Before you hit ‘send’ – does your email require an export licence?

Enforcement of Australia’s key military and dual-use goods export legislation – the Defence Trade Controls Act 2012 – has been pushed back to 2 April 2016. Businesses should take advantage of this delay to get acquainted with the country’s new, U.S.-inspired export control system, write Daniel Moulis and Alistair Bridges.

The Australian military and dual-use goods export compliance system is being internationalised, to bring it closer to the systems implemented by our major defence partners. One of the key changes brought by this transition is an expansion to any non-physical transfer of information concerning controlled goods. This clampdown on intangible transfers of controlled technology – via emails, phone calls, and any transmission system – has sent a wave of panic through Australian business and academic circles, who consider that these new export controls will be a significant burden on cross-border business activities and on research and education.

By its nature, any regulation of intangible transfers of technology needs to strike a balance between the security risks evident in the export of controlled goods and technology, and the freedom of our exporters, academics and other experts to easily share technical information. Given the uproar that the Defence Trade Controls Act 2012 (‘DTCA’) has caused – with commentators suggesting that we could see the end of mathematics and science research in Australia, and the jailing of academics for sharing their research with colleagues – it seems self-evident that security concerns have the ascendancy. Nonetheless, there have been some moderations as the law has moved towards implementation.

Loose lips sink corporate ships
The DTCA implements Australia’s obligation under the Australian-United States Defence Trade Cooperation Treaty to expand the breadth and security of the military and dual-use goods export system. It is intended to align with the operation of the United States’ International Traffic in Arms Regulation and Export Administration Regulations.

Australia’s existing export controls system is implemented through clause 13E of the Customs (Prohibited Exports) Regulations 1958. This regulates the exportation of military and dual-use goods listed in the Defence and Strategic Goods List (‘DSGL’). The DSGL is the domestic implementation of the international non-proliferation and export control regimes to which Australia is a member, such as the Wassenaar Arrangement and the Nuclear Suppliers Group. However, these export controls were limited to physical exports of military or dual-use goods. ‘Technology’ – being specific information required to develop, produce, or use goods listed in the DSGL – was only subject to controls in instances where it was transferred physically, such as via the export of a USB stick. There was no regulation of the intangible export of DSGL technology, other than when it related to WMDs (weapons of mass destruction). While this may have been appropriate when the regulations were created in the early 1990s, the subsequent adoption of information and communication technology and its integration into every aspect of business, academia and daily life meant that these export controls – like mullet haircuts, Beverley Hills 90210, and the Spice Girls – were severely out of date.

In order to address this, the initial iteration of the DTCA made the unlicensed supply of technology an offence. What this meant is that any email, email attachment, phone call, or cloud data relating to military or dual-use goods could be considered to be an ‘export’ and could fall within the domain of the DTCA controls. A person making that communication without a permit to do so would be committing a crime. The characterisation of communications as exports might be a surprise to some people. Indeed it represents a paradigm shift in the way Australian export controls will now operate.

The DTCA also makes it an offence
to publish most DSGL technology – both in relation to military and dual use goods – without ministerial approval.

Of course, a blanket ban on transfers and publication of DSGL technology would be a huge interference with business dealings, and inevitably unworkable from both a compliance and enforcement perspective. Accordingly, the reach of the DTCA’s requirements will not be absolute. Firstly, the DTCA grants the government a broad power to make regulations prescribing circumstances in which no permit will be required for the supply or publication of DSGL technologies. Secondly, to the extent that ‘specific’ information is required to develop, produce, or use goods listed in the DSGL, it is subject to controls under the DTCA unless that technology is utilised in ‘basic scientific research’, or is in the ‘public domain’.

However, these two carve-outs are limited in scope. Basic scientific research is defined as being ‘experimental or theoretical work undertaken principally to acquire new knowledge of the fundamental principles of phenomena or observable facts, not primarily directed towards a specific practical aim or objective’. So, observations regarding how different metals absorb or reflect radio waves would be basic research, whereas the test results evaluating which metal coating compounds are most suitable as RADAR-absorbent material would not. Information is considered to be in the ‘public domain’ where it is available without restrictions (other than copyright restrictions) upon its further dissemination.

These exemptions relate to what could broadly be defined as ‘general knowledge’, so the concerns of non-government entities regarding the scope of the DTCA would appear to be justified. Mathematics, physics, biology, chemistry – it does not matter what the field of expertise is – if there is dual-use equipment or technology specific to the field of research, there is an overwhelming likelihood it is listed in the DSGL. How can academics teach an online course in cryptography to students overseas, or lecture on the geological or archaeological use of magnetometers at a conference overseas, or even discuss such matters with overseas colleagues over the phone, without infringing the DTCA as originally drafted? Without a permit, they could not.

**A draft of a publication that contains dual-use DSGL technology can be sent from Australia to a person overseas for review... without the requirement for a permit.**

**Amendments now relax the initial stringency of the new laws**

The government was cognisant of these concerns and decided to delay the commencement of the licensing and enforcement provisions of the DTCA until 16 May 2015, to provide stakeholders with time to align their practices with the new regime. During this transition period, the Department of Defence, the Strengthened Export Controls Steering Group, and the Department of Industry analysed the actual and potential impacts of the DTCA in with a view to easing some of regulatory burdens it would create. The result of this consideration informed the development of the Defence Trade Controls Amendment Act 2015 ("the Amendment Act") which, as well as introducing new exceptions to the licensing requirements, has further delayed the commencement of the licensing and enforcement provisions until 2 April 2016.

The most significant advancement in the Amendment Act is the inversion of the treatment of the publication of DSGL technology for dual-use goods. Under the Amendment Act the presumption is that the publication of DSGL dual-use technology is exempt from permit requirements unless the government publishes a notice which identifies that technology as being subject to permit requirements. Publications regarding military technology still require full approval by the Minister.

The Amendment Act also allows for the supply of dual-use DSGL technology where that supply is 'preparatory' to the publication of such technology. This is slightly garbled, but essentially, what it means is that a draft of a publication that contains dual-use DSGL technology can be sent from Australia to a person overseas for review, comment or general input, without the requirement for a permit.

Finally – and this should come as a significant relief to anybody who discusses dual-use or military technology with colleagues overseas – the Amendment Act includes a new exception for the 'oral' supply of DSGL technology. This exception applies to both military and dual-use technologies, on the proviso that the supply is not made for a military end use, nor for use in a WMD programme.

Are these new exceptions helpful? Absolutely! But are they the answer to all the concerns raised? Of course not. Those concerns originate from a time when intangible transfers were not regulated. The very act of regulating intangible transfers will create red tape and complexity where previously there was none, and thus will undoubtedly have an impact on businesses and research institutions. However, the creation of the Amendment Act shows that the government does not want to stifle legitimate activities, and is willing to listen to the complaints that have been raised.

**The creation of the Amendment Act shows that the government does not want to stifle legitimate activities, and is willing to listen to the complaints that have been raised.**
framework to be further curtailed.

Having said that, there are still many questions about the scope of the amended DTCA. Importantly, whether Export controls on the supply of information are coming
The original, all-encompassing operation of the DTCA has been refined

What Australians traditionally understood to be an 'export' does not even begin to scratch the surface of what will now be subject to export controls.

—and to what extent—researchers will need to keep the government informed of their activities in order to qualify for dual-use goods exceptions is still unclear. In practice this will very likely only be ascertainable on a case-by-case basis. There is also uncertainty around the question of when the supply of technology will be considered to be preparatory to publication. Does it cover instances where publication was intended, but was not ultimately achieved? Additionally, the process for issuing notices prohibiting publication is still unknown. All these questions and more are likely to be the subject of further debate.

by the Amendment Act. While this more nuanced approach does mitigate the most extreme aspects of the DTCA's operation, there should be no mistake that as of 2 April 2016 a 'business as usual' approach will not be sufficient to ensure that cross-border research and business can continue without breaching export control requirements. What Australians traditionally understood to be an 'export' does not even begin to scratch the surface of what will now be subject to export controls. Publishing research findings on controlled chemicals used in mining could require a permit under the DTCA. Discussing your work on propulsion control software over the phone with a colleague overseas also might need to be approved beforehand. Even saving a spreadsheet on your company's cloud network may require a permit.

Businesses, universities and other research institutions will also need to familiarise themselves with the DTCA, as will anybody else who is potentially involved in the international transmission of information that may be related to technology listed in the DSGL.

Daniel Moulis is a partner and Alistair Bridges a senior lawyer at Moulis Legal in Canberra, Australia. Moulis Legal advises Australian and multinational corporations on cross-border matters including trade in goods and services, investment and export/import controls.
daniel.moulis@moulislegal.com
alistair.bridges@moulislegal.com

Foreign Trade and Logistics
Export controls
Dual-use and licensing
Economic and financial sanctions
Extra-territorial application of US law
Customs duties and imports
Risk analysis
Compliance programmes

G&W Graf von Westphalen

Graf von Westphalen
Attorneys-at-law and Tax Advisors
Berlin | Düsseldorf | Frankfurt | Hamburg | Munich
Alicante | Brussels | Istanbul | Shanghai
Contact in Brussels:
Dr. Katharina Haring, k.haring@gw.com
Contact in Hamburg:
Marian Niestedt, m.niestedt@gw.com

G&W.com

25 WorldECR
www.worlddecr.com