

EXPLANATORY STATEMENT

Select Legislative Instrument No. 51, 2014

Issued by the Authority of the Minister for Immigration and Border Protection

Customs Act 1901

Customs Legislation Amendment (Central African Republic) Regulation 2014

Subsection 270(1) of the *Customs Act 1901* (the Act) provides, in part, that the Governor-General may make regulations not inconsistent with the Act prescribing all matters which by the Act are required or permitted to be prescribed for giving effect to the Act.

Section 112 of the Act provides, in part, that the Governor-General may, by regulation, prohibit the exportation of goods from Australia and that the power may be exercised by prohibiting the exportation of goods absolutely or by prohibiting the exportation of goods unless specified conditions or restrictions are complied with.

Section 233BABAC of the Act details criminal offences in relation to the exportation of UN-sanctioned goods. UN-sanctioned goods are goods that are subject to trade sanctions under United Nations Security Council Resolutions.

Section 233BABAA of the Act provides that the regulations may prescribe goods as UN-sanctioned goods. Subsection 233BABAA(3) of the Act provides that the regulations must not specify a good as a UN-sanctioned good unless the good meets certain requirements. Firstly, the importation or exportation of the goods must be prohibited by the *Customs (Prohibited Imports) Regulations 1956* or the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations). Second, the regulation under which the importation or exportation is prohibited must give effect to a decision of the Security Council made under Chapter VII of the Charter of the United Nations that Article 25 of the Charter requires Australia to carry out, in so far as that decision requires Australia to apply measures not involving the use of armed force.

Regulation 179AAA and Schedule 1AB to *the Customs Regulations 1926* (the Customs Regulations) prescribe UN-sanctioned goods for the purposes of section 233BABAA.

The purpose of the Regulation is to amend the PE Regulations to implement an arms embargo on the Central African Republic (the CAR) imposed by United Nations Security Council Resolution 2127 (2013) (the Resolution), which was adopted on 5 December 2013.

Paragraph 54 of the Resolution provides, in part, that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the CAR, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related matériel of all types, including

weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related material, including the provision of armed mercenary personnel whether or not originating in their territories. The Resolution outlines six specific exemptions to the arms embargo, including exemptions based on humanitarian grounds.

The Regulation inserts new regulation 13CT into the PE Regulations, to prohibit the exportation of arms and related matériel (other than goods listed in the defence and strategic goods list contained in regulation 13E of the PE Regulations) where the immediate or final destination is, or is intended to be, the CAR, unless the written permission of the Minister for Foreign Affairs (Foreign Minister) or an authorised person is shown to a Collector of Customs at or before the time of exportation.

Under the Regulation, the Foreign Minister is able to authorise an SES employee or acting SES employee of the Department administered by the Foreign Minister to give permissions. In deciding whether to grant a permission to export, the Foreign Minister or an authorised person must take into account Australia's relations with other countries and Australia's obligations under international law. The Foreign Minister or an authorised person may also impose conditions and other requirements in a permission relating to exportation of the goods. The Foreign Minister also has the ability to revoke or modify a permission in certain circumstances.

The Regulation also amends the Customs Regulations to prescribe the goods identified in regulation 13CT of the PE Regulations (that is, arms and related matériel) as UN-sanctioned goods. As a result, it is a criminal offence under section 233BABAC of the Act to export these goods to a destination which is, or is intended to be, the CAR.

The remaining elements of the prohibitions in paragraph 54 of the Resolution have been implemented under the *Charter of the United Nations (Sanctions – Central African Republic) Regulation 2014*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

The Regulation is minor or machinery in nature and does not substantially alter existing arrangements and therefore no formal consultation was undertaken in relation to the amendments.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

OPC60465-A

Statement of Compatibility with Human Rights

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

Customs Legislation Amendment (Central African Republic) Regulation 2014

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

Overview of the Regulation

The Regulation amends the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) and the *Customs Regulations 1926* (the Customs Regulations) to implement an arms embargo on the Central African Republic (the CAR) imposed by United Nations Security Council Resolution 2127 (2013) (the Resolution), which was adopted on 5 December 2013.

Paragraph 54 of the Resolution provides, in part, that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the CAR, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related material, including the provision of armed mercenary personnel whether or not originating in their territories. The Resolution outlines six specific exemptions to the arms embargo, including exemptions based on humanitarian grounds.

The Regulation inserts a new regulation 13CT into the PE Regulations, to prohibit the exportation of arms and related matériel (other than goods listed in the defence and strategic goods list contained in regulation 13E of the PE Regulations) where the immediate or final destination is, or is intended to be, the CAR, unless the written permission of the Minister for Foreign Affairs (Foreign Minister) or an authorised person is shown to a Collector of Customs at or before the time of exportation.

The Regulation also amends the Customs Regulations to prescribe the goods identified in regulation 13CT of the PE Regulations as UN-sanctioned goods, making it a criminal offence under section 233BABAC of the *Customs Act 1901* (the Act) to export these goods to a destination which is, or is intended to be, the CAR.

Human Rights implications

Pursuant to section 233 of the Act, it is an offence to export a prohibited export. Therefore the act of exporting UN-sanctioned goods to a destination which is, or is intended to be the CAR, would trigger this offence (in addition to the criminal offence

in section 233BABAC under the Act). The offence in section 233 of the Act is one of strict liability and engages the right of a presumption of innocence under article 14.2 of the International Covenant on Civil and Political Rights (ICCPR) because of the high penalty that applies to this offence. Article 14.2 of the ICCPR provides that *everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*. Under international law the term ‘criminal offence’ includes not only offences or penalties that are classified as a criminal offence under national law, but also other forms of penalties that may be designated as civil penalties under domestic law. The approach under international and comparative human rights law is to consider the substance and effect of the proceedings, rather than the ‘label’ itself.

Importantly, a strict liability offence will not violate the presumption of innocence if it pursues a legitimate aim and is reasonable, necessary and proportionate to that aim.

The offence in section 233 of the Act is aimed at stopping people from exporting prohibited exports from Australia. For example, the act of exporting UN-sanctioned goods to a destination which is, or is intended to be the CAR, is prohibited. Not having to prove fault in these circumstances aims to provide a strong deterrent for those seeking to engage in this activity. As a result, the strict liability nature of the offence is reasonable and proportionate to achieving this aim.

In addition, it remains incumbent on the prosecution to prove the physical elements of the offence beyond a reasonable doubt. Also, an accused will always have the defence of honest and reasonable mistake of fact available under section 9.2 of the *Criminal Code Act 1995*. If relied upon, this is an evidential burden on the defence to prove, on the balance of probabilities, that the accused had an honest and reasonable mistaken belief of fact which, if those facts existed, would not have constituted an offence.

For these reasons, we consider the strict liability offence is not inconsistent with the presumption of innocence set out in article 14.2 of the ICCPR because it maintains all existing protections contained in Australian law.

Conclusion

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Even though it engages the right of a presumption of innocence, it maintains all existing protections contained in Australian law and does not seek to limit or restrict this right in any way.

Minister for Immigration and Border Protection