

# **A Review of the Ministry of Foreign Affairs and Trade's Export Controls Regime**

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## Disclaimer

Views expressed in this report are those of the independent reviewers and may not reflect the views of the New Zealand Government, including the Ministry of Foreign Affairs and Trade.

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## Executive summary and recommendations

1. In April 2021, the Deputy Chief Executive Policy of the Ministry of Foreign Affairs (MFAT) commissioned an independent review of the Ministry's Export Controls framework. Commissioning of the review followed public interest in media coverage of New Zealand businesses exporting to countries that were the subject of public concern in relation to human rights and humanitarian laws.
2. The Terms of Reference require us to review the Export Controls framework, including related policies, processes, systems, controls and people, and to assess whether the regime is fit for purpose.

### Context, purpose and organising framework for MFAT's Export Controls regime

3. The original purpose of the Export Controls regime was to give effect to international commitments to restrict trade in weapons and dual-use technologies and to support United Nations (UN) sanctions. The regime is also a mechanism through which to reflect New Zealand's values and interests more generally, for example in restricting trade with countries or entities that are breaching human rights.
4. One way of describing the objective of the regime is 'to maximise opportunities for trade, research and international collaboration and minimise uncertainty for exporting businesses and research institutions subject to ensuring that New Zealand meets its international commitments in relation to the proliferation of weapons, military equipment and technology, humanitarian law and human rights and operates prohibitions that are consistent with national values and interests'.
5. New Zealand's Export Controls legislation is contained within the Customs and Excise Act 2018 ('the Act'). The Act serves several functions and is administered by New Zealand Customs Service. The Secretary of MFAT is the decision-maker in relation to Export Control applications and can (and does) delegate that function within the organisation.
6. The Strategic Goods List (based on the Australian equivalent) sets out the strategic goods - weapons and dual-use goods - for which export is prohibited unless the Secretary of MFAT issues a permit.
7. MFAT publishes a set of criteria so that exporters know how permit applications will be assessed. These Criteria for Assessment have been approved by the Minister of Foreign Affairs.
8. The scope of Export Controls was significantly extended in October 2020, when the Secretary of MFAT expanded the Catch-all Controls ('Catch-alls') by Gazette Notice.
9. The Catch-alls capture exports that are not on the Strategic Goods List and that are intended for use by a military organisation (defined as any armed force, paramilitary force, police force or militia). The caveat that prohibitions for non-strategic goods should apply only for exports to countries under a UN arms embargo was removed. Exports to a small list of countries and exports of a limited number of product types (such as food and medicine) are exempt from the expanded Catch-all controls.

10. New Zealand has a relatively small defence/weapons industry, but a growing tech sector that exports a range of goods and technologies with potential dual-use.
11. New Zealand's research system is also subject to Export Controls, for example in relation to sensitive (dual-use) technologies and collaborations with researchers and institutions in countries of potential concern from an Export Controls perspective.
12. The expansion in scope of the Catch-alls, the increasing complexity of the geopolitical environment and ongoing developments in dual-use technologies mean that the volume and complexity of applications requiring consideration by MFAT is likely to be significantly higher in future than was the case in the past, as is the need for greater outreach and awareness-raising.

### Overview of permit applications

13. In the recent past (pre-Catch-all expansion), MFAT received around 700 distinct permit applications per annum, of which around 90% were 'standard' export permit applications and 10% were 'non-standard'. Approximately 7 – 10 applications per year were the subject of 'noting' advice to Ministers.
14. Almost 100% of applications were approved. However, businesses do not usually make permit applications for exports that would clearly be declined. MFAT regularly gives in-principle advice to potential applicants; where the advice is that an application is likely to be declined, the applicant will generally not proceed. MFAT does not keep records that enable an assessment of how many applications did not proceed because of in-principle advice.

### Perspectives of stakeholders

15. We interviewed a cross-section of exporting businesses and universities that interact with the Export Controls regime and NGOs, academics and activists who are interested in the effectiveness of the regime in relation to human rights, humanitarian law, non-proliferation and New Zealand's values and interests more generally.

### Exporting businesses

16. Exporting businesses understand and support the intent behind the Export Controls regime.
17. Feedback from interviewees on MFAT's implementation of Export Controls was generally positive:
  - MFAT invariably responds promptly to questions and to applications, and is willing to give in-principle advice, which helps businesses decide whether to invest resource in pursuing potential exporting opportunities
  - MFAT staff have a good understanding of the regime and its main component parts (technologies, international commitments, current foreign policy positions), which enables them to give advice relatively quickly
  - MFAT processes standard export applications in a very timely way – typically in 2 – 3 days.

18. For some, mainly businesses exporting dual-use goods and technologies and particularly those impacted by the recent expansion in the scope of the Catch-alls, aspects of the regime are problematic, notably:
- Uncertainty about the extent of coverage, with the criteria for risk assessment so broad as to make prediction of outcomes difficult in some instances
  - The risk that exports to a country may be permitted (even encouraged) and then, because of a change in circumstances, become prohibited after the business has invested in building relationships and, potentially, made multi-year commitments.
19. Other issues raised by a subset of the businesses interviewed included:
- The confusing nature of the regime, only partly addressed by the explanatory material on MFAT's website. This was particularly the case for goods not on the Strategic Goods List or where the exporter was considering export to a new market in a developing economy
  - Concern at the possibility of decision-making being influenced by public reaction to media reporting of specific instances of export, often on the basis of limited information
  - A perception that aspects of the New Zealand regime are more restrictive than is the case in like-minded countries, mainly because of the expanded scope of the Catch-all controls. A counter view was that the New Zealand regime compares favourably overall to other export control regimes (e.g., less onerous processes).

#### NGOs, academics, and activists

20. NGOs, academics and activists interviewed expressed two main concerns:
- Based on media coverage and responses to Official Information Act requests, MFAT appeared to be approving some permit applications that should have been declined, mainly because of concern about human rights abuses in or by the government of the importing country
  - The lack of transparency (due to commercial and diplomatic sensitivities), which make it difficult to assess how MFAT is implementing the regime (e.g., what information is relied on, how risks are assessed) and the extent to which New Zealand is honouring international commitments and making decisions consistent with national values and interests.

#### Universities

21. University interviewees recognised the increasing risks that Export Controls and other policy interventions are intended to address but were concerned at the lack of specificity in the definition of the expanded Catch-all controls, at the potential for constraint on academic freedom and the possibility that MFAT might take a more prescriptive approach to the Controls in future.

## Assessment of MFAT's implementation of the regime

22. A factor shaping MFAT's approach to administering the Export Controls regime is the level of resource available which has been very limited, consistent with the historically low level of complex permit applications and reflecting resource pressures across other parts of MFAT.

## Legislative mandate and operationalisation

23. MFAT has implemented the Export Controls regime consistent with the legislative mandate.
24. The sections of the Act relating to Export Controls (i.e., Part 3, subpart 4) do not have a specific purpose statement and are difficult to follow, as are the supporting legislative instruments, policy documents and their inter-relationship.

## Criteria for Assessment

25. The set of Criteria for Assessment of permit applications are based on those used in other countries and all remain relevant.
26. There are many Criteria, and they are broad in scope, which gives MFAT considerable discretion for judgement.
27. The number of Criteria is impractically large for structured application in assessing export permit applications and the Criteria as a group give little insight to exporting businesses or to interested stakeholders as to how a range of permit applications might be assessed.
28. The Criteria do not explicitly include consideration of domestic reputation. This is not easy to define but the underlying idea reflected by interviewees was that public opinion does and should influence governments in defining New Zealand's values and interests at any point in time.

## Operational policies, standards, and delegations

29. Stewardship of regulatory systems is a small part of MFAT's overall responsibilities. The Ministry does not have well-established systems, processes and supporting resources that are common in agencies for which regulation is a central part of their activities.
30. The Export Controls team has reasonable although relatively informal processes for considering applications, including:
  - A commitment to responding to questions and providing timely information to regulated parties, with many exporters highlighting the accessibility of the team
  - Timely processing of permit applications taking into account commercial pressures on the applicants (e.g., if participating in a competitive tender)
  - Ensuring at least two people handle each application, though formal delegations for all permit decisions extend to junior team members (which is relatively unusual)
  - Use of some templates, particularly for obtaining country-specific input from other parts of MFAT, though most MFAT staff have little familiarity with the specifics of the Export Controls regime
  - A draft Standard Operating Procedure setting out in detail how a permit application should be processed.

31. Whilst these operating frameworks work reasonably efficiently in a small team, it would be problematic to rely on them as workload increases or if key individuals were to leave.

### Decision-making

32. As noted above, MFAT publishes the Minister-approved Criteria for Assessment used as the basis for decision-making. The Criteria give no sense as to how to weigh risks or make trade-offs in complex cases.
33. MFAT's process for undertaking risk assessments is relatively informal and unstructured.
34. In assessing risks, MFAT officials aim to act consistent with the foreign policy positions of the government of the day (subject to remaining within the broad confines set by the legislation and Criteria for Assessment), for example in the weighting given to human rights relative to other considerations. This is appropriate for decisions that require risk assessments and where the objective is to make decisions consistent with New Zealand's values and interests.
35. Senior MFAT staff, including the accountable second-tier manager, take an active interest in the assessment of complex cases.
36. MFAT provides briefings to Ministers on complex decisions, consistent with the 'no surprises' principle.
37. MFAT has an internal review process in place for when exporters contest a permit decision. Only one exporter has ever asked for a review of a decision.
38. Documentation of complex applications refers to decisions in comparable cases in the past and in like-minded countries. Consistency across decisions relies on judgements by the individuals involved in the assessments.
39. Recent legislation on regimes that have some similar objectives – Overseas Investment and Space – provides for decision-making by Ministers (with a framework for delegations to avoid unmanageable Ministerial workloads).
40. Some regulatory regimes include mechanisms by which Ministers can be explicit in articulating the policy context within which they expect regulatory decisions to be made. For example, the Overseas Investment Act allows for a Ministerial Directive Letter which, amongst other things, directs the regulator on the relative importance of different factors in the section of the Act central to decision-making.
41. Some such mechanism would strengthen the alignment of MFAT's risk assessments with those that Ministers could be expected to make in similar circumstances.

### Review of specific decisions

42. We reviewed a sample of applications from 2017 – 2021 and the process through which MFAT assessed the applications. We covered a mix of applications that were straightforward (e.g., export to a like-minded country) and more complex (e.g., to a government entity in a country with a mixed record in human rights).
43. MFAT operates a form of triage to organise applications into straightforward and complex. This is a relatively informal process but appears to work as intended.



44. For the complex cases, the decision-making processes that we reviewed showed a considered balancing of relevant factors in the context of the Criteria and of New Zealand's values and interests. By definition, delicately balanced decisions could have gone either way.
45. Factors considered included the nature of the export, the record of the importing country/entity and potential implications for:
  - Proliferation and for human rights
  - New Zealand's overall relationship with the importing country
  - New Zealand's reputation domestically and internationally if the export was to become public knowledge.

#### Information dependencies and record-keeping

46. MFAT relies on information provided by exporters, its own historical records, country-specific input from posts, and input from other parts of government.
47. MFAT's Export Controls team is well networked with other agencies, though this largely relies on a key individual. The team regularly seeks input on assessment of technologies from other parts of government (e.g., the Defence Technology Agency) or from Five Eyes<sup>1</sup> counterparts, although timely access to resources in other agencies can be an issue.
48. Validation of information (such as end-use) is not usually undertaken. Where information is likely to be unreliable, MFAT takes this into account during the assessment process. This is broadly consistent with international approaches.
49. MFAT has invested in a basic Permit Control Database and an electronic extraction process (which enables the team to automatically extract and upload data from applications). However, this system does not readily enable aggregation of information that could be made public, nor is it well-suited to support responses to requests for information including via the Official Information Act.
50. Some basic recording of key decision steps and assessments is captured by MFAT. In some instances, critical assessment steps were not documented in the applications we reviewed.

#### Transparency and public confidence

51. The Export Controls regime operates with minimal transparency. The only information published is a very high-level summary of activity contained in New Zealand's annual report to the Arms Trade Treaty. As noted, this lack of transparency risks undermining public confidence in the regime.
52. MFAT has not undertaken independent audit or assurance of export control processes and decisions. Periodic audit and assurance would be desirable.
53. Our recommendations below include several proposals aimed at increasing transparency and reducing uncertainty in how the regime operates.

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<sup>1</sup> An intelligence grouping comprising Australia, Canada, New Zealand, United Kingdom and United States.

54. Greater transparency would likely reduce the level of media and Official Information Act requests the response to which is a significant demand on the limited resources of the Export Controls team.

#### Education, outreach, and communication

55. MFAT engages in education and outreach with known exporters covered by the Export Controls regime. These businesses commented positively on the nature of their interactions with MFAT.
56. Some previously exempt businesses interviewed had not been aware of the relevance of the recent extension of the scope of Catch-all controls and had not participated in MFAT's public consultation.
57. MFAT's Export Controls team does not actively engage with interested groups outside of exporting businesses and research institutions, mainly due to resource constraints.
58. New Zealand Trade and Enterprise has a close working relationship with MFAT and is investing in raising awareness of the scope of the Export Controls for its customer-facing staff onshore and offshore.
59. MFAT is one of several government agencies engaging with the research sector to raise awareness of risks in relation to sensitive technologies and foreign interference.

#### Compliance and enforcement

60. Regulators typically develop and publish compliance strategies – the set of measures through which to support high levels of compliance (e.g., through education and outreach, and making compliance easy) and to deter non-compliance.
61. Enforcement of Export Controls is the responsibility of the NZ Customs Service, which has a wide range of enforcement responsibilities under the Customs and Excise Act. Extra-territorial enforcement (after an export has left New Zealand) is impractical.
62. MFAT has an informal compliance strategy focused on education and outreach. We agree that this is appropriate although the absence of a documented strategy makes assessment difficult.
63. MFAT is of the view that compliance levels are high; we did not come across any evidence to suggest otherwise.

#### Capability, capacity, and funding

64. MFAT's Export Controls team of three people (recently increased from two) is small by any measure, including comparison with other export control regimes.
65. The Export Controls function is funded as part of a broad appropriation focused on MFAT's 'Delivery of New Zealand's foreign policy'. The team draws on additional resource from across MFAT (for example, legal, regional divisions, senior management), other public sector agencies and international partners as required (and subject to availability).
66. With the resource available and given the level of demand on front-line service, the Export Controls team has limited capacity to work on the system.

- 67. Many interviewees expressed concern about key person risk and noted that the regime works as well as it does in no small part because of the experience, knowledge and networks of one individual.
- 68. Exporters are not asked to cover the cost to MFAT of the permit application system. This is to prevent a disincentive to businesses seeking permits. In any event, the transaction cost of a system of fees might exceed any benefits.
- 69. The case for increased resource is strong given the almost certain increases in workload and in the complexity of the operating environment.

### Is the Export Controls regime fit for the future?

- 70. MFAT has initiated and implemented updates to elements of the regime, including the expanded scope of Catch-alls and legislation to capture broking activities undertaken by New Zealanders.
- 71. Other initiatives, notably a proposed consultation to extend the scope of the legislation to modernize the regime, including capturing intangible transfers, cloud computing, regulation making powers, appeals and incorporating other best regulatory practices was delayed by other priorities including the need to focus on the response to COVID-19.
- 72. As noted, various elements of the design and implementation of the regulatory system fall short of a contemporary view of best practice.
- 73. The Act is based on import and export of physical goods and is not designed to deal with intangible exports.

### Comparison with other Export Controls regimes

- 74. MFAT's Export Controls regime serves a similar purpose to those of like-minded countries that have made the same international commitments to human rights and humanitarian law as New Zealand.
- 75. Using open-source information, we have looked at other regimes, including Australia, UK, Ireland and EU.
- 76. The equivalent regimes are administered by the foreign affairs ministry and/or by defence and/or business-oriented agencies. Most other countries have larger defence/technology sectors and more resource dedicated to export controls.
- 77. As noted above, businesses prefer regulatory decision-making that minimises uncertainty and is predictable. Other countries have Autonomous Sanctions regimes (New Zealand does not) which requires a public statement about how a state or non-state party is regarded.
- 78. Anecdotal information from interviewees suggests that the compliance burden for the New Zealand regime is less than for other countries.
- 79. We were unable to draw firm conclusions on whether the New Zealand regime is more or less restrictive of exports as compared with other jurisdictions but conclude that the regimes are broadly comparable in their effect. This seems appropriate given the broadly shared values and the undesirability of creating an incentive for businesses to locate in countries with less effective export controls.

## Foreign interference and sensitive technologies

80. Export Controls are one amongst a range of policies and regulations designed to promote New Zealand's values and interests, including in countering the threat of foreign interference.
81. The Director-General of Security of the New Zealand Security Intelligence Service has defined foreign interference as 'an act by a foreign state, or its proxy, that is intended to influence, disrupt or subvert a New Zealand national interest by covert, deceptive or threatening means'<sup>2</sup>.
82. The nature of the threats will continue to evolve and require an ongoing system response, including through maintaining fit-for-purpose regulatory systems, one of which is Export Controls.
83. Government is working with the research sector in New Zealand to strengthen protections around research and research collaborations involving sensitive technologies that could potentially be misappropriated to New Zealand's disadvantage.
84. Recent changes to the Overseas Investment Act were intended, in part, to strengthen defences against the risk of foreign interference via mechanisms such as acquisition of New Zealand companies that have developed sensitive technologies.
85. Government agencies involved in defence and security, trade and investment and research all require access to expertise in a broad range of technologies to support the assessment of potential threats and risks. Shared access to a common set of capabilities is likely to be a more cost-effective model than each agency building its own capability.
86. To the extent that resource constraints allow, the Export Controls team participates actively in cross-government groups focused on a joined-up approach to managing threats to national interest and values including in identifying and addressing emerging risks.

## Conclusions and recommendations

87. Based on our review, MFAT has administered the Export Controls regime consistent with the underlying intent, the legislation and the supporting policy instruments.
88. We found no instances where MFAT approved or declined a permit application based on reasoning that was not allowed within the legislative framework. Risk assessments appear reasonable although, by definition, different decisions might have been reached for some 'line call' applications.
89. Design and implementation of the regime falls short of contemporary best practice in several respects and, in that sense, is not fit for what is likely to be an increasingly challenging future.
90. The regime is under-resourced for the future.

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<sup>2</sup> See, for example, the Director-General's remarks to the Justice Committee Inquiry into the 2020 General Election and Referendums

**We recommend that:**

#### **1. MFAT review and refresh the Criteria for Assessment**

**Priorities would include:**

- *Reducing the scope for interpretation to the extent practicable*
- *Reducing the number of Criteria, via consolidation, to simplify their application*
- *Adding a criterion relating to domestic reputation defined in a way that minimises uncertainty for exporting businesses and the research community*
- *Introducing periodic review of the Criteria, every three to five years.*

#### **2. MFAT invest in more structured and comprehensive systems and processes**

**Priorities would include:**

- *Refreshing and updating the Standard Operating Procedure on a regular basis*
- *Developing a gateway template or checklist for assessing and recording whether a permit can be progressed as a standard export permit*
- *Requiring that decisions on non-standard applications can only be undertaken by the Senior Counter-Proliferation Advisor or above.*

#### **3. MFAT strengthen the decision-making framework**

**Priorities would include:**

- *Documenting risk appetite to ensure alignment with Ministers, inform public understanding and reduce uncertainty for exporting businesses and the research community*
- *Considering the role of Ministers in decision-making in any review of the legislation.*

#### **4. MFAT strengthen record-keeping and evidencing of critical steps**

**Priorities would include:**

- *Undertaking regular audit or assurance that Export Control decisions are being appropriately documented and recorded*
- *Referencing the relevant legal tests being applied as part of decision-making, particularly when providing advice to Ministers.*

#### **5. MFAT enhance transparency and public confidence in the Export Controls regime**

**Priorities would include:**

- *Publishing more guidance on how MFAT takes account of information on end-use*
- *Enhanced annual reporting, covering activity levels, any emerging issues and the approach to risk and decision-making, while respecting commercial and diplomatic sensitivities*
- *Commissioning and publishing periodic independent reviews to provide assurance to Parliament and the public that MFAT is making decisions consistent with its legislated mandate and government's stated appetite for risk.*

#### **6. MFAT extend proactive outreach and education**

**Priorities would include:**

- *Ensuring (as far as practicable) that all potentially impacted exporting businesses and researchers are aware of and understand the regime*
- *Providing MFAT with early warning of emerging issues (such as new sensitive technologies).*

#### **7. MFAT work with NZ Customs Service to develop and publish a formal compliance strategy**

**Priorities would include:**

- Education and out-reach (particularly around the expanded Catch-alls) to minimise the risk of inadvertent non-compliance
- Selective investment in monitoring and intelligence to increase the likelihood of detecting any non-compliance.

#### **8. MFAT develop a business case for increased resourcing for the Export Controls regime**

**Priorities would include:**

- More depth, professional development and succession planning in the Export Controls team
- More consistent interaction with MFAT's risk and assurance functions
- Sufficient training on the structure of the Export Controls regime for MFAT staff in divisions and posts that are likely to be asked to input to decision-making.

#### **9. MFAT ensure the Export Controls regime is fit for the future**

**Priorities would include:**

- Pursuing legislative reform (preferably through new stand-alone legislation) to:
  - Clarify the legislated purpose of Export Controls
  - Make the regime easier to understand, predict and comply with for exporting businesses and the research community
  - Better-capture intangible means of export, modernise enforcement provisions and enable timely response to emerging challenges in the threat environment
- Supporting the establishment of an all-of-government centre for expertise (required by multiple agencies) to assess the uses of and risks associated with sensitive and emerging technologies.

## Introduction

91. In April 2021, the Ministry of Foreign Affairs and Trade's Deputy Chief Executive Policy commissioned an independent review of the Ministry's Export Controls framework.
92. The Terms of Reference (refer Annex One) require us to review the Export Controls framework, including related policies, processes, systems, controls and people, and to assess whether the regime is fit for purpose.

## Methodology

93. In undertaking the review, we have:
  - Assessed the context and purpose for MFAT's Export Controls regime
  - Assessed how MFAT has developed and implemented the regulatory system by:
    - i. Reviewing the main policy elements of the system including the legislation, Strategic Goods List, Criteria for Assessment and the recent expansion in scope of the Catch -all controls
    - ii. Reviewing MFAT's systems and processes for administering the regime given the policy settings
    - iii. Reviewing MFAT's processing of a sample of permit applications to test for legality and reasonableness of decision-making with reference to the law and relevant policy (refer Annex Three)
    - iv. Seeking stakeholder views on MFAT's administering of the regime
  - Considered whether the regulatory system is fit for purpose given:
    - i. Findings of our review of the existing arrangements
    - ii. Ongoing changes in the geopolitical, trading and technology environments
    - iii. Increasing interdependencies with other dimensions of New Zealand policy and regulation
    - iv. Comparison at a high-level with export control systems of like-minded countries.
94. Sources of information include:
  - Relevant documentation provided by MFAT and other government departments, stakeholders and accessed from the internet
  - MFAT's Export Controls database and records of permit applications, including any advice to Ministers
  - Stakeholder interviews, encompassing:
    - i. Exporting businesses
    - ii. Representatives of the university-based research community



- iii. NGOs, activists and academics with interests in New Zealand's foreign policy, disarmament and human rights
  - iv. Officials in MFAT and other government entities (Department of Prime Minister and Cabinet, NZ Customs Service, New Zealand Trade and Enterprise, Ministry of Business, Innovation and Employment, Export Credit Office, Defence Technology Agency) that administer or interact with the Export Controls regime and national security.
95. The list of stakeholders to interview (refer Annex Two) was developed in consultation with MFAT and augmented by suggestions from stakeholders themselves.
96. MFAT gave us access to some restricted material, consideration of which has informed our findings and recommendations. We do not discuss the specifics of permit applications, exporting businesses or New Zealand's relationship with other nations in this report.
97. We would like to thank all those who agreed to be interviewed, and the members of the Export Controls team who answered our many questions and requests for information on top of their normal responsibilities.

## Context and purpose of MFAT's Export Controls regime

98. Defence is a major economic sector internationally. A wide range of technologies developed for commercial reasons have defence applications as well. Technology developed for defence-related reasons can be a driver of innovation.
99. The original purpose of the Export Controls regime was to give effect to international commitments to restrict trade in weapons and dual-use technologies and to support UN sanctions. The regime has increasingly been used as a mechanism through which to reflect New Zealand's values and interests more generally<sup>3</sup>.
100. One way of describing the objective of the regime is to maximise opportunities for trade, research and international collaboration and minimise uncertainty for exporting businesses and research institutions subject to ensuring that New Zealand meets its international commitments in relation to the proliferation of weapons, military equipment and technology, humanitarian law and human rights and operates prohibitions that are consistent with national values and interests.
101. New Zealand has committed to the following international arrangements relevant to Export Controls:
- Wassenaar Arrangement, which controls conventional weapons and dual-use goods and technologies. 42 countries participate; the majority are European and non-European democracies. Other participants include Russia, Ukraine, Turkey and India
  - Missile Technology Control Regime

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<sup>3</sup> As discussed below, interviewees noted that 'national values and interests' includes the protection of New Zealand's reputation both domestically and internationally. This reputation could potentially be compromised by exports that provoke adverse public perception in relation to the goods themselves, the identity of the end-user or the identity of the importing country.



- Australia Group, which controls chemical and biological weapons-related materials
  - Nuclear Suppliers Group, which controls nuclear material, equipment and technology. The 48 participants include China and Russia.
102. New Zealand has also signed the Arms Trade Treaty, which controls certain conventional weapons and their associated ammunition/munitions and seeks to prevent and eradicate illicit trade and diversion of conventional arms.
103. As a member of the UN, New Zealand is committed to support UN sanctions, which include restrictions on trade with a small number of countries, the legal basis for which is contained in the United Nations Act 1946.

## Implementing export controls is inherently challenging

104. Administering a regime of export controls is inherently challenging.
105. Technology is changing rapidly; dual-use technologies are becoming increasingly prevalent. Assessing whether a dual-use technology is of concern requires expert input across a wide range of specialised technologies that are continually evolving.
106. Keeping track of end-users is difficult. Extra-territorial enforcement is impractical for most countries and certainly for New Zealand.
107. The highly visible and widely supported UN sanctions list was the initial basis for defining countries of concern in relation to exports regulated under the Catch-all controls (discussed below). Of recent time, one or more of the permanent members of the Security Council has commonly exercised a veto to prevent sanctions against countries where, from the perspective of democratic countries, sanctions are warranted. This has necessitated New Zealand (and like-minded countries) having to consider unilateral extensions to the number of importing countries for which controls apply.
108. Export controls originated in the international arrangements listed above which, although subject to interpretation in specific instances, are reasonably well-defined. Recent experience suggests that public expectation is that, in considering military-related exports, democratic governments will use export controls to reflect values and interests more fully, and to go beyond the counter-proliferation provisions of the various arrangements in ways that are not well-defined.
109. Assessments of how a potential export might be used and by whom in the importing country require an assessment of risks, often with limited information. MFAT has an extensive offshore network but is not represented in many of the countries about which judgements are most difficult.
110. As a small country, New Zealand generally adopts a nuanced approach to foreign policy, using a variety of channels to seek to influence and limiting overt and polarising criticisms of other governments. This can complicate decision-making for businesses that want to avoid expending resource pursuing opportunities for which export permits may not be granted and that would generally prefer to be aligned with government's foreign policy positions.

111. Exporters emphasised the importance of an Export Controls regime that, to the extent practicable, is designed and operated consistent with the practical challenges in winning and serving customers, which include:
- Building the relationships that create opportunities, which can take considerable time and investment
  - Being able to compete in competitive tender processes with minimal uncertainty about the need for and probability of obtaining export permits if successful
  - Being able to commit to multi-year supply contracts, and to ongoing maintenance and support
  - Complex supply chains, which can mean that goods or components are imported, maintained/enhanced and then re-exported, with the potential for individual parts to be re-exported and re-imported before the final export potentially requiring multiple interactions with the Export Controls regime
  - Sale of dual-use technologies and components to manufacturers that produce both commercial and military products (e.g., helicopters, communication systems)
  - Sales through distributors located offshore, with limited visibility or control over the ultimate purchaser of a product.

## The context for Export Controls will become more challenging

112. Interviewees noted the following trends in the broader environment for Export Controls:
- The range of state and non-state actors that are a potential threat to New Zealand appears to be increasing
  - The geopolitical situation is becoming more complex, notably the recent rise in authoritarian regimes and the evolving relationship between the United States and China
  - Digital and other new technologies are creating new ways to inflict harm. Cyber-related risks have increased massively. Digital transfers of intellectual property are difficult to detect and control.
113. International collaborations, connectedness and academic freedom continue to be central to New Zealand's future prosperity, underpinning research collaborations and export of high-value technologies and other knowledge-intensive goods and services.
114. At the same time, concern over foreign interference has increased in New Zealand and like-minded countries. The Director-General of Security of the New Zealand Security Intelligence Service has defined foreign interference as 'an act by a foreign state, or its proxy, that is intended to influence, disrupt or subvert a New Zealand national interest by covert, deceptive or threatening means'.
115. A 2020 briefing note by the European Parliament stated: '...democratic societies, institutions, processes and values are under increasing external and internal attack'.

116. Some interviewees noted that New Zealand appeared to have invested less than like-minded countries in adjusting policy and regulatory settings to respond to this increased range and level of threats. Interviewees acknowledged the recent progress that has been made, including through regulatory changes and more active outreach with the research sector.

## Export and permit activity

117. The design and resourcing of MFAT's Export Controls regime reflects historical levels of activity, which have been relatively low compared to other regulatory systems in New Zealand and to export control regimes in other jurisdictions.
118. New Zealand has relatively few businesses engaged in manufacturing or trading weapons or military equipment as such, but an increasing number in areas of dual-use, including growth areas for the economy such as software, data and analytics, communications, artificial intelligence, robotics, security and biotechnology.
119. MFAT has typically received around 700 export permit applications each year. Most of the applications are straightforward. Recent expansion in the scope of the Catch-all controls (discussed below) is likely to mean higher numbers of applications and increased complexity in terms of technological and reputational risk assessments.

Figure 1: Total Export Control permits by year

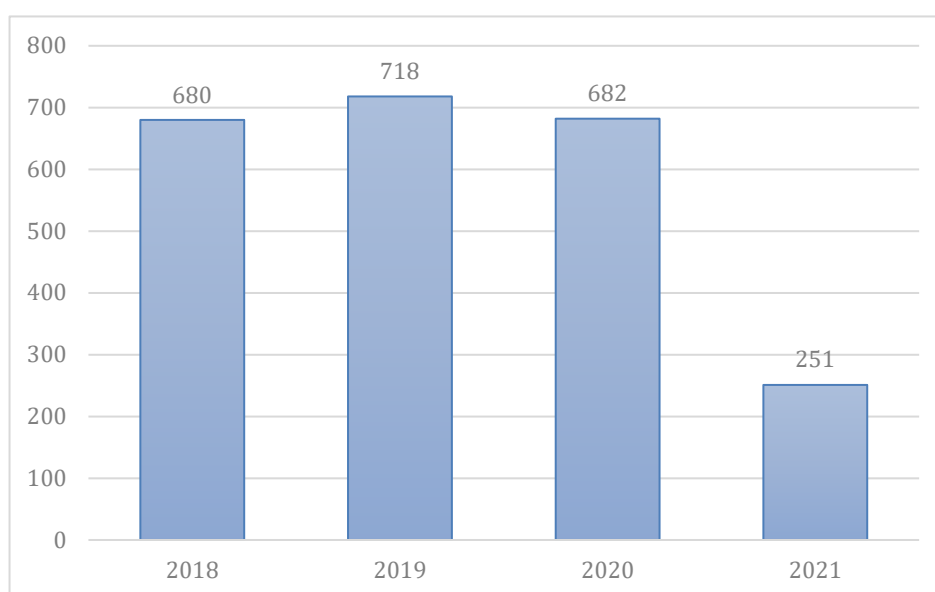
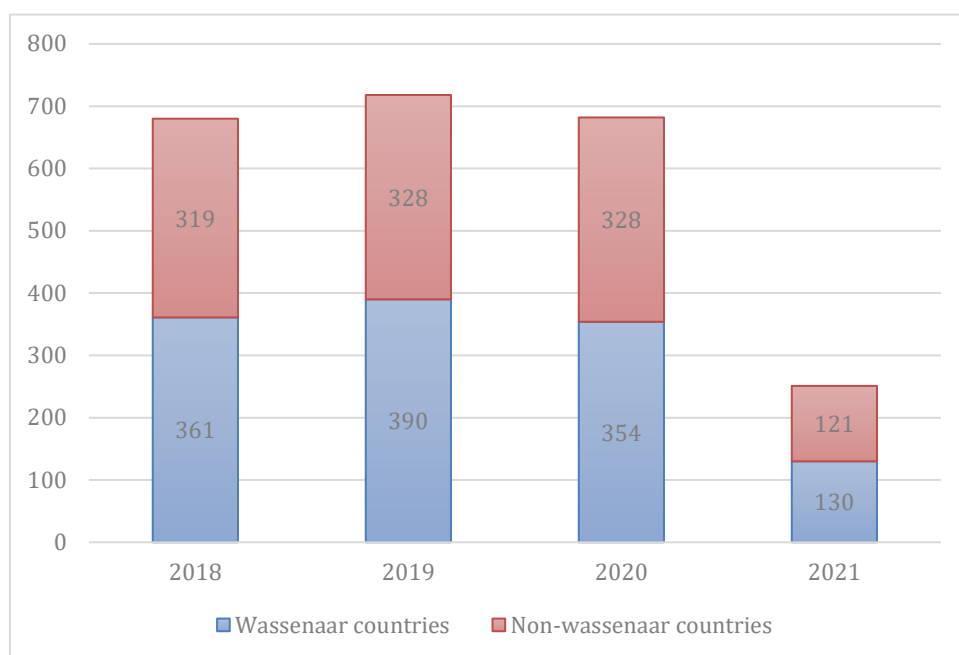


Figure 2: Permits to Wassenaar and Non-Wassenaar countries by year



## Assessment of MFAT's implementation of the regime

120. In this part of the report we describe, assess and, where appropriate, make recommendations on how MFAT has implemented the Export Controls regime, focusing on the following areas:

- Legislative mandate and operationalisation
- Criteria for Assessment
- Operational policies, standards and delegations
- Decision-making
- Information dependencies and record-keeping
- Transparency and public confidence
- Education, outreach and communication
- Compliance and enforcement
- Capacity, capability and funding.

### Legislative mandate and operationalisation

121. In this section we discuss the legislative framework for Export Controls and how MFAT has operationalised key aspects of the regime. We look at whether MFAT has acted consistent with the legislative mandate.

### The Customs and Excise Act 2018

122. The legal basis for New Zealand's Export Controls regime is the Customs and Excise Act 2018.

123. Primary purposes of the Act include:

- To enable the collection of tariffs, excise duty and other types of duty, taxes and levies
- To provide for administration and enforcement of customs controls at the border and to facilitate border control through risk management
- To define obligations of persons or persons who cause or allow goods, persons or craft to cross the border
- To set out the powers of Customs in relation to goods, persons and craft.

124. The Act is administered by New Zealand Customs Service.

125. Part 3, sub-part 4 deals with prohibited imports and exports. Section 96 provides for the prohibition of certain types of imports and exports by Order in Council on the recommendation of the Minister.

126. Prohibitions can be general or limited to goods to or from a specified place or to a specified person or class of persons and can be subject to conditions.

127. The Minister can only recommend Orders in Council that are necessary in the public interest.

128. These sections of the Act are administered by the Secretary of MFAT.
129. The Secretary is required to maintain an up-to-date list (the Strategic Goods List) of all goods and classes of goods the exportation of which is prohibited because they have or may have a strategic use. 'Strategic use' covers nuclear, biological and chemical weapons and their means of delivery, military use or applications (including for dual-use goods) and terrorist acts.
130. Where a conditional prohibition applies, the Secretary can grant a licence or permit enabling the export.
131. Customs' powers to enforce the provisions of the Act are contained in Part 4 of the legislation.

### Strategic Goods List

132. New Zealand adopts the same Strategic Goods List (SGL) as Australia and updates the list in response to updates of the Australian list.
133. The SGL covers military and dual-use goods and technology. Dual-use goods are goods and technologies developed for commercial purposes, but which may be used either as military components or for the development or production of military systems or weapons of mass destruction.
134. The SGL is in two parts:
- Part 1: Military goods and technologies and certain non-military goods (such as commercial explosives and civilian small arms)
  - Part 2: Dual-use goods and technologies, divided into 10 categories including electronics, computers, navigation and avionics, marine, aerospace and propulsion.
135. 'Technology' is defined as specific information or software necessary for the development, production or use of a product, and covers:
- 'Technical assistance' such as instruction, training and consultancy services
  - 'Technical data' such as blueprints and designs.
136. The SGL was most recently updated in 2019 and is over 300 pages in length. The MFAT website provides a link to an Australian government online search tool that can be used to help identify if goods are controlled.
137. Export of goods on the SGL is controlled, apart from a few instances where the Secretary of MFAT has granted an exemption.

### Catch-all controls

138. Catch-all controls 'catch' any item not on the Strategic Goods List.
139. Under s97 of the Act the Secretary may, by notice in the Gazette and after consultation with the Minister, prohibit the exportation of goods described by any use to which they may be put, if the Secretary considers that the prohibition is in the public interest.
140. Prior to 2020, Catch-all controls enabled:

- Prohibition of export for items not on the Strategic Goods List that are or may be intended for direct or indirect use in the development, production or deployment of nuclear, chemical or biological weapons, or their means of delivery in any country
- Military end-use controls for any item that is or may be intended for direct or indirect military end-use in a country covered by a UN arms embargo.

141. Military end-use was defined as:

- Direct or indirect use by armed forces, a paramilitary force, police force or military
- Items which are incorporated into weapons, or used in the production, maintenance or testing of weapons.

142. In 2020, following a public consultation process, the scope of the Export Controls regime was extended through the gazetting of Catch-all controls that were more comprehensive in two areas:

- A broader definition of military end-use, to encompass a wider range of military/police activities
- Application to all countries.

143. The Catch-all controls include some low-risk exemptions, for:

- Benign/humanitarian goods such as food and medicine
- A relatively small list of 'friendly' countries that participate in the same international arrangements to which New Zealand has committed and where the risk of misuse of goods is low.

144. The net effect is to considerably expand the list of countries covered by the Catch-alls beyond those subject to UN sanctions.

145. To quote from the MFAT website, "these changes (the expanded Catch-alls) represent a significant step forward in meeting current proliferation challenges facing New Zealand and demonstrate the Government's commitment to peace, security and human rights".

146. The Catch-alls were introduced via a transition process which started on 9 October 2020 and included a presumption of approval for the supply of parts for use in equipment that had already been supplied, and for existing contracts.

## Assessment

147. The Customs and Excise Act 2018 confers broad powers on MFAT<sup>4</sup>. MFAT has considerable discretion in how it operates Export Controls. We looked at whether MFAT had implemented

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<sup>4</sup> For example, MFAT is not required to (1) apply any specific conditions or tests when granting export permits – provided that MFAT is making these decisions in relation to controlled exports (2) publish or put in place any assessment criteria for decisions - though it is good regulatory practice to publish the principles or criteria that inform regulatory decisions.

any processes not consistent with the intent of the legislation. We did not find any such instances.

148. Interviewees had relatively few comments on the Strategic Goods List implemented by MFAT.
149. A simpler list would be easier to understand, but ongoing technological change is more likely to increase complexity. No interviewee suggested an alternative to utilising the Australian list, which is similar to comparable lists in other export control jurisdictions (all of which are derived directly from the work of expert groups for each of the four international export control regimes).
150. The extension of the Catch-alls has been an important step in strengthening the Export Controls consistent with their underlying intent. However, several interviewees expressed concerns, noting that:
  - New Zealand's Catch-all controls are now more extensive than the equivalent controls in other jurisdictions, which might mean opportunities for businesses in those countries that are not available to their New Zealand-based competitors
  - the extended scope has introduced increased uncertainty – interviewees would welcome more 'bright lines' – additional goods, technologies and importing countries that are clearly permitted or prohibited.
151. MFAT is aware of the preference for more bright lines, but noted the diplomatic sensitivities around being explicit in implementing prohibitions or in extending exemptions beyond a core group of nations.
152. The Customs and Excise Act is difficult to follow and lacks a specific and relevant purpose statement in relation to Export Controls. Feedback from interviewees, including lawyers advising on the scope of the controls, was consistent in this respect.
153. We address potential improvements to the legislative design later in the report when discussing whether the Export Controls regime is 'fit for the future'.

## Criteria for Assessment

154. In this section we review and discuss the Criteria for Assessment
155. The Criteria for Assessment used to assess permit applications are contained in Annex Four below. MFAT advised that the Criteria were originally based on those used by the European Union and were approved by Ministers.
156. The Criteria were refreshed in 2014 to ensure compliance with the Arms Trade Treaty (which New Zealand signed in 2013 and ratified in 2014), and to allow MFAT to consider whether an export could compromise New Zealand's wider defence and security interests to match a similar criterion in the Australian and United Kingdom export control systems.
157. The Criteria were amended again in 2019 to include consideration of whether an export would prejudice New Zealand's international relations and to align exports with the legislative prohibition on the import of semi-automatic weapons.
158. The Criteria are structured as follows:



- Section A: applications will be refused where they would violate New Zealand's international obligations (including in relation to UN sanctions) or, based on knowledge at the time, would be used in the commission of genocide, crimes against humanity or war crimes
- Section B: If an application is not refused under Section A, MFAT undertakes a risk assessment to test whether the goods to be exported would undermine peace and security or could be used to commit or facilitate serious violations of international humanitarian or human rights law, terrorism or transnational organised crime. If a risk is substantial and cannot be mitigated, MFAT will refuse the application
- Section C sets out 17 additional factors MFAT considers in risk assessments (rather than as binary yes/no tests). These include:
  - i. Potential concerns in relation to the importing country (e.g., involvement in internal or external conflict, human rights abuses)
  - ii. Potential to compromise New Zealand's wider defence and security interests or international relationships
  - iii. Potential to compromise New Zealand's international commitments
  - iv. How like-minded countries have approached similar exports
  - v. Whether the export is part of an existing contract that has previously been approved.

159. In applying the Criteria, MFAT considers the goods, the country of destination, the end-use, the end-user, and the situation overall.

## Assessment

160. Generally, we find that the Criteria for Assessment are relevant, broad in scope, large in number and not informative as to how to weigh risks or make trade-offs in complex cases.
161. The Criteria do not explicitly include consideration of domestic reputation. This is not easy to define but the underlying idea reflected by interviewees is that public opinion does and should influence governments in defining New Zealand's values and interests at any point in time.
162. The operating environment for Export Controls has changed considerably in the last few years.
163. We discuss two aspects of the Criteria further below:
- The extent to which the full set of Criteria are unwieldy in relation to standard export permit applications (which form the large majority of permits)
  - The potential for a more explicit articulation of risk-appetite in applying the Criteria to support consistent and more predictable decision-making.

***We recommend that MFAT review and refresh the Criteria for Assessment***

***Priorities would include:***

- ***Reducing the scope for interpretation to the extent practicable***
- ***Reducing the number of Criteria, via consolidation, to simplify their application***
- ***Adding a criterion relating to domestic reputation defined in a way that minimises uncertainty for exporting businesses and the research community***
- ***Introducing periodic review of the Criteria, every three to five years.***

## Operational policies, standards, and delegations

164. In this section we discuss the main operational policies, standards and processes that MFAT has developed to support decision-making in relation to permit applications. This includes the permit types that have been put in place, the standard operating procedures, and the use of templates or checklists. We also consider MFAT's system of delegations.

## Permit application process and permit types

165. There are four types of permits for exporting military and dual-use goods and technology:

- Single permits – issued for the permanent export of a fixed quantity of specified items in a single shipment<sup>5</sup>
- Single temporary permit – issued for a fixed quantity of specified items temporarily leaving New Zealand with the intention of return to the owner in New Zealand<sup>6</sup>
- Multiple permit – issued for the export of a fixed quantity of specified items that will be exported in several shipments over an extended period up to 18 months in duration
- General consents – for export of specific listed items to a country or countries<sup>7</sup>. Typically, general consents are only granted for exports to Wassenaar member countries, giving approval to the exporter to export any volume of the specified products to any end-user in the approved countries over a period of up to 24 months<sup>8</sup>.

166. There are separate single permits for the import and export of controlled chemicals.

167. Some interviewees would prefer more open-ended permits (some or all of multiple goods, multiple destination countries, longer duration). In developing permit types, MFAT has considered the need for effective controls while limiting transaction costs for applicants. The permit types strike a reasonable balance.

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<sup>5</sup> The permit is valid for three months from the issue date of the permit. The length can be longer if required – normally where the application is far in advance of the intended export date.

<sup>6</sup> For example, for a trade exhibition. The permit is valid for three months from the issue date of the permit.

<sup>7</sup> Exporters may be required, as a condition of their permit, to provide information to MFAT on the amount of goods exported under the general consent.

<sup>8</sup> General consents for non-Wassenaar countries are for any volume of specified goods for a specified end-user.

## Overview of how a permit is processed end-to-end

168. Almost all permit applications are received by MFAT electronically, to the Export Controls Mailbox (though an exporter can mail or fax an application).
169. Each application is checked to confirm the information provided. This includes confirming the type of permit requested, that it is an item within the scope of the regime, that the necessary paperwork has been included, and that the end use has been provided.
170. Once the application is complete and determined to be within scope of the Export Controls regime, it is uploaded to the Permit Controls Database (PCD) for further assessment.
171. Standard export permit applications form the large majority of permit assessment work. We understand from our conversations with MFAT that they usually comprise about 90% of applications<sup>9</sup>.
172. MFAT defines standard permit applications as not having any risk factors (with reference to the Criteria for Assessment). Many of these exports have previously been approved. If there is any doubt that the export does not fall into this category, MFAT's documented process is for the assessor to seek further input from the Senior Counter Proliferation Advisor.
173. Examples of standard export permits include:
  - New Zealand exporters filling overseas orders for non-military firearms, ammunition or accessories, or personal exports of such
  - New Zealand exporters selling small commercial quantities of communications equipment, to a state that is a member of the Wassenaar arrangement
  - New Zealand exporters returning goods to a supplier for repair.
174. The MFAT website states that these applications will be processed within 10 working days. However, both MFAT and some of the businesses we spoke with said that MFAT typically responds to standard export applications within 2 – 3 working days.
175. Non-standard export applications form the remaining approximately 10% of applications<sup>10</sup> – though based on experience to date MFAT is expecting to receive significantly more in future given the recent expansion in the scope of the Catch-all controls.
176. MFAT defines non-standard export applications as having risk factors (with reference to the Criteria for Assessment). These applications are consulted further with the appropriate MFAT country division using a short-form risk assessment template for consistency (refer Annex Five).
177. Once input is received from MFAT divisions, the team determines whether the export should be approved, denied, moved to a long-form assessment, and/or whether a submission to Ministers is required.

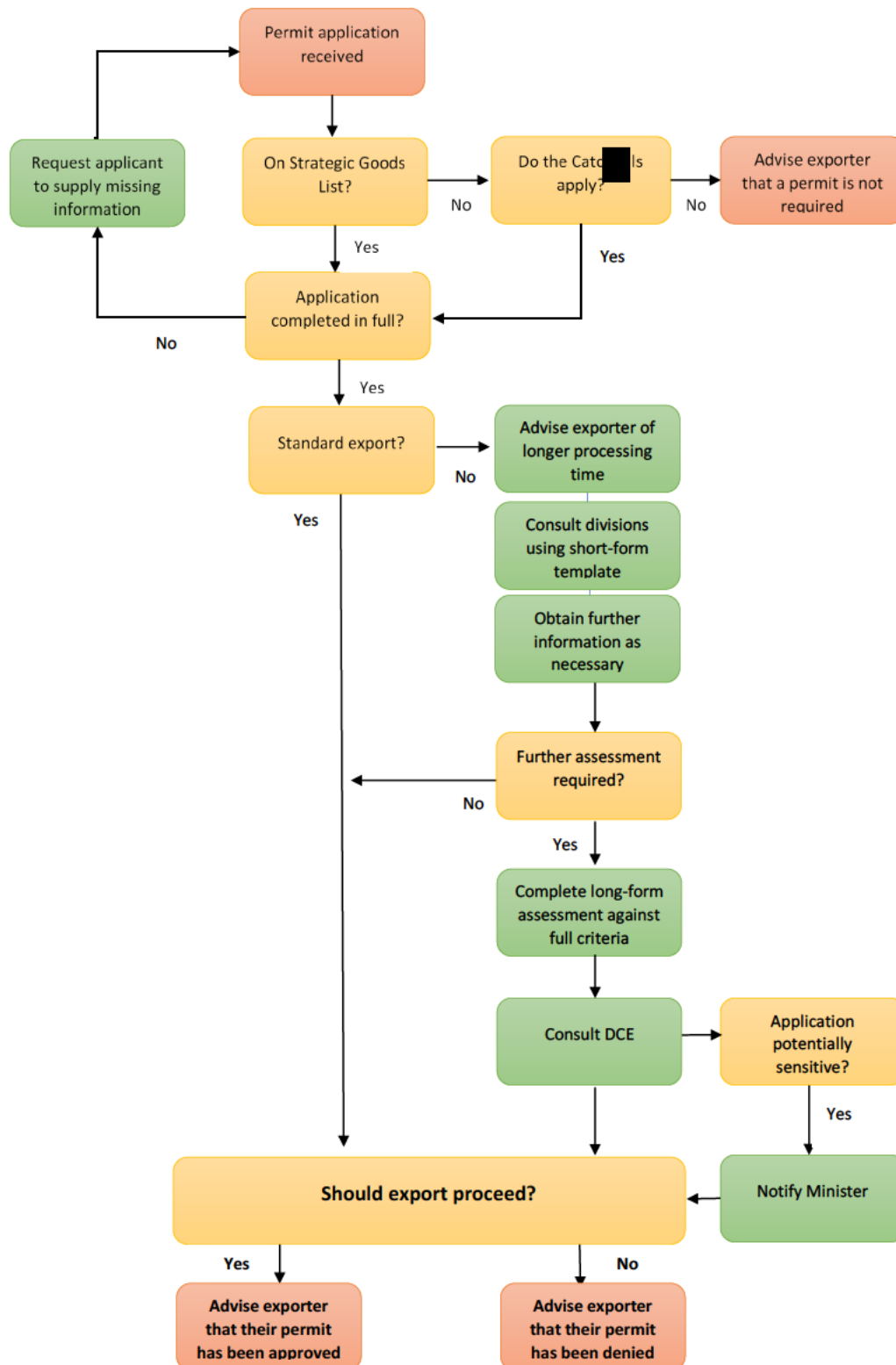
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<sup>9</sup> This is approximate as the Permit Control Database does not capture standard export permit applications as a category.

<sup>10</sup> As above

178. MFAT does not commit to a specified response time in these cases; processing of non-standard export applications may take up to six weeks or longer. Once a decision is reached, MFAT sends an export permit letter to the exporter either approving or denying the application (refer Annex Six for sample letters).
179. Exporters will often withdraw an application prior to receiving a formal denial.

Figure 3 - Overview of export permit process



## Standard operating procedure

- 180. The Export Controls team developed a draft Standard Operating Procedure (SOP) over a period to April 2018. This sets out a good practice guide to processing export permit applications, and team members are familiar with it. Because of resource constraints, the SOP has not been finalised.
- 181. The team has identified various process improvements because of which they regularly deviate from the draft SOP in practice.

## Templates and checklists

- 182. Some templates are in use, the main one being the short-form assessment template to consult with MFAT Divisions on non-standard applications. There is also a template for a long-form assessment using the Criteria for Assessment. There is no template or checklist in use to identify standard from non-standard export permit applications.
- 183. Whilst the Criteria for Assessment clearly form a reference point for decision-making, in practice MFAT only apply the Criteria in full for the most complex applications.
- 184. It is not unusual for a regulatory agency to have a simpler assessment process for non-complex applications. Applying a full assessment against the Criteria for every application would significantly affect timeliness of processing in a small team.
- 185. An improvement in current practice would be for MFAT to formalise a gateway assessment template or consolidated criteria to determine if a permit can be progressed as a standard export permit. Ideally, this decision-making process would be transparent to regulated parties and stakeholders and supported by regular review that applications are being categorised correctly.

## Approvals in principle and responsiveness

- 186. Exporters can seek an 'approval in principle' to export. Our conversations with the team indicate that this is common practice for many of the exporters with whom they interact.
- 187. 'Approvals in principle' are given with specific conditions<sup>11</sup>.
- 188. Exporting business interviewees value approvals in principle for reducing the uncertainty they would otherwise face in deciding where to invest resources in pursuit of commercial opportunities that might take some time to come to fruition.
- 189. Most exporters are positive about the responsiveness and timeliness of the Export Controls team.

## Delegations

- 190. The Secretary of MFAT has statutory delegations under the Customs and Excise Act 2018 to approve or decline exports within the scope of the Strategic Goods List and the Catch-all Controls.

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<sup>11</sup> Conditions usually include that (1) It is still necessary to apply for an export permit in the usual way at the time of export (2) It does not constitute agreement that subsequent approval will be automatically forthcoming and (3) Any change in circumstances would need to be considered.

191. We assessed the delegations in place and the extent to which the statutory delegations are followed in practice.
192. We did not observe any instances of MFAT staff operating outside of delegations. The delegations appear less hierarchical than is common practice, in that any member of the Export Controls team can make final decisions on complex applications. In practice, decisions on complex applications are invariably taken at appropriately senior levels. Annex Seven sets out the delegations in more detail.

## Assessment

193. Stewardship of regulatory systems is not mainstream business for MFAT which, as a result, lacks some of the structured systems, processes and controls that are common in core regulatory agencies.
194. Whilst MFAT has most of the components necessary for good regulatory implementation in place, these are relatively informal and there are some gaps.
195. The current arrangements work reasonably efficiently and effectively in a small team. But overall, internal processes are not of a robustness that would enable reliable and consistent implementation across a larger team or if key individuals were to leave. The current operating practices are unlikely to remain fit for purpose in an increasingly complex operating environment.

***We recommend that MFAT invest in more structured and comprehensive systems and processes***

***Priorities would include:***

- ***Refreshing and updating the Standard Operating Procedure on a regular basis***
- ***Developing a gateway template or checklist for assessing and recording whether a permit can be progressed as a standard export permit***
- ***Requiring that decisions on non-standard applications can only be undertaken by the Senior Counter-Proliferation Advisor or above.***

## Decision-making

196. In our interviews, NGOs, academics and interest groups expressed surprise at some of the permit decisions that have been reported in the media recently such as the exporting of military or dual-use goods to military groups in Saudi Arabia which, in their view, appeared clearly inappropriate.
197. In this section, we focus on MFAT's decision-making in relation to permit applications. This includes the process for applying judgement, when decisions are escalated within MFAT, interactions with the Minister's office and how decisions get reviewed.

## Risk assessments for complex permit applications

198. As noted above, MFAT publishes the Minister-approved Criteria for Assessment that are used as the basis for decision-making. The Criteria as a group are broad in scope and large in number.

199. The Criteria include some absolute tests. For example, if allowing an export permit would result in breach of international law, the application would be declined. MFAT provided us with information noting the international legal test for complicity in a breach of law by another state is extremely high<sup>12</sup>.
200. Beyond the absolute tests, the Criteria do not give much of a sense to officials or to stakeholders as to how MFAT should weigh risks or make trade-offs.
201. MFAT's process for undertaking risk assessments is relatively informal and unstructured.
202. MFAT interviewees noted that they aim to make risk assessments and decisions that are consistent with the foreign policy positions of the government of the day (subject to remaining within the confines of the legislation and Criteria). This is appropriate for decisions where the underlying objective is to reflect New Zealand's values and interests.

### Escalation of decision-making

203. Senior MFAT staff, including the accountable second tier manager, take an active interest in the assessment of complex cases and sign-off on noting advice to Ministers. Escalation operates relatively informally but appears to work as intended.

### Minister of Foreign Affairs

204. Approximately 7 – 10 applications per year are deemed sensitive enough to be the subject of noting briefings for the Minister of Foreign Affairs, typically copied to other relevant Ministerial portfolios.
205. As noted earlier, the Minister does not have a decision-making role with respect to export permit applications. In briefing Ministers, MFAT is acting in accordance with the 'no surprises principle' in the Cabinet Manual. This requires that Ministers be informed of matters of significance within their portfolio, particularly where those matters are controversial or may become the subject of public debate.

### Appeal rights

206. The Customs and Excise Act 2018 does not contain any formal appeal mechanisms for export applications if a permit is declined. An applicant may seek a judicial review of the decision. An applicant may also seek an internal review by MFAT of a decision to decline an application.
207. No applicant has initiated a judicial review. Only one applicant has requested an internal review.
208. It is unusual to have so few regulatory decisions contested by applicants. A primary reason appears to be MFAT's willingness to give early guidance and 'in-principle' advice pre-application (so that very few formal permit applications are declined).

### Assessment

#### Review of specific decisions

209. We did not find any evidence of permits being granted that were outside the scope of the regime (noting that the legislative mandate is broad by design).

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<sup>12</sup> Complicity under international law requires a state to materially facilitate an unlawful act by another state with the intention to materially facilitate that unlawful act or with knowledge to a virtual certainty that issuing the permit would materially facilitate the unlawful act.



210. In our review of a limited number of standard permit applications we did not see any instances of non-standard applications being mis-categorised as standard (and so getting less scrutiny). But as identified earlier, the lack of structure around this initial decision-making step is a potential weakness in MFAT's approach.
211. We found no instances of MFAT approving or declining a permit application based on reasoning that was not allowed within the legislative framework although, as discussed below, domestic reputation appeared to be a factor for some decisions but is not explicitly one of the Criteria.
212. MFAT interviewees noted that staff from geographical divisions that had input to complex risk assessments typically did not have a good understanding of the Export Controls regime, reflecting the infrequent nature of their involvement (and MFAT's system of regular staff rotations).
213. In the applications that we reviewed, we did not find any evidence of MFAT asking the Minister to approve or decline applications, which would be inconsistent with the legislative mandate.
214. Observations in relation to decision-making on the complex applications we reviewed are:
- The decision-making processes show a well-considered, balanced but relatively unstructured weighing of relevant factors in the context of New Zealand's values and interests
  - Documentation of complex applications refers to decisions in comparable cases in the past and in like-minded countries
  - Consistency across decisions relies on judgements by the individuals involved in the assessments
  - There is an inferred assessment of the preferences of Ministers in assessing risks and trade-offs
  - A small number of complex cases were 'line calls' and could potentially have gone either way.
215. Most exporters we spoke with reported a reasonable understanding of the judgements that MFAT makes, with several of them having received in-principle declines at some point.

### Risk appetite

216. Appetite for risk is at the heart of the decision-making process for complex permit applications and is relevant to the concerns of stakeholders who believe permits involving unacceptable risks are being approved and to the uncertainty faced by exporting businesses and researchers.
217. A documented articulation of risk appetite (consistent with the Criteria), including on how trade-offs will be approached, would increase the likelihood of decisions through time being consistent with the risk appetite preferences of the government of the day. The risk appetite statement would be signed-off by Ministers and, if practicable, made public.



218. Some regulatory regimes include mechanisms by which Ministers can be explicit in articulating the policy context within which they expect regulatory decisions to be made. For example, the Overseas Investment Act allows for a Ministerial Directive Letter which, amongst other things, directs the regulator on the relative importance of different factors in the section of the Act central to decision-making<sup>13</sup>. Some such mechanism would strengthen the alignment of MFAT's risk assessments with those that Ministers could be expected to make in similar circumstances.

### Role of Ministers in decision-making

219. As discussed, under the legislation the Secretary of MFAT is the decision-maker, rather than Ministers. In practice, MFAT aims to make decisions consistent with the policy positions of Ministers. MFAT interviewees advised that they pay careful attention to any feedback from Ministers on specific permit applications before making decisions. The feedback also shapes MFAT's approach to subsequent decisions that raise similar issues.
220. Recent legislation on regimes that have some similar objectives – Overseas Investment and Space – provides for decision-making by Ministers with a framework for delegations to avoid unmanageable Ministerial workloads.
221. In the event of legislative reform of the Export Controls regime, there would be merit in considering making the appropriate Minister the decision-maker for complex applications (appropriately defined) that require a weighing of national values and interests.

#### ***We recommend that MFAT strengthen the decision-making framework***

##### ***Priorities would include:***

- ***Documenting risk appetite to ensure alignment with Ministers, inform public understanding and reduce uncertainty for exporting businesses and the research community***
- ***Considering the role of Ministers in decision-making in any review of the legislation.***

### Information dependencies and record-keeping

222. In this section we discuss how information is validated and incorporated into decision-making. We also look at record-keeping and evidencing of critical assessment steps.

#### Validation of information

223. MFAT does not require applicants to verify their identity, the export item or ownership of the item. These requirements are met through Customs procedures at the time of export.
224. Validation of information (such as end-use) is not usually undertaken. Where information is likely to be unreliable, MFAT takes this into account during the assessment process (this can result in a default decision of 'no' for countries where no information can be relied on).
225. This is broadly consistent with the approach for other export control jurisdictions and is a reasonable way to manage any risks around the reliability of information – especially with a

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<sup>13</sup> Part 2, sub-part 3 of the Overseas Investment Act 2005

small team and given the complexity of validating information offshore. More transparency around this approach would be desirable. We discuss this further below.

226. In all cases, the initial onus is on the exporter to self-assess whether an item is controlled or not, recognising that exporters have technical knowledge of their own products.
227. Where this is not definitive, MFAT will make further enquiries. This could include:
- Requesting further information from the exporter
  - Consulting other government agencies, including the Defence Technology Agency (DTA)
  - Consulting colleagues in other export agencies, such as Australian Defence Export Controls
  - Checking for similar types of exports in the Permit Control Database.
228. Several interviewees noted that government departments are not resourced to support complex judgements in relation to such things as sensitive technologies (discussed further below). Informal arrangements, such as reliance on the goodwill of Defence Technology Agency (which is not funded for this purpose) are unlikely to be sustainable.
229. Exporters are required to identify the end-user and potential end-use on all permit applications.
230. Depending on the goods, exporters may be required to provide an end-user certificate. These are usually to certify that goods manufactured in New Zealand (or chemicals for export) will be used solely by the end-user for the purpose stated and will not be re-exported or transferred without the consent of MFAT.
231. Of the permit applications we reviewed, very few provided end-user certificates or were required to. In practice, MFAT often waives the requirement for an end-user certificate if:
- Components are to be incorporated into a larger piece of equipment
  - In the case of sporting/hunting weapons, and/or
  - The good is being exported specifically for on-sale through a distributor.
232. Validation of end-use in relation to export controls is difficult. Internationally, very few export control agencies undertake significant auditing of end-use after permits are granted. Some interviewees noted that it is impossible for MFAT to tell with any real assurance where a component part or export may end up. MFAT mitigates this risk by undertaking basic checks on the bona fides of the named end-user (e.g., does the stated address appear genuine, is the end-user's website consistent with the application).

### Consultation with other agencies

233. We looked at the interaction of MFAT with other government agencies. We were interested in what triggered consultation and the basis upon which information was incorporated into the Ministry's decisions to approve or deny export permit applications.

- 234. MFAT's Export Controls team is well-networked with other agencies, though this largely relies on a key individual. Similarly, other parts of MFAT are well-networked across the public service.
- 235. All the government agencies we spoke with were familiar with the Export Controls regime and most of them had regular contact with MFAT. Some noted that good relationships were in part through relevant individuals having worked together for some time (rather than through formal arrangements) and might be difficult to sustain as and when turnover occurs.
- 236. Consultation with other agencies on complex applications is relatively frequent although largely informal and not a required step in the assessment process, relying largely on the judgment of individuals as to whether it is necessary.
- 237. MFAT utilises inter-agency relationships to inform itself of whether a proposed export is controlled and of the risks around particular export applications. We did not observe any instances where agency consultation was formally documented, or a formal agency statement was made about a particular export application.
- 238. Timely access to resource in other agencies can be an issue, relying on goodwill rather than contracted services.

### Record-keeping and documentation

- 239. We looked at MFAT's retention of records and evidencing of critical steps taken (e.g., assessments performed, input and feedback received, communications with export permit applicants).
- 240. Overall, we found that record-keeping, information capture and databases are fairly basic.
- 241. Accessing paperwork relating to specific policy or operational decisions was not straightforward. In the sample of applications that we reviewed, MFAT mostly recorded the basic key assessments. However, critical assessment steps are sometimes not captured or would benefit from more detail.
- 242. As noted below, none of MFAT's decisions have been legally challenged. However, it is good practice to clearly record internally the process and assessment undertaken. This will reduce the risk of successful legal challenges, should any eventuate in future.
- 243. Final permit response letters back to applicants usually give the reason for the acceptance or decline. It is not always possible to give a lot of detail in these letters as information may be restricted or there may be diplomatic sensitivities relating to the importing country.
- 244. Submissions to Ministers on export controls would benefit from clearer referencing of the relevant legal tests that MFAT is applying in reaching a decision – especially given that the inter-relationship between legal instruments is somewhat opaque. Similarly, Orders in Council under s96 and Gazette notices under s97 should clearly record that the public interest assessment has been met.

### Quality of databases

- 245. The Export Control website and the Permit Control Database (PCD) are the two key export control data sites. The website instructs and holds the application forms and the PCD holds the permits and the information contained in those permits.

246. Export applicants load their application details into a PDF set up for the purpose and email the PDF application to the Export Controls mailbox.
247. Approximately two years ago, MFAT invested in a PCD extraction application, which enables the team to automatically extract and upload data from applications into the PCD. This has significantly reduced manual processing work for the Export Controls team.
248. The EC website and PCD capture basic data and enable regular reporting (such as for the Arms Trade Treaty Annual Report). However, this system does not readily enable extraction of data to provide statistical summaries of activity (which could enhance the transparency of the regime) or to readily respond to requests for information from the media and via the Official Information Act.

## Assessment

249. MFAT relies on information provided by exporters, its own historical records, country-specific input from divisions and posts, and input from other parts of government.
250. Validation of information (such as end-use) is not usually undertaken. Where information is likely to be unreliable, MFAT takes this into account during the assessment process. This is broadly consistent with international approaches.
251. MFAT has basic tools that enable data capture and extraction but do not support statistical and other information that could be used to enhance the transparency of the regime (discussed further below) and to support responses to requests for information, including via the Official Information Act.
252. Some basic recording of key decision steps and assessments is captured by MFAT. But there were some instances of critical assessment steps not being documented in the applications we reviewed.

***We recommend that MFAT strengthen record-keeping and evidencing of critical steps***

***Priorities would include:***

- ***Undertaking regular audit or assurance that Export Control decisions are being appropriately documented and recorded***
- ***Referencing the relevant legal tests being applied as part of decision-making, particularly when providing advice to Ministers.***

## Transparency and public confidence

253. In this section we discuss the extent to which the regime is transparent and measures that might be desirable to enhance public confidence in the regime.
254. NGO, academic and activist interviewees expressed high levels of concern over the lack of transparency in the way the Export Controls regime operates – how decisions are made, what decisions are made, how end-user information is assessed, and outcomes in terms of export of weapons, military equipment and dual-purpose technologies to countries of concern from a humanitarian or human rights perspective.

255. The only public information on the export of goods covered by Export Controls is contained within New Zealand's Arms Trade Treaty Annual Report. This report contains only minimal information on the quantity of conventional arms exported/imported and the identity of the importing/exporting country.
256. One consequence of this lack of transparency is that media and other interested stakeholders use Official Information Act (OIA) requests to seek information. OIA responses impose a significant resource burden on MFAT. Reliance on redacted OIA responses often means that media reporting and public discussion of export permits and human rights is not as informed as it could be. A risk is an undermining of the social licence for legitimate military and dual-use exports, to New Zealand's overall disadvantage.
257. Taking steps to build transparency and public understanding and confidence in the regime without compromising commercial or diplomatic sensitivities is difficult and would require resource but has the potential to be of significant value in sustaining public confidence in the regime.
258. Potential steps in this respect include:
- A clear articulation of the risk appetite government is prepared to accept in making decisions on complex applications, as discussed above
  - Publication of anonymised case studies, that enhance understanding of the decision-making process
  - More informative annual reporting on the regime, with as much detail and commentary as possible at the aggregate level (export categories, destination countries) without disclosing details of specific transactions or the identity of exporting businesses
  - Commissioning assurance on a regular basis by an independent party who would have access to MFAT staff and to the documentary record and could assess and affirm (or not) to Ministers, Parliament and the public that MFAT has made decisions consistent with the legislation, Criteria for Assessment, risk appetite and documented processes
  - Publishing more guidance on how MFAT takes account of information on end-use.

***We recommend that MFAT enhance transparency and public confidence in the Export Controls regime***

***Priorities would include:***

- ***Publishing more guidance on how MFAT takes account of information on end-use***
- ***Enhanced annual reporting, covering activity level, any emerging issues and the approach to risk and decision-making, whilst respecting commercial and diplomatic sensitivities***
- ***Commissioning and publishing periodic independent reviews to provide assurance to Parliament and the public that MFAT is making decisions consistent with its legislated mandate and government's stated appetite for risk.***

## Education, outreach, and communication

259. We looked at the degree to which MFAT proactively engages to educate users of the Export Controls framework and to raise awareness of security risks to their intellectual property. We also considered the level of users' understanding of the regime.
260. Although the team is only three people, approximately 0.5 of an FTE is spent actively engaging in outreach, awareness and keeping abreast of international developments. Examples of activity include:
- MFAT has a close working relationship with NZTE and supports the latter in raising awareness of the scope of Export Controls for NZTE's customer-facing staff onshore and offshore
  - MFAT is one of several government agencies engaging with the research sector to raise awareness of risks in relation to such things as sensitive technologies and the relevance of Export Controls to some areas of research and to some research collaborations
  - MFAT regularly visits individual researchers and export businesses.
261. MFAT does not engage proactively on Export Controls with interest groups, academics, NGOs or media commentators, mainly due to resource constraints. This is an important stakeholder group for MFAT, not least in maintaining public acceptance (social licence) for some categories of export.
262. Some exporting business interviewees reported a good understanding of the Export Controls regime and regular interaction with MFAT. This was particularly the case for businesses operating at least partly in the defence sector and with a long involvement with Export Controls.
263. Several interviewees had not been aware of the relevance of the recent extension of the Catch-all controls, had not participated in MFAT's public consultation and were still unclear as to whether and how the regime applied to their activities.
264. Interviewees commented on the commonality between the objectives of Export Controls and the importance to businesses of maintaining a reputation for ethical behaviour and discharge of Environment, Social and Governance responsibilities.

## Assessment

265. Given resource constraints, MFAT does a good job of engaging with and educating exporting businesses and research institutions of which it is aware. The gap is in more proactive outreach to raise awareness and understanding more widely, especially additional requirements arising from the expanded Catch-alls, including for businesses for which the controls are potentially relevant.
266. We discuss below the level of funding of the Export Controls regime. Additional outreach activities, in partnership with NZTE and MBIE and Protective Security Requirements (PSR) would be a priority in the event of any increase in funding.

***We recommend that MFAT extend proactive outreach and education***

***Priorities would include:***

- ***Ensuring (as far as practicable) that all potentially impacted exporting businesses and researchers are aware of and understand the regime***
- ***Providing MFAT with early warning of emerging issues (such as new sensitive technologies).***

## Compliance and enforcement

267. The purpose of a compliance strategy is to set out how a regulator plans to ensure high levels of compliance, for example through an intelligence-led approach, ensuring awareness of the regulatory regime, making compliance easy, and maintaining a credible threat of enforcement.
268. MFAT has good access to technological and geopolitical intelligence on emerging issues for export control regimes via its international counterparts, including the Five Eyes.
269. MFAT has not developed and documented a formal compliance strategy. The Export Controls regime appears to work effectively for businesses that approach MFAT seeking permit applications but does not cover exporting businesses who do not approach MFAT or breaches of the regulations that may occur after a permit is granted.
270. NZ Customs Service is responsible for investigations and prosecutions of breaches of the Export Controls regime. The Terms of Reference for the review were limited to the elements of Export Controls within the responsibility of MFAT. We make only limited comments on enforcement in this report.
271. Over 100 categories of goods are subject to intervention processes by Customs at the border (i.e., on import or export). Prohibited military and dual-use exports are only one category of many. Other categories include non-military firearms, objectionable publications, controlled drugs, endangered species, and hazardous wastes.
272. Customs can provide targeted checks on specified importers/exporters, based on intelligence provided by MFAT. MFAT provides some information to Customs to support monitoring and compliance. MFAT also receives some limited information from Customs confirming which exports have proceeded.
273. 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. Where that is the case, the exporter is required to inform MFAT<sup>14</sup>.
274. To date, no prosecutions have been undertaken for breaches of the MFAT-administered Export Controls, though some cases have been investigated.

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<sup>14</sup> Section 97(8) Customs and Excise Act 2018

275. Compliance with prohibitions relating to export via electronic means require goodwill, given the difficulty in detection.
276. The challenges with enforcement have meant that MFAT has focused its compliance activities on raising awareness and risk mitigation. MFAT's view is that regulated parties have historically maintained high levels of compliance with the regime.
277. As noted above, though, some business interviewees had not initially realised they were subject to Export Controls following the extension of the Catch-alls, which highlights the importance of outreach that extends beyond known users of the regime.
278. MFAT was instrumental in increasing penalties for breach of the Export Controls provisions in the most recent revisions to the Act. Nonetheless, the challenges of enforcement create a risk of a lack of an effective deterrent against illegal activity.

## Assessment

279. Monitoring compliance and undertaking enforcement of the Export Controls regime is becoming more challenging. The current enforcement regime was designed around tangible goods moving across the border. As discussed below, intangible exports are an increasing risk.
280. We agree with MFAT's focus on education and outreach as the primary means to minimise the risk of non-compliance (which is more likely to be because of ignorance than malign motivation).
281. We are not aware of any evidence to question MFAT's assessment that compliance levels are high, but a risk of non-compliance remains.

***We recommend that MFAT work with NZ Customs Service to develop and publish a formal compliance strategy***

***Priorities would include:***

- ***Education and out-reach (particularly around the expanded Catch-alls) to minimise the risk of inadvertent non-compliance***
- ***Selective investment in monitoring and intelligence to increase the likelihood of detecting any non-compliance.***

## Capability, capacity, and funding

282. We considered the capability and capacity of key staff in the Export Controls regime. We also looked at such things as separation of duties, training and development, and succession planning.

## Duties and activities of the team

283. In addition to reviewing and assessing Export Control permit applications (approximately 700 per year) and undertaking a range of outreach activities, the team also:



- Responds to queries to the Export Control inbox and to the Export Controls phone line (typically 2-3 enquiries per day)<sup>15</sup>
- Provides permits for the import and export of controlled chemicals (see Figure 4 below)
- Provides international import certificates
- Records uranium ore transits
- Approves subsequent transfers for some New Zealand manufactured goods to a different end user
- Provides diplomatic clearances for specified foreign ships or aircraft entering New Zealand waters
- Responds to Official Information Act requests
- Administer the Brokering Act (though there is only one registered broker to date)
- Provide advisory support to Immigration NZ on visa screening and to the Overseas Investment Office.

Figure 4: Chemical permit applications received by year

Year	2017	2018	2019	2020	2021
Applications received	112	118	108	90	42

### Capability of key staff

284. Most interviewees were positive about the capability, knowledge, accessibility and responsiveness of the MFAT Export Controls team, particularly the senior member.
285. We did not identify any issues around the capability of the team.

### Key person risk and succession planning

286. Many interviewees expressed concern about key person risk and noted that the regime works as well as it does in no small part because of the experience, knowledge and networks of one person.
287. MFAT has been aware of this risk for some time and has been active around succession planning to the extent possible for such a small team, and given the need for technical knowledge, capabilities and networks that are not mainstream for MFAT, or New Zealand more generally.
288. Upskilling relies on learning on the job and through leveraging the expertise of Export Controls counterparts in other jurisdictions.
289. The key person risk remains high, especially given that operating policies are not yet sufficiently formalised or systematised.

<sup>15</sup> Some typical queries are how to get a permit, how to complete an application form, or whether an item is controlled.

## Integrity of export controls process/conflicted duties

- 290. We have not identified any concerns about possible conflicts.
- 291. The team has a process of ensuring that at least two people handle every application. The person entering the data and verifying the information cannot also sign a permit out.
- 292. The Permit Control Database has functionality which ensures that once data is entered, that person is blocked from approving the application.

## Funding of the Export Controls regime

- 293. MFAT's Export Controls function is funded as part of a broad appropriation focused on MFAT's 'Delivery of New Zealand's foreign policy'. MFAT has recently increased the size of the Export Controls team from two to three. The team draws on additional resource from across MFAT (for example, legal, regional divisions, senior management), government (for example DTA) and international partners as required (and subject to availability).
- 294. In 2019, MFAT's Resources Committee considered a business case from the International Security and Disarmament Division for sufficient funds to employ a third, more senior person in the Export Controls team. The business case was consistent with the findings of this report, noting the increasing complexity of the operating environment. The request was partially approved, enabling the employment of a third person but at a more junior level.
- 295. The regime is fully funded through a Parliamentary appropriation. Exporters are not asked to cover the cost to MFAT of the permit application system. This is to prevent a disincentive to businesses seeking permits and mirrors practice for counterpart regimes in other jurisdictions.

## Assessment

- 296. MFAT's Export Controls team is small, susceptible to critical person risk and constrained in the range of activities it can sustain to support the regulatory system. The team has limited capacity to work *on* the system. We did not identify any areas where the team is focusing on non-critical activities or operating inefficiently.
- 297. Continuing to operate the Export Controls regime with a core team of three is increasingly risky to operating effectiveness – especially given the expansion in the scope of the Catch-all controls.
- 298. We think it unlikely that exporters would be easily disincentivised by a small fee. Many regulatory systems charge an application fee to recover some or all the costs of processing applications. However, there are resource costs to implementing and running a fee system and we would not consider it a priority at this time.

***We recommend that MFAT develop a business case for increased resourcing for the Export Controls regime***

***Priorities would include:***

- ***More depth, professional development and succession planning in the Export Controls team***
- ***More consistent interaction with MFAT's risk and assurance functions***
- ***Sufficient training on the structure of the Export Controls regime for MFAT staff in divisions and posts that are likely to be asked to have input to decision-making.***

## Assessing MFAT's Export Controls against government expectations of good regulatory practice

299. The Treasury website includes a set of expectations for good regulatory stewardship by government agencies.
300. In Annex Eight to this report, we have assessed MFAT's stewardship of the Export Controls regulatory regime against these expectations. Consistent with our review as whole, the assessment is mixed.
301. Implementation of the recommendations in this review would address many of the areas where we assess MFAT as not yet meeting expectations for good regulatory practice in relation to Export Controls.

## Is the Export Controls regime fit for the future?

302. In this section of the review, we assess the extent to which MFAT's Export Controls regime is fit for the future.

### Steps taken to keep the regime current

303. As discussed, MFAT has taken several steps to keep the regime current, including changes to the Criteria for Assessment made following New Zealand ratifying the Arms Trade Treaty and the recent extension in the scope of the Catch-all controls.

304. Other initiatives, notably a proposed consultation to extend the scope of the legislation to modernize the regime, including capturing intangible transfers, cloud computing, regulation making powers, appeals and incorporating other best regulatory practices was delayed by other priorities including the need to focus on the response to COVID-19.

305. MFAT has advised that, given resource constraints, key domestic partners are not in a position to engage in the development of modernisation options in 2021.

### Comparison with other export control regimes

306. We have looked at the export control regimes of like-minded countries (that have committed to the same set of international agreements) as a means of identifying potential areas for improvement in the New Zealand regime.

307. Regimes are not directly comparable because of the differences in context (e.g., differences in governance and institutional arrangements, variation in scale of regulatory activity, membership or not of regional groupings).

308. Nonetheless comparisons are helpful in assessing the New Zealand regime:

- New Zealand exporters compete with counterparts in other jurisdictions. The way the Export Controls regime operates can impact on ability to compete with businesses based in like-minded countries. Other things being equal, it is in New Zealand's interests to support this competitiveness
- As one means of assessing whether we are meeting our international obligations, and positioning ourselves as we want to relative to other countries e.g., as an advocate for human rights
- Providing insight on opportunities to improve the efficiency (cost) and effectiveness (outcomes) of the New Zealand regime.

### European Union

309. The larger regimes appear to be more systematic and are better resourced in their approach to regulatory stewardship, including in updating the regime as the operating environment changes.

310. In November 2020, the European Parliament reached agreement on a modernisation of export controls on sensitive dual-use goods and technologies, with a focus on addressing the risk of violations of human rights associated with trade in cyber-surveillance technologies<sup>16</sup>.
311. The changes also introduced due diligence obligations and compliance requirements for exporters (a strengthened 'first line of defence') and enhanced transparency through the obligation to publish reports on licences granted.

## Ireland

312. Ireland is a country of similar size to New Zealand. Ireland's export controls are based on EU requirements. The Irish regime has the same basic building blocks as New Zealand's.
313. The legislation is specific to export controls (the Control of Exports Act 2008). The catch-all controls are narrower in scope, covering exports intended for use in connection with weapons of mass destruction and in relation to breaches of arms embargos.
314. The Irish regime requires all applications to be accompanied by a certificate of end-use assurance, signed by the end-user of the goods in question.
315. The regime is administered by the Department of Business, Enterprise and Innovation; the Department consults with the Department of Foreign Affairs regarding political and human rights in the country of final destination at the time of an application. The Department may annul, suspend, modify or revoke an export authorisation which has already been granted.
316. Ireland uses Criteria for Assessment as determined by the European Council. Eight criteria are used; the matters covered are similar as for the New Zealand criteria but, on the face of it, appear simpler to apply.

## United Kingdom

317. The United Kingdom has stand-alone legislation for Export Controls – the Export Control Act 2002. The Act is administered by the Department of International Trade.
318. Compared to the relevant section of New Zealand's Customs and Excise Act, the UK legislation has a much clearer purpose statement. The Secretary of State can only impose controls for the purpose of giving effect to specific international obligations, which appears narrower in scope than the New Zealand regime. However, the UK has an economic sanctions framework which sits alongside the export controls regime.
319. The Secretary of State can give guidance about any matter relating to the exercise of a licensing power, provided it is tabled in Parliament. This power appears to be used regularly, for example in relation to Myanmar in 2021. The UK uses the same EU-based criteria for assessment as Ireland (at least for now).
320. The UK system has more formal commitments to processing times for applicants than does the New Zealand regime, but average processing times appear to be lower for New Zealand.

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<sup>16</sup> European Commission press release: 'Commission welcomes agreement on the modernisation of EU export controls', Brussels, 9 November 2020

321. Guidance for exporters in the UK appears to be more comprehensive, including published case studies.
322. The UK regime covers both tangible and intangible exports of technology – the latter has yet to be incorporated fully into the New Zealand regime.
323. Government has been engaged with the research community on the applicability of export controls, and arrangements seem more mature than in New Zealand.
324. A report on strategic export controls is tabled annually with the UK Parliament.

## Australia

325. Australia has a proportionately bigger defence industry than New Zealand and a better-resourced regime for control of strategic exports.
326. The export controls regime was developed as part of the Customs Act (1901), which regulated the export of strategic goods. The regime was modernised through the Defence Trade Controls (DTC) Act (2012) which regulates the supply, publication and brokering of strategic technology and goods.
327. Supply occurs when controlled technology is provided, or access is provided, from a person in Australia to a person outside Australia, including electronically via uploading to a server, or by providing passwords to access technology stored electronically. The current legislative framework for Export Controls in New Zealand does not regulate such transfers; adopting similar provisions as Australia's would likely require legislation separate from the Customs Act.
328. Australia's export controls sit alongside an Autonomous Sanctions Act (2011) and incorporate provisions deriving from the Defence Trade Cooperation Treaty between Australia and the United States.
329. The DTC Act includes catch-all controls, which are more limited in scope than the New Zealand equivalent.
330. The DTC Act is administered by the Defence Export Controls Branch of the Department of Defence. DTC regulations include 12 criteria for assessing permit applications. These criteria are broadly framed, as for the New Zealand regime, but fewer in number.
331. The Australian Border Force is responsible for enforcing the control of export of strategic goods, but not for intangible transfers of technology.
332. An independent review of the DTC Act in 2018 noted several issues relevant to this review of the New Zealand regime:
  - The importance of raising awareness of the provisions of the DTC Act, particularly with smaller companies, given the lack of visible consequences for non-compliance (as compared to the more active enforcement regime in the United States) and the case for triggering general monitoring and investigative powers for use by Department of Defence to monitor and investigate compliance
  - The need to address gaps in the regime, relating to new ways of exporting controlled information; to the extent practicable the regulations should be independent of the

technical method used to supply or publish technology (thereby future-proofing against new ways of doing things)

- The need for a proportionate, risk-based approach to any expansion in the scope of the regime, noting the concern of the research community about possible adverse consequences for academic freedom and for international research collaborations
- The desirability of a more joined-up approach to control of strategic goods across relevant government agencies, and the potential complications for exporters in needing to comply with two main Acts of Parliament.

## Foreign interference and sensitive technologies

333. As noted earlier, concern over foreign interference has increased in New Zealand and like-minded countries.
334. MFAT is an active participant in cross-government groups focused on ensuring that New Zealand has a sufficiently robust set of risk mitigants for all the main channels through which foreign actors may pose a threat.
335. Export Controls are one amongst a range of policies and regulations designed to protect against these risks including the threat of foreign interference and to promote New Zealand's values and interests domestically and internationally.
336. Regulation has the advantage of the force of law.
337. Government agencies are working with the research sector in New Zealand to strengthen protections around research and research collaborations involving sensitive technologies that could potentially be misappropriated to New Zealand's disadvantage.
338. Protective Security Requirements (PSR) articulate the government's requirements for protective security and are mandatory for government agencies and a framework for best practice for other organisations.
339. New Zealand's research leaders have collaborated with PSR to provide guidance to researchers and research institutions on how to ensure their research is protected. The guidance notes that 'joint research can be misused by organisations and institutions in nations with interests and ethical values that are different from our own. Joint research can provide opportunity for people with hostile intent to access expertise, IT networks and research'. The guidance also reiterates the importance of maintaining academic freedoms.
340. Recent changes to the Overseas Investment Act have strengthened government's ability to block potential purchase of a 'strategically important business', the definition of which includes businesses that have developed sensitive technologies.
341. Screening of some categories of visa application considers risks relating to sensitive technologies.

## Assessment

342. Compared to other jurisdictions, New Zealand has been relatively slow in modernising the Export Controls framework.

343. As noted earlier in the report, sections of the Customs and Excise Act relevant to Export Controls are difficult to follow and lack a specific and relevant purpose statement.
344. The current Export Controls legislation falls short of contemporary best practice as described in the Legislation Guidelines (2018) published by the Legislation Design and Advisory Committee in multiple respects.
345. Related is the increasing challenge of enforcement. The Customs and Excise Act is organised around physical imports and exports and enforcement powers only extend to tangible goods and electronic publications. This is a reason to give serious consideration to moving the Export Controls regime into standalone legislation, designed to be able to keep pace with the ongoing changes in the set of opportunities and threats that the regime is designed to balance.
346. The nature of the threats to New Zealand's values and interests will continue to evolve and require an ongoing system response, in part through maintaining fit-for-purpose regulatory systems including for Export Controls.
347. Government agencies involved in defence and security, trade, investment and research all require access to expertise in a broad range of technologies to support the assessment of potential uses, threats and risks. Shared access to a common set of capabilities is likely to be a more cost-effective model than each agency building its own capability.

***We recommend that MFAT ensure the Export Controls regime is fit for the future***

***Priorities would include:***

- ***Pursuing legislative reform (preferably through new stand-alone legislation) to:***
  - ***Clarify the legislated purpose of Export Controls***
  - ***Make the regime easier to understand, predict and comply with for exporting businesses and the research community***
  - ***Better-capture intangible means of export, modernise enforcement provisions and enable timely response to emerging challenges in the threat environment***
- ***Supporting the establishment of an all-of-government centre for expertise (required by multiple agencies) to assess the uses of and risks associated with sensitive and emerging technologies.***



## Annex One: Terms of Reference

This document details the terms of a review over the Ministry's export controls framework.

The Ministry's Deputy Chief Executive Policy (DCEP) has commissioned this engagement.

The export and import of all controlled chemicals and the export of strategic goods (firearms, military goods and technologies, and goods and technologies that can be used in the production, development or delivery of nuclear, chemical or biological weapons) is prohibited under the Customs and Excise Act 2018 (and any associated primary, secondary or tertiary legislation), unless a permit has been obtained from the Secretary of Foreign Affairs and Trade.

New Zealand's system of export controls on strategic goods (our export control regime), is designed to ensure that such trades are consistent with our wider foreign, strategic and security policy. The system is an essential element of our non-proliferation, arms control and disarmament policies, and of our commitment to being a responsible exporter.

In particular, New Zealand's export control system is a significant thread in our commitment to restrict the ability of countries or terrorist groups to develop weapons of mass destruction, and to prevent the transfer of conventional weapons for undesirable purposes.

New Zealand is a member of the four international export control regimes and the Arms Trade Treaty. These form the basis of our own export control regime:

- Wassenaar Arrangement, which controls conventional weapons and dual-use goods and technologies
- Missile Technology Control Regime, which controls missile-related goods and technologies
- Australia Group, which controls chemical and biological weapons-related materials
- Nuclear Suppliers Group, which controls nuclear material, equipment and technology
- Arms Trade Treaty, which controls certain conventional weapons and their associated ammunition/munitions.

Applications to export controlled goods are dealt with on a case-by-case basis in accordance with the Criteria for the Assessment of Export Applications which have been approved by the Minister of Foreign Affairs and Trade.

The Secretary of Foreign Affairs and Trade is the authority that grants approval for the export of strategic goods (under Section 96 of the Act) and goods not on the Strategic Goods list but subject to catch-all provisions (under Section 97 of the Act).

The Criteria for Assessment are attached to the terms of reference. The assessment is performed against the Strategic Goods list and those subject to catch-all provisions.

The objective of this engagement is to review the Ministry's export controls framework (including related policies, processes, systems, controls and people) and comment on whether this is fit for purpose.

### **Design adequacy:**

This will include considering the design aspects of the Ministry's export controls framework:

#### Legislative mandate and application

- The design of (the Ministry's) export controls in the context of the Customs and Excise Act 2018 and the extent to which the controls are congruent with the intent of the legislation

- The existence and quality of interpretation and judgement – to the extent the Ministry has designed and implemented controls not directly and explicitly attributable to the legislation (for example: because of good practice or partner/like-minded country practices, such as from Australia, UK or United States).

#### Framework, policies, standards and delegations

- The formal (Ministry-sanctioned) and documented basis upon which export controls operate and export permits are granted, including the use of templates and checklists, and whether they are of a quality that enables complete, reliable and consistent implementation across relevant Ministry staff and individual permit applications
- Formal delegation for receiving, assessing, approving and retaining export permits and applications.

#### Analysis and assessment

- The analysis and assessment process and safeguards, including the degree to which the Criteria for Assessment and catch-all provisions are able to be completely, accurately and timeously applied to export permit applications.

#### Information dependencies

- The Ministry's dependence on information received from outside of the export controls team – for example Posts, Divisions, NZ Inc. agencies (such as Customs), the New Zealand Intelligence Community and partner/like-minded countries – and whether and how such information is validated and subsequently integrated into decision making frameworks
- The method by which the Ministry captures and builds on the existing body of knowledge so that export permit applications are properly approved or denied.

#### Escalation and exception management

- Steps taken to identify, escalate and internally resolve exceptions to the basis upon which export controls operate and export permits are granted
- Peer or independent review and delegated sign-offs for deviations from approved processes.

#### Recording keeping and documentation

- The retention of records evidencing all critical steps taken, assessments performed, input and feedback received, judgement applied, review performed, authorisation provided and communications with export permit applicants.
- The integrity and auditability of records, including the use of databases, archiving and change-control.

#### Consultation and feedback

- Any interactions with Ministers' offices and other agencies, their triggers and the basis upon which such information is incorporated into the Ministry's decisions to approve or deny export permit applications.

#### Review and remediation

- Review or remediation mechanisms that might apply to individual export permit applications and decisions, how these are implemented and their consistency and accuracy.

#### Capability and capacity

- Key staff involved in the Ministry's export controls framework – in particular the export controls team and others who possess delegated authority to act under the framework

- Separation of incompatible or conflicted duties to ensure the integrity of the export controls process is safeguarded, including access controls within databases and other information repositories
- Training and development of staff directly involved in receiving, assessing, approving and retaining records of export permit applications.
- Succession and redundancy planning for key export control roles.

#### **Operating effectiveness:**

Once the design aspects of the Ministry's export controls framework have been determined and reviewed for design adequacy, this engagement will test their operating effectiveness (i.e. expected versus actual practice testing) across a sample of export permit applications and approvals.

Where there is available and suitable evidence, the reviewers may also comment on the extent to which the Ministry proactively engages to educate users of the export controls framework/applicants for export permits, and on their overall user experience.

The Ministry's export controls framework and its related policies, processes, systems, controls and people are in scope for this engagement.

The Ministry's regime is legislated under the Customs and Excise Act 2018, meaning it is Customs, rather than MFAT that has responsibility for any investigation and prosecution arising from the Ministry's work on export controls.

Therefore, the scope of this engagement will be limited to those elements of the system that are the Ministry's responsibility. Actions taken by other agencies and their staff as part of how the Act may more broadly apply to export permit applications will be outside the scope of this engagement.

The reviewers will be cognisant of the following risks:

- The Ministry's export controls framework may not be designed to properly give effect to the Ministry's obligations under the Act.
- The operation of the Ministry's export controls framework may not comply with its design intentions.

This engagement will involve:

#### Planning

- Meeting with key members of the export controls team and their managers to understand the framework and its operation in the Ministry
- Corroborating this through a review of related documents and export permit records
- Reconfirming and agreeing milestones and timelines for this engagement with key members of the export controls team and the engagement sponsor.

#### Fieldwork

- Documenting and corroborating the design and operation of the export controls framework (including related policies, processes, systems, controls and people)
- Analysing and assessing the design effectiveness and adequacy of the export controls framework, including its compliance with the legislative framework and highlighting any risks and issues
- Testing the operating effectiveness of the export controls framework across a sample of export permit applications and approvals (with equal emphasis on successful and unsuccessful applications), and compiling risks and issues.

<u>Quality assurance and draft reporting</u> <ul style="list-style-type: none"> <li>• Quality assuring the results of the engagement</li> <li>• Producing a draft report with findings and recommendations and circulating this for management (export controls team) comment</li> <li>• Providing the draft report to DCEP for sponsor comment.</li> </ul> <u>Finalisation and communications</u> <ul style="list-style-type: none"> <li>• Finalising the draft report with the export controls team and DCEP once all comments and feedback are incorporated into the report.</li> <li>• Providing the final report to the Coordination and Performance Committee (CPC) and Audit and Risk Committee for governance review and oversight.</li> </ul>													
This engagement will be performed in Wellington.													
Ben King, Deputy Chief Executive Policy, will sponsor this engagement.													
<p>The key business contacts are envisaged to be:</p> <ul style="list-style-type: none"> <li>• Cecile Hillyer, Divisional Manager International Security and Disarmament Division</li> <li>• Katy Donnelly, Unit Manager Disarmament and Arms Control</li> <li>• Export controls team: <ul style="list-style-type: none"> <li>○ Peter Noble, Senior Adviser Counter-Proliferation</li> <li>○ John Fleming, Exports Controls Coordinator</li> <li>○ Alex Thompson, Counter-Proliferation Adviser.</li> </ul> </li> </ul>													
David Smol													
This engagement will be performed in line with the timeframes below. This will depend on Ministry staff and reviewer availability.													
<table border="1"> <thead> <tr> <th>Milestone</th><th>Due</th></tr> </thead> <tbody> <tr> <td>Terms of reference finalised</td><td>22 March 2021</td></tr> <tr> <td>Planning/discovery phase completed</td><td>23 April 2021</td></tr> <tr> <td>Fieldwork completed</td><td>To be agreed at the conclusion of the discovery phase</td></tr> <tr> <td>Quality assurance and draft reporting completed</td><td>Two weeks following completion of the fieldwork</td></tr> <tr> <td>Finalisation and communications</td><td>Two weeks after completion of the draft report</td></tr> </tbody> </table>		Milestone	Due	Terms of reference finalised	22 March 2021	Planning/discovery phase completed	23 April 2021	Fieldwork completed	To be agreed at the conclusion of the discovery phase	Quality assurance and draft reporting completed	Two weeks following completion of the fieldwork	Finalisation and communications	Two weeks after completion of the draft report
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Any changes to these timeframes will need to be agreed with the review sponsor.													

## Annex Two: Stakeholders interviewed

We are grateful to the following organisations/individuals, who contributed insights to this report. A small number of interviewees requested that they not be included on the list.

### Businesses

- ExportNZ
- Oceania Defence
- CWF Hamilton & Co
- Gun City
- Flightcell
- Wisk
- Pacific Helmets
- Ordnance Developments
- Air New Zealand
- Hardy Rifle
- Endace
- Rakon
- Chapman Tripp

### Researchers

- Universities New Zealand Research Committee

### Government (both current and former staff)

- MFAT, including -
  - International Security and Disarmament Division (including Export Controls)
  - Corporate Law Unit
  - Trade Law Unit
  - Middle East and Africa Division
  - North Asia Division
  - Economic Division
  - UN, Human Rights & Commonwealth Division
  - New Zealand High Commissioner in London
  - Former Disarmament Ambassador
  - Senior Foreign Affairs Adviser to Minister of Foreign Affairs
  - Chief Data Officer
- New Zealand Customs Service
- Ministry of Business, Innovation and Employment
- New Zealand Trade & Enterprise
- Department of Prime Minister & Cabinet
- New Zealand Export Credit Office
- Defence Technology Agency

### NGOs, Academics, interest groups

- Alexander Gillespie (Waikato University)
- Disarmament and Security Centre
- Oxfam Aotearoa
- Robert Ayson (Victoria University of Wellington)
- Peace Movement Aotearoa
- Human Rights Watch
- Paul Buchanan, 36<sup>th</sup> Parallel Assessments
- Amnesty International
- Maire Leadbeater

## Annex Three: List of permit applications reviewed

	Country	Year	Category*	Export description	Type of application	Outcome	Noted w/ Minister?
<b>NON-STANDARD APPLICATIONS</b>							
<u>1</u>	<u>United Arab Emirates</u>	Mar 2021	Catch-alls	Engines and associated items	Single permit application	Allowed	Yes
<u>2</u>	<u>Philippines</u>	July 2020	Strategic goods list ML1	Small arms suppressors	In-principle enquiry	Allowed	Yes
<u>3</u>	<u>Thailand</u>	May 2020	Strategic goods list ML5	Fire control, and related equipment and systems	Single permit application	Allowed	Yes
<u>4</u>	<u>Saudi Arabia</u>	Feb 2019	Strategic goods list ML4	Explosive ordnance disposal equipment	In-principle enquiry	Denied	Yes
<u>5</u>	<u>Myanmar</u>	Jan 2019	Strategic goods list ML10	Aircraft and related equipment and components	In-principle enquiry	Denied	Yes
<u>6</u>	<u>United Arab Emirates</u>	Apr 2018	Strategic goods list ML5	Fire control, and related equipment and systems	Single permit application	Allowed	Yes
<u>7</u>	s6(a)	Dec 2017	Strategic goods list ML9	Vessels of war, special naval equipment, related accessories and components	In-principle enquiry	Allowed	Yes
<u>8</u>	<u>Hong Kong</u>	April 2021	Catch-alls	Helmets	Single permit	Denied	<u>No</u>
<u>9</u>	<u>Thailand</u>	May 2021	Strategic goods list Category 5	Telecommunications and Information Security	Multiple use permit	Denied	<u>No</u>
<u>10</u>	<u>Pakistan</u>	Apr 2021	Catch-alls	Radio equipment	In-principle enquiry	Denied	<u>No</u>
<u>11</u>	<u>Indonesia</u>	Apr 2021	Catch-alls	Radio equipment	In-principle enquiry	Allowed	No
<b>STANDARD APPLICATIONS</b>							
<u>12</u>	<u>Canada</u>	June 2020	Strategic goods list ML 901	Firearms	Multiple-use permit	Allowed	No
<u>13</u>	<u>New Caledonia</u>	June 2020	Strategic goods list ML 901	Firearms	Single export permit	Allowed	No
<u>14</u>	<u>Fiji</u>	May 2019	Strategic goods list ML 902	Ammunition and projectiles	Single export permit	Allowed	No
<u>15</u>	<u>United States</u>	May 2019	Strategic goods list ML 904	Firearm accessories	Single export permit	Allowed	No
<u>16</u>	<u>France / Canada</u>	Nov 2019	Strategic goods list Category 0	Transit of uranium ore	General consent	Allowed	No

17	<u>Thailand</u>	Aug 2020	Strategic goods list Category 5	Telecommunications and Information Security	Single export permit	Allowed	No
18	<u>Guam/Switzerland/Australia/US/HK/Malaysia/Taiwan/South Africa/Turkey/Japan/Sth Korea/China/India/Singapore/Thailand/Vietnam/Romania/Canada/Macao-China/Philippines/Bangladesh/Sri Lanka/Indonesia/Mexico/UK</u>	May 2019	Strategic goods list Category 5	Telecommunications and Information Security	General Consent	Allowed (partially)	No
19	<u>Netherlands</u>	Dec 2018	Strategic goods list Category 7	Navigation and Avionics	Single Export Permit	Allowed	No
20	<u>Germany</u>	June 2019	Strategic goods list Category 9	Aerospace and Propulsion	Single temporary export	Allowed	
<p>*Controlled goods categories are -  (1) the Strategic Goods List (SGL), which comprises: Part 1 Munitions List (ML); Part 2 Dual Use list (Categories 0 – 9); or  (2) Catch-all provisions</p>							

# Annex Four: Criteria for Assessment

## The Criteria for the Assessment of Export Applications

### A. Situations where an export permit will be refused

MFAT will refuse an application for a permit to export strategic goods if:

- the export would violate New Zealand's obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, including arms embargoes
- the export would contravene New Zealand's other international obligations
- we have knowledge at the time of considering the application, that the goods are to be used in the commission of genocide, crimes against humanity or war crimes.

### B. Risk Assessment

If the application for an export permit is not refused under section A, MFAT will undertake a risk assessment of whether:

1. The goods to be exported would undermine peace and security.
2. The goods to be exported could be used to commit or facilitate:
  - a serious violation of international humanitarian law
  - a serious violation of international human rights law
  - an act constituting an offence under international conventions or protocols relating to terrorism to which New Zealand is a party
  - an act constituting an offence under international conventions or protocols relating to transnational organised crime to which New Zealand is a party
  - serious acts of gender-based violence or serious acts of violence against women and children.

If MFAT's assessment is that there is a substantial risk of any of the negative consequences set out above in 1 and 2, and the risk cannot be mitigated, MFAT will refuse the application for an export permit.

### C. Additional factors

MFAT will also take into account the following factors in undertaking a risk assessment for a permit to export strategic goods:

1. Is there a substantial risk that the goods to be exported could be diverted or on-sold prior to, or after, delivery to their intended end-user?
2. Are there any requests for restraint or expressions of concern by competent international bodies (e.g., United Nations Security Council, Wassenaar Arrangement) or any other arms restrictions in place?
3. Would the export undercut a denial from an export control regime of which New Zealand is a member?
4. Is the export consistent with decisions made by like-minded countries operating similar export controls to New Zealand?
5. Is there evidence that the country of import is involved in the development of weapons of mass destruction?
6. Is the export part of an existing contract that has previously been approved?
7. Is the country of import involved in any conflict?



- a. Issues to consider for internal conflicts:
    - the legitimacy of the government
    - factors contributing to the conflict
    - the commitment of parties to peaceful settlement.
  - b. Issues to consider for external conflicts:
    - the nature of the conflict under international law (e.g., self-defence under Article 51 of the United Nations Charter)
    - the commitment of parties to peaceful settlement.
  - c. How would the export contribute to the conflict in question?
  - d. Is there evidence that child soldiers are being used in the conflict and, if so, how would the export affect this?
8. Would the export introduce a new capability into a regional/internal security situation?
  9. Would the export significantly enhance capabilities already employed (including, for instance, manpower effectiveness)?
    - a. How would this enhancement be perceived?
    - b. Could this enhancement materially affect an already unstable situation?
  10. Is there potential for the goods to be used in any terrorist activity?
  11. Could the export of the goods in question prejudice New Zealand's relationship with a third country?
  12. Could the export compromise New Zealand's wider defence and security interests?
  13. Could the export prejudice New Zealand's international relations?
  14. What is the human rights record of the country of import?
  15. Is there a possibility that the goods could be used in, or contribute to, an abuse of human rights?
  16. What is the country of import's record in International Humanitarian Law/Law of Armed Conflict?
  17. Are the items prohibited under New Zealand law?

## Annex Five: Short-form assessment

### Export Controls: Short Form Assessment: [Application description]

The Export Controls team has received an export permit request that we consider requires [Division]. [Exporter] is requesting approval to export [description of goods] to [importer and country].

We have conducted an initial assessment, but require your input to make this assessment more comprehensive, and to determine whether the export should be *approved*, *denied*, moved to a *long-form assessment*, and/or whether a *submission to Ministers* is required.

Please conduct your assessment and return any comments you may have no later than COP [date]. Please let us know if this is not achievable – we aim to respond to exporters within 10 days for routine exports and up to 6 weeks for complex exports.

### Goods

[Description of goods and use]

The exporter has provided the following information:

- 

### End User

[The end user is ]

### Short Assessment

Export Controls has conducted an initial assessment based on our knowledge and understanding. Please add your assessment and any other comments you may have.

Is the export in New Zealand's foreign policy and security interests?		Assessment prompts
ISED Assessment		<ul style="list-style-type: none"><li>• Does the export violate UNSC measures (e.g. sanctions), contravene international obligations, norms, requests for restraint?</li><li>• Are like-minded nations conducting similar exports or interacting with the end user country (e.g. joint military exercises)?</li><li>• Could the export prejudice New Zealand's relationship with a third country?</li></ul>
Division Assessment		

		<ul style="list-style-type: none"> <li>Is the item prohibited under New Zealand law?</li> </ul>
<b>Could the export be used in the commission of human rights abuses?</b>		<b>Assessment prompts</b>
ISED Assessment		<ul style="list-style-type: none"> <li>Could the export be used in the commission of genocide, crimes against humanity or war crimes?</li> <li>Could the export be used to violate international humanitarian law or international human rights law?</li> <li>Is there any evidence of the use of child soldiers, gender-based or sexual violence?</li> <li>Is there a risk of the export being used for internal repression?</li> </ul>
Division Assessment		
<b>Could the export undermine peace and security?</b>		<b>Assessment Prompts</b>
ISED Assessment		<ul style="list-style-type: none"> <li>Is the end user country involved in an external or internal conflict? If so, how are the goods likely to contribute to that conflict?</li> <li>Would the export introduce new, or greatly enhance existing, capabilities?</li> <li>Would the export threaten regional stability or increase local instability (through actual or perceived capabilities)?</li> <li>Could the goods be used in any terrorist, mercenary or criminal activity?</li> </ul>
Division Assessment		
<b>Could the export be diverted to undisclosed users?</b>		<b>Assessment Prompts</b>
ISED Assessment		<ul style="list-style-type: none"> <li>Could the export be diverted on-route or once delivered, either intentionally or unintentionally? <ul style="list-style-type: none"> <li>Diversion includes theft, unauthorised sale and any other means of the export ending up under control of unintended persons.</li> </ul> </li> <li>Could the goods be misused for purposes other than stated?</li> </ul>
Division Assessment		

Could the export be used for WMDs or their means of delivery?		Assessment Prompts
ISED Assessment		<ul style="list-style-type: none"> <li>Is there a risk, or evidence, of the end user country being involved in the development or use of WMDs?</li> <li>Could the export be used in the development, creation or delivery of WMDs?</li> </ul>
Division Assessment		
Does the export pose a reputational risk to New Zealand?		Assessment Prompts
ISED Assessment		<ul style="list-style-type: none"> <li>Does the export pose a reputational risk to New Zealand internationally?</li> <li>Does the export pose a reputational risk to MFAT domestically?</li> <li>What is the likelihood and consequence of public disclosure of the export?</li> </ul>
Division Assessment		
Any other/overall comments		
ISED Assessment		
Division Assessment		
ISED Recommendation	Approve / Deny / More information required / Full assessment required / Submission to Ministers required	
Division Recommendation	Approve / Deny / More information required / Full assessment required / Submission to Ministers required	

Application Date:

Date Short Form Assessment sent:

Date Short form Assessment completed by Division:

If you have not previously had any interaction with Export Controls you can find a run-down on the [MFAT website](#). Essentially, exporters must gain an export permit from the Secretary to export *strategic goods* from New Zealand ([NZ Strategic Goods List 2019](#)). Strategic goods include common items such as weapons and encrypted communications systems.

We have also recently brought in new controls on otherwise non-controlled goods/technology where the end-user is a military, para-military or police organisation – these are known as *catch-all controls*. Both export types are assessed in the same manner.

The Export Controls team assesses each export in line with our full [criteria](#). Where we need input from outside of ISED we then come to relevant divisions.

## Annex Six: Sample letters

Below are some examples of final permit letters back to exporters

### Example 1

Dear [REDACTED]

Thank you for your email of [REDACTED] seeking a permit to export a silencer to [REDACTED] in [REDACTED].

Following our informal advice by email on [REDACTED] this letter is to formally advise you that this permit application has been declined.

New Zealand's system of export controls on strategic goods is designed to ensure that such exports are consistent with broader foreign, strategic and security objectives. Applications are assessed against a set of criteria, as set out on the Ministry of Foreign Affairs and Trade website. The decision to deny this application is in accordance with these criteria.

We have assessed the application against the Criteria for the Assessment of Export Applications and judge that there are reasonable grounds to decline the application on the basis of the security situation in [REDACTED], the risk of proliferation and the difficulty of conducting an adequate assessment. In these situations our approach has been to err on the side of caution.

While our aim is to support international trade where at all possible, we regret that in this instance it is not possible to issue an approval.

Yours sincerely

[REDACTED]

for Secretary of Foreign Affairs and Trade

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### Example 2

Dear Mr [REDACTED]

Thank you for your application dated [REDACTED] seeking approval to supply firearm suppressors to the [REDACTED] military.

This letter is to advise that I am unable to issue a permit for the export of these goods to the specified end-user in [REDACTED], namely the [REDACTED].

New Zealand's system of export controls on strategic goods is designed to ensure that such exports are consistent with broader foreign, strategic and security objectives. Applications are assessed against a set of criteria, as set out on the Ministry of Foreign Affairs and Trade website. The decision to deny this application is in accordance with these criteria.

In this case, the Ministry has been unable to reasonably conclude that your requested export would not be used for purposes contrary to New Zealand's values, security and foreign policy interests. In the course of assessing your application the Ministry has exhausted all reasonable avenues of investigation and assessment, having consulted with domestic security agencies and overseas security partners on the likely end use of your goods. The Ministry has received unanimous advice that this export does not meet our export criteria, which the Export Controls team concurs with. The Ministry has significant concerns that should your export be approved, the goods could be used to perpetrate human rights abuses.

In reference to your email of [REDACTED], which requests further information on why your export request has been denied and refers to the Ministry "promoting trade with them [REDACTED]", your export falls under the New Zealand's Strategic Goods List 2019 as accessories to military weapons. As such, your export is subject to New Zealand's Export Controls regime and is assessed accordingly. The promoted exports you refer to in your email are not "strategic goods" and do not have the potential to cause, or be ancillary to causing, harm in the same way as goods used for military purposes.

[REDACTED]

### Example 3

cc NZ CUSTOMS OFFICE

#### CONSENT TO EXPORT STRATEGIC GOODS

The Secretary of Foreign Affairs and Trade consents to the **Single** export to **NEW CALEDONIA** of **Non-military Ammunition** goods listed on page two of this document, and as per the application for the export of strategic goods dated

Exporter to Overseas End User

1

) NEW CALEDONIA

#### Conditions of Export

1. **This permit is valid until 28 July 2021.**
2. Please provide a copy of this export permit to the New Zealand Customs Service; or if the goods are to be exported by airline as unaccompanied or accompanied airfreight - to the relevant airline officials at time of check-in.
3. When export goods are being returned to the overseas owner following repair or refit in New Zealand, the exporter has undertaken that the work done has not affected the use of the equipment nor provided additional capability above that required for reliability improvement.
4. Please contact this office either by email [exportcontrols@mfat.govt.nz](mailto:exportcontrols@mfat.govt.nz), by fax 04 439 8519, or by post, if the actual quantity exported varies from the quantity listed on page two of this document.
5. Permits may be revoked at any time prior to the shipment of the goods. Should an extension be required, re-application must be made.
6. If you have any questions regarding this Export Permit, or are asked to report on details of shipments or re-import into New Zealand as set out on the following page/s, please contact this office. Please quote the Permit Number provided above on all correspondence.

## Annex Seven: Delegations in operation

Operation of statutory delegations under the Customs and Excise Act 2018 within MFAT:

Key statutory delegations	Subsequent delegations	Comments
<b>The Secretary must maintain an up-to-date list of all goods and classes of goods whose exportation is prohibited because they have or may have a strategic use<sup>17</sup></b>	None	Delegations followed
<b>Goods on the Strategic Goods List are prohibited from export, except with the consent of (and subject to any conditions imposed by) the Secretary<sup>18</sup></b>	Able to be carried out by - – ISED Divisional Manager and Unit Managers  -Any policy officer, Adviser or Co-ordinator in ISED who is primarily employed in relation to implementing the NZ Export Controls regime	Delegations followed  Permits are usually signed out by the Counter-Proliferation Officer or Senior Counter-Proliferation Officer  Some non-standard applications are consulted with the Secretary prior to the permit application being approved or declined
<b>Goods subject to the catch-all controls are prohibited from export, except with the consent of (and subject to any conditions imposed by) the Secretary<sup>19</sup></b>	Delegations being put in place at the time of writing	No instances observed of delegations not being followed

<sup>17</sup> s96 Customs and Excise Act 2018

<sup>18</sup> s96 Customs and Excise Act, s5 Customs Export Prohibition Order 2017

<sup>19</sup> s97 Customs and Excise Act, s97 Gazette Notice 2020

## Annex Eight: Assessing the regime against government expectations of good regulatory practice

In reviewing implementation of the regime, we were mindful of government expectations for good regulatory practice (as set out by the Treasury in April 2017)<sup>20</sup>.

We looked at:

- Part A (expectations for the design of regulatory systems) in full
- Part B (expectations for regulatory stewardship by government agencies) in part.

We did not look at how MFAT has assessed and proposed regulatory changes as this is beyond the scope of our Terms of Reference.

We highlight the key findings in the table below.

Part A: Expectations for the design of regulatory systems -		
• has clear objectives	Partially	<p>The MFAT website contains some information on the purpose and objective of export controls. Interviewees also reported a general understanding of what the regime was intending to achieve.</p> <p>However, the legislative purpose is not well-defined. The Customs Act has a clear overall purpose under s3, but the objective of subpart 4 (which sets out the legal framework for the export controls regime) is not currently specified.</p> <p>Should legislative reform proceed, we would suggest considering a more specific legislative purpose for Export Controls.</p>
• seeks to achieve those objectives in a least cost way, and with the least adverse impact on market competition, property rights, and individual autonomy and responsibility	Mostly	<p>MFAT have a culture of seeking to be as least cost for exporters as possible whilst still being consistent with international obligations and our national interests. Some interviewees remain concerned that there are avoidable costs in the regime.</p> <p>New Zealand does not appear significantly more restrictive than regimes in like-minded countries. Most exporters (though not all) did not report any significant concerns that they were at a competitive disadvantage relative to other exporters in similar countries.</p>
• is flexible enough to allow regulators to adapt their regulatory approach to the attitudes and needs of different regulated parties, and to allow those parties to adopt efficient	Mostly	<p>The criteria allow for flexible decision-making and a wide range of permits are available to regulated parties (i.e., from single permits to general consents).</p>

<sup>20</sup> <https://www.treasury.govt.nz/sites/default/files/2015-09/good-reg-practice.pdf>



or innovative approaches to meeting their regulatory obligations		Regulated parties can contact the export control team for early advice, which is an efficient approach to meeting regulatory obligations.
<ul style="list-style-type: none"> <li>• has processes that produce predictable and consistent outcomes for regulated parties across time and place</li> </ul>	Partially	<p>For many stakeholders seeking standard export permits under the Strategic Goods List, the process appears predictable and consistent.</p> <p>However, our interviews suggest that outcomes under the Catch-all controls are much less predictable and still highly ambiguous. The approach to new technologies is not that clear.</p> <p>Some exporters remain worried about the status of a country changing over time, after they have invested significant efforts in relationships or have signed multi-year contracts.</p>
<ul style="list-style-type: none"> <li>• is proportionate, fair and equitable in the way it treats regulated parties</li> </ul>	Yes	No issues identified.
<ul style="list-style-type: none"> <li>• is consistent with relevant international standards and practices to maximise the benefits from trade and from cross border flows of people, capital and ideas (except when this would compromise important domestic objectives and values)</li> </ul>	Partially	<p>The regime is consistent with international agreements around export controls (e.g. Wassenaar Arrangement, Missile Technology Control Regime, Australia Group, Nuclear Suppliers Group; and the Arms Trade Treaty).</p> <p>But due to the small scale of our regime and the lack of resource, it has not been kept current in some areas. Further work is required to remain 'fit for the future'.</p>
<ul style="list-style-type: none"> <li>• is well-aligned with existing requirements in related or supporting regulatory systems through minimising unintended gaps or overlaps and inconsistent or duplicative requirements</li> </ul>	Yes	<p>MFAT is well-linked into other regulatory systems to minimise gaps or inconsistent requirements (e.g., overseas investment, space, immigration).</p> <p>We have not observed any obvious duplicative requirements.</p>
<ul style="list-style-type: none"> <li>• conforms to established legal and constitutional principles and supports compliance with New Zealand's international and Treaty of Waitangi obligations</li> </ul>	Yes	No issues identified.
<ul style="list-style-type: none"> <li>• sets out legal obligations and regulator expectations and practices in ways that are easy to find, easy to navigate, and clear and easy to understand,</li> </ul>	Partially	<p>The legal obligations and criteria for assessment can be found on the MFAT website. Many interviewees reported being able to find what they need.</p> <p>However, some interviewees made comments about improving accessibility and clarity of information. For example, though use of more 'business friendly' language and by linking to other relevant information on prohibited weapon exports.</p>

<ul style="list-style-type: none"> <li>● has scope to evolve in response to changing circumstances or new information on the regulatory system's performance.</li> </ul>	Partially	<p>There is some scope in principle as the legislation is not prescriptive about how MFAT should administer the regime.</p> <p>However, MFAT is very resource-constrained in practice. And the Customs and Excise Act is based around tangible goods which limits the ability of the regime to evolve.</p>
<b>Part B: Expectations for regulatory stewardship by government agencies</b>		
<b>Monitoring, review and reporting on existing regulatory systems</b>		
<b>The government expects regulatory agencies to work collaboratively to -</b>		
<ul style="list-style-type: none"> <li>● monitor the ongoing performance and condition of a regulatory system and the regulatory environment in which it operates</li> </ul>	Partially	Monitoring regulatory systems is not core business for MFAT and it does not have well-established systems for this.
<ul style="list-style-type: none"> <li>● review the system at appropriate intervals to determine whether it is still fit-for-purpose, and likely to remain so in the medium to longer-term</li> </ul>	Mostly	<p>A reasonably good job has been done informally with limited resources. For example, significant reforms have been undertaken by a team of only 2 – 3 people.</p> <p>But could potentially be done in a more structured and regular way. Unlikely to remain fit for the future.</p>
<ul style="list-style-type: none"> <li>● test existing operating assumptions, and consider the perspective and experience of regulated parties and others directly affected by the regulatory system's rules and practices, when undertaking their monitoring and review work</li> </ul>	Mostly	<p>MFAT has a good level of contact with exporting businesses and research institutions and takes account of their perspectives and experience. Contact with NGOs and interest groups is more limited, due to resource constraints.</p> <p>Some interested parties were not aware and did not participate in the recent Catch-all expansion consultation.</p>
<ul style="list-style-type: none"> <li>● periodically look at other similar regulatory systems, in New Zealand and other jurisdictions, for possible trends, threats, linkages, opportunities for alignment, economies of scale and scope, and examples of innovation and good practice</li> </ul>	Mostly	The team is well-linked to international best practice and overseas export control regimes – though lacks resources to implement some of the learnings.
<ul style="list-style-type: none"> <li>● use available monitoring and review information to proactively identify and assess, and then report or address, problems, vulnerabilities, and opportunities for improvement in the design and operation of that regulatory system, and</li> </ul>	Yes	The team has proactively identified several opportunities for improvement in the design and operation of the regulatory system (though taking them forward has been problematic in practice due to limited resources).

<ul style="list-style-type: none"> <li>● pay particular attention to requirements that appear unnecessary, duplicative, ineffective or excessively costly</li> </ul>	Yes	No unnecessary or duplicative requirements identified.
<b>Good regulator practice</b> <b>Where appropriate to their role, the government expects regulatory agencies to -</b>		
<ul style="list-style-type: none"> <li>● maintain a transparent compliance and enforcement strategy that is evidence-informed, risk-based, responsive, and proportionate to the risks or harms being managed</li> </ul>	Partially	<p>MFAT has not developed and documented a formal compliance strategy. MFAT is working actively with NZTE to raise awareness.</p>
<ul style="list-style-type: none"> <li>● provide accessible, timely information and support to help regulated parties understand and meet their regulatory obligations</li> </ul>	Partially	<p>Some information is available on the website and MFAT has a culture of being responsive to queries.</p> <p>But quality of information could be improved to allow more regulated parties to 'self-help' rather than needing to contact MFAT.</p> <p>There is scope to include more guidance and case studies to help regulated parties understand their obligations.</p> <p>Raising awareness and understanding around the catch all controls is particularly critical.</p>
<ul style="list-style-type: none"> <li>● provide simple and straightforward ways to engage with regulated parties and hear and respond to their views</li> </ul>	Yes	<p>MFAT is very accessible to regulated parties. Strong positive feedback from interviews in this regard – especially about the willingness of the team to provide 'in-principle advice'.</p>
<ul style="list-style-type: none"> <li>● maintain and publish up-to-date information about their regulatory decision-making processes, including timelines and the information or principles that inform their regulatory decisions</li> </ul>	Partially	<p>Times for decision-making are clearly stated on the website and the Criteria for Assessment are publicly available.</p> <p>However, there is scope for more transparency. This may reduce the number of Official Information Act requests that the team receive.</p>
<ul style="list-style-type: none"> <li>● develop working relationships with other regulatory agencies within the same or related regulatory systems to share intelligence and co-ordinate activities to help manage regulatory gaps or overlaps, minimise the regulatory burden on regulated parties, and maximise the effective use of scarce regulator resources</li> </ul>	Yes	<p>Working relationships across relevant government agencies appear strong and well-connected – though primarily due to a key individual with long-standing relationship.</p>
<ul style="list-style-type: none"> <li>● provide their frontline regulatory workforce with the necessary knowledge, skills, tools and support to be able to discharge their responsibilities with integrity, review and improve their professional practice, and report back on issues</li> </ul>	Mostly	<p>Small but capable team. Succession for key staff is an issue.</p> <p>Knowledge of posts around export controls could be improved, especially given that staff rotate frequently.</p>

they may encounter in the course of their work		
<ul style="list-style-type: none"> <li>● contribute to wider regulator capability building initiatives within the state sector where there are common interests and benefits from collective action and leadership</li> </ul>	Partially	No issues identified.
<ul style="list-style-type: none"> <li>● alert relevant Ministers and monitoring agencies to organisational capability or resourcing issues, or problems with legislation, that may be significantly compromising the agency's ability to discharge its responsibilities to a reasonable or expected standard</li> </ul>	Mostly	Ministers alerted to improvements needed in current regime as needed.
and <ul style="list-style-type: none"> <li>● at the time of the alert, provide advice on the nature of the resulting system performance risks and proposed or possible mitigating strategies</li> </ul>	Mostly	As above.