FEDERAL COURT OF AUSTRALIA

Tigers Realm Coal Limited v Commonwealth of Australia [2024] FCA 340

File number:	ACD 37 of 2023
Judgment of:	**KENNETT J**
Date of judgment:	9 April 2024
Catchwords:	**STATUTORY INTERPRETATION** – meaning of 'transport' in reg 4A(1)(a)(ii) of the *Autonomous Sanctions Regulations 2011* (Cth) (**the Regulations**) – where reg 12A(1) prohibits the transport of Russian coal – where engaging in conduct that contravenes reg 12A(1) may constitute an offence against s 16 of the *Autonomous Sanctions Act 2011* (Cth) (**the Act**) – whether 'transport' includes the movement of coal within Russia for the purpose of preparing to export it from Russia – whether 'transport' includes carriage by truck of coal from mine site in Russia to a port for the purpose of export – whether 'transport' includes loading coal on to independently-owned vessels for export **ADMINISTRATIVE LAW** – whether reg 4A(1)(a)(ii) of the Regulations exceeds the regulation-making power conferred by the Act **HIGH COURT AND FEDERAL COURT** – where applicant seeks declaration about whether its conduct complies with legislative requirements – where no official action has been taken to put its compliance in issue – where Commonwealth has indicated to the applicant its view that conduct contravenes legislative requirements – whether dispute is a 'matter' within the meaning of Ch III of the Constitution – whether the Court has jurisdiction to grant declaratory relief
Legislation:	*Constitution* ss 75, 76 *Acts Interpretation Act 1901* (Cth) s 21 *Autonomous Sanctions Act 2011* (Cth) ss 3, 10, 11, 14, 16, 28 *Criminal Codes* ss 5.4, 5.6, 6.1, 15.1 *Evidence Act 1995* (Cth) s 191 *Federal Court of Australia Act 1976* (Cth) ss 19, 21 *Judiciary Act 1903* (Cth), s 39B *Legislation Act 2003* (Cth) s 13 *Trade Practices Act 1974* (Cth) (repealed) s 163A

Autonomous Sanctions (Import Sanctioned Goods—Russia) Designation 2022 (Cth)

Autonomous Sanctions (Sanction Law) Declaration 2012 (Cth)

Autonomous Sanctions Amendment Regulation 2012 (No 1) (Cth)

Autonomous Sanctions Regulations 2011 (Cth) rr 4, 4A, 5, 12, 12A, 13, 13A, 14, 15, 16, 18

Autonomous Sanctions (Import Sanctioned Goods – Russia) Designation 2022 (Cth) Explanatory Statement

Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015, Select Legislative Instrument 2015 No. 30 (Cth) Explanatory Statement

Autonomous Sanctions Amendment Regulation 2012 (No 1), Select Legislative Instrument 2012 No. 204 (Cth) Explanatory Statement

Autonomous Sanctions Amendment Regulation 2013 (No. 1), Select Legislative Instrument 2013 No. 198 (Cth) Explanatory Statement

Autonomous Sanctions Regulations 2011, Select Legislative Instrument 2011 No. 247 (Cth) Explanatory Statement

Commonwealth, Parliamentary Debates, House of Representatives, 26 May 2010, 4113 (Stephen Smith, Minister for Foreign Affairs)

Cases cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27

Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493

Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd [1998] HCA 49; 194 CLR 247

Certain Lloyd's Underwriters v Cross [2012] HCA 56; 248 CLR 378

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

Commonwealth v Sterling Nicholas Duty Free Pty Ltd (1972) 126 CLR 297

Croome v Tasmania (1997) 191 CLR 119

Deripaska v Minister for Foreign Affairs [2024] FCA 62

ENT19 v Minister for Home Affairs [2023] HCA 18; 97 ALJR 509

Federal Commissioner of Taxation v Auctus Resources Pty Ltd [2021] FCAFC 39; 284 FCR 294

Federal Commissioner of Taxation v Consolidated Media

	Holdings Ltd [2012] HCA 55; 250 CLR 503 *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* [2023] NSWCA 134; 111 NSWLR 550 *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; 96 ALJR 234 *Minister for Immigration and Citizenship v Yucesan* [2008] FCAFC 110; 169 FCR 202 *Ogle v Strickland* (1987) 13 FCR 306 *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 *Re Trade Practices Act 1974 (s 163A) and Re an Application by Tooth & Co Ltd* (1978) 19 ALR 191 *Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2017] HCA 55; 262 CLR 456 *Repatriation Commission v Vietnam Veterans' Association of Australia (NSW Branch) Inc* [2000] NSWCA 65; 48 NSWLR 548
Division:	General Division
Registry:	Australian Capital Territory
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	80
Date of last submissions:	28 March 2024
Date of hearing:	4 March 2024
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ORDERS

ACD 37 of 2023

BETWEEN:	**TIGERS REALM COAL LIMITED** Applicant
AND:	**COMMONWEALTH OF AUSTRALIA** Respondent
ORDER MADE BY:	**KENNETT J**
DATE OF ORDER:	**9 APRIL 2024**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the respondent's costs as agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KENNETT J:

INTRODUCTION

1 The applicant is an Australian listed company which indirectly owns all of the shares in three companies incorporated in Russia (**the Russian subsidiaries**). The Russian subsidiaries are involved in extracting and producing coal in an area on Russia's East Coast. Their operations include a mine and a port. Coal is extracted from the ground at the mine, transported by truck to the port, stockpiled, and then subjected to various further operations before being loaded (by barge) on to ships for export. These operations are all undertaken by one or other of the Russian subsidiaries; for present purposes it is not necessary to distinguish between them. Title in the coal and all associated risk passes to the customer when it passes the rail of the ship. The coal produced by the Russian subsidiaries is sold in the Asian market. It is not exported to Australia.

2 On 10 March 2022 the Minister for Foreign Affairs made the *Autonomous Sanctions (Import Sanctioned Goods—Russia) Designation 2022* (Cth) (**the 2022 Designation**), designating coal, and certain fuels made from coal, as "import sanctioned goods" for Russia under reg 4A(3) of the *Autonomous Sanctions Regulations 2011* (Cth) (**the Regulations**). The issues that arise in this proceeding concerns the effect of that designation in respect of the Russian subsidiaries' operations.

3 From August to October 2022, discussions and correspondence occurred between the applicants' solicitors and Commonwealth agencies (the Department of Foreign Affairs (**DFAT**) and the Australian Sanctions Office) concerning the operation of reg 4A. These discussions were on a "no names" basis. However, on 3 November 2022 application was made, on behalf of the applicant, for an "Indicative Assessment" of whether it might be affected by Australian sanctions legislation. DFAT's Indicative Assessment, on 20 March 2023, was that these operations were "likely to be prohibited by, or subject to authorisation under, regulation 4A".

4 Further correspondence and meetings followed. The applicant announced to the Australian Stock Exchange that it had received the Indicative Assessment. On 9 May 2023 DFAT confirmed that its assessment remained unchanged, stating that "the movement of coal from the mine to the port and onto any cargo vessel is likely to be prohibited by, or subject to authorisation under, regulation 4A".

5 The factual background summarised above is taken from a statement of agreed facts which the parties provided to the Court and relied on under s 191 of the *Evidence Act 1995* (Cth).

6 The applicant commenced this proceeding on 22 June 2023, seeking declarations that:

(a) Regulation 4A(1)(a)(ii) of the Regulations does not apply to the movement of coal by the Russian Subsidiaries within Russia where that movement of coal is preparatory to the export of the coal from Russia;

(b) The carriage by truck of coal at the Mine Site, from the Mine to the Port for the purpose of export, is not "transport" within the meaning of regulation 4A(1)(a)(ii) of the Regulations; and

(c) The loading of coal at the Port on to independently-owned vessels for the purpose of export, is not "transport" within the meaning of regulation 4A(1)(a)(ii) of the Regulations.

'Mine Site', 'Mine' and 'Port' are defined terms used in the relevant court documents. Their precise meaning is not relevant for the questions addressed in these reasons.

7 In the alternative, the applicant seeks a declaration that reg 4A(1)(a)(ii) exceeds the regulation making power in ss 10(1) and 28 of the *Autonomous Sanctions Act 2011* (Cth) (**the Act**) and is therefore invalid.

RELEVANT ASPECTS OF THE STATUTORY REGIME

8 In *Deripaska v Minister for Foreign Affairs* [2024] FCA 62 at [6]-[10] (***Deripaska***), the essential elements of the Act were described as follows.

> 6 The Act provides for the imposition and enforcement of "autonomous sanctions" which are, broadly, sanctions that:
>
> (a) are intended to influence foreign governments, persons or entities outside Australia in accordance with Australian Government policy; or
>
> (b) involve the prohibition of conduct in or connected with Australia that facilitates the engagement by a person or entity in conduct outside Australia that is contrary to Australian Government Policy.
>
> 7 The objects of the Act, set out in s 3, make clear that such sanctions may be country-specific or may be thematic (in that they may be directed at identified international problems such as the proliferation of weapons of mass destruction, malicious cyber activity or serious violations of human rights).
>
> 8 The Act operates principally by authorising the making of regulations which impose sanctions of the kinds contemplated. Section 28 of the Act is a general

power to make regulations prescribing matters required or permitted to be prescribed or necessary or convenient to be prescribed for carrying the Act into effect. Section 10 expressly provides for the regulations to apply sanctions, as follows.

> **10 Regulations may apply sanctions**
>
> (1) The regulations may make provision relating to any or all of the following:
>
> (a) proscription of persons or entities (for specified purposes or more generally);
>
> (b) restriction or prevention of uses of, dealings with, and making available of, assets;
>
> (c) restriction or prevention of the supply, sale or transfer of goods or services;
>
> (d) restriction or prevention of the procurement of goods or services;
>
> (e) provision for indemnities for acting in compliance or purported compliance with the regulations;
>
> (f) provision for compensation for owners of assets that are affected by regulations relating to a restriction or prevention described in paragraph (b).
>
> (2) Before the Governor-General makes regulations for the purposes of subsection (1), the Minister must be satisfied that the proposed regulations:
>
> (a) will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia; or
>
> (b) will otherwise deal with matters, things or relationships outside Australia.
>
> …

9 Regulations may have extraterritorial effect (s 11). They are to have effect despite any other laws including pre-existing Acts of the Commonwealth (s 12). Later Commonwealth Acts are not to be interpreted as amending or repealing the regulations (or authorising the making of any instrument affecting their operation) except to the extent that they do so expressly (s 13).

10 The Act provides for enforcement of the regulations by an injunction granted by a court on the application of the Attorney-General (s 14). The Act also creates the following offences:

(a) contravening a "sanction law" (ie a law specified under s 6 as a sanction law) (s 16); and

(b) giving false or misleading information to the Commonwealth in connection with the administration of a sanction law (s 17).

9 The Regulations provide for the imposition of sanctions. They do so by imposing a series of prohibitions, contained in Part 3, which are declared to be "sanctions laws" for the purposes of the Act by the *Autonomous Sanctions (Sanction Law) Declaration 2012* (Cth). Contravention of any of those prohibitions is thus an offence under s 16 of the Act. Contraventions can also be restrained by an injunction under s 14 of the Act, application for which may be made by the Attorney-General.

10 The prohibitions in Part 3 are on making a "sanctioned supply" (reg 12), making a "sanctioned import" (reg 12A), providing a "sanctioned service" (reg 13), engaging in a "sanctioned commercial activity" (reg 13A), dealing with a "designated person or entity" (reg 14), dealing with a "controlled asset" (reg 15), and conduct that causes a "sanctioned vessel" to contravene a direction (reg 16). Each of the expressions in quotation marks is given content by one of the definitional provisions in Part 2 of the Regulations.

11 Relevantly here, reg 12A is as follows.

> **12A Prohibitions relating to sanctioned import**
>
> (1) A person contravenes this regulation if:
>
> (a) the person makes a sanctioned import; and
>
> (b) the sanctioned import is not an authorised import.
>
> (1A) Strict liability applies to the circumstance that the sanctioned import is not in accordance with a permit under regulation 18.
>
> Note 1: For strict liability, see section 6.1 of the *Criminal Code*.
>
> Note 2: Strict liability is not imposed on an individual for any other element of an offence under section 16 of the Act that relates to a contravention of this regulation.
>
> (2) Section 15.1 of the *Criminal Code* applies to an offence under section 16 of the Act that relates to a contravention of this regulation.
>
> Note: This has the effect that the offence has extraterritorial operation.
>
> (3) A person, whether or not in Australia, and whether or not an Australian citizen, contravenes this regulation if the person uses the services of an Australian ship or an Australian aircraft to transport import sanctioned goods in the course of, or for the purpose of, making a sanctioned import that is not an authorised import.
>
> (4) A body corporate contravenes this regulation if:
>
> (a) the body corporate has effective control over the actions of another body corporate or entity, wherever incorporated or situated; and
>
> (b) the other body corporate or entity makes a sanctioned import; and
>
> (c) the sanctioned import is not an authorised import.

Note: This regulation may be specified as a sanction law by the Minister under section 6 of the Act.

12 The effect of reg 12A(2) should be noted. Section 15.1 of the *Criminal Code*, which is applied to an offence under s 16 that relates to a contravention of reg 12A, provides as follows.

> (1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:
>
> (a) the conduct constituting the alleged offence occurs:
>
> (i) wholly or partly in Australia; or
>
> (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
>
> (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
>
> (i) wholly or partly in Australia; or
>
> (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
>
> (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
>
> (i) at the time of the alleged offence, the person is an Australian citizen; or
>
> (ii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
>
> (d) all of the following conditions are satisfied:
>
> (i) the alleged offence is an ancillary offence;
>
> (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
>
> (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

13 By operation of reg 12A(4), the applicant is contravening the regulation if the activities of its Russian subsidiaries described above involve "sanctioned imports" and are not "authorised imports". (An "authorised import" is one authorised by a permit granted under reg 18(1)(b). No relevant permit is in operation here.)

14 Regulation 4A defines a "sanctioned import" for these purposes. It is (relevantly) as follows.

> **4A Sanctioned imports**

(1) For these Regulations, a person makes a ***sanctioned import*** if:

(a) the person:

(i) imports or purchases goods from another person; or

(ii) transports goods; and

(b) the goods are import sanctioned goods for a country or part of a country.

(2) Goods mentioned in an item of the table are import sanctioned goods for the country or part of a 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 or part of a country.

[table omitted]

(3) In addition to subregulation (2), the Minister may, by legislative instrument, designate goods as import sanctioned goods for a country or part of a country mentioned in the designation.

…

15 As noted earlier, coal and several related products have been designated as import sanctioned goods for Russia by an instrument made under reg 4A(3).

THE ISSUES

16 The issues that the applicant seeks to have determined are:

(a) whether its Russian subsidiaries, in transporting coal from the mine to the port (all of which occurs in Russia), are "transporting" goods within the meaning of reg 4A(1)(a)(ii); and

(b) if that question is answered in the affirmative, so that the Russian subsidiaries and the applicant are contravening reg 12A, whether the provisions of the Regulations are valid to this extent.

JURISDICTION

17 It will be apparent that the applicant is not seeking to set aside any purported exercise of statutory power. The "Indicative Assessment" given by DFAT has no statutory status or effect. The applicant seeks only declaratory relief in order to establish whether the activities of its Russian subsidiaries are contravening reg 12A. It is not the subject of any prosecution or any proceedings seeking injunctions under s 14 of the Act.

18 The fact that the only relief sought is declaratory is not a bar to the proceeding: *Federal Court of Australia Act 1976* (Cth) (**the Federal Court Act**), s 21(2). However, there is a question whether the circumstances outlined above are such as to engage the jurisdiction of the Court.

19 The Court has, under s 19 of the Federal Court Act, such original jurisdiction as is vested in it by laws made by the Parliament. The applicant relies on s 39B(1A)(c) of the *Judiciary Act 1903* (Cth), which confers jurisdiction on the Court in matters arising under any laws made by the Parliament. The respondent does not contest the issue of jurisdiction.

20 Each of the conferrals of jurisdiction in s 39B(1) and (1A) is in relation to a class of "matter". This reflects the language of ss 75–76 of the *Constitution*, which provide for the conferral of federal jurisdiction only in relation to "matters" of specified kinds.

21 In *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; 96 ALJR 234 (***Hobart International Airport***) at [26], Kiefel CJ, Keane and Gordon JJ spoke of the concept of "matter" as involving two elements: the "subject matter" (defined by reference to the heads of jurisdiction in Chapter III of the Constitution); and a "justiciable controversy" (the "concrete or adequate adversarial nature of the dispute"). "Subject matter" can be passed over quickly in the present case. It is clear that, if the present dispute is sufficiently concrete, there is a matter "arising under" the Act and jurisdiction under s 39B(1A)(c) is enlivened.

22 In an application for declaratory relief, the question whether a justiciable controversy arises is closely related to the question whether the applicant has standing to seek the declaration. In substance, in federal jurisdiction, if there is a "matter" (ie, a sufficiently concrete controversy), no separate issue as to standing arises, although the reverse may not be true in every case (*Hobart International Airport* at [31] (Kiefel CJ, Keane and Gordon JJ), [49] (Gageler and Gleeson JJ)). Concreteness, in this context, involves a real dispute concerning the parties' existing legal rights. It requires an applicant seeking relief whose rights or interests are sufficiently affected to give it the right to seek that relief: that is, an applicant who has a "sufficient" or "real" interest in obtaining the relief (*Hobart International Airport* at [32], referring to *Forster v Jododex Aust Pty Ltd* (1972) 127 CLR 421 at 437-438 (Gibbs J)).

23 As noted in *Hobart International Airport* at [33], the requirement for a "sufficient" or "real" interest has work to do in both public and private law contexts, but "applies differently to different sorts of controversies". *Hobart International Airport* itself concerned the standing of

persons who were not parties to certain leases to seek declarations concerning the construction of provisions in those leases. The substantive issues were issues of private law.

24 Standing in public law cases, in the sense of whether an applicant has a sufficient interest to challenge an administrative decision or to enforce a statutory duty or limit on power, is a familiar and sometimes complex question: see, eg, *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Ogle v Strickland* (1987) 13 FCR 306; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; 194 CLR 247. The situation of an individual or a corporate entity seeking a declaration, in effect, that their own conduct complies with specific legislative requirements (when no official action has been taken that puts compliance in issue) is less familiar. Such an application, at least at first blush, comes close to seeking an advisory opinion. However, there are precedents for the grant of declaratory relief in cases of this kind.

(a) In *Croome v Tasmania* (1997) 191 CLR 119 the High Court accepted that a private individual had standing to challenge the validity of State laws that proscribed their conduct, without having to show that the State had any intention of prosecuting them under those laws.

(b) In *Re Trade Practices Act 1974 (s 163A) and Re an Application by Tooth & Co Ltd* (1978) 19 ALR 191 the applicant sought declarations, on the basis of agreed facts, concerning the validity and operation of a provision of the *Trade Practices Act 1974* (Cth). Section 163A of that Act was a specific conferral of jurisdiction to grant declarations of that kind. In view of the facts as presented, a Full Court of this Court found the proposed declarations too hypothetical and declined to make them. However, Brennan J observed (at 206-207):

> Cases where the plaintiff seeks to establish his right to act in a particular way, free from criminal liability or free from interference by government and statutory authorities, constitute one of the classes of cases in which declarations are granted. Dr Zamir in "The Declaratory Judgment" (1962) pp 174, 175, collects some of the cases in this class. Traders have long been entitled to this kind of declaratory relief when they seek to establish a right to carry on business in a particular way (*Rossi v Edinburgh Corp* [1905] AC 21 at 31), but the relief is not restricted to traders. In *Pharmaceutical Society v Dickson* [1970] AC 403 at 433; [1968] 2 All ER 686 at 701 Lord Upjohn said:—
>
> > This principle is not confined to trade. A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of

> course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

(c) Brennan J also referred to *Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297. There, the Supreme Court of New South Wales (clearly exercising federal jurisdiction) had declared that the respondent was not prohibited from engaging in certain conduct by a particular Commonwealth Act. The High Court allowed the Commonwealth's appeal, but observed that the Supreme Court had been correct to entertain the suit: at 305 (Barwick CJ), 311 (Menzies J (McTiernan J agreeing)), 315 (Windeyer J).

25 These cases are on point in the light of reg 12A(4). The issue whether the activities of the Russian subsidiaries described above involve "sanctioned imports" bears directly on the legal rights of the applicant because, if they do, it is in breach of reg 12A and may possibly be subject to a criminal penalty under s 16 of the Act. I have therefore concluded that the applicant has a sufficient interest in the subject-matter of the proposed declarations to give rise to a "matter" that engages this Court's jurisdiction.

THE CONSTRUCTION ISSUE

Relevant principles

26 The principles applicable to the construction of reg 4A(1)(a) are not in doubt. In *ENT19 v Minister for Home Affairs* [2023] HCA 18; 97 ALJR 509 (***ENT19***), the majority (Gordon, Edelman, Steward and Gleeson JJ) explained at [86]–[87]:

> Regulations are to be construed according to the ordinary principles of statutory construction. The starting point for the ascertainment of the meaning of a provision is its text, while at the same time regard is to be had to its context and purpose. Of course, the statutory context of regulations includes the Act under which the regulations were made and are sustained. Context should be regarded at the first stage and not at some later stage and it should be regarded in its widest sense, including by reference to legislative history and extrinsic material. As Kiefel CJ, Nettle and Gordon JJ explained in *SZTAL v Minister for Immigration and Border Protection*:
>
> > This is not to deny the importance of the natural and ordinary meaning of a word … Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> The context of the words, consideration of the consequences of adopting a provision's literal meaning, the purpose of the statute and principles of construction may lead a court to adopt a construction that departs from the literal meaning of the words of a provision. One such principle is that legislation must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. … Ultimately,

> the task in applying the accepted principles of statutory construction is to discern what Parliament is to be taken to have intended.
>
> (Footnotes omitted.)

27 References to consideration of matters of context "at the first stage" reflect the principle, accepted at least since *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 (Brennan CJ, Dawson, Toohey and Gummow JJ), that the relevance of statutory context does not depend on a conclusion being reached that the words of the provision are in some sense ambiguous. Attention to context may result in the "legal meaning" of those words being different to their "ordinary meaning", even if the latter is clear (see eg *Greylag Goose Leasing 1410 Designated Activity Company v PT Garuda Indonesia Ltd* [2023] NSWCA 134; 111 NSWLR 550 at [14]-[15] (Bell CJ)). This does not prevent the "natural and ordinary meaning" of the words used from being an appropriate starting point. The High Court has observed "on many occasions" that the task of construction must begin and end with the statutory text: *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39]. It has also been observed that the "surest guide to legislative intention" is the language which has actually been employed in the legislation: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

Ordinary meaning

28 It is not in doubt that, read according to its ordinary meaning, the expression "transports" encompasses the activity of the Russian subsidiaries in taking the coal by truck from the mine to the port. It also encompasses the carriage of coal by barge from the shore to the ship.

29 The applicant submitted, as one reason to read the term "transports" in a more limited way, that reg 4A(2) defines "import sanctioned goods" in a manner that assumes that such goods have left their country of origin (in that it refers to goods that are "exported from" or "originate in" a country or part of a country). That consideration does not directly affect the meaning of "transports", because "import sanctioned goods" identifies the subject of the relevant transporting (reg 4A(1)(b)) rather than the nature of the activity. However, I have also considered whether the terms of reg 4A(2) might mean that reg 4A(1) does not apply in this case for the separate reason that the goods that are transported by the Russian subsidiaries are not "import sanctioned goods" (because they have not left their country of origin). The short answer to any such argument is that Russian coal constitutes "import sanctioned goods" by reason of a designation under reg 4A(3) rather than by operation of reg 4A(2). Neither reg

4A(3) nor the terms of the 2022 Designation makes any reference to exportation or origin: "coal" is simply designated as a form of import sanctioned goods "for Russia".

30 It is therefore not in doubt that that which is carried from the mine to the port, and thence to waiting ships, constitutes "import sanctioned goods". The case depends entirely on whether, considered in context, the term "transports" has a narrower meaning that does not encompass the transport of the coal from mine to port and then to ships.

The applicant's construction

31 The limitation contended for by the applicant is that a person who carries or conveys goods designated as import sanctioned goods only "transports" them, within the meaning of reg 4A(1)(a)(ii), if the person carries or conveys them in an importation or cross-border setting. The person does not "transport" designated goods simply by carrying or conveying them within the particular country (or part).

"Transports" in its statutory context

32 It is convenient to consider the issue of context at four levels:

(a) the text and structure of reg 4A;

(b) the scheme of the Regulations more broadly;

(c) the consequences of the competing constructions; and

(d) the extrinsic materials.

Regulation 4A

33 Regulation 4A is definitional. Its only function is to give content to the concept of making a "sanctioned import" for the purposes of reg 12A, which prohibits that activity.

34 What is defined by reg 4A is a category of "imports", and the word "import" appears again as part of the definition itself (reg 4A(1)(a)(i)). In the latter usage at least, that expression would seem to have its ordinary meaning. Arguably, as a starting point, it would be taken to refer to imports into Australia (cf *Acts Interpretation Act 1901* (Cth), s 21(1)(b)), and analysis of the meaning of reg 4A would proceed from there. However, the applicant did not take that approach. It accepted, in the light of the extraterritorial operation conferred by reg 12A(2) and (3), that the activity of "importing" goods could include importing them into other countries if undertaken by an Australian citizen or an Australian corporation (or using an Australian ship or aircraft).

35 In any event, the word "transports" in reg 4A(1)(a)(ii) clearly *adds to* the word "imports" in reg 4A(1)(a)(i) (as does the word "purchases"). While it may in some cases be permissible to have regard to the ordinary meaning of the defined term when construing a definition (see *Federal Commissioner of Taxation v Auctus Resources Pty Ltd* [2021] FCAFC 39; 284 FCR 294 at [59]-[69] (Thawley J, McKerracher and Davies JJ agreeing) and, in addition to the cases cited there, *Repatriation Commission v Vietnam Veterans' Association of Australia (NSW Branch) Inc* [2000] NSWCA 65; 48 NSWLR 548 at [104] (Spigelman CJ, Handley JA agreeing)), it is clearly illogical to use the ordinary meaning of the defined term to read down a definition that expressly widens the meaning of that term. Accordingly, "transports" is not to be given a meaning that is tied to "imports" (whatever specific meaning the latter might have) simply because it appears as part of the definition of "sanctioned import". For the same reasons, the heading to reg 4A ("Sanctioned imports") does not assist.

36 The applicant submits, nevertheless, that, because "imports" and "transports" appear together in reg 4A(1)(a), the word "transports" is "associated or connected with the importation of import sanctioned goods". The location of the two expressions in the same paragraph of reg 4A(1) is not irrelevant. However, it is not a strong indication of meaning. As noted above, "transports" was clearly intended to add something; and it would not add much if the only activities of transport captured were those associated or connected with importation (given that the importation of goods necessarily involves transporting them). It is also not irrelevant that "imports" and "purchases" are contained in one sub-paragraph of reg 4A(1)(a) while "transports" appears in another. This suggests (albeit, again, not strongly) that they are separate ideas rather than aspects of a single concept.

37 The expression "purchases" in reg 4A(1)(a)(i) is also evidently intended to add to the content that "imports" on its own would have. The purchase of imported goods may occur before or after importation and, at least in the latter case, will not be done by the importer. Clearly, also, goods that are not imported or destined to be imported may be purchased. The applicant in its written submissions in reply disclaimed any submission that the word "purchases" was to be read down. However, this position somewhat undermines its submission that the word "transports" is to be read down because of its co-location with "imports".

38 Regulation 4A(2) has been mentioned above. It brings goods described in the table into the concept of "import sanctioned goods for a country or part of a country" if those goods are "exported from", or "originate in", that country or that part of a country. The clearest reason

why these references to export and origin do not assist the construction of reg 4A(1) is that reg 4A(2) is not the only avenue by which goods become "import sanctioned goods": reg 4A(3) provides for goods to be accorded that status by ministerial designation. A further reason is that reg 4A(2) itself contemplates goods being "exported from", or originating in, *part* of a country. This feature of reg 4A(2) undermines the notion that movement across national borders is integral to the operation of the prohibition in reg 12A.

39 The Commonwealth also relied on reg 4A(4), which provides that a person who "imports or purchases" gold, precious metals and diamonds from specified sources connected with the government of Syria makes a sanctioned import. A "purchase" of goods within reg 4A(4) does not necessarily involve any transport of the goods between countries (and might not involve any transport at all). This is consistent with the Commonwealth's position that the concept of a sanctioned import does not require movement of goods between countries. However, it is also consistent with the government of Syria having been treated as a special case, for which specific provision was to be made in relation to a specific class of goods. It does not assist in any material way with understanding the meaning of terms used in reg 4A(1).

The Regulations more generally

40 The applicant pointed to other aspects of the Regulations in an attempt to demonstrate that they embody a scheme based on accepted concepts of import and export, and the distinction between the two.

41 Regulation 12 prohibits, without authorisation, the making of a "sanctioned supply". That expression is given content by reg 4. Regulation 4(1) provides:

> (1) For these Regulations, a person makes a ***sanctioned supply*** if:
>
> (a) the person supplies, sells or transfers goods to another person; and
>
> (b) the goods are export sanctioned goods in relation to a country or part of a country; and
>
> (c) as a direct or indirect result of the supply, sale or transfer the goods are transferred:
>
> (i) to that country or part of a country; or
>
> (ii) for use in that country or part of a country; or
>
> (iii) for the benefit of that country or part of a country.

42 The concept of a "sanctioned export" thus involves the "transfer" of goods "to", "for use in" or "for the benefit of" an identified country. This comes close to a traditional conception of

exporting goods to a country. However, it does not completely match that concept, and does not support an understanding of the Regulations based on import and export, for two reasons.

(a) It includes the transfer of goods "for the benefit of" the identified country. Whatever precise meaning this expression was meant to have, it evidently reflects a deliberate decision to extend the concept of a "sanctioned supply" beyond the physical transfer of goods into the designated country.

(b) As is the case with reg 4A(2) (discussed above), any simple correlation between the defined concept and international trade in goods is disturbed by the reference to a "part of a country". In principle at least, goods transferred to or for use in part of a country may come from another part of the same country.

43 It can be accepted, in a general sense, that regs 4 and 12 are concerned with restricting the supply of identified goods to (or for the benefit of) a country that is being subjected to sanctions, while regs 4A and 12A are concerned with limiting a country's ability to benefit from trade in goods that it produces. However, it does not follow that regs 4A and 12A must be taken to be limited in their operation to goods that are imported (or in the process of being imported) into another country. The provisions must be construed according to their terms.

44 Construing the prohibitions and their supporting definitions according to their terms means that, as pointed out in the applicant's submissions, they may in theory both apply to the same conduct. If particular goods were designated as both "export sanctioned goods" and "import sanctioned goods" in relation to the same country, a literal reading of regs 4(1) and 4A(1) could result in a single act of transporting those goods constituting both a "sanctioned supply" and a "sanctioned import". Regulations 12 and 12A would both be contravened. However, that is not a result which by its incongruity tells against a construction of the principles according to their terms. It is not necessary to decide whether one or two offences under s 16 of the Act would be committed where the same conduct contravened two "sanctions laws". It is sufficient to observe that the processes of criminal prosecutions, trials and sentencing are sufficiently sophisticated to provide a just outcome in such a case, taking account of the fact (if it be the fact) that only one criminal act has occurred.

45 It was also submitted that reg 12A(3) becomes circular if a literal construction of reg 4A(1)(a) is adopted. Regulation 12A(3) provides that reg 12A is contravened when a person uses an Australian ship or an Australian aircraft to "transport import sanctioned goods in the course of, or for the purpose of, making a sanctioned import that is not an authorised import". If

transporting import sanctioned goods amounts to a "sanctioned import" without more, the words "in the course of, or for the purpose of, making a sanctioned import" in reg 12A(3) take on a degree of superfluity. However, they are not wholly redundant, as they provide the starting point for the application of the closing words of the provision ("that is not an authorised import"). Even if the consequence of a literal interpretation is that reg 12A(3) is poorly drafted, I do not think this provides significant support for an artificially narrow reading of reg 4A(1)(a)(ii). No incongruity of operation arises.

46 The applicant also made reference to reg 5, which defines a "sanctioned service" for the purposes of the prohibition in reg 13. The word "transport" appears in reg 5(5) where, it was submitted, a literal interpretation would give the sub-regulation a very broad operation. However, reg 5(5) covers the same ground as reg 4A(4) (which has been discussed above) and reg 4(4): transactions with the government of Syria and related entities concerning gold, precious metals and diamonds. This is a confined area of operation and there is no reason why, in this context, "transport" should not be given its ordinary meaning. Consistency of usage would then indicate that "transports" in reg 4A(1)(a)(ii) also has its ordinary meaning: *Regional Express Holdings Ltd v Australian Federation of Air Pilots* [2017] HCA 55; 262 CLR 456 at [21].

47 Another aspect of reg 5 referred to in the submissions was a distinction between sub-regulations (1) and (2).

(a) Pursuant to reg 5(1), a wide range of forms of assistance, including "another service" (which prima facie includes transport), constitute "sanctioned services" if they assist, or are provided in relation to, a "sanctioned supply".

(b) Pursuant to reg 5(2), a much more specific range of services ("financial assistance" and "a financial service") constitute "sanctioned services" if they assist with, or are provided in relation to, a "sanctioned import".

48 This difference may reflect, in part, the fact that transporting import sanctioned goods is expressly included by reg 4A(1)(a)(ii) in the definition of a "sanctioned import". However, the comprehensive nature of reg 5(1) and the specific and limited nature of reg 5(2)—neither of which refers expressly to transport—should be taken to reflect policy judgments concerning how widely the net should be cast in relation to the provision of services facilitating the different classes of transaction. These aspects of reg 5 are neutral as to the meaning of "transports" in reg 4A(1)(a)(ii).

Consequences of the competing constructions

49 The parties framed their submissions on the basis that, when viewed in the light of the extraterritorial operation of reg 12A, a construction of reg 4A(1)(a) in which "transports" has its ordinary meaning gives the prohibition a far-reaching operation. Any Australian citizen, Australian body corporate or Australian-controlled corporation, anywhere in the world, would contravene reg 12A(1) and be liable to prosecution if, without authorisation, it transported Russian coal (or any other import sanctioned goods). The example was proffered of an Australian truck driver, resident in France, driving between French cities with a load including some coal from Russia. By force of reg 12A(3), the prohibition would also catch any person (whether an Australian citizen or not) who used an Australian ship or aircraft to transport import sanctioned goods anywhere in the world.

50 I note that reg 12A(2), according to its terms, does not simply give extraterritorial operation to the prohibition in reg 12A(1). Instead, it applies s 15.1 of the Criminal Code to the offence created by s 16 of the Act, where the offence relates to a contravention of reg 12A(1). This involves some conceptual complexity, as to which I sought and received further written submissions from the parties. I am satisfied that it does not undermine the basis upon which the parties proceeded: that contravention of reg 12A(1) can occur outside Australia and lead, in circumstances referred to in s 15.1(b), (c) or (d), to criminal liability.

(a) The Commonwealth submitted that reg 12A(1) should be understood as capable in its terms of applying to conduct outside Australia, in part because the inclusion of reg 12A(2) makes no sense otherwise. The effect of reg 12A(2), by applying s 15.1 of the Criminal Code, is thus to limit the extraterritorial reach of the offence (under s 16 of the Act) of contravening reg 12A(1). The offence is limited to conduct that has some relevant connection with Australia (eg by the person engaging in the conduct being an Australian citizen or corporation).

(b) The applicant submitted that each of reg 12A(2), (3) and (4) is an expression of extraterritorial effect. I take this to mean that the application of s 15.1 of the Criminal Code to the offence of contravening reg 12A(1) is an expression of legislative intention that reg 12A(1) is to apply to conduct outside Australia to the extent that s 15.1 permits.

(c) To the extent that there is a difference between these positions, it is not necessary to resolve it for present purposes.

51 In the present case, it was submitted, a literal construction of reg 4A(1)(a) makes it impossible for the applicant's Russian subsidiaries to continue their operations. If their mine and port should close, the effect on the Russian government would be minimal but various private interests (including those of workers) would be adversely affected. The applicant submitted that these consequences were so surprising as to require the word "transports" in reg 4A(1)(a)(ii) to be read down.

52 Related to this submission was a suggestion that "transports", read literally, extends to any movement of goods brought about by human agency. Thus, in the present case, the Russian subsidiaries are "transporting" coal if it is carried on a wheelbarrow from the coalface to a truck, or placed on a conveyor. While this is not determinative, I do not consider that the ordinary meaning of "transports" extends this far. A person is not usually said to be "transporting" goods when carrying them around within their own premises. Loading goods on to a truck, a train or a barge is preliminary to, but does not itself constitute, transportation in its ordinary sense.

53 The Commonwealth submitted that proper regard should be had to s 16 of the Act and relevant aspects of the Criminal Code in understanding the exposure of Australian citizens and corporations to criminal liability.

(a) In relation to individuals, s 16(1) and (2) are as follows.

> (1) An individual commits an offence if:
>
> (a) the individual engages in conduct; and
>
> (b) the conduct contravenes a sanction law.
>
> (2) An individual commits an offence if:
>
> (a) the individual engages in conduct; and
>
> (b) the conduct contravenes a condition of an authorisation (however described) under a sanction law.

(b) No express provision is made in relation to the fault elements of these offences. As to the physical element of each offence that consists of a result (ie, contravention of a sanction law or a condition of an authorisation), the relevant fault element is therefore recklessness (Criminal Code s 5.6(2)). The prosecution would therefore need to prove that the individual was reckless (in the sense described in s 5.4 of the Criminal Code) as to whether they were transporting import sanctioned goods.

(c) In relation to bodies corporate, s 16(5) and (6) are as follows:

(5) A body corporate commits an offence if:

(a) the body corporate engages in conduct; and

(b) the conduct contravenes a sanction law.

(6) A body corporate commits an offence if:

(a) the body corporate engages in conduct; and

(b) the conduct contravenes a condition of an authorisation (however described) under a sanction law.

(d) An offence under s 16(5) or (6) is an offence of strict liability: s 16(8). In short, that means that no fault element need be proved (Criminal Code s 6.1). However, s 16(5) and (6) do not apply if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravention: s 16(7).

(e) The prospect of reg 12A bringing criminal sanctions to bear on persons who innocently transport import sanctioned goods, without any reason to be aware that they are breaching Australian sanctions laws, is thus more limited than it might at first appear.

54 With this qualification, the Commonwealth accepted that reg 12A, on its construction of "transports", has the broad reach identified at [49] above. It submitted that part of the intention of the sanctions regime, in relation to import sanctioned goods, is to hinder and depress trade in those goods to the extent that Australian legislation can do so.

55 The main purpose of the "sanctions" authorised by the Act and the Regulations is to seek to exert pressure on governments of other countries whose actions are considered undesirable (cf the objects in s 3 of the Act and the definition of "autonomous sanctions", set out at [57] – [58] below). Whether in the pursuit of that aim it is worthwhile to extend prohibitions on dealing with those countries' goods to Australian citizens and corporations overseas, whose activities may be unconnected with any actual importation of the goods, is a question upon which minds may differ. It is a question of public policy closely connected with the conduct of Australia's foreign relations. The fact that a consequence of giving the Regulations their ordinary meaning might be regarded as draconian is not sufficient to sustain a conclusion that that consequence could not have been intended, and the Regulations must therefore be given a different meaning. It is an error to adopt a conception of what constitutes good policy and assume that that was the legislator's intention: *Certain Lloyd's Underwriters v Cross* [2012] HCA 56; 248 CLR 378 at [25]-[26] (French CJ and Hayne J).

56 The Commonwealth also submitted that the construction advanced by the applicant introduces a significant degree of uncertainty into the operation of reg 12A. There is some force in this submission. A textual basis for limiting the concept of "transport" to an "importation" or "cross-border" setting appears to be absent. If the verb "transports" in reg 4A(1)(a)(ii) takes its colour from its proximity to "imports", it would seem to follow that the transport which is captured is transport for the purpose of, or as part of the process of, importation. Arguably at least, that covers all transport of the subject goods from the time they are identified as objects of international trade to the time they reach the hands of the importer (an understanding which, incidentally, may not assist the applicant in the present case). The point at which goods enter a stream leading to importation to another country may in some circumstances only be apparent in retrospect. However, lack of total clarity is part of the life of the law. It would not be a sufficient reason to decline to adopt the applicants' construction, if that construction were otherwise the preferable one.

Extrinsic materials

57 The Act provides a broad power to apply sanctions by regulation, leaving the particular purposes to be pursued as a matter for judgment by the Executive in framing regulations. Its "main objects", set out in s 3(1), are to:

> (a) provide for autonomous sanctions; and
>
> (b) provide for enforcement of autonomous sanctions (whether applied under this Act or another law of the Commonwealth); and
>
> (c) facilitate the collection, flow and use of information relevant to the administration of autonomous sanctions (whether applied under this Act or another law of the Commonwealth).

58 "Autonomous sanctions" are defined in s 4 as follows.

> ***autonomous sanction*** means a sanction that:
>
> (a) is intended to influence, directly or indirectly, one or more of the following in accordance with Australian Government policy:
>
> (i) a foreign government entity;
>
> (ii) a member of a foreign government entity;
>
> (iii) another person or entity outside Australia; or
>
> (b) involves the prohibition of conduct in or connected with Australia that facilitates, directly or indirectly, the engagement by a person or entity described in subparagraph (a)(i), (ii) or (iii) in action outside Australia that is contrary to Australian Government policy.

59 Given the breadth of these objectives, the extrinsic materials relating to the Act do not shed much if any light on the legislative intention embodied in particular provisions of the Regulations. Consistently with that breadth, the Minister's Second Reading Speech described the purpose of the Bill for the Act as "to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement" and observed that allowing measures to be applied by regulations would "allow the necessary flexibility for the government to respond to fluid and rapidly changing international developments in a timely way" (Commonwealth, *Parliamentary Debates*, House of Representatives, 26 May 2010, 4113 (Stephen Smith, Minister for Foreign Affairs)). In a similar vein, the Explanatory Memorandum to the Bill for the Act said:

> The purpose of the Bill is to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement, thus ensuring Australia's autonomous sanctions match the scope and extent of measures implemented by like-minded countries.

60 The Explanatory Memorandum contained references to autonomous sanctions being "targeted". Read in context, this language should be taken to refer to the capacity, provided by the Act, for the Executive to impose sanctions on particular persons, entities, activities and goods. The Act does not contain any provision requiring sanctions to be "targeted" in the sense of there being particular limits on their application.

61 The Regulations as originally made did not include the provisions of present concern (regs 4A and 12A). The Explanatory Statement for the Regulations (Autonomous Sanctions Regulations 2011, Select Legislative Instrument 2011 No. 247 (Cth) Explanatory Statement) described their field of operation as follows.

> 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.

62 Regulations 4A and 12 were inserted by the *Autonomous Sanctions Amendment Regulation 2012 (No 1)* (Cth) (**the 2012 Amendment**). Relevantly to these provisions, the Explanatory Statement (Autonomous Sanctions Amendment Regulation 2012 (No 1), Select Legislative Instrument 2012 No. 204 (Cth) Explanatory Statement) described the effect of the amendments being made as:

> … to prohibit, without prior authorisation from the Minister:
>
> …
>
> - the import, purchase or transport of Iranian and Syrian crude oil, petroleum or petrochemical products of a kind to be specified by the Minister in a separate instrument, as well as the provision of financial assistance or a financial service related to the import, purchase or transport of such products;
> - any transaction involving the supply, sale, transfer, import, purchase or transport of gold, precious metals and diamonds to which the governments of Iran and Syria, or their respective bodies, corporations or public agencies, are party.

63 The second dot point in this extract serves to emphasise the separate, special treatment of transactions involving gold, precious metals and diamonds with the government of Syria (see [39] above). The first dot point in effect reproduces the language of reg 4A(1)(a) which is in issue in this case. (It refers to the products included in the table in reg 4A(2) but, for obvious reasons, not to any products subsequently designated under reg 4A(3).) The detailed notes on clauses later in the Explanatory Statement simply restate the terms of reg 4A(1)(a).

64 I was also taken to the Explanatory Statements for further amendments to the Regulations made in 2013 (Autonomous Sanctions Amendment Regulation 2013 (No. 1), Select Legislative Instrument 2013 No. 198 (Cth) Explanatory Statement) and 2015 (Autonomous Sanctions Amendment (Russia, Crimea and Sevastopol) Regulation 2015, Select Legislative Instrument 2015 No. 30 (Cth) Explanatory Statement), the Explanatory Statement for the 2022 Designation (Autonomous Sanctions (Import Sanctioned Goods – Russia) Designation 2022 (Cth) Explanatory Statement), the text of a permit issued under the Regulations in February 2023 permitting the transport of certain Russian oil by ship, and a statement issued jointly by the Australian Government and the G7 in connection with that permit. These documents, at most, indicate successive Ministers' understandings of how the Regulations operated (or were to operate following further amendment) at various times after the 2012 Amendment. They are not capable of shedding light on the intention of the legislator at the time of enactment of the Regulations or the 2012 Amendment. They do not assist the construction of reg 4A(1)(a)(ii).

Understandings as to the meaning of the Regulations held within the Executive Government at various times do not have any particular status in themselves: *Minister for Immigration and Citizenship v Yucesan* [2008] FCAFC 110; 169 FCR 202 at [13]-[15].

65 The extrinsic materials do not provide a basis for construing the word "transports" in reg 4A(1)(a)(ii) otherwise than in accordance with its ordinary meaning.

Conclusion on construction

66 The word "transports" in reg 4A(1)(a)(ii) has its ordinary meaning. The activities of the Russian subsidiaries involve actions which constitute "sanctioned imports" as defined in reg 4A.

THE VALIDITY ISSUE

67 The applicant contends that, if the Regulations are construed in this way, they exceed the regulation making power in the Act.

68 That power, as noted above, is broad. Section 28 of the Act is a provision in a familiar form, authorising the Governor-General to 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. As to the matters "required or permitted" to be prescribed, s 10(1) provides:

> (1) The regulations may make provision relating to any or all of the following:
>
> (a) proscription of persons or entities (for specified purposes or more generally);
>
> (b) restriction or prevention of uses of, dealings with, and making available of, assets;
>
> (c) restriction or prevention of the supply, sale or transfer of goods or services;
>
> (d) restriction or prevention of the procurement of goods or services;
>
> (e) provision for indemnities for acting in compliance or purported compliance with the regulations;
>
> (f) provision for compensation for owners of assets that are affected by regulations relating to a restriction or prevention described in paragraph (b).

69 It is appropriate to note that s 10(2) requires, as a precondition to the Governor-General making any regulations, the satisfaction of the Minister that the proposed regulations will: (a) facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia; or (b) otherwise deal with matters, things or relationships outside Australia. This

limit on the regulation-making power is evidently intended to bring the Act within the power to make laws with respect to external affairs in s 51(xxix) of the Constitution.

70 As noted earlier, s 11 expressly authorises regulations having extraterritorial effect.

71 The applicant's submissions focus on s 10(1)(c) and (d) and argue that these provisions are concerned with the "supply", "sale", "transfer" or "procurement" of goods and services. It is submitted that these provisions do not confer any general power to restrict the physical movement of goods. Thus, if "transports" in reg 4A(1)(a)(ii) is construed so as to include transportation other than in the course of transferring goods in or out of a country, the regulation-making power in the Act is exceeded to that extent.

72 I do not accept this submission, for two reasons.

73 First, it ignores s 10(1)(b). For the purposes of that provision, "asset" is defined by s 4 to include:

> an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired …

74 A quantity of a saleable commodity (or a raw material that can be rendered saleable), in the possession of its producer and destined to be sold with a view to profit, is clearly within this conception of an "asset". The power in relation to assets in s 10(1)(b) is very broad, extending to the prevention or restriction of "dealings with" those assets. Moving a quantity of a commodity from one place to another constitutes "dealing with" it.

75 Secondly, the expression "transfer" in s 10(1)(c) is not defined in the Act. It sits alongside "sale" and therefore must be taken to have been intended to add something, in respect of goods, to that concept. It indicates that the subject matter of s 10(1)(c), in so far as it relates to goods, is not limited to transactions that involve transfer of title in the goods. "Transfer", as a matter of ordinary English, is capable of including physical transfer of goods from one place to another. Given the flexible power that was intended to be conferred by the Act, the word should not be read narrowly.

76 Further, if these points were not complete answers to the applicant's argument, it is not apparent that the result would be the complete invalidity of reg 4A(1)(a)(ii). Section 13(1)(c) and (2) of the *Legislation Act 2003* (Cth) require the Regulations to be read so as not to exceed the relevant regulation-making power. For reasons explored in *Deripaska* at [60]-[72] (in respect of another provision of the Regulations), general words in a legislative instrument can

ordinarily be read down so as to conform with a limit on the power to make the instrument, if the operation of what remains of the instrument is unchanged. In the case of a simple prohibition, where the provision that needs to be read down is one that identifies conduct to which the prohibition applies, that condition is satisfied. A conclusion that a literal interpretation of "transports" in reg 4A(1)(a)(ii) resulted in invalidity would call for consideration of whether, giving some more limited scope to the expression, the prohibition in reg 12A can operate validly.

77 The power conferred by s 10(1) is to make regulations "relating to" the matters listed in paragraphs (a) to (f). These are words of considerable breadth: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [87] (McHugh, Gummow, Kirby and Hayne JJ). A regulation prohibiting or restricting the transportation of goods can readily be seen to "relate to" the "sale" or the "transfer" of those goods (s 10(1)(c)) or the "procurement" of those goods (s 10(1)(d)), to the extent that it applies to transportation in a commercial context (such as the Russian subsidiaries' transport of coal from the mine to the port and thence to the ships upon which it is loaded for carriage to customers).

78 For this reason, had I concluded that the construction advanced by the Commonwealth resulted in reg 4A(1)(a) exceeding the regulation-making power in the Act, I would nevertheless hold that transportation of goods as a preliminary to their sale or export (or in the course of performing a contract of sale) is within the valid operation of the prohibition in reg 12A. On the basis of the agreed facts referred to above, this conclusion would not assist the applicant and would not support any declaration as to invalidity.

DISPOSITION

79 The application must be dismissed.

80 Each party sought its costs in the event that it succeeded on the substantive issues, and neither sought to be heard further on the question of costs. There is no apparent reason why costs should not follow the event. There will therefore be an order that the applicant pay the respondent's costs.

I certify that the preceding eighty (80) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett.

Associate:

Dated: 9 April 2024