

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Charter of the United Nations Act 1945

Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) Amendment (Resolution 2397) Regulations 2018

The *Charter of the United Nations Act 1945* provides legislative approval for the Charter of the United Nations in Australian law. Section 6 of the *Charter of the United Nations Act 1945* provides that the Governor-General may make regulations to give effect to decisions of the United Nations Security Council (UNSC) under Chapter VII of the Charter of the United Nations (the Charter) that Australia is required to carry out under Article 25 of the Charter, in so far as those decisions require Australia to apply measures not involving the use of armed force.

The *Charter of the United Nations (Sanctions-Democratic People’s Republic of Korea) Amendment (Resolution 2397) Regulations 2018* (the Regulation) amends the *Charter of the United Nations (Sanctions-Democratic People’s Republic of Korea) Regulations 2008* (the 2008 Regulation) in order to give effect to certain provisions of United Nations Security Council Resolution (UNSCR) 2397 (2017).

UNSCR 2397 was adopted by the Security Council on 22 December 2017. It tightened sanctions on the Democratic People’s Republic of Korea (DPRK) in an attempt to modify its behaviour (including in respect of its weapons of mass-destruction and missile programs), and to demonstrate the international community’s condemnation of the DPRK’s actions. UNSCR 2397 is a decision under Chapter VII of the Charter of the United Nations (the Charter), meaning that Australia is required to carry it out pursuant to Article 25 of the Charter.

The Regulation implements the following measures required by UNSCR 2397:

- Further limits on supplying to the DPRK, including indirectly, crude oil or refined petroleum products.
- Prohibitions on supplying to the DPRK all industrial machinery, transportation vehicles, and iron steel and other metals, with an exception for the provision of spare parts needed to maintain the safe operation of DPRK commercial civilian passenger aircraft. These goods are specified by reference to chapters of the “Harmonised Commodity Description and Coding System” (“HS chapters”).
 - UNSCR 2397 specifies that as of 22 December 2017, ‘DPRK commercial civilian passenger aircraft’ includes the following aircraft models and types: An-24R/RV, An-148-100B, Il-18D, Il-62M, Tu-134B-3, Tu-154B, Tu-204-100B, and Tu-204-300.
- A prohibition on supplying new or used vessels to the DPRK.
- A prohibition on providing insurance or re-insurance services to a vessel which there are reasonable grounds to believe was involved in activities, or the transport of items, prohibited by previous UNSCRRs concerning the DPRK

- Prohibitions on procuring certain food and agricultural products, machinery, electrical equipment, earth and stone (including magnetite and magnesia), wood, and vessels from the DPRK. These goods are specified by reference to HS chapters.
- A prohibition on using an Australian pipeline, Australian railway, or a vehicle that is registered or required to be registered under a law of a State or Territory, to transport refined petroleum products, crude oil, industrial machinery, transportation vehicles, and iron steel and other metals (with an exception for the provision of spare parts needed to maintain the safe operation of DPRK commercial civilian passenger aircraft) for the purpose of supplying them to the DPRK.
- A prohibition on procuring fishing rights from the DPRK, including indirectly.

No public consultation was undertaken in relation to the Regulation under section 17 of the *Legislation Act 2003* as the instrument implements Australia's international legal obligations arising from a decision of the UN Security Council. The Department of Foreign Affairs and Trade conducts regular outreach to the Australian business community to explain Australian sanctions laws implementing UNSC sanctions.

Subsection 6(3) of the Charter of the United Nations Act 1945 provides that, despite subsection 14(2) of the Legislation Act 2003, regulations made for the purposes of subsection 6(1) of the Charter of the United Nations Act 1945 may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing in force or existing from time to time.

United Nations Security Council Resolutions, including those referred to in the Regulation, can be accessed free of charge on the internet at <http://www.un.org/en/sc/documents/resolutions/> (at 26 April 2018).

Chapters of the “Harmonised Commodity Description and Coding System” referred to in the Regulation can be accessed free of charge on the internet at (<https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/Harmonized-Commodity-Description-and-Coding-Systems-HS>) (at 26 April 2018).

United Nations Security Council Resolutions do not operate in the same manner as Acts and legislative instruments. That is, subsequent resolutions in respect of a matter or issue do not always state that they are amending or replacing previous resolutions on that matter or issue. Rather, the resolutions need to be read in conjunction with one another.

The Regulation is a legislative instrument for the purpose of the *Legislation Act 2003*.

The provisions of the Regulation commence in accordance with the table in section 2 of the Regulation.

The Office of Best Practice Regulation has advised that a Regulation Impact Statement is not required (in relation to amendments to the 2008 Regulation when implementing a decision of the UN Security Council) (OBPR reference: 21407).

Full details of the Regulation are set out in the Attachment.

ATTACHMENT

Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment (Resolution 2397) Regulations 2018

Section 1

Section 1 provides that the title of the instrument is the *Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Amendment (Resolution 2397) Regulations 2018*.

Section 2

Section 2 provides that all of the provisions in the instrument commence on the day after the instrument is registered.

Section 3

Section 3 provides that the instrument is made under the *Charter of the United Nations Act 1945*.

Section 4

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

Schedule 1 – Amendments

Schedule 1 sets out the changes that the Regulation makes to the *Charter of the United Nations (Sanctions - Democratic People's Republic of Korea) Regulations 2008* (“2008 Regulation”).

Item 1

Item 1 changes the definition of “authorised service” in Regulation 4 to include, where the service is provided in a foreign country, a permit granted in a way that accords with the foreign country’s obligations under “resolutions of the Security Council relating to the DPRK”.

Item 2

Item 2 changes the definition of “authorised supply” in Regulation 4 to include, where the service is provided in a foreign country, a permit granted in a way that accords with the foreign country’s obligations under “resolutions of the Security Council relating to the DPRK”.

Item 3

Item 3 changes the definition of “export sanctioned goods” in Regulation 4 to replace the reference to “regulation 5” with “subregulation 5(1A)”. This reflects the inclusion of new subregulation 5(1A) in the Regulation, which divides “export sanctioned goods” into the two separate categories of “specified export sanctioned goods” and

“goods... that are not specified export sanctioned goods, and that are not food or medicine” (see Item 8 below).

Item 4

Item 4 adds definitions of “Harmonised Commodity Description and Coding System” and “HS chapter” to Regulation 4. These terms are used in new prohibitions on goods (see Items 10, 13, 16 and 21 below) in the Regulation that reflect obligations imposed by UNSC Resolution 2397.

Item 5

Item 5 changes the reference to “14D or 14DA” in the definition of “import authorised goods” in Regulation 4 to “14D, 14DA or 14DB”. This reflects the addition of the new Regulation 14DB (see Item 28 below).

Item 6

Item 6 changes the definition of “import sanctioned goods” in Regulation 4 to replace the reference to “regulation 7” with “subregulation 7(1A)”. This reflects the inclusion of new subregulation 7(1A) in the Regulation, which divides “import sanctioned goods” into the two separate categories of “specified import sanctioned goods” and “goods... that are not specified import sanctioned goods, and that are not food or medicine” (see Item 11 below).

Item 7

Item 7 adds definitions of “Resolution 2397”, “specified export sanctioned goods” and “specified import sanctioned goods” to Regulation 4.

Item 8

Item 8 inserts a new definition of “export sanctioned goods” into the existing Regulation 5, through a new subregulation 5(1A). This divides “export sanctioned goods” into the two separate categories of “specified export sanctioned goods” and “goods... that are not specified export sanctioned goods, and that are not food or medicine”.

Item 9

Item 9 amends subregulation 5(1) so that it refers to “specified export sanctioned goods”. This reflects the inclusion of new subregulation 5(1A) in the Regulation, which divides “export sanctioned goods” into the two separate categories of “specified export sanctioned goods” and “goods... that are not specified export sanctioned goods, and that are not food or medicine” (see Item 8 above).

Item 10

Item 10 adds to subregulation 5(1), which now lists “specified export sanctioned goods” (see Item 9 above), three new paragraphs referring to new helicopters, vessels

and “goods covered by any of HS chapters 72 to 89”, and repeals the previous reference to “a new vessel, or a new helicopter, that is not arms or related matériel”. This reflects the prohibition in Operative Paragraph 6 of Resolution 2397 on supplying goods covered by the relevant HS chapters to the DPRK.

Item 11

Item 11 inserts a new definition of “import sanctioned goods” into the existing Regulation 7, through a new subregulation 7(1A). This divides “import sanctioned goods” into the two separate categories of “specified import sanctioned goods” and “goods... that are not specified import sanctioned goods, and that are not food or medicine”.

Item 12

Item 12 amends subregulation 7(1) so that it refers to “specified import sanctioned goods”. This reflects the amendment of a new subregulation 7(1A) in the Regulation, which divides “import sanctioned goods” into the two separate categories of “specified import sanctioned goods” and “goods... that are not specified export sanctioned goods, and that are not food or medicine” (see Item 11 above).

Item 13

Item 13 adds a number of categories of goods, defined by the relevant HS chapter, to the list of “specified import sanctioned goods” (see Item 11 above). This reflects the prohibitions imposed by Operative Paragraph 6 of Resolution 2397 on procuring certain categories of goods from the DPRK.

Item 14

Item 14 repeals Part 1A, which contains offences for “exporting items (other than export sanctioned goods etc.)” and “importing items (other than import sanctioned goods etc.)”. This reflects amendments to the definitions of “export sanctioned goods” and “import sanctioned goods” (see items 8 and 11 above), which has the consequence of bringing goods that are not food or medicine, but are also not “specified export sanctioned goods” or “specified import sanctioned goods”, within the scope of the respective prohibitions on making a sanctioned supply, and on procuring, receiving or using the services of an Australian ship or aircraft to transport import sanctioned goods. This means that the unauthorised export or import of goods, which were previously subject to the offence provisions under the repealed Part 1A, are now offences under section 27 of the *Charter of the United Nations Act 1945*.

Item 15

Item 15 amends paragraph 9(4)(a) to clarify that this paragraph prohibits the transport of export sanctioned goods in the manner described.

Item 16

Item 16 inserts a new regulation 9A, which prohibits the use of pipelines or railways in Australia, or vehicles registered or required to be registered under a law of a State or Territory, to make a sanctioned supply to the DPRK of refined petroleum products, crude oil or goods covered by HS Chapters 72 to 89. This reflects prohibitions imposed by Operative Paragraphs 4, 5 and 6 of Resolution 2397.

Item 17

Item 17 inserts a new regulation 11CA, which prohibits procuring fishing rights from the DPRK, a person or entity in the DPRK, or a national of the DPRK. This reflects the clarification in Operative Paragraph 6 of Resolution 2397 that the sectoral ban on seafood imposed by Resolution 2371 prohibits the procurement of fishing rights.

Item 18

Item 18 repeals Regulation 14A, which provides for a permit to “export items (other than export sanctioned goods etc.)”. This reflects the amendment to the definition of “export sanctioned goods” in the new subregulation 5(1A) (see Item 8 above). The permit power previously contained in Regulation 14A is now found in Regulation 14B (see item 24 below).

Item 19

Item 19 inserts a new subtitle above subregulation 14B(2) to clarify that the subregulation concerns the grant of a permit to make a sanctioned supply in circumstances where the approval of the UN Security Council Committee established pursuant to Resolution 1718 is required in advance, as specified by relevant UN Security Council Resolutions.

Item 20

Item 20 replaces the references in Regulation 14B to new vessels and new helicopters that are not arms or related matériel, with references to vessels and new helicopters that are not arms or related matériel. The amendment to subregulation 14B(2) also removes the reference to crude oil, reflecting changes to the restrictions on the power to grant a permit to make a sanctioned supply of crude oil (see Item 24 below).

Item 21

Item 21 adds a new subregulation 14B(2A), to enable the grant of a permit to make a sanctioned supply of goods that are spare parts needed to maintain the safe operation of a DPRK commercial civilian passenger aircraft. This reflects the exemption provided in Operative Paragraph 7 of Resolution 2397 to the prohibition on supplying goods to the DPRK that are covered by the relevant HS chapters.

Item 22

Item 22 adds “Resolution 2397” to the list of Resolutions applicable to the restrictions set out in paragraph 14B(3)(c) on the power to grant a permit to make a sanctioned supply of a refined petroleum product.

Item 23

Item 23 adds another condition to the cumulative restrictions in 14B(3)(c) on the power to grant a permit to make a sanctioned supply, such that the supply, sale or transfer must not involve any person or entity assisting in activities prohibited, or the evasion of the measures imposed, by UN Security Council Resolutions in relation to the DPRK. This reflects Operative Paragraph 5 of Resolution 2397.

Item 24

Item 24 replaces subregulation 14B(4) so as to reflect the new restrictions imposed by Operative Paragraph 5 of Resolution 2397 on the supply of refined petroleum products to the DPRK.

Item 24 also adds a new subregulation 14B(5), which reflects the new restrictions imposed by Operative Paragraph 4 of Resolution 2397 on the supply of crude oil to the DPRK.

Finally, Item 24 adds new subregulations 14B(6), 14B(7), 14B(8) and 14B(9), which concern “export sanctioned goods that are not specified export sanctioned goods”. These replace the repealed Regulation 14A (see Item 18 above) and enable the grant of a permit to make a sanctioned supply of goods that are not “specified export sanctioned goods” where the applicable conditions under the subregulations are satisfied.

Item 25

Item 25 repeals Regulation 14C, which provides for a permit to “import items (other than export sanctioned goods etc.)”. This reflects the amendment to the definition of “import sanctioned goods” in the new subregulation 7(1A) (see Item 11 above). The permit power previously contained in Regulation 14C is now found in the new Regulation 14DB (see Item 28 below).

Item 26

Item 26 changes the heading of Regulation 14D to “Permit for import sanctioned goods – coal”. This clarifies that coal is an “import sanctioned good” pursuant to subregulation 7(1).

Item 27

Item 27 changes the heading of Regulation 14DA to “Permit for import sanctioned goods—statues or textiles.” This clarifies that statues and textiles are “import sanctioned goods” pursuant to subregulation 7(1)).

Item 28

Item 28 adds a new Regulation 14DB, concerning “import sanctioned goods that are not specified import sanctioned goods”. This subregulation replaces the repealed Regulation 14C (see Item 25 above) and enables the grant of a permit to procure, receive or transport goods that are not “specified import sanctioned goods”, where the applicable conditions under the subregulations are satisfied.

Item 29

Item 29 amends subregulation 14J(2) to add the relevant paragraph of Resolution 2397, and to separate out the references to earlier resolutions.

Item 30

Item 30 amends subregulation 14J(3) to reflect the repeal of Part 1A (see Item 14 above).

Item 31

Item 31 repeals Regulation 16, reflecting the replacement of the *Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) Luxury Goods List 2006* with the *Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) (Luxury Goods) Instrument 2017*.

Item 32

Item 32 adds a new Part 4 that concerns application, savings and transitional provisions. The new regulations added by Part 4 provide that permits in force under the superseded regulation 14A continue to have effect under the replacement regulation 14B (see Item 24 above).

Statement of Compatibility with Human Rights

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

Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment (Resolution 2397) Regulations 2018

The *Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Amendment (Resolution 2397) Regulations 2018* (the Regulation) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Regulation amends the *Charter of the United Nations (Sanctions-Democratic People's Republic of Korea) Regulations 2008* (the 2008 Regulation) in order to give effect to certain provisions of United Nations Security Council Resolution (UNSCR) 2397 (2017). UNSCR 2397 was adopted by the Security Council on 22 December 2017. It tightened sanctions on the DPRK in an attempt to modify its behaviour (including in respect of its weapons of mass-destruction and missile programs), and to demonstrate the international community's condemnation of the DPRK's actions. UNSCR 2937 is a decision under Chapter VII of the Charter of the United Nations (the Charter), and Australia is required to carry it out pursuant to Article 25 of the Charter.

The Regulation implements the following measures required by UNSCR 2397:

- Further limits on supplying to the DPRK, including indirectly, crude oil or refined petroleum products.
- Prohibitions on supplying to the DPRK all industrial machinery, transportation vehicles, and iron steel and other metals, with an exception for the provision of spare parts needed to maintain the safe operation of DPRK commercial civilian passenger aircraft.
- A prohibition on supplying new or used vessels to the DPRK.
- A prohibition on providing insurance or re-insurance services to a vessel which there are reasonable grounds to believe was involved in activities, or the transport of items, prohibited by previous UNSCRs concerning the DPRK
- Prohibitions on procuring food and agricultural products, machinery, electrical equipment, earth and stone (including magnetite and magnesite), wood, and vessels from the DPRK.
- A prohibition on using an Australian pipeline, Australian railway, or a vehicle that is registered or required to be registered under a law of a State or Territory, to transport refined petroleum products, crude oil, industrial machinery, transportation vehicles, and iron steel and other metals (with an exception for the provision of spare parts needed to maintain the safe operation of DPRK commercial civilian passenger aircraft) for the purpose of supplying them to the DPRK.
- A prohibition on procuring fishing rights, including indirectly, from the DPRK.

Right to a fair hearing and right to liberty

The Regulation expands the scope of the definitions of ‘export sanctioned goods’ and ‘import sanctioned goods’ in the 2008 Regulation. Because the prohibitions relating to ‘export sanctioned goods’ and ‘import sanctioned goods’ are specified as ‘UN sanction enforcement laws’ under the *Charter of the United Nations (UN Sanction Enforcement Law) Declaration 2008* (the Declaration), contravening these prohibitions may, under section 27 of the *Charter of the United Nations Act 1945*, result in a penalty of imprisonment.

The Regulation also creates new prohibitions on (i) using an Australian pipeline, Australian railway, or a vehicle that is registered or required to be registered under a State or Territory law, to transport certain prohibited goods; and (ii) procuring fishing rights (directly or indirectly) from the DPRK. These new prohibitions in the 2008 Regulation are specified as ‘UN sanction enforcement laws’ by the Declaration, meaning that contravening these prohibitions may, pursuant to section 27 of the *Charter of the United Nations Act 1945*, result in a penalty of imprisonment.

Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) protects the right to a fair trial and fair hearing. Article 9 of the ICCPR protects the right to liberty, including the right not to be arbitrarily detained. The notion of arbitrariness incorporates elements of inappropriateness, injustice and lack of predictability.

In its Report No. 11 of 2017, the Parliamentary Joint Committee on Human Rights (the Committee) expressed the view that prohibitions on dealing with import and export sanctioned goods in the 2008 Regulation engages Articles 9 and 14 (right to liberty) of the ICCPR. The Committee noted that Australia’s human rights obligations require that interferences with a person’s human rights must have a clear basis in law, meaning that any measures which interfere with human rights must be sufficiently certain and accessible, such that people are able to understand when an interference with their rights will be justified.

The Committee, in Report 11 of 2017, expressed concern that the definitions of “export sanctioned goods” and “import sanctioned goods” in the 2008 Regulation were insufficiently precise. The Committee noted that measures limiting the right to liberty must be sufficiently precise such that people who would potentially be subject to them are aware of the consequences of their actions. Accordingly, the Committee raised the concern that the application of the relevant offence provisions to the export and import prohibitions in the 2008 Regulation could result in arbitrary detention in certain cases.

The Government considers that any limitations on human rights that may arise as a consequence of the amended definitions of “export sanctioned goods” and “import sanctioned goods” in the Regulations are permissible and consistent with Australia’s obligations under international human rights law. The new goods that are covered by the amended definitions in the Regulation are described using clear language and succinct terms, such as ‘new helicopter’ and ‘vessels’, that can be readily understood. Further, where applicable, the goods that are added by the Regulation to the

definitions of ‘import sanctioned goods’ and ‘export sanctioned goods’ in the 2008 Regulation are described by reference to the relevant chapters of the Harmonised Commodity Description and Coding System (HS), thereby ensuring that there is a single and accessible reference point for determining whether a particular good falls within the scope of the prohibitions. The relevant HS chapters are publicly available and can be accessed free of charge on the internet at <https://unstats.un.org/unsd/tradekb/Knowledgebase/50018/Harmonized-Commodity-Description-and-Coding-Systems-HS> (at 27 April 2018).

As described above, in expanding sanctions on the DPRK, the Regulation has the legitimate aim of modifying the DPRK’s behaviour and demonstrating the international community’s condemnation of the DPRK’s actions. The Regulations also implement a binding decision of the United Nations Security Council pursuant to Chapter VII of the Charter, which Australia is required as a matter of international law to implement. In accordance with the description of the Regulation above, the Government believes that the relevant measures are a reasonable, necessary and proportionate means of achieving the legitimate and lawful objective of effecting change in the DPRK’s behaviour and implementing a binding decision of the United Nations Security Council.

The Government notes that it keeps its sanctions regimes under regular review, and will continue to consider issues such as human rights compatibility going forward.