to produce, components of DSGL goods; and
- the supply is made in connection with the production of the components; and



- the DSGL technology supplied is limited to that which is reasonably necessary for the person to whom the supply is made to produce the components; and
- the DSGL technology supplied is not of a kind that would enable the overall design of the DSGL goods, or any means of producing the DSGL goods as a whole, to be determined

What is the purpose of this exception?

Build-to-Print is a common type of manufacturing that refers to the process of building products to client instructions, commonly used to manufacture pieces of equipment or other components.

The purpose of this exception is to enable the 'build-to-print' manufacturing of components of DSGL goods.

What DSGL technology can be supplied to the manufacturer?

The DSGL technology supplied for the purposes of build-to-print manufacturing should not include the disclosure of sensitive information, such as design methodology, engineering analysis, detailed process information or manufacturing know-how.

Only information that is necessary to enable the manufacture of the components of the DSGL goods should be supplied.

Examples

An Australian company who builds hydrophones provides instructions for building a component of the hydrophone to a manufacturer, also based in Australia that employs foreign persons who would be involved in manufacturing the necessary components. The hydrophone company does not disclose sensitive information to the components manufacturer on how the component interacts with the hydrophone, and does not provide instructions on how to build the completed product. The components manufacturer does not have sufficient information to enable them to reverse engineer and build a completed hydrophone.

27. Lapsed Timeframes Exception (Section 10B)

Section 10B of the DTC Amendment Act creates an offence relevant to people who receive DSGL goods or DSGL technology from Australia while outside Australia, and subsequently supply, transfer or provide access to those goods or technology while outside Australia, without a permit.

An element of the offence in section 10B is that the supplier obtained the DSGL goods or DSGL technology directly or indirectly as a result of an earlier export or supply from a place in Australia.

The section 10B offence does not apply for an indefinite period of time after the earlier export or supply was made.

An exception to the offence in section 10B exists where a period of time has elapsed since the earlier export or supply. The lapsing timeframe commences on the date on which the DSGL goods or technology are exported or supplied outside of Australia. Once the specified lapsing time has run out, the offence in section



10B will not apply, i.e. there will no longer be a requirement for a permit for supplying, transferring or providing access to those goods or technology.

The Defence Trade Legislation Amendment Regulation sets out the lapse period for each part of the DSGL:

- For goods or technology on Part 1 (Munitions) of the DSGL, the exception will be available after a lapse of 12 months since the earlier export or supply.
- For goods or technology on the 'Sensitive List' in Part 2 (Dual-Use) of the DSGL, exception will be available after lapse of six months since the earlier export or supply.
- For goods or technology on the 'Very Sensitive List' in Part 2 (Dual-Use) of the DSGL, the exception will be available after a lapse 12 months since the earlier export or supply.

The purpose of the lapsed timeframes exception is to ensure Australia's export control framework is fit-for-purpose for the Australian context. The lapsed controls seek to address Australia's national security requirements and are tailored to the level of sensitivity of each category of DSGL goods, technology or services.

28. The Australia-US Defense Cooperation Treaty and the DTC Amendment Act

What is the Australia-US Defense Trade Cooperation (the Treaty)?

The Treaty was negotiated to improve the efficiency of eligible two-way transfers between Australia and the US by facilitating the export of controlled goods within an Approved Community without the need for an export licence.

The Treaty was signed by the Australian and the United States Governments in 2007, and came into force on 16 May 2013.

The implementing legislation, the Defence Trade Controls Act 2012 (the Act), commenced on 6 June 2013.

The new criminal offences in the DTC Amendment Act include exceptions that ensure that supplies of goods, technology or services made under the Treaty are not affected by the requirements of the DTC Amendment Act.



Examples

Exception to the section 10A Offence of the DTC Amendment Act (supply of DSGL technology in Australia to a foreign person)

The offence in section 10A is relevant to people who supply DSGL technology to a foreign person within Australia without a permit authorising the supply.

This offence will not apply where the supply of DSGL technology is made in compliance with the terms of the Treaty.

Exception to the section 10B offence of the DTC Amendment Act (certain supplies of DSGL goods or DSGL technology from outside Australia)

This offence is relevant to people who receive DSGL goods or DSGL technology from Australia while outside Australia, and subsequently supply, transfer or provide access to those goods or technology while outside Australia, without a permit.

This offence will not apply if the supply is made in compliance with the terms of the Treaty.

Exception to the section 10C offence of the DTC Amendment Act (provision of DSGL services outside Australia)

This offence is relevant to Australian people who provide DSGL services outside Australia to a foreign person without a permit.

This offence will not apply where the DSGL services are provided in compliance with the terms of the Treaty.

What does it mean to comply with the terms of the Treaty?

The exceptions to sections 10A, 10B and 10C are only available to members of the Approved Community under the Treaty, i.e. members of the Australian Community and the United States Community. An entity will only be part of the Approved Community if they submit an application and are approved to be a member.

The exceptions are only available where the goods, technology or services are provided to a member of the Approved Community.

The supply of goods or technology or the provision of services must relate to goods that are an Article 3(1) US Defence Article or an Article 3(3) US Defence Article. The relevant goods or technology must be listed in Part 1 of the Defense Trade Cooperation Munitions List and must not be listed in Part 2 of the List.

The supply or the services must relate to an activity referred to in Article 3(1)(a), (b), (c) or (d) of the Treaty. Namely:

- United States and Australian combined military or counter-terrorism operations as described in the Implementing Arrangements of the treaty.
- United States and Australian cooperative security and defense research, development, production, and support programs that are identified pursuant to the implementing arrangements.
- Mutually determined specific security and defense projects where the Government of Australia is the end-user that are identified pursuant to the implementing arrangements.



United States Government end-use.

How do the reforms from the Treaty relate to DTC Amendment Act?

The Treaty intended to facilitate eligible transfers of controlled goods and technology between Australia and the US without an export licence.

The commitment by the AUKUS partners to streamline defence trade and create an export licence-free environment has delivered on the intent of the Treaty at an unprecedented scale.

29. Open general licence (AUKUS nations)

Open general licences are licences issued by the United Kingdom government that allow the export of dualuse items or military goods software or technology and trade of military goods, to, between and among Australia, the USA and the UK.

- LINK: Open general licence (AUKUS Nations)
- LINK: Open general licence (AUKUS nations) guidance note

30. ITAR Exemptions

Australia and the UK are subject to special treatment under the US Arms Export Control Act. Section 126.7 of the International Traffic in Arms Regulations provides a licensing exemption for certain transfers between and among U.S. entities registered with the Directorate of Defense Trade Controls (DDTC); the governments of Australia, the United Kingdom, and the United States; and Authorized Users of Australia and the United Kingdom. This exemption reduces the time and cost required for eligible parties to engage in defense trade within and between Australia, the UK, and the United States.

LINK: ITAR § 126.7 Exemption for Australia and the UK Article - DDTC Public Portal (state.gov)

31. Grandfathered Existing Permits Exception (Sections 10B and 10C)

What does 'grandfathering' mean?

In simple terms, when something is grandfathered, it means there are circumstances where an old rule continues to apply in some situations, while a new rule will apply in all future cases.

Under the DTC Amendment Act, certain criminal offences will not apply if they relate to earlier exports or supplies made in accordance with a permit granted before the commencement of sections 10B and 10C of the Amendment Act, i.e. before 1 September 2024.



Exception in the Section 10B Offence (certain supplies of DSGL goods or DSGL technology from outside Australia)

This offence is relevant to people who receive DSGL goods or DSGL technology from Australia while outside Australia, and subsequently supply, transfer or provide access to those goods or technology while outside Australia, without a permit.

An element of the offence in section 10B is that the supplier obtained the DSGL goods or DSGL technology directly or indirectly as a result of an earlier export or supply from a place in Australia.

The grandfathering provision creates an exception to the section 10B offence if:

- The earlier export or supply was made in accordance with a permission or permit; and
- The permission or permit was granted before the commencement of section 10B of the DTC Amendment Act, i.e. 1 September 2024.

The purpose of this exception is to ensure that subsequent offshore supplies of DSGL goods or technology associated with exports or supplies that have been previously assessed as being suitable to be granted an export or supply permit, are not unduly burdened by the new offence provision on the commencement of that section.

Exception in the Section 10C Offence (provision of DSGL services outside Australia)

This offence is relevant to Australian people who provide DSGL services outside Australia to a foreign person without a permit.

The grandfathering provision creates an exception to the section 10C offence if:

- The DSGL services are provided in connection with a lawful supply of DSGL goods or technology that occurred before the commencement of section 10C the DTC Amendment Act, i.e. before 1 September 2024; and
- The DSGL services are provided under a contract, agreement or arrangement entered into before the commencement of section 10C of the DTC Amendment Act.

The purpose of this exception is to provide that the section 10C offence does not apply where DSGL services are being provided as part of commercial arrangements that are in place prior to the commencement of the DTC Amendment Act. The purpose of this exception is to ensure that existing commercial arrangements do not need to be renegotiated or otherwise changed because of the new requirements established by the commencement of section 10C.



32. Original Manufacturers Exception (Section 10B)

What is the original equipment manufacturer exception?

Section 10B of the DTC Amendment Act establishes an offence for certain supplies of DSGL goods or DSGL technology that occurs outside Australia, where the DSGL goods or DSGL technology were previously exported or supplied from within Australia to 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.

Section 10B applies only to supplies of DSGL goods or DSGL technology that are listed on Part 1 (Munitions) and the 'Sensitive' and 'Very Sensitive' Lists in Part 2 (Dual Use) of the DSGL.

Section 10B does not apply to the supply of DSGL goods that are firearms.

An exception to the criminal offence in section 10B exists in circumstances where the earlier export or supply, the current supply, or any intervening supply of the DSGL goods or technology is to the person who originally produced the goods or technology (i.e. the original manufacturer).

What offences does this exception apply to?

This exception only applies to the section 10B offence.

Where can the goods and technology be transferred to?

Under this exception, the DSGL goods and technology can only be transferred back to the original equipment manufacturer who produced the goods or technology that was originally supplied.

What items from the DSGL can be transferred under this exception?

This exception only allows for the transfer of items back to the original manufacturer that are listed under the DSGL Part 1 (Munitions) or Part 2 (Dual-Use) 'Sensitive List' or 'Very Sensitive List'.

The section 10B offence does not apply to DSGL goods and technology outside of this scope, so the original equipment manufacturer exception does not apply.

33. Provision of DSGL services to a country in the Five Eyes Intelligence Community

A person will not be required to hold a permit when providing DSGL services to a country in the Five Eyes Intelligence Community (Australia, Canada, New Zealand, the UK or the US).

This exception from the requirement to hold a permit operates in addition to other exceptions that relate to activities involving the US and UK (e.g. AUKUS licence free environment) and countries listed on the Foreign Country List (FCL), see separate factsheets.



What offences does the Five Eyes exception apply to?

 The Five Eyes exception only applies to the 10C offence (provision of DSGL services outside Australia).

What does the 10C offence regulate?

 Section 10C establishes an offence for the provision of certain DSGL services outside Australia by an Australian person to a foreign person.

What are DSGL services?

• 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 DSGL goods that are, or DSGL technology that is, within the scope of Part 1 of DSGL.

When does the Five Eyes exception apply?

This exception applies if:

- The DSGL services are provided to:
 - an Australian person, or a citizen or permanent resident of Canada, New Zealand, the United Kingdom or the United States of America and received at a place in Australia, Canada, New Zealand, the United Kingdom or the United States of America
 - a body corporate incorporated by or under a law of Canada, New Zealand, the United Kingdom or the United States of America, or of a part of any of those countries and received at a place in Australia, Canada, New Zealand, the United Kingdom, or the United States of America
 - the Government of Canada, New Zealand, the United Kingdom or the United States of America, or the government of a part of either of any of those countries and received at a place in Australia, Canada, New Zealand, the United Kingdom, or the United States of America, or
- an authority of the Government of Canada, New Zealand, the United Kingdom or the United States, or the government of part of any of those countries and received at a place in Australia, Canada, New Zealand, the United Kingdom or the United States.

The exception will not apply if the DSGL goods or technology to which the DSGL services relate is an Australian Military Sales Program item or an item on the Excluded Technologies List.

34. Penalties

The DTC Amendment Act introduces three new offences to the DTC Act. These offences are the section 10A offence, the section 10B offence and the section 10C offence. Conduct which breaches any of these offences will result in a penalty.



What are the penalties for committing an offence under the DTC Amendment Act?

- The penalty for conduct without a permit, which constitutes an offence under the DTC Amendment Act, is a maximum of 10 years' imprisonment or a fine of up to 2,500 penalty units, or both.
- As at 1 July 2023, the value of one penalty unit is \$313 (Source: Crimes (Amount of Penalty Unit) Instrument 2023).

Have the penalties been increased under the DTC Amendment Act?

- No, the maximum penalty under the DTC Amendment Act is the same as the maximum penalties that currently exist under the DTC Act.
- The only change is that these same penalties now apply to the three new offences established by the DTC Amendment Act.

Is this the default penalty for committing any offence under the DTC Amendment Act?

- No, the DTC Amendment Act specifies the penalty to be a maximum of 10 years' imprisonment or a fine of up to 2,500 penalty units or both.
- The size of the penalty will be dependent on the severity of the offence.
- The size of the penalty is applied at the discretion of the court imposing the penalty.
- The penalty will only apply if the offence is proven in a court of law.

Defence conducted significant consultation with industry, academia and the research sector in developing the *Defence Trade Controls Amendment Act 2024*, including establishing standing working groups.

- Defence continues to engage closely with affected stakeholders in implementing this legislation to promote understanding and ensure compliance with the regulations.
- Defence's consultations in developing the legislation indicated there was not broad support among industry, academia or the research sector for adopting a US-style penalty framework which enables public servants to issue civil penalties.
- Stakeholders were also not supportive of increasing the penalty provisions in line with the scale of the US framework.
- In Australia, the penalty amounts have been the same since the introduction of the *Defence Trade Controls Act 2012*: up to 10 years imprisonment or a fine of up to 2,500 penalty units.

Comparison with the US

- By contrast, the US framework entails up to 20 years imprisonment and there is no limit on the size
 of the fine.
- An example of two recent penalties issued by US public servants are:
 - In 2024, the Department of State issued Boeing with a \$51 million civil penalty for breaching the ITAR (which Boeing voluntarily disclosed).
 - In 2023, the Department of Commerce (dual-use) imposed the largest standalone administrative penalty in its history amounting to USD\$300m.