

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment Instrument 2023

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 in response to situations of international concern. 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.

The *Autonomous Sanctions Regulations 2011* (the Regulations) make provision for, among other things, the proscription of persons and entities for autonomous sanctions in relation to Myanmar. The Regulations enable 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 they satisfy a range of criteria, as set out in Regulation 6. Designations and declarations are referred to collectively as ‘listings’.

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/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.

Designated and declared persons in relation to Myanmar are listed in the *Autonomous Sanctions (Designated and Declared Persons—Myanmar) List 2018* (the List).

The *Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment Instrument 2023* (the Instrument) amends the List. In accordance with regulation 6, the Instrument lists 16 persons for targeted financial sanctions and travel bans, and lists 2 entities for targeted financial sanctions under the Myanmar listing criteria. The Minister made the listings being satisfied that the persons and entities meet the listing criteria mentioned in item

6 of the table in regulation 6, that is the persons are current or former members of the State Administration Council, and that the Minister is satisfied that the entities are owned or controlled by, or provide support (including political support) to, a regime controlled by the Myanmar military; or are owned or controlled by a person mentioned in any of paragraphs (a) to (ga) of regulation 6 or by an immediate family member of such a person.

Under subregulations 9(1) and (2) of the Regulations, listings that are made under regulation 6 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).

Details of the Instrument, which amends the 2018 List are set out at **Attachment A**.

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations are part, was the subject of extensive consultation with governmental and non-governmental stakeholders when introduced. The new sanctions being imposed through the making of the Instrument were subject to targeted consultation within government.

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 is not appropriate in the circumstances as it would risk alerting 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 (OBPR reference: OBPR22-02078).

This Instrument is exempt from sunseting under table item 10B of section 12 of the Legislation (Exemptions and Other Matters) Regulation 2015 on the basis that it is subject to a more stringent statutory review process than is set out in Part 4 of Chapter 3 of the *Legislation Act 2003*.

Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment Instrument 2023.

Section 1

The title of the instrument is the *Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment Instrument 2023* (the Instrument).

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 in any published version of this instrument.

Section 3

The instrument is made under section 6 of the *Autonomous Sanctions Regulations 2011*.

Section 4

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

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

Item 1

Item 1 of Schedule 1 amends section 1 of the *Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018* (the Principal List) to change the title of the Principal List to the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Myanmar) List 2018*.

This change is required as the Minister is exercising the power to designate entities for targeted financial sanctions provided for by paragraph (i) of the listing criteria set out in table item 6 of regulation 6 of the Regulations.

Item 2

Omits “paragraphs 6(1)(a) and (b)” and substitutes “subregulation 6(a) and (b)”. Item 2 is a technical amendment that is required due to a change in the numbering of the authorising power in the Regulations resulting from amendments made by the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021*.

Item 3 and 4

Items 3 and 4 of Schedule 1 are technical amendments to update the headings of Part 2 and section 4 of the Principal List to make it clear that they relate to persons and entities designated and declared under the Myanmar listing criteria set out in item 6 of the table in regulation 6 of the *Autonomous Sanctions Regulations 2011* (the Regulations). These amendments are necessary because the Principal List now includes entities designated under the Myanmar listing criteria (see item 9).

Item 5 and 6

Items 5 and 6 are technical amendments that are required due to a change in the numbering of the authorising power in the Regulations. These amendments ensure that the relevant paragraph of the Regulations is referenced.

Item 7

Item 7 is a technical amendment to reflect that Schedule 1 of the Principal Instrument will have two parts following the designation of entities (see item 9).

Item 8

The persons listed in item 8 of Schedule 1 to this instrument are designated by the Minister for the purposes of paragraph 6(a) of the Regulations and declared by the Minister for the purposes of paragraph 6(b) of the Regulations. The 16 persons are persons that the Minister is satisfied are current or former members of the State Administration Council.

Item 9

Item 9 adds a new Part to Schedule 1 to the Principal List. The entities listed in the new Part 2 are designated by the Minister for the purposes of paragraph 6(a) of the Regulations. The 2 entities are entities that Minister is satisfied are owned or controlled by, or provide support (including political support) to, a regime controlled by the Myanmar military; or are owned or controlled by a person mentioned in any of paragraphs (a) to (ga) of regulation 6 or by an immediate family member of such a person.

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) Amendment Instrument 2023

Attachment B

The *Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment Instrument 2023* (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 egregious situations of international concern. The Government considers that targeted financial sanctions and travel bans are the most effective and least rights-restrictive way to achieve its legitimate foreign policy objective of signalling Australia's ongoing concerns about the situation in Myanmar. These sanctions allow a targeted response to Australia's concerns about serious violations of human rights committed by the military regime and ongoing efforts to suppress the rights of the civilian population through violence and coercion.

The listings made by this Instrument pursue legitimate objectives and 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 *Autonomous Sanctions Regulations 2011* (the Regulations) make provision for, among other things, the proscription of persons and entities for autonomous sanctions in relation to Myanmar. The Regulations enable 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 they satisfy a range of criteria, as set out in Regulation 6. Designations and declarations are referred to collectively as 'listings'.

The human rights compatibility of the Instrument is addressed by reference to each of the human rights engaged below. To the extent that the Instrument relates to the designations of an entity for targeted financial sanctions, human rights are only affected insofar as they are prohibited from making an asset to, or for the benefit of, the designated entity or making an asset which they own or control to be used with or dealt with by a designated entity. This does not engage any of the applicable rights or freedoms.

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 or entities (for specified purposes or more generally)'; and 'restriction or prevention of uses of, dealings with, and making available of, assets'. The listings contained in the Instrument were made pursuant to regulation 6 of the Regulations, which provides that the Minister may, by legislative instrument, designate a person or entity 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/or travel bans, the Minister uses predictable, publicly available criteria. These criteria are designed to capture only those persons that the Minister is satisfied are involved in situations of international concern, as set out in regulation 6 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.

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.

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

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 6 of the Regulations 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, 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 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 6 of the Regulations are drafted by reference to specific foreign countries, 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 item 6 of the table in regulation 6 of the Regulations 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 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 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 6 of the Regulations are reasonable and objective. They are reasonable insofar as they only allow the Minister to list 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 necessary to achieve the objective of the Instrument. Country-specific sanctions will inevitably impact persons from certain countries more than others, given 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 Myanmar nationality due to the location of the situation of international concern to which the measures respond.

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 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.