Defence Trade Controls Act

Overview of the Defence Trade Controls Act 2012 (CTH)

The DTCA was given Royal Assent on 13 November 2012 and includes measures to strengthen Australia's export controls in relation to military and dual-use goods and technology as part of its international obligations under the Wassenaar Agreement, the Missile Technology Control Regime, the Australia Group and the Nuclear Suppliers Group. The DTCA also implements the *Australia-United States Defence Trade Co-operation Treaty*.

The DTCA forms part of Australia's wider export control framework which aims to stop goods and technology that can be used in chemical, biological and nuclear weapons, or military goods and technologies, from being transferred to individuals, states or groups outside Australia. The Act was introduced to close a number of gaps in Australia's existing export regulations such as where goods and technology are supplied or published electronically over the internet or where goods and technology are brokered between two destinations outside Australia.

Under the DTCA, certain dealings in controlled goods and technology are only permitted if the person engaged in the dealing has a permit or has been approved by the Minister for Defence. Where a permit is required, the person also has to comply with certain permit conditions including record-keeping requirements under the Act. Broadly, the process for determining what requirements apply involves the following questions:

1 Is the good or technology listed in the Defence and Strategic Goods List?

2 If so, is the good or technology listed as military (Part 1) or dual-use (Part 2)?

3 Is the good or technology being supplied, brokered or published?

4 Does an exemption apply?

What goods and technology are covered?

The DTCA only applies to the specific controlled goods or technology listed in the DSGL. If a good or technology is not listed on the DSGL, or is specifically exempted, then it is not subject to the requirements of the DTCA.

The DSGL is divided into two parts:

- Part 1 lists munitions and military related goods, meaning goods and technologies designed or adapted for use by armed forces or goods that are inherently lethal, incapacitating or destructive such as non-military firearms, nonmilitary ammunition and commercial explosives and initiators;
- Part 2 lists goods that have dual use, meaning goods and technologies developed to meet commercial needs but which may be used either as military components or for the development or production of military systems or weapons of mass destruction.

Part 2 of the DSGL is further divided into particular categories of goods and technology. The items listed in each category are generally highly specific and limited to those that have been specifically designed for a particular purpose or which meet particular technical specifications. For example, the 'Computers' category includes computers that are specifically designed to operate below -45 degrees Celsius or above 85 degrees Celsius. Goods and technology that do not meet the technical specifications or fulfil the particular purposes outlined under each category in the DSGL will not be subject to the DTCA.

The table below, which is an extract from the Department of Defence website, lists each category in Part 2 of the DSGL and provides examples of the types of goods and technology captured in that category.

Part 2 of the DSGL – Dual Use Goods and Technology	
Category	Examples
Nuclear Materials; Facilities and Equipment	Nuclear reactors, gas centrifuges, materials designed for nuclear use
Materials, Chemicals, Micro-organisms and Toxins	Powdered metals, ceramics, composite materials, toxic chemicals and pathogens, protective and detection equipment, body armour
Materials Processing	Machine tools (CNC machines), crucibles, valves, robots, vibration test systems, vacuum pumps, chemical processing and handling equipment
Electronics	Radiation hardened electronics, Field Programable Gate Arrays (FPGA), microwave electronics, electronic test equipment, high energy storage devices, fast switching devices
Computers	Radiation hardened computers, high performance computers, tools for development and delivery of intrusion software
Telecommunications and Information Security	Telecommunications systems, jamming equipment, RF monitoring equipment, IP network surveillance equipment; cryptographic and cryptanalytic equipment, cryptographic activation equipment
Sensors and Lasers	Marine acoustic systems, imaging detector systems, optical mirrors, lasers, magnetometers
Navigation and Avionics	Gyroscopes, accelerometers, inertial navigation systems, flight control systems
Marine	Submersible vehicles, remotely controlled manipulators, noise reduction systems, air independent power systems
Aerospace and Propulsion	Aero gas turbine engines, rocket propulsion systems, UAVs, sounding rockets, wind tunnels, turbine blade production equipment

Although the controlled items on the DSGL are generally highly specific, companies and research institutions involved in the development of goods and technology with the potential for military application may be affected, even if those goods and technology were developed primarily for non-military commercial purposes. Enterprises involved in research and development in relation to any of the above categories are encouraged to review the technical specifications of any goods and technology they develop and compare them against the items listed in that category.

Exemptions from the DSGL

The DSGL includes specific exemptions for technology and software that is in the public domain, technology developed for basic scientific research, technology supplied for the purpose of seeking a patent and equipment designed for medical end-use. Technology and software controlled by Part 2 of the DSGL also includes any source code unless that source code has been specifically exempted.

- **Public domain:** this exemption applies to technology controlled by Part 1 of the DSGL and technology and software controlled by Part 2 of the DSGL. Technology and software is deemed to be in the public domain if it has been made available without restrictions (excluding copyright restrictions) upon its dissemination.
- **Basic scientific research:** this exemption applies to technology controlled by Part 1 and Part 2 of the DSGL. Basic scientific research means experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts and not primarily directed towards a specific practical aim or objective. This definition is highly restrictive and is unlikely to extend to technology developed for commercial application.
- **Patent applications:** this exemption applies to technology controlled by Part 1 and Part 2 of the DSGL. The exemption only applies to the minimum necessary information for a patent application.
- **Medical equipment:** this exemption applies to equipment that incorporates an item controlled by Part 2 of the DSGL. Certain items listed on Part 1 of the DSGL also specifically exempt medical equipment. Medical equipment means any equipment that has been specially designed for medical end-use.

What activities are regulated?

The Act regulates three main activities, whether they occur within or outside of Australia:

- The intangible supply of controlled technology from a person in Australia to a person outside Australia;
- Publishing controlled military technology; and
- Brokering controlled military goods and technology.

The DTCA does not regulate exports involving the physical transfer of controlled goods or technology across

Australia's borders. Physical exports of DSGL goods and technology are regulated by the *Customs (Prohibited Exports) Regulations 1958* (Cth) and may require an export permit.

The distinction between an intangible supply and a physical export can sometimes be complicated. For example, taking a laptop or USB drive containing controlled technology overseas involves the physical transfer of a controlled item and is therefore regulated as an export (and may require an export permit). However, sending the same controlled technology as a file over the internet to a person outside Australia is regulated as an intangible supply and is therefore subject to the DTCA.

The table below, which is extracted from the Department of Defence's guidance note to the DTCA, provides a high-level summary of the key requirements for each activity under the Act.

Requirements under the *Defence Trade Controls Act 2012* (CTH)		
	Controlled Military Technology (DSGL Part 1)	Controlled Dual-Use Technology (DSGL Part 2)
Intangible supply	Permit required	Permit required
Publishing	Approval by Minister for Defence or her delegate required	No approval required but Minister may prohibit publishing of specific technology if it would be adverse to Australia's interests
Brokering	Permit required	No permit required (except for a WMD or military end-use) but Minister may prohibit brokering of specific technology if it would be adverse to Australia's interests

1 Intangible Supply

The DTCA prohibits a person from either supplying military or dual-use technology (**controlled technology**) to another person outside of Australia without a permit. Supply includes providing access to controlled technology, for example, providing a password to a person outside of Australia that allows them to access electronic files. The restriction applies only to supply across Australia's borders. Supply that is wholly within or wholly outside Australia is not affected.

Only supplies to a person outside of Australia are controlled. No permit is required to supply military or dual use technology wholly within Australia. A permit is also not required unless the supply of controlled technology is to another person. For example, no permit is required if a person wants to access controlled technology while overseas from a cloud storage service, although a permit would be required to provide access to that cloud storage service to somebody else outside Australia.

A person may apply to the Minister for a permit to supply controlled technology. The Minister will grant a permit if satisfied that the supply would not prejudice the security, defence or international relations of Australia. A permit may cover multiple supplies or a project described in the application.

There are a number of exceptions where a controlled technology can be supplied without a permit, including:

- **Verbal supply:** where the supply is made orally (for example, over the phone or by video conference) and does not involve the provision of access to controlled technology and the supply is neither for a military end-use or for use in a Weapons of Mass Destruction program. This exception does not apply to electronic recordings of verbal communications. If you are looking to rely on this exception, you should specify to counterparties that they must not record the conversation.
- **Pre-publication supply of dual-use items:** where the supply of dual-use technology under Part 2 of the DSGL is preparatory to the publication of the controlled technology to the public or to a section of the public and the Minister has not issued a notice prohibiting the publication of that technology. This covers, for example, supply of a draft publication to a publisher or international peer reviewer. This exception does not apply to the supply of military technology under Part 1 of the DSGL.

2 Publishing

The Act also prohibits a person from publishing, including publishing over the internet, technology in Part 1 of the DSGL (**military technology**) to the public or a section of the public unless the person has approval from the Minister authorising the publication. The Minister will only give approval to publish military technology if satisfied that the publication would not prejudice the security, defence or international relations of Australia. No approval is required for military technology that has already been lawfully made available to the public.

No approval or permit is required to publish technology in Part 2 of the DSGL (**dual-use technology**). However, the Minister or the Secretary may issue a notice prohibiting the publication of any controlled technology, including dual-use technology, if he or she reasonably believes that the publication would prejudice the security, defence or international relations of Australia. No notices have yet been issued in relation to any dual-use technology.

The rules relating to publishing controlled technology only apply where the technology is published to the public or a section of the public. Controlled technology published to a private or restricted audience is treated as an intangible supply and may require a supply permit.

3 Brokering

For the purposes of the DTCA, a broker is a person located in Australia, or an Australian citizen or permanent resident located outside of Australia, who acts as an agent or intermediary between two or more persons located outside Australia in relation to the supply of controlled goods or technology where the person:

- receives money or a non-cash benefit for acting as a broker; or
- advances their political, religious or ideological cause by acting as a broker.

The DTCA prohibits a person from acting as a broker in relation to goods and technology in Part 1 of the DSGL (**military goods and technology**) unless they have a permit authorising the brokering.

No permit is required to act as a broker in relation to goods and technology in Part 2 of the DSGL (**dual-use goods and technology**) except where the person acting as broker knows or is reckless or negligent as to whether the goods or technology will be for a military end-use or used in a Weapons of Mass Destruction program.

Requirements for permit holders

Permit holders are required to comply with any conditions of their permit as well as any requirements imposed by the DTCA. This includes keeping records of any supplies or any brokering arrangements made by a permit-holder for a period of five years.

The record keeping requirements only apply to permits for the supply and brokering of controlled goods and technology.

Persons who have been approved by the Minister to publish controlled military technology do not have to keep records of any publications made subject to that approval.

Legislative Review

The DTCA is scheduled to be reviewed on or shortly after 2 April 2018 following two years of operation of the offence provisions. After this, the Act will continue to be reviewed in five-yearly intervals to ensure the regulations reflect international developments and best practice over time. These reviews will provide scope for stakeholders to advise on the financial impact of the regulation to enable further refinement as required.

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