



10 May 2021

Minister of Foreign Affairs

For approval by

17 May 2021

MFAT Export Controls – FADTC Briefing

BRIEFING Decision Submission

PURPOSE To recommend that MFAT postpones acceptance of a request to appear before the Foreign Affairs and Defence Select Committee to brief it on the processes used in considering applications for military-related trade due to the risk of compromising the independent review of the Ministry's export controls framework.

Tukunga tūtohua – Recommended referrals

Prime Minister

For information by

20 May 2021

Taipitopito whakapā – Contact details

NAME	ROLE	DIVISION	WORK PHONE
Sylvester Shamy	Assistant Secretary	Risk, Governance and Assurance	s9(2)(a)
Cecile Hillyer	Divisional Manager	International Security and Disarmament	

Mā te Tari Minita e whakakī – Minister's Office to complete

Approved

Noted

Seen

Needs amendment

Declined

Withdrawn

Overtaken by events

See Minister's notes

Comments

MFAT Export Controls – FADTC Briefing

Pito matua – Key points

- The Foreign Affairs Defence and Select Committee has approached the Ministry suggesting it appear before it in May or June to brief the Committee on the processes the Ministry uses in considering applications for military-related trade permits. Such processes come under the Ministry's export controls framework.
- The independent review of the Ministry's export controls framework by David Smol is underway, currently in discovery phase. Given the review is not an inquiry for the purposes of the Inquiries Act 2013 or judicial process, we do not see legal barriers to officials attending such a hearing.
- We do, however, see other risks to the review from accepting FADTC's request at this time. They relate to resourcing and to public confidence and perception.

Resourcing.

- With only one primary adviser and two advisers / coordinators in support, the Ministry's Export Controls team is small, relative to its high workloads. The team is already stretched in responding to export permit enquiries and applications, and now has the additional high priority of supporting the review.
- The impact on this team from the extensive business support required to adequately prepare for and attend FADTC risks affecting the Ministry's ability to respond to queries relating to the review. In turn, that could delay the reviewer's timetable and report preparation, potentially undermining the public interest in these matters being reviewed in a timely fashion.

Public confidence and perception.

- We do not know whether the FADTC briefing would be open to the public. Regardless, a briefing on the very same topic that is the subject of an independent review and is conducted simultaneously runs a risk of:
 - Influencing, even if unintentionally and subconsciously, the reviewer's viewpoints and opinions on the topic or specific aspects of the topic, or
 - Public perceptions of the topic, or
 - As a worst case, but not impossible scenario, both of the above.

Conclusion

- s9(2)(g)(i)
- While it is important to support FADTC in its work, including to support its role as the Parliament's scrutineer of the Ministry's work, in this particular case at this particular time, we see a risk of a hearing cutting across the greater public good of progressing the review of the export controls framework. We therefore recommend you direct us to postpone the invitation until the Review report has been received and considered by the Ministry.

Ben King
for Secretary of Foreign Affairs and Trade

MFAT Export Controls – FADTC Briefing

Tūtohu – Recommendations

It is recommended that you:

- | | | |
|---|--|-----------------|
| 1 | Note the Ministry of Foreign Affairs and Trade has been invited to appear before the Foreign Affairs, Defence and Trade Select Committee to brief it on the Ministry's processes for considering applications for military-related trade permits. | Yes / No |
| 2 | Note accepting the invitation risks negatively affecting the conduct of the independent review into the Ministry's export control framework, both in terms of resourcing to support the review and public confidence and perception. | Yes / No |
| 3 | Agree that the Ministry should postpone acceptance of the FADTC invitation until the Ministry has received and considered the report of the independent Review. | Yes / No |

Hon Nanaia Mahuta
Minister of Foreign Affairs / Minita Take Aorere

Date: / /



24 May 2021

Minister of Foreign Affairs

For information by

28 May 2021

Review of Export Controls regime – progress update

BRIEFING Overview Submission

PURPOSE To provide an update on progress of the independent review of the Export Controls regime

Tukunga tūtohua – Recommended referrals

Prime Minister	For information by	4 June 2021
Minister for Trade and Export Growth	For information by	4 June 2021
Minister of Defence	For information by	4 June 2021
Associate Minister of Foreign Affairs	For information by	4 June 2021
Minister of Customs	For information by	4 June 2021
Minister for Disarmament and Arms Control	For information by	4 June 2021

Taipitopito whakapā – Contact details

NAME	ROLE	DIVISION	WORK PHONE
Ben King	Deputy Chief Executive Policy	Deputy Chief Executive Policy	s9(2)(a)
Craig Bennett	Divisional Manager	Audit and Risk	

Mā te Tari Minita e whakakī – Minister's Office to complete

- | | | |
|--|---|------------------------------------|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Noted | <input type="checkbox"/> Referred |
| <input type="checkbox"/> Needs amendment | <input type="checkbox"/> Declined | <input type="checkbox"/> Withdrawn |
| <input type="checkbox"/> Overtaken by events | <input type="checkbox"/> See Minister's notes | |

Comments

Review of Export Controls regime – progress update

Pito matua – Key points

- In March 2021 you agreed the Terms of Reference for an independent review of the Ministry's export controls regime. These were publicly released in April, when the Ministry contracted David Smol to undertake the review.
- This report provides you with an update on the progress of the review to date.
- As per the Terms of Reference, Mr Smol has undertaken an initial discovery phase, which has included discussions with the Ministry staff responsible for the regime as well as those who administer it, an initial review of relevant documents, and initial interviews of a small number of individuals representing organisations that administer or interact with the regime.
- Based on insights gained from the discovery phase, Mr Smol has developed a project plan, timetable and budget to complete the review by 30 June 2021. This includes interviews with around 35 people/organisations that administer, use, interact with and have views on the export control regime, based mainly on suggestions by MFAT, NZTE and ExportNZ. He has noted that delivery against this timetable is somewhat dependent on the availability of key stakeholders for interview, and that he will provide early advice of any time slippage.
- The Ministry has reviewed the plan and budget and is satisfied that they are appropriate, noting that Mr Smol is utilising the skills of a former MBIE colleague with expertise in design and delivery of regulatory systems, which reduces the overall cost of the review to the Ministry.

Ben King
for Secretary of Foreign Affairs and Trade

Tūtohu – Recommendations

It is recommended that you:

- | | | |
|---|---|-----------------|
| 1 | Note the progress made to date in the review of the Export Controls regime | Yes / No |
|---|---|-----------------|

Hon Nanaia Mahuta
Minister of Foreign Affairs / Minita Take Aorere

Date: / / 2021



9 August 2021

Minister of Foreign Affairs

For approval by

16 August 2021

Export Controls Review: Report for Consideration

BRIEFING Overview Submission

PURPOSE This submission presents the Export Controls Review Report for your consideration, updates you on the Ministry of Foreign Affairs and Trade's plans regarding its implementation, and recommends that you agree to release a media statement on the Review.

Tukunga tūtohua – Recommended referrals

Prime Minister	For information by	20 August 2021
Minister for Trade and Export Growth	For information by	20 August 2021
Associate Minister of Foreign Affairs	For information by	20 August 2021
Minister of Customs	For information by	20 August 2021
Minister for Disarmament and Arms Control	For information by	20 August 2021

Taipitopito whakapā – Contact details

NAME	ROLE	DIVISION	WORK PHONE
Cecile Hillyer	Divisional Manager	International Security and Disarmament	s9(2)(a)
Peter Noble	Senior Counter-Proliferation Adviser	International Security and Disarmament	

Mā te Tari Minita e whakakī – Minister's Office to complete

- | | | |
|--|---|------------------------------------|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Noted | <input type="checkbox"/> Seen |
| <input type="checkbox"/> Needs amendment | <input type="checkbox"/> Declined | <input type="checkbox"/> Withdrawn |
| <input type="checkbox"/> Overtaken by events | <input type="checkbox"/> See Minister's notes | |

Comments

Export Controls Review: Report for Consideration

Pito matua – Key points

- In March 2021 you asked, and approved the Terms of Reference, for an independent review of the export control system run by the Ministry of Foreign Affairs and Trade (MFAT) to ensure that the system remained fit for purpose. The review report has now been completed and is attached for your consideration.
- The report delivered by David Smol and Jennie Kerr has found that MFAT has administered the export control system consistent with the underlying intent, the legislation and supporting policy instruments. The report also found that the design and implementation of the system falls short of contemporary best practice in several respects.
- The report found that administering a system of export controls is inherently difficult and is becoming more so with the changing international situation and the pace of technological developments. The report concludes that while Aotearoa New Zealand's export controls system has been administered adequately to date, it is not fit – or resourced – for what is likely to be an increasingly challenging future.
- The report provides a comprehensive suite of recommendations to improve the design and implementation of the system to bring it up to contemporary best regulatory practices, and to align with Ministerial expectations.
- Key recommendations relate to MFAT reviewing and refreshing the criteria used to assess export applications, investing in more structured and comprehensive systems and processes, strengthening the decision-making framework and record-keeping, enhancing transparency and public confidence, and extending outreach and education.
- The review also presents recommendations relating to increased resourcing for the export control system, the development of a formal compliance strategy (with the NZ Customs Service), and steps to “future proof” the system including through the pursuit of legislative reform.
- Subject to your feedback, MFAT accepts all the recommendations (listed as an Annex for ease of reference) in the report and is committed to expediting their implementation as soon as practicable. Officials are developing a plan for implementing the recommendations and understanding their resource implications, and will seek your agreement to the plan once finalised.
- Our initial view is that implementing some elements of the review – particularly around systems and staffing levels – may require resourcing which could not be met from MFAT's baseline. We will provide further advice on this point as we continue to develop an implementation programme for the review.
- It is anticipated that the majority of the recommendations should be able to be implemented by the end of the first quarter, 2022. Recommendations around possible legislative reform would be subject to further consultations with you, and would likely need to be progressed on a longer timeline.
- Following your consideration of the report, MFAT would propose to release it in full, subject to any minor redactions which may be necessary due to international or commercially sensitive reasons, along with a Ministry media statement. This release would be coordinated with any media statement from you. Drafts of both statements are attached for your consideration.
- Given the interest of the Foreign Affairs, Defence and Trade Select Committee, a draft letter to the Chair of FADTC, advising that the report has been completed and MFAT

Export Controls Review: Report for Consideration

officials stand ready to appear before the Committee if requested, is also attached for your consideration.



Ben King
for Secretary of Foreign Affairs and Trade

Tūtohu – Recommendations

It is recommended that you:

- | | | |
|---|--|-----------------|
| 1 | Note that an independent review has found MFAT has administered the export control system consistent with the underlying intent, the legislation and supporting policy instruments, but that design and implementation of the system falls short of contemporary best practice in several respects; | Yes / No |
| 2 | Note the recommendations of the report; | Yes / No |
| 3 | Agree that MFAT should accept all the recommendations in the report and commit to expediting their implementation as soon as practicable; | Yes / No |
| 4 | Note that if you agree recommendation three, MFAT will provide a plan for your consideration on implementation of the recommendations, including advice on implications for MFAT's budget; | Yes / No |
| 5 | Agree that in conjunction with a media release about the completion of the report, MFAT release the report in full with an accompanying media statement, subject to any minor redactions which may be necessary for international or commercially sensitive reasons; | Yes / No |
| 6 | Note the attached media statements for your consideration; and | Yes / No |
| 7 | Agree to advise the Chair of FADTC that the report has been completed and MFAT stands ready to appear before the Committee if requested (see attached draft letter). | Yes / No |

Hon Nanaia Mahuta
Minister of Foreign Affairs / Minita Take Aorere

Date: / /

Export Controls Review: Report for Consideration

Pūrongo – Report

1. In March 2021 you asked, and approved the Terms of Reference, for an independent review of the export control system administered by the Ministry of Foreign Affairs and Trade to ensure it remained fit for purpose.
2. From the shortlist of independent reviewers you approved, the Ministry engaged David Smol to conduct the review. He was assisted by an associate, Jennie Kerr. The review team interviewed a wide spectrum of stakeholders including exporting businesses, the university-based research community, non-governmental organisations, activists and academics, as well as officials in MFAT and other government agencies.
3. The report has now been completed and is attached for your consideration.
4. Subject to your views, MFAT proposes to accept all the recommendations (listed at Annex for reference) in the report and is committed to expediting their implementation as soon as practicable.

Overview of the Report

5. The report finds that MFAT has administered the export control system consistent with the underlying intent, the legislation and supporting policy instruments. The report also found that the design and implementation of the system falls short of contemporary best practice in several respects. With respect to decision-making on specific applications, the review looks a number of complex cases spanning the period 2017-21 and concludes that the processes followed had shown a considered balancing of relevant factors in the context of the assessment criteria and of Aotearoa New Zealand's values and interests.
6. The report notes that administering a system of export controls is inherently challenging but that Aotearoa New Zealand's system has been successfully administered with limited resources, consistent with the historically low level of complex applications. Operating frameworks and processes were reasonably efficient, but somewhat informal, suited to the current small team size and reflective of the resource allocated.
7. The report found that the operating environment has changed significantly and continues to do so. The international setting has become increasingly challenging with the rise of authoritarian regimes and the concomitant human rights abuses and deprivation of freedoms which accompany them. There has also been a substantive rise in foreign interference¹.
8. The report noted that there have been some improvements in the system in recent years, in particular the introduction of strengthened catch-all controls which has been a positive step to counter foreign interference and prevent non-controlled goods and technology being transferred to undesirable entities or destinations. However, the new controls have brought a substantially higher work load including considerably more complex applications. They also touch many more exporters, resulting in a greater need for awareness and outreach. Similarly, there is a greater requirement for outreach and awareness related to countering foreign interference.

¹ The Director-General 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'.

Export Controls Review: Report for Consideration

9. Against this backdrop, the report concludes that the system is no longer fit for purpose to meet current and future challenges or workload. This is due to under-resourcing and the need to improve design and implementation of the system to bring it up to contemporary best regulatory practices. It also identified the need for stand-alone legislation to better facilitate the operation of the system and to address gaps which cannot be rectified by amending the Customs Act, including consideration of the role of Ministers in decision making. The key areas for improvement are listed below.

Key recommendations

10. The key areas for implementation include:

- Review and consolidate the assessment criteria to simplify and clarify their application, including to add a new criterion related to domestic reputational risk.
- Develop more structured and comprehensive processes and documentation practices, including training for wider MFAT staff/Posts to better input into the process.
- Strengthen decision-making, including documenting risk appetite aligned with Ministerial expectations.
- Enhance transparency:
 - Develop a transparency policy.
 - Review, in consultation with exporters, what further information can be released to the public.
 - Capture a wider range of data to inform regular public reporting.
- Enhance public confidence:
 - Provide more information on the basis for decision-making.
 - Conduct regular audits of decision-making.
 - Commission periodic independent reviews of the export controls regime.
- Enhance resourcing to meet contemporary requirements, including implementation of report recommendations.
- Enhance outreach activities to improve awareness and compliance, and to reduce foreign interference risks.
- Publish a formal compliance strategy.

11. In the longer term:

- Continue to work to introduce stand-alone export controls legislation to address identified regulatory gaps, including the role of Ministers and improving regulatory best practice.

Export Controls Review: Report for Consideration

- Work with other agencies to establish an all-of-government centre/mechanism to identify and evaluate sensitive and emerging technologies.
12. A plan to implement these recommendations is now being developed and will be provided to you once finalised. It is anticipated that the majority of the recommendations should be able to be implemented by the end of the first quarter, 2022. Recommendations around possible legislative reform would be subject to your consideration of further advice which we will develop in consultation with other relevant agencies over the coming months.
13. Implementing the review looks likely to require significant additional resource, particularly those recommendations touching on systems and staffing levels. It may not be possible for these additional demands to be met from MFAT's baseline.

Release of the Report and Media Statement

14. Following your consideration and feedback, it is proposed that the report be released in full on the MFAT website (with an accompanying media statement), subject to any minor redactions which may be necessary for international or commercially sensitive reasons. This release would be coordinated with any media statement from you.
15. Drafts of both media statements are attached for your consideration.

Foreign Affairs, Defence and Trade Select Committee

16. Following its interest in, and earlier hearing on, export controls, FADTC has indicated that it wishes to discuss the report following its release.
17. A draft letter from you to the Chair of FADTC is attached for your consideration. It notes you have received the report and that it will be released following your consideration, and advises that MFAT stands ready to appear before the Committee if requested.

Export Controls Review: Report for Consideration

Annex: Recommendations of the Review of Export Controls

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.

Export Controls Review: Report for Consideration

6. MFAT extend proactive outreach and education

Priorities would include:

- Enhancing understanding of the regime
- 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 the 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.

Aide Memoire — Export Controls Review

Background

- In March 2021 I asked for an independent review of the export control system run by the Ministry of Foreign Affairs and Trade (MFAT) to ensure that the system remained fit for purpose.

Findings

- The report delivered by David Smol has found that MFAT has administered the export control system consistent with the underlying intent, the legislation and supporting policy instruments. The report also found that the design and implementation of the system falls short of contemporary best practice in several respects.
- The report found that administering a system of export controls is inherently difficult and is becoming more so with the changing international situation and the pace of technological developments.
- The report concludes that while our export controls system has been administered adequately to date, it is not fit – or resourced – for what is likely to be an increasingly challenging future.

Recommendations

- The report provides a comprehensive suite of recommendations to improve the design and implementation of the system to bring it up to contemporary best regulatory practices, and to align with Ministerial expectations.
- Key recommendations relate to MFAT reviewing and refreshing the criteria used to assess export applications, investing in more structured and comprehensive systems and processes, and strengthening the decision-making framework and record-keeping. Key recommendations also focus on enhancing transparency and public confidence, and extending outreach and education.
- In addition, the review presents recommendations relating to increased resourcing for the export control system, the development of a formal compliance strategy (with the NZ Customs Service), and steps to “future proof” the system including through the pursuit of legislative reform.

Next Steps

- MFAT accepts all the recommendations and is committed to expediting their implementation as soon as practicable. Officials are developing a plan for implementing the recommendations and understanding their resource implications, and will seek my agreement to the plan once finalised.
- It is anticipated that the majority of the recommendations should be able to be implemented by the end of the first quarter, 2022. Recommendations around possible legislative reform would likely need to be progressed on a longer timeline.

Public release

- In conjunction with media statements (by myself and the Ministry) later this week, MFAT will release the report in full, subject to any minor redactions which may be necessary due to international or commercially sensitive reasons.

FADTC

- Given the interest of the Foreign Affairs, Defence and Trade Select Committee, I have sent a letter to the Chair of FADTC, advising that the report has been completed and that MFAT officials stand ready to appear before the Committee if requested.

International Security and Disarmament Division

Ministry of Foreign Affairs and Trade

September 2021