



## SAFEGUARDING AUSTRALIA'S MILITARY SECRETS

# A guide for industry

*This product is designed to assist industry entities in their support for employees who are in scope of Part IXAA of the Defence Act 1903 - known as the Safeguarding Australia's Military Secrets (SAMS) legislation.*

### What is SAMS?

The *Defence Amendment (Safeguarding Australia's Military Secrets) Act 2024* amended the *Defence Act 1903* through the insertion of a new Part IXAA.

Known as the Safeguarding Australia's Military Secrets (SAMS) legislation, Part IXAA establishes an authorisation framework to regulate the performance of work and specified training for a foreign military, foreign government or foreign government controlled entity.

Specifically, the SAMS legislation requires:

1. former defence staff members to obtain authorisation if they intend to perform work for a particular foreign military, foreign government or foreign government controlled entity.

*A former defence staff member includes former members of the Australian Defence Force, former Australian public servants of the Department of Defence and the Australian Submarine Agency, and former members of the reserves who rendered continuous full-time service.*

2. any Australian citizen or permanent resident to obtain authorisation if they intend to provide training in relation to certain export-controlled items or military tactics, techniques or procedures to a foreign military, foreign government or foreign government controlled entity.

The penalty for performing work for or specified training with a relevant foreign country without authorisation is 20 years imprisonment.

An individual will not commit an offence if they have been granted an authorisation for the work or training. This authorisation is known as a Foreign Work Authorisation (FWA).

### Personal obligation

The obligation to obtain an FWA is a personal one. An individual who is in scope of the SAMS legislation is responsible for seeking an FWA, even if the work or training is provided through an industry entity or as a contractor.

### Role of the industry employer

An industry employer can support an employee who is in scope of the SAMS legislation by ensuring the employee has the information they require for an FWA assessment. This includes information on:

- any foreign military, foreign government or foreign government controlled entity that benefits from the work or training; and

- whether any training provided is in scope of the SAMS legislation – that is, relates to Part 1 of the Defence and Strategic Goods List (DSGL) or to military tactics, techniques or procedures (TTPs). As SAMS obligations relate to the individual, not the employer, privacy concerns are paramount.

**Defence is unable to share personal information with the employing entity.** If the employing entity requires an individual's FWA-related information, they must request this from the individual.

### Relationship with Defence Export Controls

The SAMS legislation works alongside the *Defence Trade Controls Act 2012* (DTC Act) to protect sensitive military knowledge and capabilities. While there are similarities in scope, there are also key differences:

- SAMS legislative requirements and offences apply to the individual, whereas section 10C of the DTC Act applies to the exporting entity.
- The SAMS legislative scope is on DSGL Part 1 training and military TTPs, whereas the DTC Act's section 10C has a wider DSGL scope and does not include military TTPs.

The offences in the SAMS legislation and those in the DTC Act are interrelated but do not duplicate each other.

- Section 115B of the SAMS legislation regulates the provision of training to a foreign military, foreign government or foreign government controlled entity in relation to goods, software or technology in Part 1 of the DSGL; or military TTPs. The foreign entity may be based in Australia.
- Section 10C of the DTC Act regulates the provision of services to foreign nationals outside Australia in relation to Part 1 of the DSGL. DSGL services include training but also encompass design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, demilitarisation, operation, destruction, processing or use of DSGL Part 1 goods or technology.

Holding a DEC permit does not remove an individual's obligations under the SAMS legislation. **Depending on the activity, an entity may need a DEC export permit and the individual/s involved may also need an FWA under the SAMS legislation.**

In a situation covered by both the SAMS legislation and section 10C of the DTC Act, the individual concerned need only apply for an FWA. That is, if an FWA has been granted for the same activity, a permit under section 10C of the DTC Act is not required for that individual.





## Foreign Work Authorisation Guide — This is for guidance purposes only and does not constitute legal advice.

| Question                                                                                                                                                                                                                                                                                                                                                                                                       | Response                            |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|
| <b>Q1:</b> Are you an Australian citizen or permanent resident?                                                                                                                                                                                                                                                                                                                                                | <b>Yes</b> – go to <b>Q2</b>        |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – FWA not required        |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q2</b>     |
| <b>Q2:</b> Planning to work or deliver training for or on behalf of a foreign military, foreign government or foreign government controlled entity? <i>Note: This includes foreign beneficiaries of the work or training.</i>                                                                                                                                                                                  | <b>Yes</b> – go to <b>Q3</b>        |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – FWA not required        |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q3</b>     |
| <b>Q3:</b> Is the work or training directly or indirectly benefiting <b>only</b> Canada, New Zealand, the United Kingdom or the United States? <i>That is, there are no foreign beneficiaries of the work from other countries.</i>                                                                                                                                                                            | <b>Yes</b> – FWA not required       |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – go to <b>Q4</b>         |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q4</b>     |
| <b>Q4:</b> Is the work or training covered by any of the following exceptions:                                                                                                                                                                                                                                                                                                                                 |                                     |
| <ul style="list-style-type: none"> <li><b>(a)</b> an existing and current foreign work authorisation?* <i>Note: The FWA must cover the same scope of work and foreign beneficiaries to meet this exception.</i></li> </ul>                                                                                                                                                                                     | <b>Yes</b> – FWA not required       |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – go to <b>Q4 (b)</b>     |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q4 (b)</b> |
| <ul style="list-style-type: none"> <li><b>(b)</b> Authorised by a written agreement with the Commonwealth?* <i>Note: This exception does not extend to subcontractors.</i></li> </ul>                                                                                                                                                                                                                          | <b>Yes</b> – FWA not required       |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – go to <b>Q4 (c)</b>     |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q4 (c)</b> |
| <ul style="list-style-type: none"> <li><b>(c)</b> Solely in the course of, and as part of, service in any capacity in or with any armed force <b>and</b> a declaration by the Attorney-General has been made under subsection 119.8(1) of the Criminal Code covering the circumstances of the service?*</li> </ul>                                                                                             | <b>Yes</b> – FWA not required       |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – go to <b>Q4 (d)</b>     |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q4 (d)</b> |
| <ul style="list-style-type: none"> <li><b>(d)</b> In the course of, and as part of, employment or engagement by the Commonwealth?*</li> </ul>                                                                                                                                                                                                                                                                  | <b>Yes</b> – FWA not required       |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – go to <b>Q4 (e)</b>     |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q4 (e)</b> |
| <ul style="list-style-type: none"> <li><b>(e)</b> Solely or primarily for either or both: <ul style="list-style-type: none"> <li>» providing aid of a humanitarian nature</li> <li>» performing an official duty for: <ul style="list-style-type: none"> <li>› the United Nations or agency of the United Nations</li> <li>› the International Committee of the Red Cross?*</li> </ul> </li> </ul> </li> </ul> | <b>Yes</b> – FWA not required       |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – go to <b>Q5</b>         |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q5</b>     |
| <b>Q5:</b> In the past 10 years, were you employed as a member of the Australian Defence Force, or as a Department of Defence or Australian Submarine Agency Australian Public Servant?                                                                                                                                                                                                                        | <b>Yes</b> – go to <b>Q6</b>        |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – go to <b>Q7</b>         |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – go to <b>Q6</b>     |
| <b>Q6:</b> Has the relevant foreign work restriction period elapsed for all past roles performed? <i>See the Defence (Non-foreign work restricted individual) Determination 2024 (job family legislative instrument) to determine your foreign work restriction period.</i>                                                                                                                                    | <b>Yes</b> – go to <b>Q7</b>        |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – FWA required            |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – FWA required        |
| <b>Q7:</b> Is the role providing training relating to goods, software or technology within the scope of <b>Part 1 of the Defence and Strategic Goods List</b> ; or training relating to military tactics, military techniques or military procedures?                                                                                                                                                          | <b>Yes</b> – FWA required           |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>No</b> – FWA not required        |
|                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Unsure</b> – FWA required        |

\* **Note:** An individual bears an evidential burden in relation to these matters - see subsection 13.3(3) of the Criminal Code.