

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—Democratic People’s Republic of Korea) Amendment (No. 3) Instrument 2023

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. 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) make provision for, among other things, the proscription of persons or entities for autonomous sanctions in relation to the DPRK. Regulation 6 of the Regulations enables the Minister for Foreign Affairs (the Minister) to designate a person or entity for targeted financial sanctions and/or declare a person for 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:

- 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 persons and entities, and designated entities, in relation to the DPRK are listed in the Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Democratic People’s Republic of Korea) List 2012 (the 2012 List).

In accordance with regulation 6, the Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Democratic People’s Republic of Korea) Amendment (No. 3) Instrument 2023 (the 2023 Instrument) gives effect to the following:

- The renewal of the designations and declarations (together referred to as listings) of 10 persons and 10 entities that were continued in effect by the Minister in December 2020.
 - These listings were continued in effect on the basis that these persons or entities met the criteria mentioned in item 1 of the table in regulation 6, that is a person the Minister is satisfied is associated with the DPRK's weapons of mass destruction or missiles programs, or has assisted, in the violation, or evasion, by the DPRK of (i) Resolution 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321 of the United Nations Security Council; or a subsequent resolution relevant to a resolution mentioned in (i).
 - Under subregulations 9(1) and (2) of the Regulations, designations and declarations that are declared to continue to have effect under subregulation 9(3) cease to have effect three years after the making of the most recent declaration, unless the Minister declares they are to continue pursuant to subregulation 9(3).

The 2023 Instrument continues under subregulation 9(3) of the Regulations the designations and declarations which were continued in effect in December 2020, with the exception of those that are now subject to United Nations Security Council (UNSC) sanctions. The Minister made the 2023 Instrument being satisfied that each of the persons and entities listed in Part 1 of Schedule 1 of the 2023 Instrument continues to meet the current criteria set out in item 1 of the table in regulation 6, being a person or entity that:

- is, or has been, associated with the DPRK's weapons of mass destruction program or missiles program; or
- is assisting, or has assisted, in the violation, or evasion, by the DPRK of UN Security Council Resolutions 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321, or a subsequent resolution relevant to one of the aforementioned resolutions.

The latest biodata of persons and entities listed in Part 1 of Schedule 1 of the 2023 Instrument have been amended where updated information is available. The 2023 Instrument removes the names of 12 persons and 10 entities from the 2012 List, on the basis that those designations and declarations do not require renewal as the relevant persons and entities are now subject to UNSC sanctions.

Details of the 2023 Instrument, which amends the 2012 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 Department of Foreign Affairs and Trade undertook public consultation in relation to the listings contained in the 2023 Instrument through its website. No submissions were received in response to this public consultation.

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* (Cth).

The Office of Impact Analysis (OIA) has advised that a Regulation Impact Statement is not required for listing instruments of this nature (OBPR22-02078).

Autonomous Sanctions (Designated Persons and Entities and Declared Persons—
Democratic People’s Republic of Korea) Amendment (No. 3) Instrument 2023

Section 1

The title of the instrument is the Autonomous Sanctions (Designated Persons and Entities and Declared Persons—Democratic People’s Republic of Korea) Amendment (No. 3) Instrument 2023 (the 2023 Instrument).

Section 2

Sections 1 to 4 of the 2023 Instrument commence on 1 December 2023. Schedule 1, Part 1 of the instrument commences on 1 December 2023. Schedule 1 Part 2 of the 2023 Instrument commences on 2 December 2023.

Section 3

Section 3 provides that the 2023 Instrument is made under paragraphs 6(a) and (b) and subregulation 9(3) of the Autonomous Sanctions Regulations 2011 (the Regulations).

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Subsection 33(3) of the *Acts Interpretation Act 1901* has been relied on, in conjunction with regulation 6 of the Regulations, to:

- update the information of some of the designated and declared persons and designated entities in the Autonomous Sanctions (Designated Persons and Entities – Democratic People’s Republic of Korea) List 2012 (the 2012 List); and
- repeal the listings of 12 persons and 10 entities from the 2012 List, on the basis that those designations and declarations do not require renewal as the persons and entity are now subject to UNSC sanctions.

Section 4

Section 4 provides that each instrument that is specified in a Schedule to the 2023 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 2023 Instrument has effect according to its terms.

Schedule 1 Part 1 —Amendments

Autonomous Sanctions (Designated Persons and Entities – Democratic People’s Republic of Korea) List 2012.

Item 1

Item 1 contains the Minister’s declaration under subregulation 9(3) of the Regulations that the designations, and where relevant, declarations of 10 persons and 10 entities under paragraphs 6(a) and 6(b) of the Regulations continue to have effect.

Items 2 to 8

Part 2 of Schedule 1 of the 2012 List sets out persons that the Minister has designated for targeted financial sanctions under paragraph 6(a) of the Regulations and declared for the purposes of a travel ban under paragraph 6(b) of the Regulations.

Items 2 to 8 effect the Minister's declaration under subregulation 9(3) of the Regulations that the listings of the persons listed in Part 1 of Schedule 1 of the 2023 Instrument continue to have effect.

The listings are continued on the basis that each person meets the criteria mentioned in item 1 of the table in regulation 6; that is, they are a person that the Minister is satisfied:

- is, or has been, associated with the DPRK's weapons of mass destruction program or missiles program; or
- is assisting, or has assisted, in the violation, or evasion, by the DPRK of UN Security Council Resolutions 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321, or a subsequent resolution relevant to one of the aforementioned resolutions.

Items 9 to 13

Part 3 of Schedule 1 of the 2012 List sets out entities that the Minister has designated for targeted financial sanctions under paragraph 6(a) of the Regulations.

Items 9 to 12 effect the Minister's declaration under subregulation 9(3) of the Regulations that the listings of the entities listed in Part 3 of Schedule 1 of the 2023 Instrument continue to have effect.

The listings are continued on the basis that each entity meets the criteria mentioned in item 1 of the table in regulation 6; that is, they are an entity that the Minister is satisfied:

- is, or has been, associated with the DPRK's weapons of mass destruction program or missiles program; or
- is assisting, or has assisted, in the violation, or evasion, by the DPRK of UN Security Council Resolutions 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321, or a subsequent resolution relevant to one of the aforementioned resolutions.

Schedule 1 Part 2 —Repeals

Autonomous Sanctions (Designated Persons and Entities – Democratic People’s Republic of Korea) List 2012.

Item 1

Item 1 repeals the listings of 12 persons listed in Part 2 of Schedule 1 of the 2012 List, on the basis that those listings ceased to have effect on 2 December 2023.

These persons are captured by UNSC sanctions under the Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) Regulations 2008 (and therefore subject under Australian law to targeted financial sanctions and travel bans).

Item 2

Item 2 repeals the listing of 10 entities listed in Part 3 of Schedule 1 of the 2012 List, on the basis that the listing ceased to have effect on 2 December 2023.

These entities are captured by UNSC sanctions under the Charter of the United Nations (Sanctions – Democratic People’s Republic of Korea) Regulations 2008 (and therefore subject under Australian law to targeted financial sanctions).

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—
Democratic People’s Republic of Korea) Amendment (No. 3) Instrument 2023

The Autonomous Sanctions (Designated Persons and Entities and Declared Persons—
Democratic People’s Republic of Korea) Amendment (No. 3) Instrument 2023 (the
2023 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 frameworks 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,
other weapons of mass destruction and ballistic missile programs, and related
proliferation activities. 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 a reasonable, necessary and proportionate response
to the situation of international concern, and do not affect particularly vulnerable
groups. The Government keeps its sanctions frameworks under regular review,
including in relation to whether more effective, less rights-restrictive means are
available to achieve similar foreign policy objectives.

The 2023 Instrument continues under subregulation 9(3) of the Regulations the
designations and declarations that were last continued in effect in December 2020.
The Minister made the 2023 Instrument being satisfied that each of the persons and
entities meets the current criteria set out in item 1 of the table in regulation 6 and is a
person or entity that:

- a) is, or has been, associated with the DPRK’s weapons of mass destruction
program or missiles program; or
- b) is assisting, or has assisted, in the violation, or evasion, by the DPRK of UN
Security Council Resolutions 825, 1540, 1695, 1718, 1874, 1887, 2087,
2094, 2270 or 2321, or a subsequent resolution relevant to one of the
aforementioned resolutions.

The human rights compatibility of the 2023 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 2023 Instrument 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 designations and declarations contained in the 2023 Instrument were made pursuant to regulation 6 of the *Autonomous Sanctions Regulations 2011* (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 (and declare a continuation in effect under subregulation 9(3)).

The measures contained in the 2023 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 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.

Accordingly, targeted financial sanctions and travel bans imposed by the Minister through the designation and declaration of specific persons under the Regulations are reasonable, necessary and proportionate to the individual circumstances the sanctions are seeking to address. Any interference with the right to privacy created by the operation of the 2023 Instrument is not arbitrary or unlawful and 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, the autonomous sanctions framework is authorised by domestic law and is 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 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 2023 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. Under the Regulations, 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 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, such a separation would be reasonable, necessary, proportionate and justified in achieving the objective of the 2023 Instrument.

Accordingly, any interference with the right to respect for the family created by the operation of the 2023 Instrument is not unlawful or arbitrary and, is 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 2023 Instrument and are proportionate due to the targeted nature of listings. The Regulations also provide sufficient flexibility to treat each case 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 framework 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) of the ICESCR.

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) of the ICCPR is engaged in an individual case, such that a person listed in the 2023 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 framework. 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.

Preventing a person who is, for example, known to have undertaken activities linked to the DPRK’s nuclear or other weapons of mass destruction programs, from travelling to, entering or remaining in Australia through operation of the 2023 Instrument, is a reasonable means to achieve the legitimate foreign policy objective of signalling Australia’s concerns about the DPRK weapons of mass destruction and missiles programs. Australia’s practice in this respect is consistent with that of other countries such as the United States, the European Union, and the United Kingdom.

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 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 2023 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 2023 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 2023 Instrument is consistent with Australia's international non-refoulement obligations as, together with the 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, 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 2023 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 list only those foreign countries 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 throughout this statement.

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 2023 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 DPRK 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 individuals is a highly targeted, justified and less 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 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 listed in the 2023 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.