

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Continuing Effect Declaration 2020

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 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 threats to regional peace and stability posed by the Democratic People's Republic of Korea's (DPRK) nuclear, other weapons of mass destruction and ballistic missile programs, and related proliferation activities.

The *Autonomous Sanctions Regulations 2011* (the Regulations) makes provisions relating to, amongst other things, the designation of vessels or classes of vessels as 'sanctioned vessels'. Under subregulation 8(4) of the Regulations, the Minister for Foreign Affairs (the Minister) may issue a written direction requiring a sanctioned vessel to leave Australia (including by a particular route), or to not enter a particular port or place, or any port or place, in Australia. The ability to issue such a direction to a sanctioned vessel for the DPRK assists in ensuring that other DPRK sanctions measures that Australia has in place — such as restrictions on the import and export of goods and services and on dealing with designated persons and entities — are complied with. Regulation 16 of the Regulations prohibits engaging in conduct that causes a sanctioned vessel to contravene a direction that has been given by the Minister. As regulation 16 of the Regulations is specified as a sanction law by the *Autonomous Sanctions (Sanction Law) Declaration 2012*, a person who contravenes regulation 16 commits an offence under section 16 of the Act. Regulation 17 of the Regulations provides that where a direction is given to a sanctioned vessel under subregulation 8(4), and the vessel contravenes that direction, the vessel is forfeited to the Commonwealth.

The imposition of sanctions, including through the designation of vessels, is designed to increase pressure on the DPRK to comply with its non-proliferation obligations consistent with United Nations Security Council resolutions, and engage in serious negotiations on its nuclear and missile programs.

In 2017 the Minister, through the *Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Designation 2017* (the Designation) (F2017L00877 on the Federal Register of Legislation), designated a class of vessels in respect of the DPRK as 'sanctioned vessels' pursuant to subregulation 8(1) of the Regulations. Under section 4 of the Designation, the class of

vessels designated as sanctioned vessels is essentially any vessel that is flagged or registered in the DPRK as well as vessels owned, operated or controlled by DPRK persons or entities. Under subregulation 9(1) of the Regulations, the Designation ceases to have effect three years after the date on which it took effect unless the Minister declares the Designation is to continue.

The *Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Continuing Effect Declaration 2020* (the Declaration) continues the Designation under subregulation 9(3) of the Regulations. No specific criteria needs to be met under the Regulations in order for the Minister to make a declaration continuing the effect of the Designation.

Section 1 of the Declaration provides that the name of the instrument is the *Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Continuing Effect Declaration 2020*.

Section 2 of the Declaration provides that it will commence the day after it is registered on the Federal Register of Legislation.

Section 4 of the Declaration defines DPRK and adopts the definitions set out in the Designation for DPRK vessel class, sanctioned vessels and vessel.

Section 5 of the Declaration declares that the designation of each vessel within the DPRK vessel class as a sanctioned vessel for the DPRK in the *Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Designation 2017* continues to have effect.

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations and the Declaration are part, was the subject of extensive consultation with governmental and non-governmental stakeholders. The Department of Foreign Affairs and Trade (DFAT) undertook public consultation in relation to the continuation of the Designation through its website, seeking submissions from interested parties. Persons and entities who subscribe to DFAT's sanctions email updates list were also notified of the consultation process. The public consultation process ran for 4 weeks and no submissions were received in response when the consultation period closed on 26 April 2020.

The Office of Best Practice Regulation advised that a regulation impact statement is not required (OBPR Reference: 26252).

Statement of Compatibility with Human Rights

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

Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Continuing Effect Declaration 2020

The *Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Continuing Effect Declaration 2020* (the Declaration) 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 threats to regional peace and stability posed by the Democratic People's Republic of Korea's (DPRK) nuclear, weapons of mass destruction and proliferation programs. 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 Declaration continues in effect the *Autonomous Sanctions (Classes of Sanctioned Vessels - Democratic People's Republic of Korea) Designation 2017* (the Designation) which defines the 'DPRK vessel class', and designates each vessel that comes within the 'DPRK vessel class' as a 'sanctioned vessel' under paragraph 8(1)(b) of the *Autonomous Sanctions Regulations 2011* (the Regulations). Under subregulation 9(1) of the Regulations, the Designation ceases to have effect three years after the date on which it took effect unless the Minister declares the Designation is to continue.

Under subregulation 8(4) of the Regulations, the Minister for Foreign Affairs (the Minister) may direct a sanctioned vessel to leave Australia, including by a particular route, or to not enter a particular port or place, or any port or place, in Australia. Importantly, under regulation 8(5), before issuing such a direction, the Minister must have regard to Australia's obligations at international law. This includes Australia's obligations under the United Nations Convention on the Law of the Sea and related agreements, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Finally, under regulation 17, sanctioned vessels are forfeited to the Commonwealth in the event of non-compliance with a direction, except if the contravention is necessary to secure the safety of the sanctioned vessel or human life.

The ability to issue directions to sanctioned vessels assists in ensuring that other DPRK sanction measures that Australia has in place — such as restrictions on the import and export of goods and services, restrictions on providing bunkering services to vessels and other services and restrictions on dealing with designated persons and entities — are complied with. The Declaration is a mechanism through which Australia can maintain its foreign policy and national security interests, and facilitate compliance with Australian sanctions laws with respect to the DPRK.

As set out above, the human rights compatibility of the Declaration is safeguarded by subregulation 8(5), pursuant to which the Minister must have regard to Australia's obligations at international law – including the ICCPR and ICESCR – before issuing a direction. The human rights compatibility of the Declaration is further addressed by reference to each of the human rights engaged below.

Right to respect for 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 respect for 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 respect for 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.

Permissible limitations

The Declaration is not an unlawful interference with the right to respect for the family. Section 10 of the *Autonomous Sanctions Act 2011* (the Act) permits regulations to apply sanctions. The Declaration is made pursuant to regulation 8 of the *Autonomous Sanctions Regulations 2011* (the Regulations), which provides that the Minister may, by legislative instrument, designate a sanctioned vessel.

As the Declaration designates DPRK vessels, it is highly unlikely, as a practical matter, that any person on such a vessel will hold an Australian visa, usually reside in Australia and have immediate family in Australia.

To the extent that the designation of DPRK vessels engage and limit the right to respect for the family in a particular case, the Regulations require the Minister to have regard to Australia's obligations at international law – including Articles 17 and 23 of the ICCPR – before issuing a direction. This provides a mechanism to address circumstances in which issues such as the possible separation of family members in Australia were involved. Finally, were such a separation to take place such a separation would be justified in the circumstances.

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

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.

Permissible limitations

To the extent that Article 12(4) is engaged in an individual case, such that a person on a designated vessel is prevented from entering Australia as their 'own country' through the issuing of a direction, any direction to that vessel would be justified. As set out above in relation to Articles 17 and 23 of the ICCPR, the Regulations require the Minister to have regard to Australia's obligations at international law – including Article 12(4) of the ICCPR – before issuing a direction. Designation of and directions to DPRK vessels for the purposes of upholding compliance with Australia's autonomous sanctions measures are a reasonable and proportionate means of achieving the legitimate objectives of the regime.

Non-refoulement

The obligations relating to the prohibition on torture and other cruel, inhuman or degrading treatment or punishment under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT) and Article 7 of the ICCPR, as well as Article 6 of the ICCPR on the right to life and prohibition on arbitrary deprivation of life, may be engaged in rare circumstances involving a direction to a designated vessel where there was a person on board that vessel who had entered Australia and was seeking protection in Australia. There is no permissible derogation from these implied or express non-refoulement obligations.

To the extent that a direction to a designated vessel may engage Australia's non-refoulement obligations, the Designation is consistent with Australia's international non-refoulement obligations as, in addition to exercising discretion over whether or not to issue a direction to a designated vessel, the Minister has the power to revoke a Designation or a direction issued. Under subregulation 8(5) of the Regulations, before giving a direction to a designated vessel, the Minister must have regard to Australia's obligations at international law. Further, non-refoulement obligations are considered prior to a person becoming available for removal under the *Migration Act 1958*. A person must not be removed from Australia to another country if there is a real risk that the person may be subjected to arbitrary deprivation of life, the death penalty, torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment.

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.

Permissible limitations

Any differential treatment of people as a consequence of the application of the Declaration does not amount to discrimination pursuant to Article 26 of the ICCPR.

The designation of DPRK vessels for the purposes of upholding compliance with Australia's autonomous sanctions regime is reasonable and objective. It is reasonable insofar as it only relates to DPRK vessels, in an effort to uphold compliance with autonomous sanctions and address activities which the Government has specifically determined give rise to situations of international concern. It is objective, insofar as it provides a clear, consistent and objectively-verifiable reference point ('DPRK vessel class') by which the Minister is able to issue a direction.

To the extent that the measures result in a differential impact on persons from the DPRK, 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 predominately impact persons of DPRK nationality due to the class of vessels designated and the situation of international concern to which the measures respond.

Designating classes of vessels, issuing directions to them, and forfeiture in the event of non-compliance, 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 these measures may impact individuals of certain nationalities and national origins more than others, there is no information to support the view that affected groups are vulnerable. Rather, the individuals impacted by the Declaration are persons on DPRK vessels, designated for the purposes of upholding compliance with autonomous sanctions that have been established to respond to situations of international concern. Further, there are several safeguards in place, such as the requirement to take into account international obligations before issuing a direction, and prohibition on forfeiture in the event that a contravention was necessary to secure the safety of a sanctioned vessel or human life, to ensure that any limitation is proportionate to the objective being sought.