

## Article Information

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# Safeguarding Australia’s Military Secrets Act - Implications for defence industry

***The Defence Amendment (Safeguarding Australia’s Military Secrets) Act 2024 (Cth) (SAMS Act) commenced on 6 May 2024 and is aimed at ensuring Australia’s military secrets are not passed on to foreign militaries***

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## Overview of the SAMS Act

The SAMS Act’s primary purpose is to protect Australia’s military techniques, tactics and procedures. It takes a prescriptive approach by implementing new restrictions and penalties on Australian citizens and permanent residents with Defence knowledge who wish to or currently do work for foreign governments and military organisations.

This, combined with the recent major changes to the *Defence Trade Controls Act 2012* (Cth) (**DTC Act**), emphasise the need for defence industry organisations and personnel to seek appropriate advice about their security and trade controls obligations.

## Major Changes to Defence Act 1903 (Cth)

The SAMS Act inserts a new Part IXAA into the *Defence Act 1903* (Cth) and creates an offence for former defence staff members, known as ‘foreign work restricted individuals’, to perform work for, or on behalf of, a military organisation or government body of a relevant foreign country.<sup>[1]</sup> A relevant foreign country is a foreign country determined by the Minister in a legislative instrument to not be relevant for the purposes of the SAMS Act. In the same manner, the Minister can also specify classes of former defence staff members deemed not to need foreign work restrictions.

The SAMS Act creates a further offence for any citizen or permanent resident of Australia to provide training to, or on behalf of, a military organisation or government body of a relevant foreign country where the training relates to ‘goods, software or technology within the scope of Part 1 of the Defence and Strategic Goods List’ or to military tactics, techniques or procedures.<sup>[2]</sup> Part 1 of the Defence and Strategic Goods List covers ‘*goods and technologies designed or adapted for use by armed forces or goods that are inherently lethal*’.<sup>[3]</sup> These offences carry a penalty of 20 years imprisonment, however a number of exceptions are available.<sup>[4]</sup>

## Foreign Work Authorisations

One such exception is where the individual has been granted a foreign work authorisation for the work or training being provided.<sup>[5]</sup>

An individual wishing to obtain a foreign work authorisation must submit a request to the Minister in the prescribed form.<sup>[6]</sup> The Minister must then, as soon as reasonably practicable, grant or refuse the request in writing.<sup>[7]</sup>

Before approval can be granted, the Minister is required to consider a number of factors including, but not limited to:

- the kind of work and role performed by an individual when they were a defence staff member;
- any other kind of work performed by the individual other than as a defence staff member;
- the length of time that the individual was a defence staff member and the kinds of information accessed;
- the particular foreign military organisation or government body for which, or on behalf of which, the individual

- would perform the work if the authorisation was granted; and
- the kind of training or work the individual would provide or perform if the authorisation was granted.[\[8\]](#)

Importantly, the SAMS Act provides that an authorisation request must be refused if the Minister ‘*reasonably believes that the performance of the work, or the provision of the training, by the individual would prejudice the security, defence or international relations of Australia.*’[\[9\]](#) Any authorisation granted must not be for a period longer than 3 years.[\[10\]](#)

The SAMS Act empowers the Minister to impose conditions on an authorisation and to cancel, suspend or vary an authorisation subject to certain criteria being satisfied.[\[11\]](#) The Minister can also delegate their functions and powers to highly-ranked defence members.[\[12\]](#)

Section 115K does permit an individual to apply for a review of the decision within 28 days after notification.[\[13\]](#) This only applies to “reviewable decisions”, such as:

- A refusal to grant an individual an authorisation;
- A decision to grant an authorisation different to what was requested or with conditions;
- A decision to, or a refusal to, vary, suspend or cancel an authorisation.[\[14\]](#)

### **Other Exceptions**

Other exceptions to the offences include where the work or training is:

- authorised by a written agreement to which the Commonwealth is a party;
- in the course of the individual’s employment or engagement by the Commonwealth;
- solely in the course of the individual’s service in any capacity in or with any armed force and there is a declaration under subsection 119.8(1) of the *Criminal Code*; or
- solely or primarily for the purposes of providing humanitarian aid or performing an official duty for the United Nations or the International Committee of the Red Cross.[\[15\]](#)

### **Criminal Code**

Finally, the SAMS Act makes amendments to the *Criminal Code* to clarify that the offence in relation to military-style training involving a foreign government does not apply to an individual with a foreign work authorisation, to a class of individuals who are not foreign work individuals, and to countries that are not relevant foreign countries.[\[16\]](#)

As referenced above, the SAMS Act introduces new criminal penalties for violations, such as:

- a maximum of 20 years imprisonment if a foreign work restricted individual works for, or on behalf of, a military organisation or government body of a relevant foreign country without an exception;
- a failure to comply with conditions of foreign work authorisation can lead to a maximum sentence of 5 years imprisonment; and
- a maximum penalty of 20 years imprisonment where an Australian citizen / permanent resident (who is not authorised) provides training to, or on behalf of, a military organisation or government body of a foreign country in relation to goods within Part 1 of the DSGL, or military training.

### **Conclusion**

With the advent of AUKUS, Australia’s defence legislative framework is in a period of significant upheaval. The SAMS Act is only one aspect of the legislative and regulatory change that the defence industry, although a pivotal one.

Piper Alderman has significant experience in advising the defence industry across the full spectrum of legal services. Please contact us should you need advice in respect of the SAMS Act or anything else your business may require.

[\[1\]](#) *Defence Amendment (Safeguarding Australia’s Military Secrets) Act 2024* (Cth) ss 114, 115A(1) (“SAMS Act”).

[\[2\]](#) *Ibid* s 115B(1).

[\[3\]](#) *Defence and Strategic Goods List 2021* (Cth) pt 1A div 2.

[\[4\]](#) *SAMS Act* (n 1) ss 115A(1), 115B(1).

[\[5\]](#) *Ibid* ss 115A(2), 115B(2).

[\[6\]](#) *Ibid* ss 115C(1), (3).

[\[7\]](#) Ibid s 115C(4).

[\[8\]](#) Ibid ss 115C(5)-(6).

[\[9\]](#) Ibid s 115C(8).

[\[10\]](#) Ibid s 115C(10)(a).

[\[11\]](#) Ibid ss 115C(12), 115E-115H.

[\[12\]](#) Ibid s 115N.

[\[13\]](#) Ibid s 115K.

[\[14\]](#) Ibid s 115K(9).

[\[15\]](#) Ibid ss 115A(3)-(6), 115B(3)-(6).

[\[16\]](#) Ibid sch 2.