

EXPLANATORY STATEMENT

Select Legislative Instrument No. 30, 2015

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

*Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol)
Regulation 2015*

The *Autonomous Sanctions Regulations 2011* (the Principal Regulations) 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.

The purpose of the proposed *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015* (the Regulation) is to implement autonomous sanctions measures announced by the Prime Minister on 1 September 2014 in response to the Russian threat to the sovereignty and territorial integrity of Ukraine.

The Regulation amends the Principal Regulations so as to prohibit, without prior authorisation from the Minister for Foreign Affairs:

- the export to Russia of goods and services that are arms and related materiel;
- the export to Russia of goods and services for use in oil exploration and production;
- the export to Crimea and Sevastopol of goods and services related to infrastructure in the transport, telecommunications, energy, oil, gas, and minerals sectors; and
- the import from Russia of arms and related materiel;
- the import from Crimea and Sevastopol of any goods that have not been verified by Ukrainian authorities;
- commercial dealings that provide certain entities of Russia access to Australian capital markets; and
- Australian investment in Crimea and Sevastopol related to infrastructure in the transport, telecommunications, energy, oil, gas, and minerals sectors.

The Department of Immigration and Border Protection, the Department of Defence, the Treasury and the Australian Securities and Investments Commission were consulted in the preparation of the Regulation.

The Department of Foreign Affairs and Trade (DFAT) conducted a public consultation on the exposure draft of proposed amendments to the *Autonomous Sanctions Regulations 2011* from 18 November to 9 December 2014. DFAT received four submissions in the consultation. No submission objected to the introduction of expanded sanctions in relation to Russia, Crimea and Sevastopol. DFAT adopted the majority of the comments put forward during the public consultation in the Regulation.

Details of the Regulation are set out in the Attachment.

Statement of Compatibility with Human Rights

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

Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015

The *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015* (the Amendment Regulation) 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*.

The Regulation is intended to give effect to additional autonomous sanctions measures announced by the Prime Minister on 1 September 2014 in relation to Russia, Crimea and Sevastopol, in response to the Russian threat to the sovereignty and territorial integrity of Ukraine.

The Regulation amends the *Autonomous Sanctions Regulations 2011* (the Principal Regulations) by expanding the scope of existing measures in relation to Russia. These measures include an arms embargo, restrictions on the access of Russian state-owned banks to Australian capital markets, preventing the export of goods and services for use in Russia's oil exploration or production, and restrictions on Australian trade and investment in Crimea.

The human rights obligation that may possibly be affected by the amendment to the Regulation is the presumption of innocence. Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. As strict liability offences allow for the imposition of criminal liability without the need to prove fault, all strict liability offences engage the presumption of innocence in article 14(2) of the ICCPR. A strict liability offence will not necessarily violate the presumption of innocence provided that it is: (i) aimed at achieving a purpose which is legitimate; (ii) based on reasonable and objective criteria, and (iii) proportionate to the aim to be achieved.

Regulations 12, 12A, 13 and 13A of the Principal Regulation provide that strict liability applies to the circumstance that the sanctioned supply, sanctioned import, sanctioned service or sanctioned commercial activity is not authorised by a permit under regulation 18 of the Principal Regulation. The Amendment Regulation extends these provisions to certain supplies, imports, services or commercial activity in relation to Russia, Crimea and Sevastopol. The effect of this is that strict liability applies to the existence or otherwise of a sanctions permit. For an individual, strict liability will not apply to any other element of the offence. The purpose of this provision is to prevent a spurious defence that a statement of the Minister could be taken as de facto authorisation to engage in conduct that is prohibited under the Act. Either the permit exists or it does not exist.

The Regulation is compatible with human rights because the limitations that arise are reasonable, necessary and proportionate measures which enable Australia to maintain its foreign policy and national security interests.

ATTACHMENT

Details of the *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015*

Section 1 – Name of Regulation

Section 1 provides that the name of the Regulation is the *Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015*.

Section 2 – Commencement

Section 2 provides that the Regulation commences on the day after it is registered.

Section 3 – Authority

Section 3 provides that the Regulation is made under the *Autonomous Sanctions Act 2011*.

Section 4 – Schedule

Section 4 provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item [1] – Regulation 3

Item [1] inserts new definitions for ‘investment service’ and ‘money making instruments’.

Item [2] – Regulation 3 (definition of *sanctioned commercial activity*)

Item [2] amends the definition of ‘sanctioned commercial activity’ to include in it regulations 5B and 5C of the Regulation for Russia, Crimea and Sevastopol.

Item [3] – Regulation 3

Item [3] inserts a new definition for ‘tradeable securities’.

Item [4] – At the end of Part 1

Item [4] inserts a new interpretative rule for the application of provisions on a ‘sanctioned supply’, ‘sanctioned imports’ and a ‘sanctioned service’ that apply to both a part of a country and a country. The rule provides that those provisions do not apply to the country merely because they apply to the part, nor do those provisions apply to one part merely because they apply to another part.

Item [5] – Subregulations 4(1) and (2)

Item [5] provides that all references to ‘country’ in the subregulation are supplemented with ‘or part of a country’, to extend the Principal Regulation to parts of countries.

Item [6] – Subregulations 4(2) (table heading)

Item [6] provides that table heading is replaced with ‘Countries of parts of countries and export sanctioned goods’, to extend the Principal Regulation to parts of countries.

Item [7] – Subregulations 4(2) (table, heading to column headed “Country”)

Item [7] provides that heading to the table column heading ‘Country’ is replaced with ‘Country or part of a country’, to extend the Principal Regulation to parts of countries.

Item [8] – Subregulation 4(2) (before table item 2)

Item [8] inserts a new table item to provide ‘export sanctioned goods’ for Crimea.

Table item 1 provides that ‘export sanctioned goods’ for Crimea are items, of a kind specified by the Minister in an instrument under the Principal Regulation, relating to the creation, acquisition or development of infrastructure in the transport, telecommunications or energy sectors, or in relation to the exploitation of oil, gas and mineral reserves in Crimea.

Item [9] – Subregulation 4(2) (after table item 3)

Item [9] inserts new table items to provide ‘export sanctioned goods’ for Russia and Sevastopol.

Table item 3A provides that ‘export sanctioned goods’ for Russia are: (a) arms or related materiel; (b) items, of a kind specified by the Minister in an instrument under the Principal Regulation, suited to any of the following categories of exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf: (i) oil exploration and production in waters deeper than 150 metres; (ii) oil exploration and production in the offshore area north of the Arctic Circle; and (iii) projects that have the potential to product oil from resources located in shale formations by way of hydraulic fracturing (other than exploration and production through shale formations to locate or extract oil from non-shale reservoirs).

Table item 3B provides that ‘export sanctioned goods’ for Sevastopol are items, of a kind specified by the Minister in an instrument under the Principal Regulation, relating to the creation, acquisition or development of infrastructure in the transport, telecommunications or energy sectors, or in relation to the exploitation of oil, gas and mineral reserves in Sevastopol.

Item [10] – Subregulation 4(3)

Item [10] provides that the reference to ‘country’ in the subregulation is supplemented with ‘or part of a country’, to allow the Minister to designate export sanctioned goods for a part of a country.

Item [11] – At the end of paragraph 4A(1)(b)

Item [11] provides that the reference to ‘country’ in the subregulation is supplemented with ‘or part of a country’, to extend the application of a ‘sanctioned import’ to import sanctioned goods for a part of a country.

Item [12] – Subregulation 4A(2)

Item [12] provides that goods mentioned in an item of the table are import sanctioned goods for the country or part of the country mentioned in the item if: (a) the goods are exported from the country or part of a country; or (b) the goods originate in the country of part of a country.

Item [13] – Subregulation 4A(2) (table, before the column headings)

Item [13] inserts ‘Countries or parts of countries and sanctioned imports’ as the title of the table in the subregulation.

Item [14] – Subregulation 4A(2) (table, heading to column headed “Country”)

Item [14] replaces the column heading ‘Country’ with ‘Country or part of a country’.

Item [15] – Subregulation 4A(2) (before table item 1)

Item [15] inserts the list of goods for Crimea in the table in subregulation 4(2), by inserting an entry for Crimea at item 1AA of the table that specifies ‘All goods’.

Item [16] – Subregulation 4A(2) (after table item 1)

Item [16] inserts the lists of goods for Russia and Sevastopol in the table in subregulation 4(2), by inserting an entry for Russia at item 1A of the table that specifies ‘arms and related materiel’ and an entry for Sevastopol at item 1B of the table that specifies ‘All goods’.

Item [17] – Subregulation 4A(3)

Item [17] supplements the reference to ‘country’ in the subregulation with ‘or part of a country’, to extend the Principal Regulation to parts of countries.

Item [18] – After subregulation 4A(4)

Item [18] inserts a new subregulation that provides that subregulation 4A(2) does not include goods originating in Crimea or Sevastopol which have been made available to the Ukrainian authorities for examination and for which compliance with the

conditions conferring entitlement to preferential origin has been verified by the Ukrainian authorities.

Item [19] – After subregulation 5(1)

Item [19] inserts a new subregulation that provides that subregulation 5(1) does not apply to a sanctioned supply of certain items relating to oil for Russia.

Item [20] – After subregulation 5(2)

Item [20] inserts a new subregulation that provides that subregulation 5(2) does not apply to a sanctioned import of arms or related materiel for Russia.

Item [21] – Before subregulation 5(3)

Item [21] inserts a new subregulation to provide that a ‘sanctioned service’ is also the provision to a person of an investment service if it assists with, or is provided in relation to, a sanctioned commercial activity.

Item [22] – Subregulation 5(4)

Item [22] provides that all references to ‘country’ in the subregulation are supplemented with ‘or part of a country’, to extend the Principal Regulation to parts of countries.

Item [23] – Subregulation 5(4) (table heading)

Item [23] replaces the table heading ‘Country’ with ‘Country or part of a country’.

Item [24] – Subregulation 5(4) (table, heading to column headed “Country”)

Item [24] replaces the column heading ‘Country’ with ‘Country or part of a country’.

Item [25] – Subregulation 5(4) (before table item 2)

Item [25] inserts a new item in the table at item 1, which provides that a ‘sanctioned service’ for Crimea for the purposes of subregulation 5(4) would assist with or be provided in relation to (a) the manufacture, maintenance or use of an export sanctioned good for Crimea; (b) engagement in a sanctioned commercial activity for Crimea.

Item [26] – Subregulation 5(4) (before table item 2)

Item [26] inserts a new item in the table at item 3A, which provides that a ‘sanctioned service’ for Russia for the purposes of subregulation 5(4) would assist with or be provided in relation to (a) a military activity; (b) the manufacture, maintenance or use of arms or related materiel. Item [26] would also insert a new item in the table at 3B, which would provide that a ‘sanctioned service’ for Sevastopol for the purposes of subregulation 5(4) would assist with or be provided in relation to (a) the manufacture,

maintenance or use of an export sanctioned good for Sevastopol; (b) engagement in a sanctioned commercial activity for Sevastopol.

Item [27] – At the end of regulation 5

Item [27] inserts a new subregulation at 5(6), which provides that a ‘sanctioned service’ is also, for Russia, the provision to Russia, or to a person, entity or body for use in Russia, of a service that is necessary for any of the following categories of exploration and production projects in Russia, including its Exclusive Economic Zone and Continental Shelf: (a) oil exploration and production in waters deeper than 150 meters; (b) oil exploration and production in the offshore area north of the Arctic Circle; (c) projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing (other than exploration and production through shale formations to locate or extract oil from non-shale reservoirs).

Item [27] inserts a new subregulation at 5(7), which provides that services applicable to subregulation (6) are drilling, well-testing, logging and completion service, and supply of specialised floating vessels.

Item [28] – Regulation 5A (heading)

Item [28] replaces the heading ‘Sanctioned commercial activity’ with ‘Sanctioned commercial activity – Iran and Syria’.

Item [29] – After regulation 5A

Item [29] inserts a new regulation at 5B, which sets out the meaning of ‘Sanctioned commercial activity’ for Russia.

A new subregulation 5B(1) provides that a ‘sanctioned commercial activity’ for Russia means the direct or indirect purchase or sale of, or any other dealing with, bonds, equity, transferrable securities, money market instruments or other similar financial instruments issued by certain entities and with a specified maturity period.

A new subregulation at 5B(2) provides that subregulation 5B(1) does not apply in relation to derivative products whose value has been linked to an underlying asset mentioned in 5B(1) but that does not involve the purchase or sale of, or any other dealing in relation to, the underlying asset.

Item [29] also inserts a new subregulation at 5B(3), which provides that a ‘sanctioned commercial activity’ for Russia also means directly or indirectly making, or being part of any arrangement to make loans or credit involving certain entities and with a specified maturity period.

A new subregulation at 5B(4) provides that subregulation 5B(3) does not apply to loans or credit that have a specific and documented objective to provide: (a) financing for non-prohibited imports or exports of goods and non-financial services between Australia and Russia; or (b) emergency funding to meet the solvency and liquidity criteria for certain Australian legal persons.

A new subregulation at 5B(5) provides that subregulation 5B(3) does not apply to drawdown or disbursements made under existing contracts whose maturity date has been fixed for the repayment in full of all funds made available and for the cancellation of all the commitments, rights and obligations under the contract.

Item [29] also inserts a new subregulation at 5B(6), which provides that the entities referred to in subregulations 5(1) and 5(3) are: (a) a major public financial or other institution in Russia with an explicit mandate to promote Russian competitiveness, economic diversification and investment; (b) a Russian company that is predominantly engaged in major activities relating to the development, production, sale or export of military equipment or services; and (c) a Russian public company that is involved in the transportation or sale of crude oil or petroleum products. The Minister will specify these entities in an instrument under the Principal Regulation. The entities referred to in subregulations 5(1) and 5(3) also include entities that are owned or controlled, or acting on behalf or at the direction of, an entity described in (a), (b) or (c).

A new subregulation 5B(7) specifies the ‘terms and conditions’ of drawdowns and disbursements.

Item [29] inserts a new regulation at 5C, which sets out the meaning of ‘Sanctioned commercial activity’ for Crimea and Sevastopol.

A new subregulation 5C(1) provides that ‘sanctioned commercial activity’ for Crimea and Sevastopol means the granting of financial loan or credit, or the establishment of a joint venture relating to transport, telecommunications or energy sector infrastructure projects; or in relation to the exploitation of oil, gas or mineral resources in Crimea or Sevastopol.

A new subregulation 5C(2) provides that ‘sanctioned commercial activity’ for Crimea and Sevastopol also means the acquisition or extension of an interest in an enterprise in Crimea or Sevastopol in the transport, telecommunications, energy, oil, gas or mineral sectors.