

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 29

Issued by the Authority of the Minister for Foreign Affairs

Charter of the United Nations Act 1945

Charter of the United Nations (Dealing with Assets) Regulations 2008

The purpose of the Regulations is to implement Australia's obligations to freeze assets and prevent assets being made available to all persons and entities designated by the United Nations Security Council as being subject to such measures. This represents a key difference between the Regulations and the regulations they will repeal, namely the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*, which currently implement Australia's obligations under United Nations Security Council Resolution 1373 (28 September 2001) relating to terrorism. The Regulations will also accommodate amendments made to the *Charter of the United Nations Act 1945* (the Act) by the *International Trade Integrity Act 2007*.

Section 6 of the Act provides that the Governor-General may make regulations for, and in relation to, giving effect to decisions that:

- (a) the Security Council has made under Chapter VII of the Charter of the United Nations; and
- (b) 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.

Section 15 of the Act further provides that the Governor-General may make regulations prescribing matters of which the Minister for Foreign Affairs (the Minister) must be satisfied before listing, by notice in the *Gazette*, a person, entity or asset, to give effect to a decision that:

- (a) the United Nations Security Council has made under Chapter VII of the Charter of the United Nations;
- (b) Article 25 of the Charter of the United Nations requires Australia to carry out; and
- (c) relates to terrorism and dealing with assets.

In addition, section 22A of the Act provides that the Governor-General may make regulations concerning procedures relating to assets that are, may or may become freezable assets.

In 2001 the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1373 (2001) which, among other things, required States to freeze without delay funds, other financial assets and economic resources: of

persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities. It also required States to prohibit the making available of funds, financial assets and economic resources or financial or other related services, directly or indirectly, for the benefit of, such persons or entities, or those acting on their behalf.

The United Nations Security Council has also adopted country-specific resolutions which, among other things, require States to freeze the funds, other financial assets and economic resources of persons and entities designated by the United Nations Security Council as being the subject of such measures, and to prohibit the making available of funds, other financial assets and economic resources to such designated individuals and entities.

The Regulations will:

- (i) define various permissible dealings relating to persons and entities designated under country-specific sanctions regulations;
- (ii) require the Minister to list a person or entity if the Minister is satisfied that the person or entity is mentioned in Resolution 1373;
- (ii) allow the Minister to list an asset, or class of asset, if the Minister is satisfied that the asset, or class of asset, is owned or controlled by a person or entity mentioned in Resolution 1373; and
- (iv) allow a person who holds an asset that the person suspects is, or may be, a controlled asset to request the Australian Federal Police (AFP) to assist the person determine whether or not the asset is owned or controlled by a designated person or entity. Previously, such requests for AFP assistance were limited to assets relating to terrorists and other persons and entities designated pursuant to Resolutions 1267 and 1373, and subsequent related Resolutions. The Regulations will extend the scope of such requests for AFP assistance to relate to assets of all persons and entities designated by the United Nations Security Council as being the subject of asset freeze measures.

Interdepartmental and public consultation was undertaken during the preparation of the Regulations. The Department of Foreign Affairs and Trade conducted briefing sessions on the *International Trade Integrity Act 2007*, including the consequential amendments that would be required for each of the regulations made under the Act, in each State and Territory capital between September and November 2007. In addition, the Department gave industry-specific briefings to peak industry bodies assessed as most likely to be affected (the Australian Bankers Association, the Customs National Consultative Group and the Association of Minerals and Petroleum Lawyers). Finally, from August 2007 the Department posted notices on its website and on the business.gov.au consultation site inviting interested parties to provide written comments on a revised regulatory regime

under the Act as amended. Other Commonwealth agencies, including the Attorney-General's Department, were consulted during the drafting of the Regulations.

The relevant United Nations Security Council Resolutions can be found on the UN website (www.un.org).

Details of the Regulations are set out in the Annex.

Details of the *Charter of the United Nations (Dealing with Assets) Regulations 2008*

Part 1: Preliminary

Regulation 1 states that the name of the Regulations is the *Charter of the United Nations (Dealing with Assets) Regulations 2008*.

Regulation 2 states that the Regulations commence immediately after the commencement of Schedule 1 to the *International Trade Integrity Act 2007*. This is because the Regulations accommodate amendments made by the *International Trade Integrity Act 2007* to the Act.

Regulation 3 states that the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* are repealed. This is because the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* currently implement Australia's obligations under Resolution 1373, whereas the Regulations have a broader scope.

Regulation 4 provides for the definition of certain terms used in the Regulations, including 'controlled asset' and 'designated person or entity'. 'Controlled asset' means a freezable asset or a controlled asset as defined in any of the Sanctions Regulations (as defined in regulation 5). 'Asset' is defined in section 2 of the Act. 'Freezable asset' is defined in section 14 of the Act, and means an asset that is owned or controlled by a proscribed person or entity, is a listed asset, or is derived or generated from these assets. 'Designated person or entity' means a proscribed person or entity, or a designated person or entity as described in any of the Sanctions Regulations. 'Proscribed person or entity' is defined in section 14 of the Act, and means a person or entity listed by the Minister for Foreign Affairs under section 15 or 18 of the Act. The definitions in the Regulations reflect changes in terminology between the Regulations and the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*.

Regulation 5 defines various permissible dealings for the 'Sanctions Regulations'. 'Sanctions Regulations' are listed in regulation 4 and are any of the regulations made under the Act to implement country-specific resolutions that impose obligations on Member States of the United Nations to take certain measures short of the use of armed force against another State or its nationals. Regulation 5 also provides definitions of 'basic expense dealing', 'contractual dealing', 'required payment dealing', 'legally required dealing' and 'extraordinary expense dealing'. These correspond with categories contained within relevant country-specific United Nations Security Council sanctions that impose asset freeze obligations, including Resolution 1373.

Part 2: Grounds for listing persons, entities or assets

The Regulations move from regulation 5 to regulation 20 to allow the insertion, if need be, of further regulations. This deliberate drafting decision is similarly reflected between parts 2 and 3, and parts 3 and 4.

Regulation 20 provides that the Minister must list a person under sub-section 15(2) of the Act if the Minister is satisfied that the person or entity is a person or entity mentioned in paragraph 1(c) of Resolution 1373. Paragraph 1(c) imposes an asset freeze obligation on Member States of the United Nations to freeze terrorist assets and to prevent assets being made available to terrorists. Regulation 20 also specifies that the Minister may list an asset, or class of asset, if the Minister is satisfied that the asset, or class of asset, is owned or controlled by a person or entity mentioned in paragraph 1(c) of Resolution 1373.

Regulation 21 provides for advance notice of listing of persons, entities and assets. The Department may give notice of decisions of the Minister to list a person or entity, or an asset or class of asset, under section 15 of the Act to any person who is engaged in the business of holding, dealing in, or facilitating dealing in, assets. Such notice may be given before notice of the listing that is the subject of the decisions is published in the *Gazette*.

Part 3: Authorised Dealings

Regulation 30 provides that for certain definitions used in Part 3, namely ‘basic expense dealing’, ‘contractual dealing’ and ‘extraordinary dealing’.

Regulation 31 provides that the Minister has the power to authorise certain dealings, if the use or dealing is defined in regulation 30, and if an application has been made under section 22 of the Act specifying for which kind of dealing (as defined in regulation 30) the application is. Section 22 of the Act provides for authorised dealings with freezable assets. (Freezable assets will mean controlled assets under the Regulations).

Part 4: Miscellaneous

Regulation 40 provides that the Department of Foreign Affairs and Trade must maintain a document that sets out all persons and entities that are currently designated persons and entities, and all assets or classes of assets currently listed under the Act. The Department must ensure an electronic version of this list is publicly available on the Internet.

Regulation 41 provides that a person who holds an asset that the person suspects is, or may be, a controlled asset may request the AFP to help the person determine whether or not the asset is owned or controlled by a designated person or entity. Such a request must be accompanied by details of the asset, and as much information about the asset (including information about the owner or controller of the asset) as is known to the person making the request. The AFP must use its best endeavours to help a person who has made such a request, and respond in writing to the person making the request as soon as practicable.

Regulation 41 also provides that the AFP response must state whether the AFP considers that it is likely that the asset is owned or controlled by a designated person or entity, or it is unlikely that the asset is owned or controlled by a designated person or entity, or it is unknown whether the asset is owned or controlled by a designated person or entity. It should be noted that regulation 41, or the Regulations as a whole, do not limit the obligations of a reporting entity under the *Anti-Money Laundering and*

Counter-Terrorism Financing Act 2006.

Regulation 42 sets out what a person who is holding an asset must do if the person forms an opinion that the asset is a controlled asset or the asset, having been a controlled asset, or having been previously treated by the person as a controlled asset, is not, or is no longer, a controlled asset. Regulation 42 further provides that as soon as practicable after a person forms such an opinion, the person must inform the AFP of certain matters.

Regulation 43 provides that, unless it is necessary to do so to comply with the Act or the Regulations, certain protection of information measures apply to a person who, at the time that something is done under the Act or these Regulations, is the Minister, Secretary of the Department, an officer of the Commonwealth, an AFP employee, a member of the AFP, or a person (or an employee or such a person) who holds a controlled asset or an asset that the person suspects may be a controlled asset.

Regulation 44 provides that a person (including the Commonwealth) is not liable to an action, suit or proceeding for anything done or omitted to be done in good faith and without negligence under regulations 41 or 42. It should be noted that section 24 of the Act is an indemnity for anything done or omitted to be done in compliance or purported compliance with the Act.