

Export Controls on dual-use goods

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Australia's export controls are contained in legislation that includes the Customs Act 1901, the Defence Trade Controls Act 2012 (DTCA), Weapons of Mass Destruction (Prevention of Proliferation) Act 1995 and Military End-Use provisions (section 112BA) and by sanctions. The Department of Foreign Affairs and Trade (DFAT) administers the implementation of sanctions, which restrict or prohibit the export of specified goods to particular countries or individuals or entities. The Department of Defence administers the supply of defence and dual use goods overseas.

This article includes a brief discussion of dual use goods, including the Defence and Strategic Goods List (DSGL).

Controls on the supply of Defence and Dual Use Goods

Australia is a member of four major export control regimes, the Wassenaar Arrangement, Missile Technology Control Regime, Nuclear Suppliers Group and the Australia Group, and as a member has committed to ensuring that Australian exports comply with our international obligations, our own national security and that they meet our strategic policy objectives.

Australia implements controls on the most critical items and technology that could contribute to, for example, development of weapons of mass destruction (WMD), through the *Defence Trade Controls Act 2012* ("the Act").

The legal authority for these controls is Regulation 13E of the *Customs (Prohibited Exports) Regulations 1958*, which provides that the export of any item listed in the DSGL must be approved prior to export.

The purpose of the Act is to control the transfer of defence and strategic goods, software and technology in accordance with Australia's international obligations. The Act includes provisions regulating:

- brokering the supply of goods on the Defence and Strategic Goods (DSGL) List and related technology; and now
- the intangible supply of technology relating to DSGL goods, such as supply by electronic means

The Defence and Strategic Goods List (DSGL) administered by the Department of Defence specifies the goods, software or technology that is regulated and requires a permit when exported, supplied, brokered, published or transhipped through Australia, unless there is an exemption. For example, Defence agencies exporting military goods for an exercise are exempt, but, if the export is done by a freight forwarder, an export permit may be required.

The list is divided into two parts and applies to both new and used goods:

- Part 1 is the Munitions (military goods) List. These are military items designed or adapted for military purposes or non-military goods those that are inherently lethal, incapacitating or destructive;
- Part 2 lists goods that are "dual use", that is, commercial items and technologies that may be used or adapted for use in a military program or contribute to the development and production of chemical, biological or nuclear weapons or systems. These are in the following 10 categories:

- Category 0 – Nuclear Materials;
- Category 1 – Materials, Chemicals, Microorganisms and Toxins;
- Category 2 – Materials Processing;
- Category 3 – Electronics;
- Category 4 – Computers;
- Category 5 – Telecommunications and Information Security;
- Category 6 – Sensors and Lasers;
- Category 7 – Navigation and Avionics;
- Category 8 – Marine;
- Category 9 – Aerospace and Propulsion.

This List is amended from time to time to reflect changes in the various multilateral non-proliferation and export control regimes of which Australia is a member. This List is also common between member nation

signatories to the relevant Agreements, however, there is the occasional slight difference in controls between certain goods in some categories between nations.

Defence has an online self-assessment DSGL search tool available. To establish whether a particular item is controlled, you need to first check the DSGL to determine if the goods themselves are listed, and then whether related materials, equipment, software or technology are also listed.

There are some exceptions, for example DSGL technology already in the public domain or what would be considered as basic scientific research is not controlled, otherwise, unless either a permit has been granted by the Minister for Defence or a legislative exemption applies to the export, supply, publication or brokering activity, such goods may not be exported. .

If the goods are listed on the DSGL, the technical specifications of the goods against the control thresholds in the DSGL must be checked. Commonly, this associated technology may also be controlled if it is 'required' for the 'development', 'production' or 'use' of the controlled good. For example, the DSGL lists computers that are designed to operate below -45 °C or above 85 °C. The control only applies to the technology necessary for the computer to operate at these temperatures. Technology that does not influence this ability is not controlled.

Controls on the intangible supply of technology for DGSGL goods have also been in place since 2 April 2016. Goods that are in intangible form, which would require a permit to export if they were in tangible form (i.e. if they were actual goods), now also require an export permit. Some examples of intangible means are email, fax, telephone and providing access to training or electronic presentations that contain DSGL technology. The provisions apply across all sectors of industry, including universities, training and research.

It's important to remember too that the inclusion of controlled information in the repair and return of goods, or provision of a technical paper, specification, blueprint or even an email containing such information, sent overseas even if to a fellow employee or a client, is prohibited unless an export permit is first obtained. Importantly, it does



not matter to what country the information is exported, including our allies.

The outcome is that a permit is also required to take controlled technology stored on a physical medium, such as on your laptop or a USB drive, outside of Australia. This includes scenarios where the information is sent by post or is carried by hand or in checked baggage.

Please note that goods and technology that are not controlled in the DSGP may still be prohibited for export by the Minister for Defence if they are considered to be capable of use in a WMD program. Such a prohibition would be made under the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*.

Examples

Examples of goods / technology for which export permits may be required:

- Vacuum pumps; high temperature rubber rings; gas centrifuges; (Category 1)
- some types of valves and composite materials (Category 1);
- machine milling tools (Category 2);
- some carbides and coating technologies (Category 2);
- various lasers (Category 6);
- decryption algorithms (Category 7); and

- technology for machining propellers to reduce underwater noise (Category 8).

Export permits

Applications to export defence and dual-use goods are made through the Defence Export Controls (DEC). They are considered on a case-by-case basis and assessed to determine whether the controlled activity would be prejudicial to the security, defence or international relations of Australia. These assessments include consideration of Australia's international obligations, regional security, national security and foreign policy, and human rights.

It should be noted that if goods to be exported to a country subject to sanctions also appear in the DSGP, separate permissions are required from Department of Foreign Affairs and Trade and Defence.

US Export Goods

The United States controls the export, import and use of certain military and dual use items, both inside and outside USA through the *International Traffic in Arms Regulations and the Export Administration Regulations (EAR) / Commerce Control List (CCL)*. Note that these controls are separate from and in addition to any required Australian export licences.

Essentially, if an export from Australia

contains any tangible (e.g. parts) or intangible goods (e.g. software) that are of USA origin that would require an export permit from USA, then an export from Australia may require export permits from both Australia and USA. Although export permits for Australian goods are obtained through Defence Export Controls (DEC), they do not provide the export permits for controlled US origin components or software, which must be obtained from USA.

Penalties

If you get it wrong? Significant penalties including seizure and forfeiture of the goods, a 10 year prison term and/or a fine of 2,500 penalty units can apply. If the goods also include components etc of US origin, then significant penalties may also be incurred from US.

Past examples in Australia include attempts to mail small quantities of high temperature viton orings and certain drones. Similar examples have occurred in USA and Canada. For example, what was essentially a mail room mix up in Canada for fifty synthetic rubber rings, worth a few cents each, resulted in a CN\$90,000 fine. In the USA, large penalties are commonly issued. For example, in 2014 penalties for violations included one for US\$10 million and one for US\$20 million.



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