

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Designated Persons and Entities and Declared Persons— Thematic Sanctions) Instrument 2022

Autonomous sanctions are measures not involving the use of armed force which a government imposes as a matter of foreign policy in response to situations of international concern.

Section 3 of the *Autonomous Sanctions Act 2011* (the Act) provides for country-specific or thematic sanctions regimes. Thematic sanctions regimes allow Australia to respond flexibly and swiftly to egregious situations of international concern wherever they occur.

Regulation 6A of the *Autonomous Sanctions Regulations 2011* (the Regulations) enables the Minister for Foreign Affairs (the Minister) to designate a person or entity, and/or declare a person, to address serious violations or serious abuses of human rights, or serious corruption.

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 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
- 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.

Designations and declarations are referred to collectively as ‘listings’.

Section 10(4) of the Act provides that, before making a thematic sanctions listing decision, the Minister must consult and obtain the agreement in writing of the Attorney-General, and consult such other Ministers as the Minister considers appropriate. These provisions ensure that thematic sanctions listings decisions take account of all relevant foreign policy and other national interest considerations.

In accordance with Regulation 6A, the *Autonomous Sanctions (Designated Persons*

and Entities and Declared Persons—Thematic Sanctions) Instrument 2022 (the Instrument) designates 39 persons for targeted financial sanctions and declares the persons for travel bans.

These are the inaugural listings made by the Minister under Australia's thematic autonomous sanctions regimes in relation to serious violations or serious abuses of human rights and serious corruption. The listings signify the significance of the mistreatment of Sergei Magnitsky as the inspiration for the global Magnitsky movement, which Australia joined when it established its Magnitsky-style thematic autonomous sanction regimes in December 2021. This demonstrates Australia's commitment to act in our national interest to impose costs on, influence and deter those responsible for egregious situations of international concern wherever they occur.

In accordance with Regulation 6A(4), the Instrument lists 25 persons that have engaged in, been responsible for, or been complicit in, serious violations or serious abuses of human rights in Russia. The listings cover serious violations or serious abuses of the right to life, and of the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, in relation to the mistreatment and death of Sergei Magnitsky in Russia in 2009.

In accordance with regulation 6A(5), the Instrument lists 14 Russian persons that have engaged in, been responsible for, or been complicit in, serious corruption in relation to the corruption uncovered by Sergei Magnitsky.

Details of the Instrument are set out at **Attachment A**.

Under subregulations 9(1) and (2) of the Regulations, listings that are made under regulation 6A of the Regulations cease to have effect three years after the date on which they took effect, unless the Minister declares they are to continue pursuant to subregulation 9(3).

The legal framework for the imposition of thematic human rights and corruption sanctions was the focus of a 12-month Parliamentary inquiry which received written and oral submissions from both government and civil society. Measures included in the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021* implemented key aspects of the Government's response (tabled 5 August 2021) to the Joint Standing Committee on Foreign Affairs, Defence and Trade's report on its inquiry '*Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement?*'.

The new thematic sanctions listing criteria form part of Australia's existing legal framework for the imposition and implementation of targeted financial sanctions and travel bans. This framework was the subject of extensive consultation with government and non-government stakeholders at the time of its introduction. The new sanctions being imposed through the making of the Instrument were subject to consultation within government and with relevant international partners.

In order to meet the policy objective of prohibiting unauthorised financial transactions involving the persons designated in the Instrument, the Minister is satisfied that wider

consultations beyond those already undertaken would not be appropriate or practicable (subsections 17(1) and (2) of the *Legislation Act 2003*). Consultation would risk alerting the persons to the impending sanctions and enabling capital flight before assets can be frozen.

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required for this listing instrument (OBPR reference: 22-02066).

Attachment A

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Instrument 2022

Section 1

The title of the instrument is the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Instrument 2022* (the Instrument).

Section 2

The Instrument commences the day after it is registered.

Section 3

The Instrument is made under paragraph 6A of the *Autonomous Sanctions Regulations 2011*.

Section 4

Regulations is defined in this instrument as the *Autonomous Sanctions Regulations 2011*.

Section 5

Subsections 5(1) and (2) relate to serious violations or serious abuses of human rights. These subsections provide that each person mentioned in an item of the table in Schedule 1 is a designated and declared person.

Section 6

Subsections 6(1) and (2) relate to serious corruption. These subsections provide that each person mentioned in an item of the table in Schedule 2 is a designated and declared person.

Schedule 1

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Instrument 2022

The persons listed in Clause 1 of Schedule 1 are designated by the Minister for targeted financial sanctions and declared by the Minister for travel bans for the purposes of paragraph 6A(4).

The Minister made the designations and declarations being satisfied that each of the 25 persons had engaged in, been responsible for, or been complicit in a serious violation or serious abuse of a person's right to life, or right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Schedule 2

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Instrument 2022

The persons listed in Schedule 2 are designated by the Minister for targeted financial

sanctions and declared by the Minister for travel bans for the purposes of paragraph 6A(5) of the Regulations.

The Minister made the designations and declarations being satisfied that each of the 14 persons had engaged in, been responsible for, or been complicit in an act of corruption that is serious.

Statement of Compatibility with Human Rights

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

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Instrument 2022

The *Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Thematic Sanctions) Instrument 2022* (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*.

Australia's autonomous sanctions regimes impose highly targeted measures in response to situations of international concern. Section 3 of the *Autonomous Sanctions Act 2011* (the Act) provides for country-specific or thematic sanctions regimes. Thematic sanctions regimes allow Australia to respond flexibly and swiftly to egregious situations of international concern wherever they occur.

The *Autonomous Sanctions Regulations 2011* (the Regulations) make provision for, amongst other things, the proscription of persons for autonomous sanctions. The Instrument, made under regulation 6A of the Regulations, designates persons for targeted financial sanctions and declares persons for travel bans. Designations and declarations are referred to collectively as 'listings'.

The Minister made the listings being satisfied that the persons met the listing criteria in regulation 6A of the Regulations in relation to serious violations and serious abuses of human rights, or serious corruption.

The thematic sanctions listings made by this Instrument pursue legitimate objectives. They have appropriate safeguards in place to ensure that any limitation on human rights engaged by the imposition of sanctions is a reasonable, necessary and proportionate response to the situation of international concern, and do not affect particularly vulnerable groups.

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 Instrument 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

Permissible limitations

The Instrument is not an unlawful interference with an individual's right to privacy. Section 10 of the Act permits regulations relating to, among other things: 'proscription of persons (for specified purposes or more generally)'; and 'restriction or prevention of uses of, dealings with, and making available of, assets'.

The designations and declarations contained in the Instrument were made pursuant to regulation 6A of the Regulations, which provides that the Minister may, by legislative instrument, designate a person for targeted financial sanctions, and/or declare a person for a travel ban.

The measures contained in the Instrument 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 listing a person under the Regulations for targeted financial sanctions and 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 6A of the Regulations.

Accordingly, targeted financial sanctions and travel bans imposed by the Minister through the listing of specific persons 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 Instrument is not arbitrary or unlawful and, therefore, is consistent with Australia's obligations under Article 17 of the ICCPR.

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

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

As set out above, autonomous sanctions regimes are authorised by domestic law and are not unlawful.

As the listing criteria in regulation 6A of the Regulations are drafted to address themes of international concern, and the listings in the Instrument are made in relation to specific foreign countries where those themes arise, it is highly unlikely, as a practical matter, that a person declared for a travel ban will hold an Australian visa, usually reside in Australia, or have immediate family in Australia.

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

To the extent that the travel bans imposed pursuant to the Instrument engage and limit the right to respect for the family in a particular case, the Regulations provide sufficient flexibility to treat different cases differently.

Regulation 19 of the Regulations provides that the Minister may 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 decision is subject to natural justice requirements, and may be judicially reviewed. This provides a mechanism to address circumstances in which issues such as the possible separation of family members in Australia are involved. In any case, were such a separation to take place, for the reasons outlined in relation to Article 17 above, such a separation would be reasonable, necessary and proportionate justified in the achieving the objective of the Instrument.

Accordingly, any interference with the right to respect for the family created by the operation of the Instrument 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 (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 the 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 the ICESCR, limitations must be proportionate.

Permissible limitations

Any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is reasonable and necessary to achieve the objective of the Instrument and are proportionate due to the targeted nature of listings.

The Regulations also provide sufficient flexibility to treat different cases differently by allowing 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’ in regulation 20 is, in part, to enable the Australian Government to administer the sanctions regime in a manner compatible with relevant human rights standards.

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.

Permissible limitations

As the listing criteria in regulation 6A of the Regulations are drafted to address themes of international concern, and the listings in the Instrument are made in relation to specific foreign countries where those themes arise, it is highly unlikely, as a

practical matter, that a person declared for a travel ban would be an Australian citizen, or have spent such lengths of time in Australia, such that Australia could be considered their ‘own country’. Furthermore, travel bans – which are a power to refuse a visa and to cancel a visa – do not apply to Australian citizens.

To the extent that Article 12(4) is engaged in an individual case, such that a person listed in the Instrument is prevented from entering Australia as their ‘own country’, 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, necessary 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 whom the Minister is satisfied are responsible for giving rise to situations of international concern. Preventing a person who meets the listing criteria in regulation 6A of the Regulations in relation to serious violations and serious abuses of human rights or serious corruption from travelling to, entering or remaining in Australia through operation of the Instrument is a reasonable means to achieve the legitimate foreign policy objective of signalling Australia’s stance on situations of international concern. Australia’s practice in this respect is consistent with that of other countries such as the United States, the United Kingdom and Canada.

Regulation 19 of the Regulations provides that the Minister may 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 decision is subject to natural justice requirements, and may be judicially reviewed.

Non-refoulement

Right

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, are engaged by the travel restrictions in the Instrument. There is no permissible derogation from these implied or express non-refoulement obligations.

Permissible limitations

To the extent that the travel bans imposed pursuant to the Instrument engage Australia’s non-refoulement obligations 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.

A travel ban may lead to the cancellation of a visa held by a non-citizen lawfully in Australia, which can lead to removal under section 198 of the *Migration Act 1958*. Australia will continue to meet its non-refoulement obligations through mechanisms prior to the person becoming available for removal under the *Migration Act 1958*,

including through the protection visa application process, and through the use of the Minister for Home Affairs' personal powers in the *Migration Act 1958*.

The Instrument is consistent with Australia's international non-refoulement obligations as, together with the Foreign Minister's powers to revoke a declaration or waive its operation in an individual case, 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; or torture or cruel, inhuman 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 Instrument does not amount to discrimination pursuant to Article 26 of the ICCPR.

The criteria set out in regulation 6A of the Regulations are reasonable and objective. They are reasonable insofar as they allow the Minister to list only those persons the Minister is satisfied have been involved, as specified in the listing criteria, in 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.

Denying access to international travel and the international financial system to certain listed persons is a highly targeted, justified and least rights-restrictive means of achieving the objectives of the Regulations, including in a context where other conventional mechanisms are unavailable.

While these measures may impact persons 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 designated in the Instrument are persons the Minister is satisfied have been involved, as specified in the listing criteria, in 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.