

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Act 2011

Autonomous Sanctions Amendment (Myanmar) Regulations 2022

Section 10 of the *Autonomous Sanctions Act 2011* (the Act) enables the Governor-General to make regulations applying sanctions. Section 10 (paragraph 10(1)(a)) of the Act provides that the *Autonomous Sanctions Regulations 2011* (the principal Regulations) may make provision relating to the proscription of persons or entities for specified purposes or more generally. Section 28 of 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 the Australian Government imposes and implements as a matter of foreign policy. They are a discretionary tool which the Government can apply, alone or with like-minded countries where appropriate, to address egregious situations of international concern.

When considering whether to apply autonomous sanctions, the Government considers Australia's national interest, including bilateral, regional and multilateral equities, and the impact of sanctions on Australia's economic, security or other interests.

Autonomous sanctions differ from United Nations Security Council sanctions which the United Nations Security Council imposes and which all United Nations Member States, including Australia, are obliged to implement as a matter of international law.

The principal Regulations enable, among other things, the Minister for Foreign Affairs (the Minister) to designate a person or entity for targeted financial sanctions, and declare a person for a travel ban, if the Minister is satisfied that the person or entity meets criteria specified in the principal Regulations. Designations and declarations are hereafter collectively referred to as 'listings'. The principal Regulations provide that the Minister must make listings by legislative instrument.

Schedule 1 of the Regulations would amend the principal Regulations by enabling the Minister to list, under the Myanmar sanctions regime, additional categories of persons for targeted financial sanctions or travel bans and entities for targeted financial sanctions.

The amendments in Schedule 1 of the Regulations expand the listing criteria for the Myanmar sanctions regime set out in item 6 of the table in subregulation 6(1) of the principal Regulations, enabling the Minister to:

- designate or declare a current or former member of the State Administration Council (SAC) or National Defence and Security Council (NDSC) or any successor of either body with similar functions
- designate or declare a current or former member of any other body that the Minister is satisfied is a key governance body of a regime controlled by the Myanmar military
- designate or declare a current or former member of a political party or association that the Minister is satisfied is part of, or is participating in the governance or administration of, a regime controlled by the Myanmar military

- designate an entity that the Minister is satisfied is owned or controlled by, or provides support (including political support) to, a regime controlled by the Myanmar military, and
- designate an entity that the Minister is satisfied is owned or controlled by a person listed for targeted financial sanctions or a travel ban under the Myanmar sanctions regime.

In line with the existing criteria, the new criteria enables sanctions to be imposed on immediate family members of persons mentioned in item 6 of the table in regulation 6, or on entities that are owned or controlled by immediate family members.

The term ‘immediate family member’ is defined in regulation 3 of the principal Regulations to mean a person’s spouse, adult child, spouse of an adult child, parent, brother, sister, stepbrother or stepsister or the spouse of a brother, sister, stepbrother or stepsister.

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

- a 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.

Details of the Regulations which amend the principal Regulations are set out at **Attachment A**.

The legal framework for the imposition of autonomous sanctions by Australia, of which the principal Regulations are part, was the subject of extensive consultation with governmental and non-governmental stakeholders when introduced. The expansion of the criteria under the Myanmar autonomous sanctions regime was subject to targeted consultation with stakeholders potentially impacted by the Regulations, including Australian businesses, humanitarian and development partners and Commonwealth Government agencies. The Department is satisfied that targeted consultation with potentially impacted stakeholders was appropriate and practicable in this instance.

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required (OBPR reference: 01632).

The instrument 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*. A statement of compatibility with human rights is at **Attachment B**.

Autonomous Sanctions Amendment (Myanmar) Regulations 2022

Section 1

The title of the instrument is the *Autonomous Sanctions Amendment (Myanmar) Regulations 2022*.

Section 2

Subsection 2(1) provides that the instrument commences the day after it is registered.

Subsection 2(2) is a technical provision that makes clear that any information inserted in column 3 of the table about the specific date of commencement is not part of the instrument and can be inserted or edited at a later date.

Section 3

The instrument is made under the *Autonomous Sanctions Act 2011*.

Section 4

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

Schedule 1

Item 1

Regulation 6 of the Regulations sets out the listing criteria for existing sanctions to enable a person or entity to be designated for targeted financial sanctions or for a person to be declared for a travel ban. Item 6 of the table in regulation 6 sets out the listing criteria for the Myanmar sanctions regime.

Item 1 expands on the existing listing criteria for imposing sanctions on persons under the Myanmar sanctions regime by inserting a new paragraph (ga) into item 6 of the table in regulation 6.

Subparagraph (ga)(i) provides that the Minister may designate or declare a current or former member of the State Administration Council (SAC) or any successor of that body with similar functions.

Subparagraph (ga)(ii) provides that the Minister may designate or declare a current or former member of the National Defence and Security Council (NDSC) and any successor of that body with similar functions.

Subparagraph (ga)(iii) provides that the Minister may designate or declare a current or former member of any other body that the Minister is satisfied is a key governance body of a regime controlled by the Myanmar military.

Subparagraph (ga)(iiii) provides that the Minister may designate or declare a current or former member of political party or association that the Minister is satisfied is part of, or is participating in the governance or administration of, a regime controlled by the Myanmar

military.

Item 2

Item 2 is a technical amendment that is consequential to item 1. Item 2 extends the Minister's ability to list an immediate family member of a person mentioned in paragraphs (a) to (g) to include an immediate family member of a person mentioned in paragraph (ga).

The term 'immediate family member' is defined in regulation 3 of the Regulations to mean a person's spouse, adult child, spouse of an adult child, parent, brother, sister, stepbrother or stepsister or the spouse of a brother, sister, stepbrother or stepsister.

Item 3

Item 3 expands on the existing listing criteria by introducing criteria to enable the imposition of targeted financial sanctions on entities under the Myanmar sanctions regime by inserting new paragraph (i) into item 6 of the table in regulation 6.

Subparagraph (i)(i) provides that the Minister may designate an entity where the Minister is satisfied that the entity is owned or controlled by, or provides support to (including political) support to, a regime controlled by the Myanmar military. This clause is intended to capture a broad range of entities, including for example:

- a private company that provides financial support to a regime controlled by the Myanmar military
- a military organisation that provides support to a regime controlled by the Myanmar military, including providing support to former military personnel, and
- military aligned political parties that provide political support to a regime controlled by the Myanmar military.

Subparagraph (i)(ii) provides that the Minister may designate an entity where the Minister is satisfied that the entity is owned or controlled by a person mentioned in any of paragraphs (a) to (ga) or an immediate family member of such a person.

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Attachment B

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

AUTONOMOUS SANCTIONS AMENDMENT (MYANMAR) REGULATIONS 2022

The Autonomous Sanctions Amendment (Myanmar) Regulations 2022 (the Regulations) are 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*.

Overview of the Amendment Regulations

Section 10 of the *Autonomous Sanctions Act 2011* (the Act) enables the Governor-General to make regulations applying sanctions. Section 10 (paragraph 10(1)(a)) of the Act provides that the *Autonomous Sanctions Regulations 2011* (the principal Regulations) may make provision relating to the proscription of persons or entities for specified purposes or more generally. Section 28 of the Act also 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 the Australian Government imposes and implements as a matter of foreign policy. They are a discretionary tool which the Government can apply, alone or with like-minded countries where appropriate, to address egregious situations of international concern.

When considering whether to apply autonomous sanctions, the Government considers Australia's national interest, including bilateral, regional and multilateral equities, and the impact of sanctions on Australia's economic, security or other interests.

Autonomous sanctions differ from United Nations Security Council sanctions which the United Nations Security Council imposes and which all UN Member States, including Australia, are obliged to implement as a matter of international law.

The principal Regulations enable, among other things, the Minister for Foreign Affairs (the Minister) to designate a person or entity for targeted financial sanctions, and declare a person for a travel ban, if the Minister is satisfied that the person or entity meets criteria specified in the Regulations. Designations and declarations are hereafter collectively referred to as 'listings'. The Regulations provide that the Minister must make listings by legislative instrument.

Schedule 1 of this instrument amends the Regulations to enable the Foreign Minister to list, under the Myanmar sanctions regime, the additional categories of persons for targeted financial sanctions or travel bans.

The amendments in Schedule 1 of this instrument expand the listing criteria for the Myanmar sanctions regime set out in item 6 of the table in subregulation 6(1) of the Regulations, enabling the Minister for Foreign Affairs to:

- designate or declare a current or former member of the State Administration Council (SAC) or National Defence and Security Council (NDSC) or any successor of either body with similar functions
- designate or declare a current or former member of any other body that the Minister is satisfied is a key governance body of a regime controlled by the Myanmar military
- designate or declare or a current or former member of a political party or association that the Minister is satisfied is part of, or is participating in the governance or administration of, a regime controlled by the Myanmar military
- designate an entity that the Minister is satisfied is owned or controlled by, or provides support (including political support) to, a regime controlled by the Myanmar military, and
- designate an entity that the Minister is satisfied is owned or controlled by a person listed for targeted financial sanctions or a travel ban under the Myanmar sanctions regime.

In line with the existing criteria, the new criteria enables sanctions to be imposed on immediate family members of persons mentioned in item 6 of the table in regulation 6, or on entities that are owned or controlled by immediate family members.

Human rights implications

Australia can, and already does, impose targeted financial sanctions and travel bans on a number of persons in response to the situation of international concern in Myanmar. The instrument designates additional categories of persons and entities for targeted financial sanctions and declare additional categories of persons for travel bans under the Myanmar autonomous sanctions regime. This enhances the Government's ability to respond rapidly to a variety of situations in Myanmar.

The amendments do not change the overarching operation of the existing Regulations. The amendments enable the Government to impose financial sanctions on additional categories of persons and entities, and travel bans on additional categories of persons, in Myanmar. Each legislative instrument making listings against persons or entities in these additional categories will be accompanied by a separate Statement of Compatibility, which will address rights that are relevant to those particular listings.

These legislative instruments have the potential to impact on the following rights:

- the right to privacy (Article 17 of the ICCPR);
- the right to respect for the family (Articles 17 and 23 of the ICCPR);
- the right to an adequate standard of living (Article 11(1) of the International Covenant on Economic, Social and Cultural Rights);
- the right to freedom of movement (Article 12 of the ICCPR); and
- the right to non-refoulement (which comes from obligations relating to the prohibition on torture and other cruel, inhuman or degrading treatment or punishment under Article 3 of 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).

We consider that the following aspects of the Regulations would prevent legislative instruments listing persons for targeted financial sanctions and travel bans from breaching the rights above. The Regulations are transparent and targeted. When listing a person under the Regulations for targeted financial sanctions or a travel ban, the Minister uses predictable, publicly available criteria. These criteria are designed to capture only those persons the Minister is satisfied are in the categories of persons or entities, as set out in regulation 6 (table item 6) of the Regulations.

Once a listing has been made, the Minister may revoke the listing at any time, upon application or on his or her own initiative. The Regulations provide that listings automatically expire after three years if not otherwise continued in effect by legislative instrument.

When considering whether to continue a listing, the Minister invites submissions from the listed person or entity, or their authorised representatives. The Minister does not consult a person or entity in advance of listing them for the first time, which would put the person or entity on notice that they may be listed, providing an opportunity for them to remove assets from Australian jurisdiction and rendering any listing less effective.

Listing decisions are subject to judicial review but not merits review. In line with the principles developed by the Administrative Review Council, the exclusion of merits review is justified as sanctions listings decisions can affect Australia's relations with other countries and, as such, are decisions of high political content with the decision-making power personally vested in the Minister.

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.

The Regulations also allow the Minister, upon application, to provide for certain payments to be made to a designated person and for a designated person's assets to be dealt with in certain circumstances, including in relation to food, housing, medicine and medical treatment. The Minister may, upon his or her own initiative, provide for payments to be made to a designated person, or for a designated person's assets to be dealt with, if the Minister is satisfied that to do so is in the national interest.

Conclusion

This instrument is compatible with human rights as the measures in the Regulations do not raise any human rights issues.