

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 247

Autonomous Sanctions Act 2011

Autonomous Sanctions Regulations 2011

The purpose of the Regulations is to facilitate the conduct of Australia's relations with certain countries, and with specific entities or persons outside Australia, through the imposition of autonomous sanctions in relation to those countries, or targeting those entities or persons.

Section 28 of the *Autonomous Sanctions Act 2011* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Autonomous sanctions are punitive measures not involving the use of armed force that target the persons, entities or governments most responsible for a situation of grave international concern, with the goals of mitigating the harmful consequences of that situation and achieving positive change. Situations of international concern may include the grave repression of the human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction (WMD) or their means of delivery, or an internal or international armed conflict.

The Regulations apply the autonomous sanctions the Australian Government presently imposes under the new legislative framework established by the Act. These current sanctions are: embargoes on the export of arms or related materiel to Burma, Fiji, Iran, Syria and Zimbabwe; a further embargo on the export of goods on the Australia Group Common Control Lists to Iran; targeted financial sanctions against designated persons or entities in Burma, the Democratic People's Republic of Korea (DPRK), Iran, Libya, Syria and Zimbabwe, as well as against persons involved in the commission of atrocities during the break-up of the former Yugoslavia; travel restrictions on individuals designated for targeted financial sanctions, as well as against designated persons in Fiji; and a port ban on DPRK vessels.

An objective of the Act is to assist the administration of, and compliance with, autonomous sanctions measures by removing distinctions between the scope and extent of autonomous sanctions and Australia's UN sanction enforcement laws applied under the *Charter of the United Nations Act 1945*. Consequently, the Regulations apply restrictions on trade in goods (currently given effect under the *Customs (Prohibited Exports) Regulations 1958*) and targeted financial sanctions (currently given effect under the *Banking (Foreign Exchange) Regulations 1959*) using the same form and structure, and with the same scope and effect, as corresponding measures are applied in regulations made under the *Charter of the United Nations Act 1945*.

The Regulations are divided into four substantive sections:

- Part 2 ("Autonomous sanctions", regulations 4 to 11) contains regulations that define the scope of the individual sanctions measures (that is, the goods, services, individuals, entities and vessels to be subject to sanctions);
- Part 3 ("Sanctions laws", regulations 12 to 17) contains regulations that define the conduct that contravene the autonomous sanctions described in Part 2;

- Part 4 (“Authorisations”, regulations 18 to 20) contains regulations that define the circumstances in which conduct that otherwise contravene autonomous sanctions may be authorised;
- Part 5 (“Dealing with assets”, regulations 21 to 25) contains regulations that set out operational arrangements relating specifically to regulations in Part 3 that gave effect to targeted financial sanctions (that is, regulations 14 and 15).

The new legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations are part, have been the subject of extensive consultation with governmental and non-governmental stakeholders since May 2010. The Australian Customs and Border Protection Service, the Department of Defence, the Department of the Treasury, the Reserve Bank of Australia, the Department of Immigration and Citizenship and the Department of Infrastructure and Transport were consulted in the preparation of the Regulations.

This consultation included public and industry consultation sessions in mainland capital cities in May 2010, in advance of the *Autonomous Sanctions Bill* being first tabled in the House of Representatives and again in August 2011, before the Autonomous Sanctions Regulations were released for public comment. It also included briefings for state and territory Government agencies, as well as industry-specific sessions for the financial services sector, the freight forwarding and customs brokering sector and to the tertiary education sector.

On 27 September 2011 the Regulations were published on the Department of Foreign Affairs and Trade website as an exposure draft for three weeks for public comment. The Department received nine submissions from a range of organisations in the financial services sector, the tertiary education sector and the legal community. These submissions were published on the Department’s website. The Government’s response to the issues raised by these submissions was also published on the Department’s website.

Details of the Regulations are set out in the [Attachment](#).

Details of the *Autonomous Sanctions Regulations 2011***Regulation 1 – Name of Regulations**

Regulation 1 provides that the name of the Regulations *Autonomous Sanctions Regulations 2011*.

Regulation 2 – Commencement

Regulation 2 provides for the Regulations to commence on the day after they are registered.

Regulation 3 – Definitions

Regulation 3 provides for the definition of certain terms used in the Regulations, including “arms or related materiel”, “Australia Group Common Control Lists”, “controlled asset”, “designated asset”, “designated person or entity”, “export sanctioned goods”, “financial service”, “paramilitary equipment”, “sanctioned service”, “sanctioned supply” and “sanctioned vessel”. A Note to regulation 3 clarifies that other words and expressions used in the Regulations have the meaning given by section 4 of the Act, including “asset” and “sanction law”.

Part 2 – Autonomous sanctions**Regulation 4 – Sanctioned supply**

Regulation 4 provides that a “sanctioned supply” is the direct or indirect supply, sale or transfer of export sanctioned goods in relation to a country to, or for the use in or benefit of, that country. Regulation 4 includes a table specifying that “arms or related materiel” are export sanctioned goods for Burma, Fiji, Iran, Syria and Zimbabwe, and that “goods mentioned in the Australia Group Common Control Lists, as existing from time to time” are additionally export sanctioned goods for Iran. Regulation 4 also authorises the Minister, by legislative instrument, to designate additional goods as export sanctioned goods for a country mentioned in the designation.

Regulation 5 – Sanctioned service

Regulation 5 provides that a “sanctioned service” is the provision to either Burma, Fiji, Iran, Syria or Zimbabwe of technical advice, assistance or training, financial assistance, or a financial or other service, if it assists with, or is provided in relation to, a military activity, or an activity involving the supply, sale, transfer, manufacture, maintenance or use of an export sanctioned good for the respective country.

Regulation 6 – Designation of persons or entities

Regulation 6 authorises the Minister, by legislative instrument, to designate a person or entity, either on the basis that the person or entity is mentioned in an item of the table in regulation 6, or on the basis that the Minister is satisfied that the person or entity is contributing to the proliferation of weapons of mass destruction. The purpose of such a designation is to subject the designated person or entity to targeted financial sanctions. The designated person or entity becomes the object of the prohibition in regulation 14. An asset owned or controlled by a designated person or entity is a “controlled asset”, subject to the prohibition in regulation 15.

Regulation 6 also authorises the Minister, by legislative instrument, to declare a person for the purpose of preventing the person from travelling to, entering or remaining in Australia, either on the basis that the person is mentioned in an item of the table in regulation 6, or on the basis that the Minister is satisfied that the person is contributing to the proliferation of weapons of mass destruction.

Regulation 7 – Designating controlled assets

Regulation 7 authorises the Minister, by legislative instrument, to designate an asset that is owned or controlled by a person or entity designated under regulation 6 as a “designated asset”.

Regulation 8 – Sanctioned vessels

Regulation 8 authorises the Minister, by legislative instrument, to designate either a specific vessel, or each vessel in a class of vessels, as a “sanctioned vessel” for a country mentioned in the designation, whether or not the vessel is owned, registered or flagged by that country. Any change in the name, flag or registration of the vessel does not of itself change its status as a “sanctioned vessel”.

Regulation 8 authorises the Minister, having had regard to Australia’s obligations at international law, to direct a sanctioned vessel to leave Australia, including by a particular route, or not enter a particular port or place, or any port or place, in Australia. Such a direction is not a legislative instrument.

Regulation 9 – Duration of designation under regulation 6, 7 or 8 or declaration under regulation 6

Regulation 9 provides that a designation made under regulations 6, 7 or 8, or a declaration made under regulation 6, ceases to have effect on the third anniversary of the day on which it took effect. The Minister is able, by legislative instrument, to extend the validity of a particular designation or declaration specified in the instrument for additional periods of three years, if the Minister remains satisfied that the person or entity continues to meet the relevant designation or declaration criteria.

Regulation 9 clarifies that the fact a particular designation or declaration has a specified duration does not prevent that designation or declaration being revoked at any time pursuant to regulation 10. Similarly, the fact a particular designation or declaration has expired or will expire does not prevent the same person, entity, asset or vessel from being subject to a new designation or declaration.

Regulation 10 – Revocation of designation under regulation 6, 7 or 8 or declaration under regulation 6

Regulation 10 authorises the Minister, by legislative instrument, to revoke a designation made under regulations 6, 7 or 8, or a declaration made under regulation 6, either on the Minister’s own initiative, or on application by the person or entity to which the designation or declaration relates (in the case of regulation 6), or by the designated person or entity that owns or controls the designated asset (in the case of regulation 7), or by the owner or controller of the sanctioned vessel (in the case of regulation 8).

Regulation 11 – Application for revocation of designation under regulation 6, 7 or 8 or declaration under regulation 6

Regulation 11 provides for the process by which a person or entity subject to designation or declaration under regulation 6, or who owns or controls either a controlled asset designated under regulation 7 or a sanctioned vessel designated under regulation 9, may apply for the revocation of those decisions. The application must be in writing to the Minister, and set out the circumstances relied upon to justify the application. The Minister is only required to consider one such application per year from the same applicant.

Part 3 – Sanctions laws

It is anticipated that regulations 12, 13, 14, 15 and 16 will be specified as “sanction laws” by the Minister under section 6 of the Act. Consequently, a contravention of these regulations will be an offence under section 16 of the Act.

Each of these regulations provides that section 15.1 of the *Criminal Code* applies to an offence under section 16 of the Act that relates to their contravention. This means that section 16 of the Act applies to a contravention of these regulations where the conduct constituting the alleged contravention either occurred wholly or partly in Australia, or wholly or partly on board an Australian aircraft or an Australian ship, or was committed anywhere in the world by an Australian citizen or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Regulation 12 – Prohibitions relating to a sanctioned supply

Regulation 12 prohibits the making of a sanctioned supply other than as authorised by a permit granted under regulation 18.

The prohibition in regulation 12 also applies to a person, whether or not in Australia, and whether or not an Australian citizen, who used the services of an Australian ship or an Australian aircraft to transport export sanctioned goods in the course of, or for the purpose of, making an unauthorised sanctioned supply.

A body corporate with effective control over the actions of another body corporate or entity, wherever incorporated or situated, is liable under regulation 12 for any unauthorised sanctioned supply made by that other body corporate or entity.

Regulation 13 – Prohibitions relating to the provision of sanctioned services

Regulation 13 prohibits the provision of a sanctioned service that was either not itself authorised by a permit granted under regulation 18, or was not provided in relation to an authorised sanctioned supply.

A body corporate with effective control over the actions of another body corporate or entity, wherever incorporated or situated, is liable under regulation 13 for any sanctioned service made by that other body corporate or entity that was either not itself unauthorised, or not provided in relation to a sanctioned supply that was authorised.

Regulation 14 – Prohibition of dealing with designated persons or entities

Regulation 14 prohibits directly or indirectly making an asset available to, or for the benefit of, a person or entity designated under regulation 6, other than as authorised by a permit granted under regulation 18.

Regulation 15 – Prohibition of dealing with controlled assets

Regulation 15 requires a person who holds an asset that is owned or controlled by a person or entity designated under regulation 6 to freeze that asset. It does so by prohibiting that person from either using or dealing with that asset, or allowing it to be used or dealt with, or facilitating the use of or dealing with it, other than as authorised by a permit granted under regulation 18.

Regulation 16 – Prohibitions relating to sanctioned vessels

Regulation 16 prohibits the contravention of a direction given by the Minister under regulation 8 to a sanctioned vessel. The prohibition will not apply if the defendant could prove that the contravention was necessary to secure the safety of the sanctioned vessel or human life, or was authorised or required under Part IIIAAA of the *Defence Act 1903*.

Regulation 17 – Forfeiture of sanctioned vessels

Regulation 17 provides that a sanctioned vessel that contravenes a direction given to it under regulation 8 is forfeited to the Commonwealth, unless the contravention was necessary to secure the safety of the sanctioned vessel or human life, or authorised or required under Part IIIAAA of the *Defence Act 1903*.

Part 4 – Authorisations

Regulation 18 – Minister may grant permits

Regulation 18 authorises the Minister to grant permits, either on application by a person or on the Minister's own initiative, authorising a sanctioned supply, a sanctioned service, making an asset available to a person or entity that would otherwise contravene regulation 14, or a use of, or a dealing with, an asset that would otherwise contravene regulation 15. The Minister must not grant a permit unless satisfied about any circumstance or matter required by this Part to be considered for a particular kind of permit and that it would be in the national interest to do so.

Regulation 19 – Minister may waive operation of declaration under paragraph 6 (1) (b) or (2) (b)

Regulation 19 authorises the Minister to waive the operation of a declaration under regulation 6 so as to allow the person to travel to, enter or remain in Australia, either on the grounds that it would be in the national interest or on humanitarian grounds. Such a waiver could be subject to conditions and would have effect for the period (if any) or in the circumstances (if any) specified by the Minister in the waiver. The waiver ceases to have effect if the person failed to comply with a condition to which it was subject; or the period (if any) for which it had effect ends; or the circumstances in which it had effect cease to exist.

Regulation 20 – Permit for assets and controlled assets

Regulation 20 provides that an application for a permit authorising a use of, or a dealing with, a controlled asset that would otherwise contravene regulation 14, or the making available of an asset to a person or entity that would otherwise contravene regulation 15, must be for the three types of dealing described in regulation 20. The three types of permissible dealing are:

- a “basic expense dealing”, related to basic expenses, including foodstuffs, rent or mortgage, medicines or medical treatment, taxes, insurance premiums, public utility charges, reasonable professional fees, reimbursement of expenses associated with the provision of legal services, or fees or service charges that are in accordance with a law in force in Australia for the routine holding or maintenance of frozen assets;
- a “legally required dealing”, meaning a dealing necessary to satisfy a judicial, administrative or arbitral lien or judgement that was made prior to the date on which the person or entity became a designated person or entity; where the dealing is not for the benefit of a designated person or entity;
- a “contractual dealing”, meaning a payment to apply interest or other earnings due on accounts holding controlled assets, or payments required under contracts, agreements or obligations made before the date on which those accounts became accounts holding controlled assets. If the account into which the payment is paid is frozen under Sanctions Regulations, this payment would also be frozen once received.

Part 5 – Dealing with assets

Regulation 21 – Advance notice of listing of persons, entities and assets

Regulation 21 authorises the Department to give notice of a designation made under regulations 6 or 7, including before the designation is published, to any person who is engaged in the business of holding, dealing in, or facilitating dealing in, assets.

Regulation 22 – Consolidated list of entities, persons and assets

Regulation 22 requires the Department to maintain on its website a document that sets out specified information relating to all persons and entities that are currently designated persons or entities under regulation 6 and all assets or classes of assets currently designated under regulation 7. The document could be consolidated with the document mentioned in regulation 40 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008*.

Regulation 23 – Request to AFP for help

Regulation 23 provides for a person who holds an asset that the person suspects is, or may be, a controlled asset, to request the AFP to help the person determine whether or not the asset is owned or controlled by a designated person or entity. Regulation 23 requires the AFP to use its best endeavours to provide such help and to respond in writing as soon as practicable as to whether the AFP considers that it is either likely, unlikely that, or unknown whether, the asset is owned or controlled by a designated person or entity. A note to regulation 23 clarifies that the Regulations do not limit the obligation of a cash dealer under section 16 of the *Financial Transaction Reports Act 1988* to report a suspicious transaction or a reporting entity under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

Regulation 24 – Informing AFP of opinion about asset

Regulation 24 requires a person to notify the AFP, as soon as practicable after he or she forms an opinion that an asset he or she is holding is in fact owned or controlled by a person or entity designated under regulation 6, of that opinion. The notice has to include as much information about the asset (including information about the owner or controller of the asset) as is known to the person. A person must similarly notify the AFP if an asset he or she is holding, having been a controlled asset, or having been previously treated by the person as a controlled asset, is not, or is no longer, a controlled asset.

25 Protection of information

Regulation 25 provides that a person cannot be required in a court to produce any document that has come into his or her custody or control, or to divulge or communicate any matter or thing that has come to his or her notice of the person, in the course of, or because of, giving effect to or complying with the Act or the Regulations, unless it is necessary to do so to comply with the Act or these Regulations.

Part 6 – Miscellaneous**Regulation 26 – Delegations by Minister**

Regulation 26 authorises the Minister to delegate, in writing, the Minister's powers and functions under the Regulations (other than this power of delegation) to the Secretary of the Department, or an SES employee, or acting SES employee, in the Department. The delegate must comply with any directions of the Minister in exercising powers or functions under the delegation.