Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Designated and Declared Persons – Ukraine) Amendment List 2020

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 the Australian 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 threats to a country's sovereignty and territorial integrity.

The *Autonomous Sanctions Regulations 2011* (the Regulations) make provision relating to, amongst other things, the proscription of persons or entities for autonomous sanctions, including in relation to the threat to the territorial integrity and sovereignty of Ukraine. Regulation 6 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 are responsible for, or complicit in, the threat to the territorial integrity and sovereignty of Ukraine (item 9 of the table at subregulations 6(1)).

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:

- the 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.

Regulation 9 of the Regulations provides that designations and declarations made under regulation 6 cease to have effect on the third anniversary of the day on which the designation or declaration took effect unless it is declared to continue to have

effect. Regulation 9(3) provides that the Minister may declare that a designation or declaration under regulation 6 continues to have effect.

Designated and declared persons, and designated entities, in respect of Ukraine are listed in the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014* (the 2014 List).

Details of the *Autonomous Sanctions (Designated and Declared Persons – Ukraine) Amendment List 2020* (the Amendment List) which amend the 2014 List are set out at **Attachment A**.

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

In order to meet the policy objective of prohibiting unauthorised financial transactions involving the persons specified in the Amendment List, the Department is satisfied that wider consultations beyond those it has already undertaken would be unnecessary (subsections 17(1) and (2) of the *Legislation Act 2003*).

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required (OBPR reference: 24116).

Attachment A

Autonomous Sanctions (Designated and Declared Persons – Ukraine) Amendment List 2020

Section 1
The title of the instrument is the *Autonomous Sanctions (Designated and Declared Persons – Ukraine) Amendment List 2020.*

Section 2
The instrument commences the day after it is registered.

Section 3
The instrument is made under subregulation 6(1) of the *Autonomous Sanctions Regulations 2011*.

Section 4
The following persons listed in Schedule 1 of the Amendment List are designated by the Minister for the purposes of paragraph 6(1)(a) of the Regulations and declared by the Minister for the purposes of paragraph 6(1)(b) of the Regulations:

- Ekaterina Borisovna ALTABAEVA
- Lidia Aleksandrovna BASOVA
- Sergei Andreevich DANILENKO
- Yuriy Mikhailovich GOTSANYUK
- Vladimir Vladimirovich NEMTSEV
- Ekaterina Eduardovna PYRKOVA
- Mikhail Vladimirovich RAZVOZHAEV

The designations and declarations are made on the basis that the person meets the criteria mentioned in item 9 of the table in subregulation 6(1) of the Regulations, that is, they are a person that the Minister is satisfied is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

Section 5
Section 5 provides that Schedule 2 of the Amendment List amends the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014.*

Schedule 1
Schedule 1 lists the persons designated and declared by the Minister for targeted financial sanctions and travels bans as per section 4 of the Amendment List.

Schedule 2
Schedule 2 amends the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Ukraine) List 2014* to include the listings of the persons designated and declared by the Minister for targeted financial sanctions and travel bans as per section 4 of the Amendment List.

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 – Ukraine) Amendment List 2020

The *Autonomous Sanctions (Designated and Declared Persons – Ukraine) Amendment List 2020* (the Amendment List) 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. This includes threats to a country's sovereignty and territorial integrity. Thus, autonomous sanctions pursue legitimate objectives, and have appropriate safeguards in place to ensure that 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 human rights compatibility of the Amendment List 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 Amendment List 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 Amendment List is made pursuant to regulation 6 of the *Autonomous Sanctions Regulations 2011* (the

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

Regulations), which states that the Minister may, by legislative instrument, designate and/or declare a person for targeted financial sanctions and/or travel bans, and pursuant to regulation 9 of the Regulations, which states that the Minister may declare that a designation or declaration under regulation 6 continues to have effect.

The measures contained in the Amendment List 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 designating 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 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 threats to the sovereignty and territorial integrity of Ukraine, 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 Ukraine.

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

Right to protection of 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 protection of 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 protection of 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 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, be located 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 Amendment List engage and limit the right to protection of 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, the position of the Australian Government is that such a separation would be justified in the circumstances of the individual case.

Accordingly, any interference with the right to protection of the family created by the operation of the Amendment List 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 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 ICESCR, limitations must be proportionate.

Permissible limitations

The Government considers any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. The Regulations 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 the basic expenses exemption is, in part, to enable the

Australian Government to administer the sanctions regime in a manner compatible with relevant human rights standards.

The Government considers that 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

To the extent that Article 12(4) is engaged in an individual case, such that a person listed in the Amendment List is prevented from entering Australia as their 'own country', the Government considers 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, complicit in the threat to the sovereignty and territorial integrity of Ukraine, from travelling to, entering or remaining in Australia through operation of the Amendment List is a reasonable means to achieve the legitimate foreign policy objective of signalling Australia's concerns about the situation in Ukraine. Australia's practice in this respect is consistent with likeminded partners such as the US, the EU, and the UK.

Under regulation 2.43(1)(aa) of the *Migration Regulations 1994*, the Minister for Home Affairs cannot cancel a visa that is classified as a 'relevant visa'. Regulation 2.43(3) of the *Migration Regulations 1994* provides that a 'relevant visa' includes, among others, a protection, refugee, or humanitarian visa. Australia's non-refoulement obligation is considered at the pre-removal stage for those who fall under subregulation 2.43(1)(aa) of the *Migration Regulations 1994*. As such, the Minister's power is compatible with Australia's protection obligations engaged by a person on a visa other than a 'relevant visa'.

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.

To the extent that Australia's non-refoulement obligations are engaged through a travel ban, and noting the Committee's previous queries in relation to section 197C of the *Migration Act 1958*, Australia will continue to meet its non-refoulement obligations through mechanisms other than the removal powers in section 198 of the *Migration Act 1958*, including through the protection visa application process, and through the use of the Minister's personal powers in the *Migration Act 1958*. These mechanisms ensure that non-refoulement obligations are addressed before a person becomes ready for removal under section 198.

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

The Government considers that any differential treatment of people as a consequence of the application of the Amendment List 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 Russian and Ukrainian national origin or nationality due to the location of the situation of international concern to which the measures respond.

The Government considers that 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 the Government recognises these measures may impact individuals of certain nationalities and national origins more than others, it does not have information that supports the view that affected groups are vulnerable. Rather, the individuals designated in the Amendment List 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.