

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018

Section 28 of the *Autonomous Sanctions Act 2011* (the Act) provides that the Governor-General may 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.

Autonomous sanctions are punitive measures not involving the use of armed force which a government imposes as a matter of foreign policy - as opposed to an international obligation under a United Nations Security Council decision - in situations of international concern. Such situations include the grave repression of the human rights or democratic freedoms of a population by a government.

The *Autonomous Sanctions Regulations 2011* (the Regulations) facilitate the conduct of Australia's relations with other countries including Myanmar and with specific persons or entities outside Australia. The Regulations enable the imposition of autonomous sanctions on particular persons or entities due to concerns about armed conflict, weapons proliferation and human rights.

The Regulations currently impose an arms embargo in relation to Myanmar, which makes it an offence to directly or indirectly supply, sell or transfer arms or related matériel to Myanmar, for use in Myanmar, or for the benefit of Myanmar, without a sanctions permit. The arms embargo includes restrictions on the export or provision of certain services if it assists with, or is provided in relation to, the direct or indirect supply, sale or transfer of arms or related matériel to Myanmar, for use in Myanmar, or for the benefit of Myanmar; or the manufacture, maintenance or use of arms or related matériel, without a sanctions permit.

The Regulations also enable the Minister for Foreign Affairs (the Minister) to designate a person or entity for targeted financial sanctions and/or declare a person for the purposes of a travel ban, if they satisfy a range of criteria, as set out in regulation 6.

The purpose of a designation is to subject the designated person or entity to targeted financial sanctions. There are two types of targeted financial sanctions under the Regulations:

- the designated person or entity becomes the object of the prohibition in regulation 14 (which prohibits directly or indirectly making an asset available to, or for the benefit of, a designated person or entity, other than as authorised by a permit granted under regulation 18); and/or
- an asset owned or controlled by a designated person or entity is a “controlled asset”, subject to the prohibition in regulation 15 (which requires a person who holds a controlled asset to freeze that asset, by prohibiting that person from

either using or dealing with that asset, or allowing it to be used or dealt with, or facilitating the use of or dealing with it, other than as authorised by a permit granted under regulation 18).

The purpose of a declaration is to prevent a person from travelling to, entering or remaining in Australia.

Each person listed in Schedule 1 of the *Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018* (the 2018 List) is designated by the Minister pursuant to paragraph 6(1)(a) of the Regulations, and declared by the Minister pursuant to paragraph 6(1)(b) of the Regulations, on the basis that the person meets the criteria mentioned in Item 6(d) of the table in subregulation 6(1); that is, they are a person that the Minister is satisfied is:

- a current or former military officer of the rank of Brigadier-General or higher.

The new sanctions comprise financial and travel restrictions on the following five persons which fulfil that criterion.

Persons

- Lieutenant-General Aung Kyaw Zaw (aka Aung Kyaw Zaww)
- Major-General Maung Maung Soe
- Brigadier-General Aung Aung
- Brigadier-General Than Oo
- Brigadier-General Khin Maung Soe

These individuals have been identified by multiple credible sources as being responsible for grave human rights abuses in Rakhine State.

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations and the 2018 List are part, was the subject of extensive consultation with governmental and non-governmental stakeholders.

In order to meet the policy objective of prohibiting unauthorised financial transactions involving the persons specified in the 2018 List, the Department is satisfied that wider consultations beyond those it has already undertaken would be unnecessary (subsections 17(1) and (2) of the *Legislation Act 2003*).

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required (OBPR reference: 24116).

Statement of Compatibility with Human Rights

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

Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018

The *Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018* (the 2018 List) 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*.

Modern sanctions regimes impose highly targeted measures in response to situations of international concern. This includes the grave repression of human rights or democratic freedoms of a population by a government, or the proliferation of weapons of mass destruction or their means of delivery, or internal or international armed conflict. Thus, autonomous sanctions pursue legitimate objectives, and have appropriate safeguards in place to ensure that any limitation on human rights engaged by the imposition of sanctions is justified and a proportionate response to the situation of international concern. The Government keeps its sanctions regimes under regular review, including in relation to whether more effective, less rights-restrictive means are available to achieve similar foreign policy objectives.

The human rights compatibility of the 2018 List is addressed by reference to each of the human rights engaged below.

Right to privacy

Right

Article 17 of the International Covenant on Civil and Political Rights (the ICCPR) prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence.

The use of the term 'arbitrary' in the ICCPR means that any interferences with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the individual circumstances. Arbitrariness connotes elements of injustice, unpredictability, unreasonableness, capriciousness and 'unproportionality'.¹

Reports

The Parliamentary Joint Committee on Human Rights (the Committee) has noted that the designation of a person engages the right to privacy under Article 17 of the ICCPR, including on the basis that the freezing of a person's assets impacts their individual autonomy. The Committee expressed the view that the designation and declaration of a person is a 'significant incursion into a person's right to personal

¹ Manfred Nowak, *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 1993) 178.

autonomy in one's private life', particularly the freezing of a person's assets and the requirement for a permit to access his or her funds for basic expenses. It further noted that it may be difficult for family members to access their own funds for basic expenses (such as household goods), without having to account for the expenditure.

Permissible limitations

The 2018 List is not an unlawful interference with an individual's right to privacy. Section 10 of the *Autonomous Sanctions Act 2011* (the Act) permits regulations relating to, among other things: 'proscription of persons or entities (for specified purposes or more generally)'; and 'restriction or prevention of uses of, dealings with, and making available of, assets'. The 2018 List is made pursuant to regulation 6 of the *Autonomous Sanctions Regulations 2011* (the Regulations), which states that the Minister may, by legislative instrument, designate and/or declare a person for targeted financial sanctions and/or travel bans.

The measures contained in the 2018 List are not an arbitrary interference with an individual's right to privacy. An interference with privacy will not be arbitrary where it is reasonable, necessary and proportionate in the individual circumstances.

In designating an individual under the Regulations for targeted financial sanctions and/or travel bans, the Minister uses predictable, publicly available criteria. These criteria are designed to capture only those persons the Minister is satisfied are involved in situations of international concern, as set out in regulation 6 of the Regulations.

Targeted financial sanctions and travel bans under the autonomous sanctions regime are imposed in response to situations of international concern, including where there are, or have been, egregious human rights abuses, weapons proliferation (in defiance of UN Security Council resolutions), indictment in international criminal tribunals, undemocratic systems of government, and threats to the sovereignty and territorial integrity of a State. Given the seriousness of the human rights abuses occurring in Rakhine state, especially since 25 August 2017, the Government considers that targeted financial sanctions and travel bans are the least rights-restrictive way to achieve its legitimate foreign policy objective of signalling Australia's concerns about the situation in Myanmar.

Accordingly, targeted financial sanctions and travel bans imposed by the Minister through the designation of specific individuals under the Regulations are reasonable, necessary and proportionate to the individual circumstances the sanctions are seeking to address. Therefore, any interference with the right to privacy created by the operation of the 2018 List is not arbitrary or unlawful and, therefore, is consistent with Australia's obligations under Article 17 of the ICCPR.

Right to protection of the family

Right

The right to respect for the family is protected by articles 17 and 23 of the ICCPR. It covers, among other things, the separation of family members under migration laws, and arbitrary or unlawful interferences with the family.

Limitations on the right to protection of the family under articles 17 and 23 of the ICCPR will not violate those articles if the measures in question are lawful and non-arbitrary. An interference with protection of the family will be consistent with the ICCPR where it is necessary and proportionate, in accordance with the provisions, aims and objectives of the ICCPR, and is reasonable in the individual circumstances.

Reports

The Committee has noted that the Regulations engage the right to protection of the family; a person who hold an Australian visa and is declared under the autonomous sanctions regime for the purpose of preventing the person from travelling to, entering or remaining in Australia will have their visa cancelled pursuant to the *Migration Regulations 1994*. If the person is in Australia at the time, this makes the person subject to removal, which may result in that person being separated from their family, which therefore engages and limits the right to protection of the family.

Permissible limitations

As set out above, the autonomous sanctions regime is authorised by domestic law and is not unlawful.

As the listing criteria in regulation 6 are drafted by reference to specific foreign countries, it is highly unlikely, as a practical matter, that a person declared for a travel ban will hold an Australian visa, be located in Australia and have immediate family also in Australia.

The Department of Foreign Affairs and Trade (DFAT) consults relevant agencies as appropriate in advance of a designation and declaration of a person with known connections to Australia to determine the possible impacts of the designation and declaration on any family members in Australia.

To the extent that the travel bans imposed pursuant to the 2018 List engage and limit the right to protection of the family in a particular case, the Regulations allow the Minister to waive the operation of a travel ban on the grounds that it would be either: (a) in the national interest; or (b) on humanitarian grounds. This provides a mechanism to address circumstances in which issues such as the possible separation of family members in Australia are involved. In addition, this decision may be judicially reviewed. Finally, were such a separation to take place, for the reasons outlined in relation to Article 17 above, the position of the Australian Government is that such a separation would be justified in the circumstances of the individual case.

Accordingly, any interference with the right to protection of the family created by the operation of the 2018 List is not unlawful or arbitrary and, therefore, consistent with Australia's obligations under Articles 17 and 23 of the ICCPR.

Right to an adequate standard of living

Right

The right to an adequate standard of living is contained in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (the ICESCR) and requires States to ensure the availability and accessibility of the resources that are essential to the realisation of the right: namely, food, water, and housing.

Article 4 of ICESCR provides that this right may be subject to such limitations ‘as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. To be consistent with ICESCR, limitations must be proportionate.

Reports

The Committee has noted that economic sanctions (generally) engage and limit Article 11(1) of ICESCR, as persons subject to such sanctions will have their assets effectively frozen and may therefore have difficulty paying for basic expenses.

Permissible limitations

The Government considers any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. The Regulations allow for any adverse impacts on family members as a consequence of targeted financial sanctions to be mitigated. The Regulations provide for the payment of basic expenses (among others) in certain circumstances. The objective of the basic expenses exemption is, in part, to enable the Australian Government to administer the sanctions regime in a manner compatible with relevant human rights standards.

The Government considers that the permit process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1).

Right to freedom of movement

Right

Article 12 of the ICCPR protects the right to freedom of movement, which includes a right to leave Australia, as well as the right to enter, remain, or return to one’s ‘own country’.

The right to freedom of movement may be restricted under domestic law on any of the grounds in article 12(3) of the ICCPR, namely national security, public order, public health or morals or the rights and freedoms of others. Any limitation on the enjoyment of the right also needs to be reasonable, necessary and proportionate.

Report

The Committee has expressed the view that the Regulations may in certain circumstances engage Article 12(4) of the ICCPR, concerning the right to enter one’s own country; the Committee noted that the power to cancel a person’s visa that is

enlivened by declaring a person for a travel ban may engage and limit the right to enter one's own country pursuant to Article 12(4) of the ICCPR. According to the Committee, this is because a person's visa may be cancelled (with the result that the person may be removed) in circumstances where that person has a close and enduring connection to Australia such that Australia may be considered their 'own country' for the purposes of the ICCPR, even if that person is not a citizen.

The Committee has also noted that while persons on 'relevant visas',² including protection, refugee or humanitarian visas, cannot have their visa cancelled under section 2.43(1)(aa) of the *Migration Regulations 1994* following the exercise of the Minister's power to declare persons under the Regulations, the Minister's power is incompatible with Australia's protection obligations owed to persons who are not on 'relevant visas', because they do not meet the requirements of independent, effective and impartial review of non-refoulement decisions.

Permissible limitations

To the extent that Article 12(4) is engaged in an individual case, such that a person listed in the 2018 List is prevented from entering Australia as their 'own country', the Government considers the imposition of the travel ban would be justified. As set out above in relation to Article 17 of the ICCPR, travel bans are a reasonable and proportionate means of achieving the legitimate objectives of Australia's autonomous sanctions regime.

Travel bans are reasonable because they are only imposed on persons who the Minister is satisfied are responsible for giving rise to situations of international concern. Thus, preventing a person who is, for example, a senior military officer responsible for grave human rights abuses in Myanmar, from travelling to, entering or remaining in Australia through operation of the 2018 List is a reasonable means to achieve the legitimate foreign policy objective of signalling Australia's concerns about the situation in Myanmar. Australia's practice in this respect is consistent with likeminded partners such as the US, the EU, and the UK.

Under regulation 2.43(1)(aa) of the *Migration Regulations 1994*, the Minister for Home Affairs cannot cancel a visa that is classified as a 'relevant visa'. Regulation 2.43(3) of the *Migration Regulations 1994* provides that a 'relevant visa' includes, among others, a protection, refugee, or humanitarian visa. Australia's non-refoulement obligations is considered at the pre-removal stage for those who fall under subregulation 2.43(1)(aa) of the *Migration Regulations 1994*. As such, the Minister's power is compatible with Australia's protection obligations engaged by a person on a visa other than a 'relevant visa'.

The Minister may also waive the operation of a declaration that was made for the purpose of preventing a person from travelling to, entering or remaining in Australia, on the grounds that it would be in the national interest, or on humanitarian grounds. This decision is subject to natural justice requirements, and may be judicially reviewed.

² As that term is defined in section 2.43(1)(aa) of the *Migration Regulations 1994*.

To the extent that Australia's non-refoulement obligations are engaged through a travel ban, and noting the Committee's previous queries in relation to section 197C of the *Migration Act 1958*, Australia will continue to meet its non-refoulement obligations through mechanisms other than the removal powers in section 198 of the *Migration Act 1958*, including through the protection visa application process, and through the use of the Minister's personal powers in the *Migration Act 1958*. These mechanisms ensure that non-refoulement obligations are addressed before a person becomes ready for removal under section 198.

Right to equality and non-discrimination

Right

The right to equality and non-discrimination under Article 26 of the ICCPR provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that people are equal before the law and are entitled without discrimination to the equal and non-discriminatory protection of the law.

Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria, serves a legitimate objective, and is a proportionate means of achieving that objective.

Reports

The Committee has taken the view that Australia's autonomous sanctions regime engages Article 26 of the ICCPR to the extent that the designation or declaration of a person may result in indirect discrimination on the basis of national origin or nationality. The Committee expressed the view that designation or declarations in relation to specified countries appeared to have a disproportionate impact on persons on the basis of national origin or nationality.

Permissible limitations

The Government considers that any differential treatment of people as a consequence of the application of the 2018 List does not amount to discrimination pursuant to Article 26 of the ICCPR.

The criteria set out in regulation 6 of the Regulations are reasonable and objective. They are reasonable insofar as they list only those States and activities which the Government has specifically determined give rise to situations of international concern. They are objective, as they provide a clear, consistent and objectively-verifiable reference point by which the Minister is able to make a designation or declaration. The Regulations serve a legitimate objective, as discussed above.

To the extent that the measures result in a differential impact on persons from particular countries, this is both proportionate and justifiable. Country-specific sanctions will inevitably impact persons from certain countries more than others, as they are used as a tool of foreign diplomacy to facilitate the conduct of Australia's international relations with particular countries. In this case, the measures will impact

persons of Myanmarese national origin or nationality, because the situation of international concern that the measures respond to is within Myanmar.

The Government considers that denying access to international travel and the international financial system to certain designated individuals is a highly targeted, justified and less rights-restrictive means of achieving the aims of the Regulations, including in a context where other conventional mechanisms are unavailable. While the Government recognises these measures may impact individuals of certain nationalities and national origins more than others, it does not have information that supports the view that affected groups are vulnerable. Rather, the individuals designated in the 2018 List are persons the Minister is satisfied are involved in activities that give rise to situations of international concern. Further, there are several safeguards, such as the availability of judicial review and regular review processes, in place to ensure that any limitation is proportionate to the objective being sought.