

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022

Section 10 of the *Autonomous Sanctions Act 2011* (the Act) enables the Governor-General to make regulations applying sanctions.

The Act provides a framework for the implementation of autonomous sanctions.

Autonomous sanctions are measures not involving the use of armed force which the Australian Government imposes and implements as a matter of foreign policy. They are a discretionary tool which the Government can apply, alone or with like-minded countries where appropriate, to address egregious situations of international concern.

The purpose of the *Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022* is to apply to the Ukrainian regions of Donetsk and Luhansk the existing autonomous sanctions measures that are in place in respect of the illegally-annexed Ukrainian regions of Crimea and Sevastopol. The extension of sanctions is in response to Russia's significantly elevated threat to Ukraine's sovereignty and territorial integrity. Russia's aggression towards Ukraine presents a serious threat to the international rules-based order which underpins global security.

When considering whether to apply autonomous sanctions, the Government considers Australia's national interest, including bilateral, regional and multilateral equities, and the impact of sanctions on Australia's economic, security or other interests.

Autonomous sanctions differ from UN Security Council sanctions which the UN Security Council imposes and which all UN Member States, including Australia, are obliged to implement as a matter of international law.

Details of the *Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022*, which amend the *Autonomous Sanctions Regulations 2011* (the Regulations), are set out at **Attachment A**.

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations are part, was the subject of extensive consultation with governmental and non-governmental stakeholders when introduced, and when amended to include the Russia/Ukraine sanctions. The application of existing sanctions measures to the Ukrainian regions of Donetsk and Luhansk was subject to targeted consultation within government. The Minister considered such consultation to be appropriate and practicable in the circumstances, given the urgency presented by Russia's actions, and because the proposed amendment does not alter the operation of the existing regulatory framework.

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required (reference: OBPR22-01800).

The 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*. A statement of compatibility with human rights is at **Attachment B**.

Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022

Section 1

The title of the instrument is the *Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022*.

Section 2

Subsection 2(1) provides that the instrument commences on 28 March 2022. This commencement date provides Australians and Australian businesses who may be impacted by these regulations an opportunity to seek a permit from the Minister for Foreign Affairs to enable them to fulfil any existing contractual obligations they may have with respect to the Ukrainian regions of Donetsk and Luhansk.

Subsection 2(2) is a technical provision that makes clear that any information inserted in column 3 of the table about the specific date of commencement is not part of the instrument and can be inserted or edited at a later date.

Section 3

The instrument is made under the *Autonomous Sanctions Act 2011*.

Section 4

Each instrument that is specified in a Schedule to this instrument 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

Item [1] – Regulation 3

Regulation 3 of the *Autonomous Sanctions Regulations 2011* (the principal Regulations) contains definitions of terms that are used in the principal Regulations.

Item 1 inserts into regulation 3 of the principal Regulations a definition of ‘specified Ukraine region’. This term is used in amendment items 2-16 of the amendment Regulations. ‘Specified Ukraine region’ includes the two regions already subject to autonomous sanctions (Crimea and Sevastopol), as well as the regions of Donetsk and Luhansk and a region of Ukraine specified by the Minister under proposed regulation 3B (see item 2).

Item [2] – At the end of Part 1

Item 2 enables the Minister for Foreign Affairs to specify, by legislative instrument, a region of Ukraine as being a ‘specified Ukraine region’. This means that, in the event that Russian action threatens additional Ukrainian territory, that the existing sanctions could be applied to new regions.

Item [3] Subregulation 4(2) (table item 1, column headed “Country or part of country”)

Regulation 4 of the principal Regulations sets out what constitutes a sanctioned supply of an export sanctioned goods for a country or part of country. Provision of a sanctioned supply is prohibited under regulation 12, unless the Minister has granted a permit authorising the sanctioned supply under regulation 18.

Item 3 replaces the current reference to Crimea in table item 1 with the term ‘specified Ukraine region’. Read together with items 4 and 5, this means that goods that are currently ‘export sanctioned goods’ for Crimea and Sevastopol also become ‘export sanctioned goods’ for the Ukrainian regions of Donetsk and Luhansk (and any region specified by the Minister in the future under proposed regulation 3B).

Item 4 - Subregulation 4(2) (table item 1, column headed “Goods”)

This item relates to item 3 above. Utilising the existing definition, ‘export sanctioned goods’ for a ‘specified Ukraine region’ would be items, of a kind specified by the Minister in an instrument under this regulation, relating to the creation, acquisition or development of infrastructure in one or more of the following sectors:

- (a) transport;
- (b) telecommunications;
- (c) energy;
- (d) the exploitation of oil, gas and mineral reserves in the specified Ukraine region.

The Minister has specified goods as ‘export sanctioned goods for Crimea and Sevastopol’ in the legislative instrument *Autonomous Sanctions (Russia, Crimea and Sevastopol) Specification 2015*. See transitional provision in proposed regulation 28 set out in item 16 below, which has the effect of applying these goods to parts of Ukraine that come within the proposed definition of ‘specified Ukraine region’.

Item [5] - Subregulation 4(2) (table item 3B)

This item is consequential to items 3-4 and repeals the entry relating to Sevastopol from the table in subregulation 4(2) of the principal Regulations.

Item [6] – Subregulation 4A(2) (table item 1AA, column headed “Country or part of country”)

Regulation 4A of the principal Regulations sets out what constitutes a sanctioned import for a country or part of country. Provision of a sanctioned import is prohibited under regulation 12A, unless the Minister has granted a permit under regulation 18.

Item 6 replaces the current reference to Crimea in table item 1AA with the term ‘specified Ukraine region’. Read together with items 7 and 8, this means that goods that are currently ‘import sanctioned goods’ for Crimea and Sevastopol also become ‘import sanctioned goods’ for the Ukrainian regions of Donetsk and Luhansk (and any region specified by the Minister in the future under proposed regulation 3B).

Item 7 – Subregulation 4A(2) (table item 1B)

This item is consequential to item 6 and repeals the entry relating to Sevastopol from the table in subregulation 4A(2) of the principal Regulations.

Item 8 – Subregulation 4A(5)

This item is consequential to item 6 and ensures that the existing exception to ‘import sanctioned goods’ of goods originating in Crimea or Sevastopol that is set out in subregulation 4A(5), also extends to parts of Ukraine that come within the proposed definition of ‘specified Ukraine region’.

Item 9 – Subregulation 5(4)

Item 9 is a technical amendment necessary to reflect that ‘part of country’ is also referred to in the table in subregulation 5(2).

Item 10 - Subregulation 5(4) (table item 1, column headed “Country or part of country”)

Regulation 5 of the principal Regulations sets out what constitutes a sanctioned service. Provision of a sanctioned service is prohibited under regulation 13, unless the Minister has granted a permit authorising the sanctioned service under regulation 18.

Item 10 replaces the current reference to Crimea in table item 1 with the term ‘A specified Ukraine region’. Read together with items 11 and 12, this means that activities that are currently a ‘sanctioned service’ for Crimea and Sevastopol also become a ‘sanctioned service’ for the Ukrainian regions of Donetsk and Luhansk (and any region specified by the Minister in the future under proposed regulation 3B).

Item 11 - Subregulation 5(4) (table item 1, column headed “Activity”)

This item relates to item 10 above. Utilising the existing definition of an ‘activity’ for a ‘specified Ukraine region’ as is currently applied to Crimea and Sevastopol, means that a sanctioned service for Crimea, Sevastopol, Donetsk and Luhansk (and any region specified by the Minister in the future under proposed regulation 3B) would be the provision to that region, or to a person for use in that region, of:

- (a) technical advice, assistance or training; or
- (b) financial assistance; or
- (c) a financial service; or
- (d) another service;

if it assists with, or is provided in relation to either: 1) the manufacture, maintenance or use of an export sanctioned good for the specified Ukraine region’ or 2) engagement in sanctioned commercial activity for the specified Ukraine region. ‘Sanctioned commercial activity’ is set out in regulation 5C of the principal Regulations.

Item 12 - Subregulation 5(4) (table item 3B)

This item is consequential to items 10-11 and repeals the entry relating to Sevastopol from the table in subregulation 5(4) of the principal Regulations.

Item 13 – Regulation 5C (heading)

This item is a technical amendment that is consequential to items 13-15. It ensures that the title of regulation 5C reflects the content of the regulation.

Item 14 – Paragraphs 5C(1)(c) and (d)

Currently, regulation 5C of the principal Regulations sets out what constitutes a sanctioned commercial activity for Crimea and Sevastopol. Provision of a sanctioned commercial activity is prohibited under regulation 13A, unless the Minister has granted a permit authorising the activity under regulation 18.

Item 14 replaces the current references to ‘Crimea or Sevastopol’ in regulation 5C(1) with the term ‘a specified Ukraine region’. This means that an activity that is currently a ‘sanctioned commercial activity’ for Crimea and Sevastopol is also ‘sanctioned commercial activity’ for

the Ukrainian regions of Donetsk and Luhansk (and any region specified by the Minister in the future under proposed regulation 3B).

This amendment prohibits the granting by a person of any financial loan or credit, or the establishment by a person of a joint venture, relating to:

- (a) the creation, acquisition or development of infrastructure in any of the following sectors in a specified Ukraine region:
 - (i) transport;
 - (ii) telecommunications;
 - (iii) energy; or
- (b) the exploitation of oil or gas, or of mineral resources specified by the Minister in an instrument under this regulation, in a specified Ukraine region.

Item 15 – Paragraphs 5C(2)

Item 15 is related to the amendment at item 14, and replaces the current references to ‘Crimea or Sevastopol’ in regulation 5C(2) with the term ‘a specified Ukraine region’. This amendment means that sanctioned commercial activity also means the acquisition or extension by a person of an interest in an enterprise that was established in a specified Ukraine region and is engaged in an activity referred to in item 14 above.

Item 16 – Amendments made by the *Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022*

Item 16 is a transitional provision that ensures that the *Autonomous Sanctions (Russia, Crimea and Sevastopol) Specification 2015* (the Specification) has effect on or after the commencement of the proposed Regulations as if the applicable references in the Specification to ‘Crimea and/or Sevastopol’ were instead references to a ‘specified Ukraine region’.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

AUTONOMOUS SANCTIONS AMENDMENT (UKRIANE REGIONS) REGULATIONS 2022

The Autonomous Sanctions Amendment (Ukraine Regions) Regulations 2022 (the Amendment Regulations) are 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 Amendment Regulations

Section 10 of the *Autonomous Sanctions Act 2011* (the Act) enables the Governor-General to make regulations applying sanctions.

The *Autonomous Sanctions Act 2011* (the Act) provides a framework for the implementation of autonomous sanctions.

Autonomous sanctions are measures not involving the use of armed force which the Australian Government imposes and implements as a matter of foreign policy. They are a discretionary tool which the Government can apply, alone or with like-minded countries where appropriate, to address egregious situations of international concern.

The purpose of the Amendment Regulations is to apply to the Ukrainian regions of Donetsk and Luhansk the existing autonomous sanctions measures that are in place in respect of the illegally-annexed Ukrainian regions of Crimea and Sevastopol. The extension of sanctions is in response to Russia's significantly elevated threat to Ukraine's sovereignty and territorial integrity. Russia's aggression towards Ukraine presents a serious threat to the international rules-based order which underpins global security.

When considering whether to apply autonomous sanctions, the Government considers Australia's national interest, including bilateral, regional and multilateral equities, and the impact of sanctions on Australia's economic, security or other interests.

Human rights implications

The Amendment Regulations are 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 Amendment Regulations amend the *Autonomous Sanctions Regulations 2011* (the Principal Regulations) by applying to the Ukrainian regions of Donetsk and Luhansk the existing autonomous sanctions measures that are in place in respect of the illegally-annexed Ukrainian regions of Crimea and Sevastopol. These measures include import and export restrictions, restrictions on the provisions of certain services and on certain commercial activity. The reforms do not change the overarching operation of the Principal Regulations.

The human rights obligation that may possibly be affected by the amendment to the Principal Regulations 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 Regulations provide that strict liability applies unless the sanctioned supply, sanctioned import, sanctioned service or sanctioned commercial activity is authorised by a permit under regulation 18 of the Principal Regulations. The Amendment Regulations extends these prohibitions to the Ukrainian regions of Donetsk and Luhansk. 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 Amendment Regulations are 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.

Conclusion

This instrument is compatible with human rights as the measures in the Amendment Regulations do not raise any human rights issues.