EXPLANATORY STATEMENT

Issued by authority of Minister for Defence

Defence Act 1903

Defence (Non-foreign work restricted individual) Determination 2024

The instrument is made under subsection 115(1) of the *Defence Act 1903* (the Act). The instrument commences on the day after the instrument is registered and is a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Purpose

Part IXAA of the Act regulates the work that former defence staff members may perform and the training that Australian citizens or permanent residents of Australia, who are not former defence staff members, may provide.

Under Part IXAA, former defence staff members, known as foreign work restricted individuals, are restricted from performing work for, or on behalf of, a military organisation, or government body, of a relevant foreign country (as defined in section 113 of the Act). Engaging in this conduct without a permit—called a foreign work authorisation (FWA), issued under section 115C of the Act—is an offence with a penalty of 20 years imprisonment.

The purpose of this instrument is to determine classes of former defence staff members who are not foreign work restricted individuals by reference to:

- the particular kinds of work an individual performed as a defence staff member; and
- the period of time that has elapsed since an individual performed that kind of work as a defence staff member.

The significance of such a determination is that, under Part IXAA of the Act, an individual who is not a foreign work restricted individual is not subject to the relevant penalty provisions in Part IXAA of the Act. Accordingly, this means that such an individual is not required to apply for or hold a FWA before performing work for, or on behalf of, a military organisation, or government body, of a relevant foreign country.

Details of the instrument

Details of the instrument are set out in **Attachment A**.

Consultation

The Office of Impact Analysis was consulted in relation to this instrument and confirmed that a regulation impact analysis was not required for this instrument (OIA24-07448).

Parliamentary scrutiny

The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in accordance with subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement provides that the instrument is compatible with human rights because it promotes the protection of human rights, and to the extent that it may limit human rights, those limitations are necessary, reasonable and proportionate. The Statement is included at **Attachment B**.

The instrument is made by the Honourable Richard Marles, Minister for Defence, in accordance with the requirements of section 115 of the Act.

Attachment A

Details of the *Defence (Non-foreign work restricted individual) Determination 2024*

Section 1 Name

This section provides that the name of the instrument is the *Defence (Non-foreign work restricted individual) Determination 2024*.

Section 2 Commencement

This section provides that the instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 Authority

This section provides that the instrument is made under subsection 115(1) of the *Defence Act 1903* (the Act).

Section 4 Definitions

This section sets out the meaning of key terms used throughout the instrument, including:

- ***Act*** means the *Defence Act 1903*.
- ***agency head*** has the same meaning as in the *Public Service Act 1999*.
- ***APS employee*** has the same meaning as in the *Public Service Act 1999*.
- ***SES employee*** has the same meaning as in the *Public Service Act 1999*.
- ***star ranked officer*** means a member of the ADF that holds, or is acting in a position mentioned in items 3, 4 or 5 of the table in Schedule 1 to the Act.

A note to this section states a number of expressions used in the instrument are defined in the Act, including defence staff member, foreign work restricted individual and service chief.

Section 5 Individuals that are not foreign work restricted individuals

This section provides that a person is included in a class of individuals for the purpose of subsection 114(2) of the Act if:

- they are within the scope of an item of a table in Schedule 1; and
- they meet the condition in column 5 of a table in Schedule 1 for an item; or
- where multiple items of a table in Schedule 1 apply to a person—they meet the condition in column 5 of a table in Schedule 1 for the item with the greatest value

In effect, this provision states that a person will not be a foreign work restricted individual where they fall into one of the categories of defence staff members set out in Schedule 1 and they satisfy the requirement for a certain period of time to have elapsed since they last performed work as this category of defence staff member. Paragraph 5(b) of the instrument requires that, where an individual falls within the scope of multiple items of Schedule 1, such as where they performed multiple roles during their time as a defence staff member, that person is required to comply with the greatest 'time elapsed' requirement before they are a foreign work restricted individual.

A foreign work restricted individual is an individual who was, but is not currently, a defence staff member (as defined in section 113 of the Act). Under subsection 115A(1) of the Act, it is an offence for a foreign work restricted individual to work for, or on behalf of, a military organisation, or government body, of a relevant foreign country without a foreign work authorisation. However, subsection 115(1) of the Act provides that the Minister may, by legislative instrument, determine a class of individuals that are not foreign work restricted individuals.

Schedule 1—Classes of individuals that are not foreign work restricted individuals

Schedule 1 of the instrument sets out classes of individuals that are not foreign work restricted individuals for the purpose of subsection 115(1) of the Act. It consists of five Parts, with each Part relating to a separate, distinct cohort of defence staff members. These cohorts are:

- Australian Public Service employees (Department of Defence and Australian Submarine Agency) (Part I);
- Defence Senior Executives (Part II);
- Royal Australian Navy personnel (Part III);
- Australian Army personnel (Part IV);
- Royal Australian Air Force personnel (Part V);

Each Part within Schedule 1 contains a table that lists the classes of individuals that are not foreign work restricted individuals. In accordance with the requirements of subsection 115(2) of the Act, these classes of individuals have been determined by reference to:

- the particular kinds of work an individual performed in their role as a defence staff member; and
- the period of time that has elapsed since an individual performed that kind of work in their role as a defence staff member.

For each class of individuals set out in an item of a table, there is a requirement for a certain period of time to have elapsed, which is prescribed in column 5. The purpose of this requirement is to specify the amount of time that must pass since a person last worked in a role as a defence staff member before that person is no longer a foreign work restricted individual. This time period requirement is either 1, 5 or 10 years, depending on the particular kinds of work an individual was required to undertake as

part of their role as a defence staff member. The time period should be calculated from when the person last undertook work in the applicable role as a defence staff member. While this may be the last day of employment as a defence staff member, it may also be when a secondment, temporary transfer, promotion or other type of movement between roles within the APS or ADF occurs.

For example, an APS employee that worked in media and communications (Part I, item 47/48) with the Department before leaving the Department on 1 July 2024 would be required to wait 1 year before they would no longer be a foreign work restricted individual. During this 1 year period, this individual would not be able to work for, or on behalf of, a military organisation, or government body, of a relevant foreign country without being issued a foreign work authorisation by the Minister or their delegate.

Attachment B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence (Non-foreign work restricted individual) Determination 2024

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

Part IXAA of the Act regulates the work that former defence staff members may perform and the training that Australian citizens or permanent residents of Australia, who are not former defence staff members, may provide.

Under Part IXAA, former defence staff members, known as foreign work restricted individuals, are restricted from performing work for, or on behalf of, a military organisation, or government body, of a relevant foreign country (as defined in section 113 of the Act). Engaging in this conduct without a permit—called a foreign work authorisation (FWA), issued under section 115C of the Act—is an offence with a penalty of 20 years imprisonment.

The purpose of this instrument is to determine classes of former defence staff members who are not foreign work restricted individuals, by reference to:

- the particular kinds of work an individual performed as a defence staff member; and
- the period of time which that has elapsed since an individual performed that kind of work as a defence staff member.

The significance of such a determination is that, under Part IXAA of the Act, an individual who is not a foreign work restricted individual is not subject to the relevant penalty provisions in Part IXAA of the Act. Accordingly, this means that such an individual is not required to apply for or hold a FWA before performing work for, or on behalf of, a military organisation, or government body, of a relevant foreign country.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- the right to work in Article 6 (1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Right to work

Article 6(1) of the ICESCR recognises the right to work, including the rights of an individual to take the opportunity to gain their living by work which they freely choose or accept, and requires appropriate steps to be taken to safeguard this right.

The measures of the instrument positively engage the right to work as set out in Article 6(1) of the ICESCR. This is because the instrument has the effect of determining classes of individuals that are not foreign work restricted individuals, as defined in section 114 of the Act. Where a person is part of one of these specified classes of individuals set out in the instrument, that person is excluded from the scope of the offence provision in subsection 115A(1) of the Act, since that offence only applies to

foreign work restricted individuals. The effect of this is that such an individual is not required to apply for, hold or comply with a foreign work authorisation enabling them to engage in the conduct of the offence under subsection 115A(1)—this being to perform work for, or on behalf of, a military organisation, or government body, of a relevant foreign country. Collectively, these factors contribute to enhancing the right of work for the individual.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights.