

Ministry of Foreign Affairs and Trade

Export Controls Framework Review – Terms of Reference – Final

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| Introduction | <p>This document details the terms of a review over the Ministry’s export controls framework.</p> <p>The Ministry’s Deputy Chief Executive Policy (DCEP) has commissioned this engagement.</p> |
| Background | <p>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.</p> <p>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.</p> <p>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.</p> <p>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:</p> <ul style="list-style-type: none"> • 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. <p>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.</p> <p>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).</p> <p>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.</p> |
| Objectives | <p>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.</p> |

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

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| | <p>databases, archiving and change-control.</p> <p><u>Consultation and feedback</u></p> <ul style="list-style-type: none"> 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. <p><u>Review and remediation</u></p> <ul style="list-style-type: none"> Review or remediation mechanisms that might apply to individual export permit applications and decisions, how these are implemented and their consistency and accuracy. <p><u>Capability and capacity</u></p> <ul style="list-style-type: none"> 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. <p>Operating effectiveness:</p> <p>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.</p> <p>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.</p> |
| Scope | The Ministry's export controls framework and its related policies, processes, systems, controls and people are in scope for this engagement. |
| Scope exclusions | <p>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.</p> <p>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.</p> |
| Risk Considerations | <p>The reviewers will be cognisant of the following risks:</p> <ul style="list-style-type: none"> The Ministry's export controls framework may not be designed to properly give effect to the Ministry's obligations under the Act. |

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| | <ul style="list-style-type: none"> The operation of the Ministry's export controls framework may not comply with its design intentions. |
| Approach | <p>This engagement will involve:</p> <p><u>Planning</u></p> <ul style="list-style-type: none"> 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. <p><u>Fieldwork</u></p> <ul style="list-style-type: none"> 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. <p><u>Quality assurance and draft reporting</u></p> <ul style="list-style-type: none"> Quality assuring the results of the engagement Producing a draft report with findings and recommendations and circulating this for management (export controls team) comment Providing the draft report to DCEP for sponsor comment. <p><u>Finalisation and communications</u></p> <ul style="list-style-type: none"> Finalising the draft report with the export controls team and DCEP once all comments and feedback are incorporated into the report. Providing the final report to the Coordination and Performance Committee (CPC) and Audit and Risk Committee for governance review and oversight. |
| Location | This engagement will be performed in Wellington. |

| Engagement sponsor | Ben King, Deputy Chief Executive Policy, will sponsor this engagement. | | | | | | | | | | | | |
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| Key business contacts | <p>The key business contacts are envisaged to be:</p> <ul style="list-style-type: none"> • Cecile Hillyer, Divisional Manager International Security and Disarmament Division • Katy Donnelly, Unit Manager Disarmament and Arms Control • Export controls team: <ul style="list-style-type: none"> ○ Peter Noble, Senior Adviser Counter-Proliferation ○ John Fleming, Exports Controls Coordinator ○ Alex Thompson, Counter-Proliferation Adviser. | | | | | | | | | | | | |
| Engagement Team | David Smol | | | | | | | | | | | | |
| Engagement milestones | <p>This engagement will be performed in line with the timeframes below. This will depend on Ministry staff and reviewer availability.</p> <table border="1" data-bbox="464 909 1461 1429"> <thead> <tr> <th data-bbox="464 909 967 972">Milestone</th> <th data-bbox="967 909 1461 972">Due</th> </tr> </thead> <tbody> <tr> <td data-bbox="464 972 967 1037">Terms of reference finalised</td> <td data-bbox="967 972 1461 1037">7 April 2021</td> </tr> <tr> <td data-bbox="464 1037 967 1137">Planning/discovery phase completed</td> <td data-bbox="967 1037 1461 1137">30 April 2021</td> </tr> <tr> <td data-bbox="464 1137 967 1234">Fieldwork completed</td> <td data-bbox="967 1137 1461 1234">To be agreed at the conclusion of the discovery phase</td> </tr> <tr> <td data-bbox="464 1234 967 1335">Quality assurance and draft reporting completed</td> <td data-bbox="967 1234 1461 1335">Two weeks following completion of the fieldwork</td> </tr> <tr> <td data-bbox="464 1335 967 1429">Finalisation and communications</td> <td data-bbox="967 1335 1461 1429">Two weeks after completion of the draft report</td> </tr> </tbody> </table> <p>Any changes to these timeframes will need to be agreed with the review sponsor.</p> | Milestone | Due | Terms of reference finalised | 7 April 2021 | Planning/discovery phase completed | 30 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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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 can't 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?

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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?