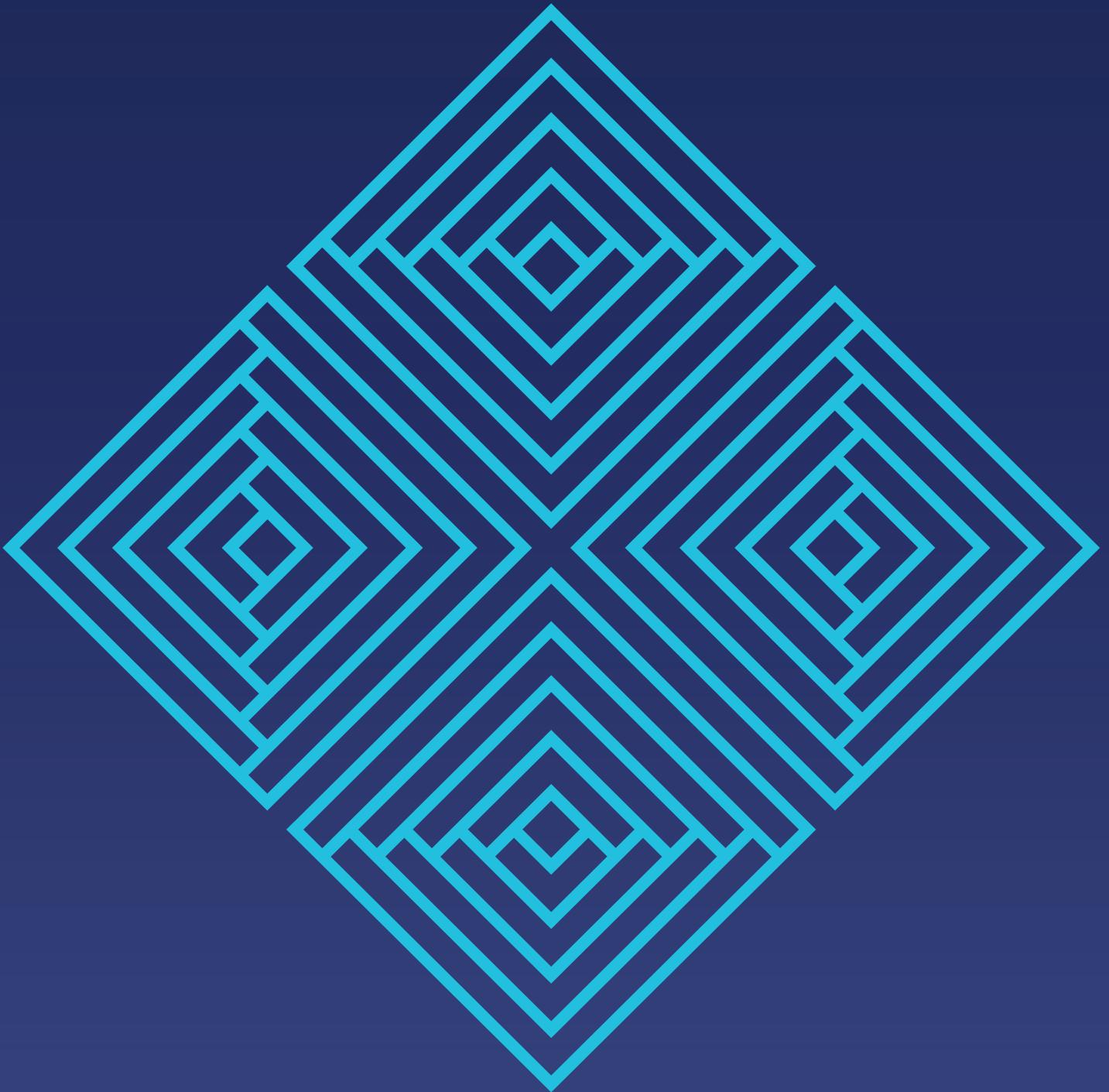




PUBLIC CONSULTATION DOCUMENT

Proposed changes to Catch-All Export Controls



MFAT is seeking feedback on proposals to widen the application of “catch-all” export controls for goods and technology destined for a military end-use.

1 Current situation

The New Zealand Government controls the export of strategic goods and technology¹ through the Customs and Excise Act 2018. There are two types of controls:

- *Controls on military or “dual-use” items on the NZ Strategic Goods List (NZSGL)*
 - > No changes are being proposed in this area
- *Catch-all controls, which “catch” any item not on the NZSGL.*
 - > Changes are being proposed in this area

1.1 WHAT ARE CATCH-ALL CONTROLS?

There are two types of catch-all controls covering: (i) weapons of mass destruction (WMD), and (ii) military end-use.²

- *WMD controls apply to any item not on the NZSGL that is, or may be intended for, direct or indirect use in the development, production or deployment of nuclear, chemical or biological weapons in any country.*
 - > No changes are being proposed in this area
- *Military end-use controls apply to any item that is, or may be intended for, direct or indirect military end-use in a country covered by a UN arms embargo.*
 - > Changes are being proposed in this area as set out below

1.2 WHAT IS THE CURRENT SCOPE OF MILITARY END-USE CONTROLS?

“Military end-use” is defined as:

- *direct or indirect use by armed forces, a paramilitary force, police force or militia³*
- *items which are incorporated into weapons, or used in the production, maintenance or testing of weapons.⁴*

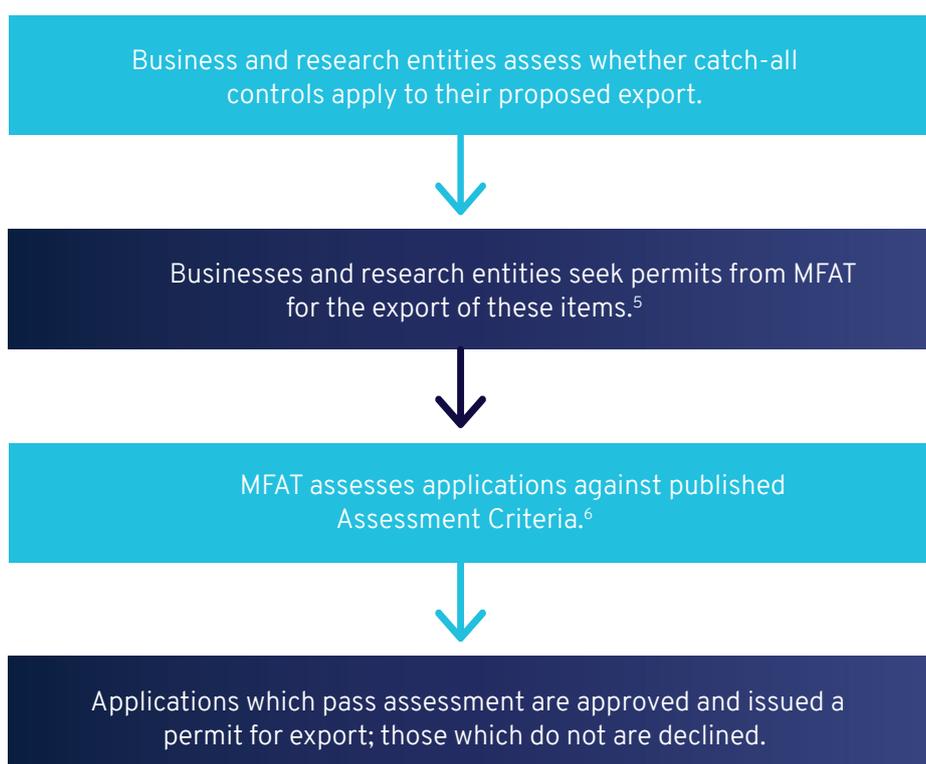
Countries to which military end-use catch-all controls currently apply (because they are subject to a UN arms embargo) are:

- *Central African Republic, Democratic Republic of Congo, Democratic People’s Republic of Korea (North Korea), Eritrea, Iran, Lebanon, Libya, Somalia, South Sudan, Sudan and Yemen.*

1.3 HOW ARE CATCH-ALL CONTROLS MANAGED?

Currently the Secretary of Foreign Affairs and Trade has the authority under the Customs and Excise Act to approve or decline the exports to which catch-all controls apply.

The process for applications is as follows:



Examples of an export under current military end-use catch-all controls:

SCENARIO 1:

Company A seeks to export commercial vehicles to the army of a country under a United Nations arms embargo. The vehicles are not on the list of items embargoed by the United Nations, or on the NZ Strategic Goods List, but because the goods are destined for a military user, the exporter must seek a permit from MFAT.

SCENARIO 2:

Company A seeks to export the same vehicles to the army of a country not under a UN arms embargo. No permit is required for this export, even if there are concerns about the vehicles being used, for example, to provide logistic support to a military operation to repress a civilian population.

2 Why are changes being proposed?

Limiting the scope of our catch-all controls to countries under a UN arms embargo is no longer sufficient to manage the risks we face from exports to military users in countries of concern.

Due to differences among its members, the UN Security Council is currently unable to impose arms embargoes on some countries of concern, such as Syria. Even if the Council were more active, it is unlikely its sanctions would extend to all countries of concern to New Zealand.

Therefore a risk exists that goods or technology exported from New Zealand to a military end-user might contribute to a conflict, or human rights violations, support repressive regimes, or increase the military capability of a state which is challenging our security interests. Failing to regulate exports in these cases poses security, political or reputational risks to New Zealand and its international relationships.

MFAT would welcome views on the rationale for making changes to catch-all controls.

3 What changes are being proposed?

It is proposed that the scope of catch-all controls be widened to ensure that they capture significant risks to New Zealand's interests. Specifically it is proposed to

1. Widen the scope of catch-all controls to include all countries, but with exemptions for businesses needing to seek permits for certain low-risk countries and products (see section 3.1 below).
2. Amend the definition of military end-use so that it includes operations and activities of a military/police nature (see section 3.2 below).

Catch-all control element	Current situation	Proposed changes
Scope of catch-alls for military end-use	Countries under UN arms embargo	All countries, but with exemptions for business needing to seek permits for certain low-risk countries and products
Definition of military end-use	Items incorporated into weapons, or used in the production, maintenance or testing of weapons	Current definition expanded to include "activities or operations of a military or police nature"
Definition of military end-user	Armed forces, paramilitary, police, militia	No change
Criteria for assessing applications	Assessment Criteria	No change

3.1 PROPOSED CHANGES TO THE SCOPE OF CATCH-ALL CONTROLS

To enable an efficient system of catch-all controls focused on areas of significant risk, while minimising any unnecessary impacts on business, it is proposed that:

- *the Secretary of Foreign Affairs and Trade have the authority to prohibit exports of goods and technology not listed in the NZSGL to any country for military end-use or application.*
- *Companies and research entities are able to apply for a permit to export non-listed goods for military end-use or application.*
- *There be exemptions from the requirement to seek permits involving countries and goods that pose a low risk, as set out below.*

3.1.1 EXEMPTIONS

It is recognised that some countries and products involve a low risk, and that requiring exporters and research entities to apply for permission in these cases imposes a burden which is not commensurate with the risk. Accordingly it proposed that there be three types of exemptions, where businesses and research entities will NOT need to apply for permission to export for a military end-use. These exemptions would cover:

- *Exports to end-users in the following countries: Australia, Canada, Iceland, Japan, Norway, Republic of Korea (South Korea), Switzerland, US, and any member state of the European Union (and the UK when it leaves the EU) because the risk of misuse of goods and technology in these countries is minimal and all these countries participate in international export control regimes to which New Zealand belongs.⁷*
 - > *Note that if the item is exported to a state covered by an exemption, with the intention that it be re-exported to a state not covered by an exemption, a permit is still required.*
- *Exports of live animals, food, beverages, and medical, health and sanitary products, because these goods do not contribute materially to military/police operations or activities.*
- *Exports that are part of an assistance programme provided by the New Zealand government.*

Notwithstanding these three exemptions for exporters needing to seek a permit, the Secretary of Foreign Affairs and Trade would still have the authority to block any exports covered by the exemptions, or require a permit to be sought for specific transactions, should individual cases of concern emerge.

MFAT would welcome views on the proposed scope of catch-all controls and the proposed exemptions.

3.2 CHANGES TO THE DEFINITION OF MILITARY END-USE

The current definition of military end-use⁹ focuses on the incorporation of exported items into weapons, and in the production, maintenance and testing of weapons. This definition does not cover the risk that certain goods or technologies could be used by military/police for inappropriate activities, in particular during operations. It is therefore proposed to widen the definition to encompass a wider range of military/police activities while excluding activities which are of a more general nature such as food production or medical care.

- *It is proposed that military end-use would be defined as any item for “incorporation into weapons, or use in the production, maintenance or testing of weapons” [i.e. the current definition] and additionally “or operations and activities of a military or police nature”.*
- *A permit would be required for items falling within this definition. No permit would be required for items not covered by the definition. In cases where the situation is unclear, MFAT will provide advice to an exporter on whether a permit is required.*

MFAT would welcome views on the proposed changes to this definition.

3.3 EXAMPLES OF EXPORTS UNDER THE PROPOSED CHANGES

Permit required

Company A is seeking to export civilian water craft to a military user in a country not on the exemption list. *As the goods could be used in military operations a permit is required.*

Company B is intending to sell IT applications for use in police operations by a police force in a country not on the exemption list. *Since the item is for police operational use, a permit is required.*

Company C is transferring technology to a civilian research partner in a country not covered by an exemption. *If the exporter judges that there is a risk the technology could be diverted to military end-use in the future, a permit is required.*

Permit not required

Company W is seeking to export items not on the NZSGL for use by an armed force in an EU country. *It does not need to apply for a permit, as EU countries are covered by an exemption.*

Company X is seeking to export health-related items to a military hospital in Africa. *It does not need to apply for a permit as medical products are covered by an exemption.*

Company Y is exporting accounting software to the Police in a country not on the exemption list. *No permit is required because accounting is not an activity of a military/police nature.*

Company Z is supplying military clothing to a police force in a Pacific island country under an official NZ government assistance programme. *No permit is required as NZ government assistance programmes are exempt.*

4 Transitional measures

It is proposed that there be transitional arrangements to minimise the impact of this rule change on existing business and research activities:

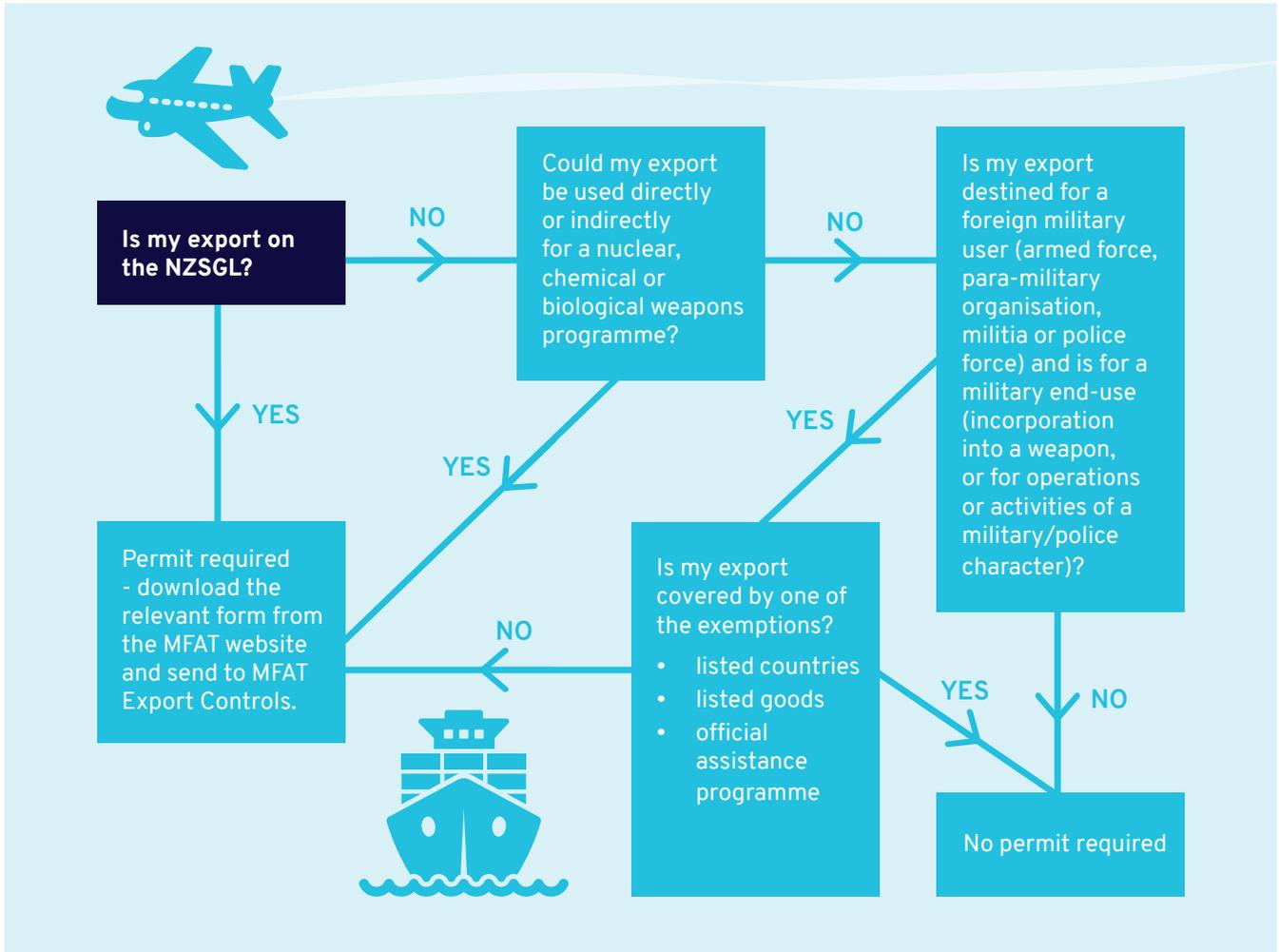
- *A six month gap between the announcement and enforcement of the new rules, to allow time for permits to be obtained for products to be delivered after the enforcement date.*
- *A presumption of approval for existing contracts.*
- *A presumption of approval for the supply of parts for use in equipment which has already been supplied.*

MFAT will provide advice to individual businesses and research entities to help them implement the proposed changes with minimum disruption.

MFAT would welcome views on the proposed transitional arrangements

5 How will this affect exporters?

- *If these proposals are implemented, catch-all controls will apply to a wider range of countries but the current process for seeking approvals will not change.*
- *Businesses and research entities transferring goods and technologies overseas will need to assess whether their customer is a “military end-user” (including police), or whether items are destined for, or could be diverted to, a “military end-use” (including police).*
- *They will need to consider whether any of the exemptions for seeking a permit would apply, seeking advice from MFAT if required.*
- *The range of permits currently available for the export of goods and technologies (which includes permits for single and multiple transactions) will remain the same.*
- *The process for applying for permits (including no fees and a 10-day turn-around for routine applications) will remain the same.*
- *A flow chart showing how these changes could be reflected in decision-making by exporters is on the following page.*



MFAT would welcome views on the impact of the proposed changes on current exports.

6 Your views are welcome

MFAT would welcome comments on this proposal, in particular:

- *the rationale for widening catch-all controls*
- *the proposed scope of catch-all controls and the proposed exemptions*
- *the proposed definition of military end-use*
- *the proposed transitional arrangements*
- *the impact on current exports to military, para-military, militia or police end-users.*

Comments on this proposal should be sent to exportcontrols@mfat.govt.nz, or mailed by 15 November 2019 to: Export Control Unit, International Security and Disarmament Division, MFAT, Private Bag 18-901, Wellington 6160. Should you wish to discuss this proposal in person, please call MFAT Export Controls on 04 439 8227.

TERMS OF USE AND PRIVACY POLICY

MFAT will hold and treat any information provided to us in confidence. Comments will be viewed and collated by MFAT staff and summaries may be provided to various Ministers and Parliamentary Committees.

Your comments will be used in the preparation of any recommendations put forward on changes to the export of strategic goods and technology, in particular changes to Customs Export Prohibition Order 2017.

MFAT does not currently intend to publish all comments but this may change, so if you do consent to your comments being published on the MFAT website, please indicate this in your submission. If you consider any comments provided by you to be commercially sensitive, please also indicate this in your submissions. This will assist in ensuring the information is kept confidential and will also allow any safeguards available under the law to be applied to your commercially sensitive information.

Under the Privacy Act 1993 where the commenter provides personal information (name, contact details, etc.) this information will be held by MFAT and may be viewed by a range of people (staff and third party contractors) to the extent necessary to work on the issue. Email addresses are not made available to the public and unless required by law we won't publicise the names or email addresses of individuals who provide comments without their consent.

Comments may constitute public records and will be retained and be publically accessible to the extent required by the provisions of the Public Records Act 2005.

MFAT may also need to disclose the comments under the Official Information Act 1982 or to a Parliamentary Select Committee or parliament in response to a parliamentary question.

1. "Technology" is defined under the Act in terms of "tangible technology" which includes written materials and electronic information.
2. Customs Export Prohibition Order 2017 section 6(2)
3. Customs and Excise Act 2018, section 97(10)
4. Customs Export Prohibition Order 2017 section 6(3)
5. For details see <https://www.mfat.govt.nz/en/trade/trading-weapons-and-controlled-chemicals/>
6. Under the Criteria, an application will be declined if the export of goods or technologies would violate New Zealand's international obligations; or if they could be used to commit or facilitate a serious violation of international law or in the commission of genocide, crimes against humanity, or war crimes; or if there is a substantive risk they would undermine peace and security. There are also criteria for assessing proliferation, reputational and national interest risks which could result in an application being declined. For the full Criteria see <https://www.mfat.govt.nz/en/trade/trading-weapons-and-controlled-chemicals/how-your-application-is-assessed/#criteria>
7. The Nuclear Suppliers Group, the Australia Group (covering chemical and biological weapons), the Missile Technology Control Regime and the Wassenaar Arrangement (covering conventional weapons),
8. Customs Export Prohibition Order 2017 section 6(3),
9. The Customs and Excise Act requires exporters to be "reasonably aware" whether goods are intended for, or may be put to, a military end-use.

MFAT

MINISTRY OF FOREIGN AFFAIRS AND TRADE