

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment (Continuation of Effect) Instrument 2021

Section 28 of the *Autonomous Sanctions Act 2011* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Autonomous sanctions are measures not involving the use of armed force which a government imposes as a matter of foreign policy—as opposed to an international obligation under a United Nations Security Council decision—in response to situations of international concern. Such situations include the grave repression of the human rights or democratic freedoms of a population by a government.

The *Autonomous Sanctions Regulations 2011* (the Regulations) make provision for, amongst other things, the proscription of persons or entities for autonomous sanctions. 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 the purposes of a travel ban, if the Minister is satisfied that they meet one of the criteria, as set out in item 6 of the table at subregulation 6(1).

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 respect of Myanmar are listed in the *Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018* (the 2018 List).

Under subregulations 9(1) and 9(2) of the Regulations, designations and declarations cease to have effect on the third anniversary of the day on which they took effect or

were most recently declared to continue in effect, unless the Minister declares (or further declares) that they are to continue in effect pursuant to subregulation 9(3) of the Regulations.

In accordance with subregulation 9(3) of the Regulations, the *Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment (Continuation of Effect) Instrument 2021* (the Instrument) amends the 2018 List to continue in effect the designations and declarations of five persons for targeted financial sanctions and travel bans. The Minister made the designations and declarations being satisfied that the individuals are current or former military officers of the rank of Brigadier-General or higher, and therefore meet the criteria set out in item 6 of subregulation 6(1). The Instrument also makes several minor technical drafting amendments.

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

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations and the 2018 List are part, was the subject of extensive consultation with governmental and non-governmental stakeholders when introduced. The Department of Foreign Affairs and Trade (DFAT) undertook consultation through its website in relation to whether the designations and declarations contained in the 2018 List should continue in effect, seeking submissions from relevant parties. The consultation process ran for four weeks and no submissions were received. The consultation period closed on 10 September 2021.

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required (OBPR reference: 26252).

*Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment
(Continuation of Effect) Instrument 2021*

Section 1

The title of the instrument is the *Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment (Continuation of Effect) Instrument 2021*.

Section 2

The instrument commences the day after it is registered.

Section 3

The Instrument is made under paragraphs 6(1)(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 subregulation 6(1) of the Regulations, to:

- insert “Part 1” and “Part 2” headings before section one and section 4 respectively, amend the headings of sections 4 and Schedule 1 and remove a subheading in Schedule 1 of the *Autonomous Sanctions (Designated and Declared Persons – Myanmar) List 2018* (the 2018 List)
- in section 3 amend the wording to more accurately specify the operative paragraphs of the Regulations under which the instrument is made.
- omit an unnecessary numbered paragraph in subsection 4(1)
- update the information of some of the designated and declared persons from the 2018 List whose designations and declarations are continued in effect by the Instrument.

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

Item 1 is a technical amendment to insert the heading of new Part 1 and is necessary because there are now multiple parts to the 2018 List.

Item 2

Item 2 is a technical amendment required to more accurately specify the operative paragraphs of the Regulations under which the instrument is made.

Item 2A

Item 2A is a technical amendment to insert the heading of new Part 2 and is necessary because there are now multiple parts to the 2018 List.

Item 3

Item 3 is a technical amendment required to more accurately specify the operative paragraphs of the Regulations under which persons mentioned in Schedule 1 are designated or declared.

Item 3A

Item 3A inserts the new Part 3 into the 2018 List. Section 5 of Part 3 provides that Part 3 is made for the purposes of subregulation 9(3) of the Regulations. Section 6 contains the Minister's declaration under subregulation 9(3) of the Regulations that the designations of the persons in subsection 6(1) and the declarations of the persons in subsection 6(2) continue to have effect.

The designations and declarations of the following persons are continued on the basis that each person meets the criteria in paragraph (d) of item 6 of the table in subregulation 6(1) of the Regulations; that is, they are a person who the Minister is satisfied is a current or former military officer of the rank of Brigadier-General or higher.

- Aung Kyaw Zaw (aka Aung Kyaw Zaww)
- Maung Maung Soe
- Aung Aung
- Than Oo
- Khin Maung Soe

Item 4

Item 4 repeals Schedule 1 of the 2018 List and replaces it with a new, updated Schedule listing the designated and declared persons whose designations and declarations are continued in effect by new section 6.

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 (Continuation of Effect) Instrument 2021

The *Autonomous Sanctions (Designated and Declared Persons—Myanmar) Amendment (Continuation of Effect) Instrument 2021* (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*.

Modern sanctions regimes impose highly targeted measures in response to situations of international concern, including the grave repression of the human rights of a population by a government. Autonomous sanctions pursue legitimate objectives, and have appropriate safeguards in place to ensure that any limitation on human rights engaged by the imposition of sanctions is justified and a proportionate response to the situation of international concern. The Government keeps its sanctions regimes under regular review, including in relation to whether more effective, less rights-restrictive means are available to achieve similar foreign policy objectives.

The Instrument continues, under subregulation 9(3) of the *Autonomous Sanctions Regulations 2011* (the Regulations), designations and declarations made in relation to Myanmar in 2018. The Minister made the Instrument being satisfied that each of the persons listed in Schedule 1 of the Instrument meets the current criteria set out in item 6(d) of the table of subregulation 6(1), that being that the individuals are current or former military officers of the rank of Brigadier-General or higher.

The Instrument also makes several minor technical drafting amendments.

The human rights compatibility of the Instrument is addressed by reference to each of the human rights engaged below.

This Statement considers the extent to which the measures in the Instrument impact on the human rights of individuals located in Australia. In this context, it is noted none of the individuals listed for sanctions in relation to Myanmar have been in Australia at any time during their listing.

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 *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 Instrument were made pursuant to subregulation 9(3) of the *Autonomous Sanctions Regulations 2011* (the Regulations), which provides that the Minister may, by legislative instrument, declare that a designation or declaration specified in the instrument continues to have effect.

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 continuing the designation and/or declaration of 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.

Targeted financial sanctions and travel bans under the autonomous sanctions regime are imposed in response to situations of international concern, including where there are, or have been, egregious human rights abuses, weapons of mass destruction proliferation (in defiance of UN Security Council resolutions), indictment in international criminal tribunals, undemocratic systems of government, and threats to the sovereignty and territorial integrity of a State. Given the seriousness of the human rights abuses occurring in Rakhine state, especially since 25 August 2017, the Government considers that targeted financial sanctions and travel bans are the least rights-restrictive way to achieve its legitimate foreign policy objective of signalling Australia’s concerns about the situation in Myanmar.

Accordingly, targeted financial sanctions and travel bans imposed by the Minister through the continuation of the designation and declaration of specific individuals 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, as such, 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 regime 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 Instrument engage and limit the right to respect for the family in a particular case, 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. 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 justified in the circumstances.

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 justified. The Regulations also allow 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 ‘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 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 who the Minister is satisfied are responsible for giving rise to situations of international concern. Thus, preventing a person who is, for example, a senior military officer responsible for grave human rights abuses in Myanmar, 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 concerns about the situation in Myanmar. 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 in the national interest, or 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 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, 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 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 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 justifiable. Country-specific sanctions will inevitably impact persons from certain countries more than others, as they are used as a tool of foreign diplomacy to facilitate the conduct of Australia's international relations with particular countries. In this case, the measures will predominately impact persons of Myanmar national origin or 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 designated individuals is a highly targeted, justified and less rights-restrictive means of achieving the aims of the Regulations, including in a context where other conventional mechanisms are unavailable. While these measures may impact individuals of certain nationalities and national origins more than others, there is no information to support the view that affected groups are vulnerable. Rather, the individuals 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.