



# Submission to the Review of the Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023

**Australian Industry Group**

**November 2023**





## Introduction

Ai Group is pleased to submit our input for the Review of the Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023. The Ai Group Defence Council, as the primary national representative body for Australia's defence industry, plays a pivotal role in fostering collaboration between the government, the defence sector, and the defence industry. We provide trusted advice to various stakeholders in Defence and industry.

The Bill aims to amend the Defence Act 1903 to regulate the work of certain former defence staff members for or on behalf of military organisations or government bodies of relevant foreign countries, without requiring a foreign work authorisation. Additionally, it addresses the training provided by Australian citizens and permanent residents to relevant foreign militaries or governments without a foreign work authorisation.

This legislation underscores Australia's commitment to enhancing security standards to protect sensitive technology and information, particularly as we engage in work through our AUKUS partnership with the United States and the United Kingdom.

## Key Themes and Assessment of Analysis

Ai Group has identified key themes from Defence Council members that underscore the significance of the Bill. These themes are centred around concerns regarding the broad application of the Bill, the need for clarity, implications for certain businesses and individuals, as well as the challenges associated with resourcing. These themes are central to our recommendations aimed at improving the Bill and ensuring its effective implementation.

The Australian defence industry relies on a globally mobile workforce. The ability to deploy skilled personnel across borders is crucial for meeting the dynamic needs of the defence industry sector. The chief apprehension among Defence Council members is that the measures set out in this Bill, if not refined, could potentially compromise the overall effectiveness, proficiency, and capability of the workforce in the Australian defence industry.

It's essential to address these concerns to maintain the Australian defence industry's high level of proficiency and expertise on the global stage. For a detailed analysis of specific sections of the proposed legislation, please refer to the accompanying **Appendix: Detailed Analysis of Proposed Legislation**.

### Concerns about the Broad Application of the Bill

Ai Group members have several concerns about the broad application of this Bill. Australia already has a range of robust legislative measures and policies in place to deter and respond to the risk of foreign collection of our defence secrets. The Criminal Code, for instance, contains general secrecy offenses that apply to current and former Commonwealth officers, including ADF personnel, who harm the national interest by disclosing information entrusted with them. The code specifically prohibits the provision of military-style training involving a foreign government principal.

Ai Group members note that, as drafted, the proposed Bill includes all work that foreign work restricted individuals perform, unless an individual authorisation or Ministerial legislative instrument exemption is in place for a country or class of individual. While presumably most countries we perform work in will be excluded by Ministerial instrument, we are concerned that this process imposes additional business overhead and risk as follows:



1. There is a risk that a defence industry company is provided with authorisation from Defence Export Control for certain proposed work to a certain country, but if that country is still not exempt from this Bill, then every individual involved in that organisation's work scope would need to apply for authorisation under the Bill.
2. The definition of 'work' and 'training' is particularly open as it relates to regional collaboration among the Defence science community. There is a risk that because of Australia's close research ties with Quad and Five Eyes countries, discussions may occur between defence industry personnel and Defence science organisations that fall within the scope of a "government body of a foreign country."

### **The Need for Clarity**

The new section 115A and its accompanying Explanatory Memorandum do not address whether the offense only occurs if the foreign work restricted individual is engaged directly by the in-scope entity relating to the relevant foreign country. Presumably, the intent is to capture direct and indirect engagements under the offense to deal with circumvention of the requirement. However, this is an important point of clarification for businesses.

### **Implications for Certain Businesses**

For certain businesses, it would be impractical to seek approval for senior staff working across multiple projects and multiple nations, e.g., NATO projects. Former ADF staff would risk 20 years imprisonment to engage with any Government entity, e.g., a Foreign Government-owned university – even when they are engaged in actions that have no military application, e.g., they take up a project to teach mathematics.

### **Breadth of Clause 115B**

Under new section 115B, any Australian citizen or permanent resident (other than a foreign work restricted individual) would commit an offense if the individual provides training to, or on behalf of, a military organisation, or government body, of a relevant foreign country: relating to goods, software, or technology within the scope of Part 1 of the Defence and Strategic Goods List (DSGL) which is the Munitions List.

This clause is too broad. For example, we can look at staff that work on rocket motors – any Australian who gains employment working on space/rocket technology could be captured within Part 1 of the DSGL, and this would again severely impact their employment within a global multinational that was not UK/AU/USA.

Ai Group members have suggested that the bill may result in global research institutions not employing Australian citizens within cutting-edge projects. The compliance burden and reputational risk of an employee being sentenced to 20 years imprisonment would result in Australians not being employed.

### **Resourcing for Approvals**

The resourcing for Government staff to undertake approval connected to this bill would be extensive. Accomplished Australians working across the globe can change projects, countries, and engagements on a daily basis. This Bill would require a dynamic approval process that takes place within hours, as it would otherwise restrict the global employment of Australian citizens.

### **Impact on Employment Options**

For certain businesses, the result of the Bill will be reduced employment options for former members of the ADF. Ai Group defence industry members encourage global mobility within its workforce. A recent example of an employee assignment that has the potential to be



inadvertently subject to this Bill includes an employee of an Ai Group Defence Council member who formerly served as a member of the Permanent Forces assuming a regional sales role and consequently liaising with a wide range of South-East Asian countries as part of his duties.

## Recommendations

The Bill should include the following amendments to address these business risks:

1. **Additional Exclusion in Section 115A:** An exclusion in section 115A that permits any work authorised by a Defence Export authorisation. Alternatively, we suggest amplifying section 115A (3) to explicitly include that a 'written agreement' encompasses such a Defence Export authorisation.
2. **Streamlined Exclusion Process:** An additional exclusion process should be considered that permits the Minister to grant authorisations to all employees of a business. This measure would significantly reduce the administrative burden for companies that perform certain acceptable roles.
3. **Specified Roles/Ranks and Specialisations:** Specify that the Act applies exclusively to specified roles and ranks within the Australian Defence Force (ADF), such as ADF members holding the rank of LTCOL and above. Additionally, include specific specialisations like Pilot, Electronic Warfare, Cyber, and Intelligence. This targeted approach ensures a focused application of the Act, concentrating on higher-ranking officials and specialised roles crucial to national security.

## Conclusion

It is critical to safeguard Australia's military secrets, ensure the smooth operation of businesses, the protection of individual rights, and the preservation of global collaborations. We suggest the recommendations in this submission are steps toward achieving these goals. It is our firm belief that through thoughtful amendments and a practical approach, the Bill can serve its intended purpose effectively while promoting Australia's security and standing in the global defence community.



## Appendix: Detailed Analysis of Proposed Legislation

| No. | Section of SAMS Bill  | Issue  |
|-----|---|--|
| 1   | <b>113 Definitions – 'public enterprise'</b>  | <p>According to the Explanatory Memorandum, the definition of 'public enterprise' (which falls within the definition of 'government body' for the purpose of the offence provisions) is 'intended to capture public enterprises that are directly or indirectly, formally or informally, controlled or influenced by foreign state actors, with interests that are harmful to Australia.'</p> <p>However, the Bill's actual definition of 'public enterprise' is sufficiently broad to capture public institutions (potentially including, for example, public universities or other public education institutions) that are controlled by foreign actors who have no association with the military nor any interests that are harmful to Australia.</p>   |
| 2   | <b>113 Definitions – 'relevant foreign country'</b>   | <p>The offences apply in respect of a 'relevant foreign country', which is defined to mean a foreign country other than one which the Minister has determined not to be a relevant foreign country. We would argue that rather than a "whitelist" that is countries where SAMS bill does not apply instead the Government should have a "blacklist" e.g., only those countries of concern China, Iran etc.</p>   |
| 3   | <b>113 Definitions – 'training'</b>   | <p>The definition of 'training' is too broad (and circular) in that it is defined to include 'any training' and does not refer to any particular act or purpose. This needs to be narrower in its definition or it risks impacting Australia as a leader in STEM and will restrict employment options for Australians globally.</p>  |
| 4   | <b>115A Offence – foreign work restricted individuals performing work for, or on behalf of a foreign military organisation or government body</b> | <p>This offence is far too broad and refers to "any work" performed by a foreign work restricted individual, as opposed to work or training relating to that individual's defence background or work that might give rise to certain risks in respect of the individual</p> <p>The EM provides that the penalty amount of 20 years' imprisonment complements comparable offences in other Commonwealth legislation, including the offence under section 83.3 of the Criminal Code for providing military-style training to foreign government principals or foreign political organisations.</p> <p>However, the offence established in section 83.3 of the Criminal Code is arguably distinct from the offences established by the SAMS Bill, as it must involve an individual 'using arms or practising military exercises, movements or evolutions'. That is, the offence in section 83.3 deals with an individual who is training with a foreign army, as opposed to (for example) the</p> |

| No. | Section of SAMS Bill   | Issue  |
|-----|--|--|
|     |  | <p>employee of a corporation providing services to a foreign military under a contract.</p> <p>Similarly, the EM's reference to the 20-year penalty for offences created by the Bill being aligned with those penalties imposed for offences in respect of sabotage and foreign interference (for example) is not entirely accurate. To be found guilty of those offences, an individual must intend for the relevant act to produce a particular outcome or state of affairs (or be reckless as to the outcome of the conduct), whereas the offences provided for in the SAMS Bill are effectively strict liability (i.e. there is no intention element).</p>   |
| 5   | <b>115B Offence – other individuals providing training to a foreign military organisation or government body</b> | <p>The offence applies to Australian citizens or permanent residents. There is no linkage to sharing Australian sourced controlled material or military tactics, military techniques, or military procedures.</p> <p>"Military" is not defined. In this case if I am an Australian citizen, and I move to France and join their foreign legion and then take these skills under contract with a European Defence company to an African nation and teach them about military logistics I could face 20 years imprisonment.</p> <p>The offence can be triggered if the training "relates to" goods, software, or technology within the scope of Part 1 of the Defence and Strategic Goods List. This is a very low threshold test.</p> |
| 6   | <b>115C (2) Grant of foreign work authorisation</b>  | <p>Why is there a restriction? The rationale for the 12-month restriction is not explained in the Bill or EM. If an individual's circumstances (or other circumstances relating to the government body or military organisation) change in the period following a request, what is the purpose of the individual being prevented from requesting an authorisation following such change?</p>   |
| 7   | <b>115E Cancellation of authorisation, 115F Suspension of authorisation, 115G Variation of authorisation</b>     | <p>The Minister has broad discretion to cancel, suspend or vary an authorisation if satisfied that it would be appropriate in all the circumstances (which circumstances, according to the EM, may include economic, technological, and political changes having the potential to impact Australia's national security interests). No compensation is provided to affected persons should any loss be suffered because of the cancellation, suspension, or variation. This would result in global companies not employing Australian Citizens in important roles in projects as it would be seen as a risk.</p>  |



© Ai Group, 2023

The copyright in this work is owned by the publisher, Ai Group Limited, Level 5/441 St Kilda Road, Melbourne VIC 3004. All rights reserved. No part of this work may be reproduced or copied in any form or by any means (graphic, electronic or mechanical) without the written permission of the publisher. This submission is confidential and intended for the designated recipients only and is not intended for distribution without the explicit permission of Ai Group Limited.

