

EXPLANATORY STATEMENT

Select Legislative Instrument 2011 No. 248

Charter of the United Nations Act 1945

Charter of the United Nations (Sanctions – Libyan Arab Jamahiriya) Amendment Regulations 2011 (No. 2)

The purpose of the Regulations is to amend the *Charter of the United Nations (Sanctions – Libyan Arab Jamahiriya) Regulations 2011* (the Principal Regulations), to implement Australia's obligations under United Nations Security Council (UNSC) resolution 2009 (16 September 2011) and resolution 2016 (27 October 2011), modifying sanctions in relation to the Libyan Arab Jamahiriya (Libya). The Principal Regulations give effect in Australia to obligations arising from UNSC resolution 1970 (26 February 2011) and resolution 1973 (17 March 2011).

Section 6 of the *Charter of the United Nations Act 1945* (the Act) provides, in part, that the Governor-General may make regulations for, and in relation to, giving effect to decisions that the UNSC has made under Chapter VII of the Charter of the United Nations (the Charter) that Article 25 of the Charter requires Australia to carry out, in so far as those decisions require Australia to apply measures not involving the use of armed force.

Resolution 2009 contains obligations requiring amendments to the Principal Regulations. Paragraph 13 of resolution 2009 provides for a new exception to the arms embargo imposed by paragraph 9 of resolution 1970, namely the supply of arms or related materiel intended solely for security or disarmament assistance to the Libyan authorities and the supply of small arms, light weapons and related materiel for the sole use of United Nations personnel, media representatives and humanitarian and development workers and associated personnel.

Paragraph 15 of resolution 2009 modifies the asset freeze imposed in resolution 1970 and resolution 1973, and provides that the prohibition on making an asset available to a designated person or entity does not apply to the making available of an asset to, or for the benefit of, the Central Bank of Libya, the Libyan Arab Foreign Bank, the Libyan Investment Authority and the Libyan Africa Investment Portfolio.

Paragraph 16 of resolution 2009 provides for an exception to the prohibition in resolution 1970 on the use of, or dealing with, the funds, other financial assets or economic resources of the Central Bank of Libya, the Libyan Arab Foreign Bank, the Libyan Investment Authority and the Libyan Africa Investment Portfolio that were outside Libya and frozen on 16 September 2011. Paragraph 16 provides that the above exception may occur if is for one or more of the following purposes: (i) humanitarian needs; (ii) fuel, electricity and water for strictly civilian uses; (iii) resuming Libyan production and sale of hydrocarbons; (iv) establishing, operating or strengthening institutions of civilian government and civilian public infrastructure; or (v) facilitating the resumption of banking sector operations, including to support or facilitate international trade with Libya.

Resolution 2016 contains obligations requiring amendments to the Principal Regulations. Paragraph 5 of resolution 2016 terminates the provisions of paragraphs 4 and 5 of resolution 1973, which created an exception to the arms embargo imposed by paragraph 9 of resolution 1970, namely the UNSC's authorisation of the use of all necessary measures to protect civilians and civilian populated areas under threat of attack in Libya.

In addition to amending the Principal Regulations to give effect to new obligations arising from resolution 2009 and resolution 2016, the Regulations also amend regulation 7 and regulation 9 of the Principal Regulations to include a common definition of "authorised supply" and "authorised service" respectively, which are included in other regulations made under the Act.

No public consultation was undertaken in relation to the Regulations and the Principal Regulations as they implement Australia's international legal obligations arising from decisions of the UNSC.

Resolutions 2009 and 2016 were adopted under Article 41 of Chapter VII of the Charter and the measures are binding on Australia pursuant to Article 25 of the Charter. The relevant UNSC resolutions can be found on the UN website (www.un.org).

Details of the Regulations are set out in the Attachment.

Details of the *Charter of the United Nations (Sanctions – Libyan Arab Jamahiriya) Amendment Regulations 2011 (No. 2)*

Regulation 1 – Name of the Regulations

Regulation 1 provides that the name of the Regulations is the *Charter of the United Nations (Sanctions – Libyan Arab Jamahiriya) Amendment Regulations 2011 (No. 2)*.

Regulation 2 – Commencement

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

Regulation 3 – Amendment of the *Charter of the United Nations (Sanctions – Libyan Arab Jamahiriya) Regulations 2011*

Regulation 3 provides that Schedule 1 amends the *Charter of the United Nations (Sanctions – Libyan Arab Jamahiriya) Regulations 2011*.

Schedule 1 – Amendments

[1] Regulation 3, definition of *designated person or entity*, paragraph (c)

Item [1] substitutes a new definition for the term ‘designated person or entity’ to clarify that the term applies to a person or entity designated by the Committee established pursuant to paragraph 24 of resolution 1970 or the Security Council for paragraph 17 of resolution 1970, other than a person or entity specified in paragraph 14 of resolution 2009.

[2] Regulation 3, after definition of *Resolution 1973*

Item [2] inserts in regulation 3 a definition of ‘Resolution 2009’ as this term appears in regulation 3 as amended by item [1].

[3] After subregulation 6(4)

Item [3] inserts in new subregulations 6(5) to (7), including a definition of ‘authorised supply’.

Paragraph 6(5)(a) provides that an authorised supply means a sanctioned supply that is authorised by a permit under regulation 7.

Paragraph 6(5)(b) alternatively provides that an authorised supply means a sanctioned supply that is authorised by, if the supply, sale or transfer takes place in, or is from a foreign country, a permit (i) granted by the foreign country; and (ii) properly granted by that foreign country; and (iii) granted in a way that accords with the foreign country’s obligations under resolution 1970 or any other relevant resolution of the Security Council.

Subregulation 6(6) provides that a defendant, to a charge under section 27 of the Act that relates to subregulation (1), (2) or (3), bears an evidential burden in relation to the

matter in subparagraph (b)(i) of the definition of authorised supply in subregulation (5).

Subregulation 6(7) provides that for paragraph (b) of the definition of authorised supply in subregulation (5), a permit is taken not to have been properly granted on the basis of false or misleading information provided by any person, or of corrupt conduct by any person.

[4] Paragraphs 7(2)(c) and (d)

Item 4 replaces existing paragraphs 7(2)(c) and (d) with new paragraphs 7(2)(c), (d) and (e) to clarify the existing grounds under which the Minister is authorised to grant a permit for the supply of goods that would otherwise contravene regulation 6 of the Principal Regulations. These amendments implement paragraph 13 of resolution 2009 and paragraph 5 of resolution 2016.

Item 4 substitutes the existing paragraph 7(2)(c) with existing subparagraph 7(2)(d), to provide that the Minister may grant a permit only if the sanctioned supply is a supply of arms or related materiel that is (i) not a supply of arms and related materiel mentioned in paragraph 7(2)(a) or 7(2)(b); and (ii) approved in advance by Committee.

Paragraph 7(2)(d) provides that the Minister may grant a permit only if the sanctioned supply is a supply of arms or related materiel to which the following apply: (i) the arms or related materiel are intended solely for security or disarmament assistance to the Libyan authorities; (ii) the supply is notified in advance to the Committee; (iii) 5 working days have passed since the notification was given; (iv) the Committee has not advised against granting a permit to the applicant.

Paragraph 7(2)(e) provides that the Minister may grant a permit only if the sanctioned supply is a supply of small arms, light weapons or related materiel to which the following apply: (i) the small arms, light weapons or related materiel are to be temporarily exported to the Libyan Arab Jamahiriya for the sole use of the United Nations personnel, representatives of the media, humanitarian and development workers, or associated personnel; and (ii) the supply is notified in advance to the Committee; (iii) 5 working days have passed since the notification was given; (iv) the Committee has not advised against granting a permit to the applicant.

[5] After subregulation 9(4)

Item 5 inserts new subregulations 9(5) to (7), including a definition of ‘authorised service’.

Paragraph 9(5)(a) provides that an authorised service means a sanctioned service that is authorised by a permit under regulation 10.

Paragraph 9(5)(b) alternatively provides that an authorised service means a sanctioned service that is authorised by, if the service is provided in a foreign country, a permit (i) granted by the foreign country; and (ii) properly granted by the foreign country; and (iii) granted in a way that accords with the foreign country’s obligations under resolution 1970 or any other relevant resolution of the Security Council.

Subregulation 9(6) provides that a defendant, to a charge under section 27 of the Act that relates to subregulation (1), (2) or (3), bears an evidential burden in relation to the matter in subparagraph (b)(i) of the definition of authorised service in subregulation (5).

Subregulation 9(7) provides that for paragraph (b) of the definition of authorised service in subregulation (5), a permit is taken not have been properly granted if the prosecution shows that the permit was granted on the basis of false or misleading information provided by any person, or of corrupt conduct by any person.

[6] Paragraphs 10(2)(b) and (c)

Item 6 substitutes paragraphs 10(2)(b) and (c) to clarify the existing grounds under which the Minister is authorised to grant a permit for the provision of a service that would otherwise contravene regulation 9 of the Principal Regulations. These amendments implement paragraph 13 of resolution 2009 and paragraph 5 of resolution 2016.

Item 6 substitutes the existing paragraph 10(2)(b) with existing paragraph 10(2)(c), to provide that the Minister may grant a permit only if the sanctioned service consists of technical assistance and personnel that is (i) related to the supply of arms and related materiel that are not arms or related materiel mentioned in subparagraph (a)(i); and (ii) approved in advance by the Committee.

Paragraph 10(2)(c) provides that the Minister may grant a permit only if the sanctioned service consists of technical assistance or training, or financial or other assistance to which the following apply: (i) the technical assistance or training, or financial or other assistance, is intended solely for security of disarmament assistance to the Libyan authorities; (ii) the provision of the technical assistance or training, or financial or other assistance, is notified in advance to the Committee; (iii) 5 working days have passed since the notification was given; (iv) the Committee has not advised against granting a permit to the applicant.

[7] Subregulation 11(2)

Item 7 substitutes subregulation (2) to clarify that a person does not contravene the prohibition in subregulation (1) on making an asset available to a designated person or entity if the asset is made available to, or for the benefit of, the following designated entities in paragraph 7(2)(a): (i) the Central Bank of Libya; (ii) the Libyan Arab Foreign Bank; (iii) the Libyan Investment Authority; (iv) the Libyan Africa Investment Portfolio; or, as provided for in paragraph 7(2)(b), (i) a person or entity that is acting on behalf or at the direction of an entity in subparagraph (a) (i), (ii), (iii) or (iv); and (ii) is not otherwise a designated person or entity; or, as provided for in paragraph 7(2)(c), an entity that is (i) owned or controlled by an entity in subparagraph (a)(i), (ii), (iii) or (iv); and (ii) is not otherwise a designated person or entity.

Item 7 also renumbers the existing subregulation 11(2) as subregulation 11(3).

These amendments implement paragraph 15 of resolution 2009.

[8] Subregulation 12(2)

Item 8 substitutes subregulation (2) to clarify that a person does not contravene the prohibition in subregulation (1) on the use of or dealing with a controlled asset without authorisation, if the controlled asset is (a) owned or controlled by (i) the Central Bank of Libya; (ii) the Libyan Arab Foreign Bank; (iii) the Libyan Investment Authority; (iv) the Libyan Africa Investment Portfolio; and (b) is not an asset that (i) was outside the Libyan Arab Jamahiriya on 16 September 2011; and (ii) was frozen on 16 September 2011.

Item 8 also renumbers the existing subregulation 12(2) as subregulation 12(3).

These amendments implement paragraph 15 of resolution 2009.

[9] Regulation 13

Item 9 substitutes regulation 13 to provide that, under subregulation (1), the Minister may, on application, grant a person a permit authorising (a) the making available of an asset to a person or entity that would otherwise contravene subregulation 11(1); or (b) a use of, or dealing with, a controlled asset that would otherwise contravene regulation 12.

Subregulation 13(2) provides that the application must be for either (a) a dealing with an asset described in regulation 5 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008*, in the circumstances mentioned in the corresponding item of the table in subregulation (3); or (b) a use of, or dealing with, an asset for an authorised purpose mentioned in subregulation (4) if (i) the application relates to an asset that is owned or controlled by the Central Bank of Libya, Libyan Arab Foreign Bank, Libyan Investment Authority or Libyan Africa Investment Portfolio; and (ii) was outside the Libyan Arab Jamahiriya and frozen on 16 September 2011.

Subregulation 13(3) provides that for paragraph 2(a), the application must be for a dealing mentioned in an item of the table and the circumstances for the item.

Subregulation 13(4) provides that for paragraph 2(b), an authorised purpose for a use or dealing with the asset includes any of the following purposes: (a) addressing humanitarian needs; (b) providing water or energy for civilian use; (c) resuming the production and sale of hydrocarbons in Libyan Arab Jamahiriya; (d) establishing, operating or strengthening civilian government institutions and civilian public infrastructure; (e) facilitating the resumption of banking sector operations and supporting international trade with Libyan Arab Jamahiriya.

Paragraph 13(5)(a) provides that the Minister may grant a permit only if the Minister is satisfied that the application is for a dealing, in the circumstances for the item mentioned in subregulation (3), and the circumstances for dealing has been completed.

Paragraph 13(5)(b) provides that the Minister may grant a permit only if the Minister (i) is satisfied that the application is for a use or or dealing with the asset for an authorised purpose mentioned in paragraph 4(a), (b), (c), (d) or (e); and (ii) has notified the Committee that the Minister has consulted with the Libyan authorities about the use of the controlled asset and the Minister proposes to authorise the use or dealing for an authorised purpose; and (iii) has provided the notification to the Libyan

authorities and has not been advised against granting a permit to the applicant by the authorities, within 5 working days after the Minister notified the authorities; and (iv) has not been advised against granting a permit to the applicant by the Committee, within 5 working days after the Minister notified the Committee.

Subregulation 13(6) provides that a permit is subject to any conditions specified in it.

These amendments implement paragraph 16 of Resolution 2009.

[10] Regulation 13A

Item 10 omits regulation 13A, removing the prohibition in the Principal Regulations relating to Libyan Arab Jamahiriya aircraft. This amendment implements paragraph 21 of resolution 2009.