

Replacement Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Charter of the United Nations Act 1945

Charter of the United Nations Act 1945 List 2003 (No 2)

Charter of the United Nations Act 1945 List 2003 (No 3)

Charter of the United Nations Act 1945 List 2004 (No 2)

The *Charter of the United Nations Act 1945* (COTUNA) provides legislative approval for the *Charter of the United Nations* (the Charter) in Australian law. Part 4 of COTUNA gives effect to United Nations Security Council (UNSC) decisions made under Chapter VII of the Charter that relate to terrorism and dealing with assets in relation to terrorists. Australia is required under Article 25 of the Charter to carry out such UNSC decisions, insofar as those decisions require Australia to apply measures not involving the use of armed force.

COTUNA makes provision for, amongst other things, the listing of persons or entities involved in the commission of terrorist acts. This regime is an important tool which implements Australia's international obligation to cooperate on the prevention of terrorist financing. Section 15 of COTUNA, read in conjunction with subregulation 6(1) of the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulations 2002* (Terrorism and Dealing with Assets Regulations), obliges the person holding the position of Minister for Foreign Affairs (the Minister) to list a person or entity for counter-terrorism financial sanctions, if the Minister is satisfied that they are a person or entity mentioned in paragraph 1(c) of the UNSC Resolution 1373 (2001) (UNSCR 1373). That is, that they are: a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts; an entity owned or controlled by such persons; or a person or entity acting on behalf of, or at the direction of, such persons and entities.

The purpose of a listing under section 15 of COTUNA is to subject the listed person or entity to counter-terrorism financial sanctions. There are two components to counter-terrorism financial sanctions under COTUNA:

- prohibiting persons from using or dealing with assets owned or controlled by a listed person or entity unless they have authorisation to do so;
- prohibiting persons from making assets available to a listed person or entity unless they have authorisation to do so.

Persons or entities listed for counter-terrorism financial sanctions are set out in Schedule 1 of this Instrument. The listing of each person or entity was made under section 15 of COTUNA on the basis that the Minister was satisfied they met the listing criteria set out in subregulation 6(1) of the Terrorism and Dealing with Assets Regulations. That is, they are a person or entity mentioned in paragraph 1(c) of UNSCR 1373. Paragraph 1(c) of UNSCR 1373 is set out in a note to section 3 of this Instrument. The full resolution is published on the UNSC website ([www.undocs.org/S/RES/1373\(2001\)](http://www.undocs.org/S/RES/1373(2001))) and can be freely accessed and used by members of the public.

Australia's counter-terrorism financial sanctions listings are subject to periodic review. Consequently, some persons and entities listed in Schedule 1 of this Instrument may no longer be subject to sanctions. All persons and entities who remain subject to financial sanctions under Australian sanctions law are set out in a document maintained by the Department of Foreign Affairs and Trade pursuant to regulation 40 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Consolidated List). The Consolidated List is available on the Department of

Foreign Affairs and Trade website: www.dfat.gov.au/international-relations/security/sanctions/consolidated-list.

This Instrument was published in the Commonwealth Gazette on making and is stated to commence on gazettal. Ordinarily, in accordance with subsection 12(2) of the *Legislation Act 2003* (the Legislation Act), to the extent that it disadvantages or imposes liabilities on a person, a listing Instrument only applies in relation to a person (other than the Commonwealth or an authority of the Commonwealth) once registered on the Federal Register of Legislation (FRL). However, subsequent to the registration of the Instrument on the FRL on 26 May 2021, the *Charter of the United Nations Amendment Act 2021* (the Amendment Act) was enacted by Parliament. While the Amendment Act does not expressly override subsection 12(2) of the Legislation Act, by deeming a listing to have been registered on the FRL in instances where lack of registration would otherwise impact the applicability or enforceability of that listing, the Amendment Act ensures that listings are able to be enforced from their date of commencement when that is prior to their registration on the FRL.

The Instrument advances human rights by preventing and suppressing terrorist acts by ensuring that the entities listed are denied access to assets that could be used to carry out or facilitate terrorist acts. A Statement of Compatibility with Human Rights is at **Attachment A**.

The sanctions imposed through this Instrument were subject to thorough vetting by Australian Government agencies as well as consultation with relevant international partners. This is the appropriate level of consultation as anything further would risk alerting persons and entities to the impending sanctions and enable them to make arrangements to avoid the immediate effect of the measures. Additional consultation beyond this would not be reasonably practicable as it would inevitably frustrate Australia's obligation at international law to prohibit unauthorised financial transactions to individual terrorists or terrorist entities.

Statement of Compatibility with Human Rights

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

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Overview of the Disallowable Legislative Instrument

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COTUNA makes provision for, amongst other things, the listing of persons or entities involved in the commission of terrorist acts. This regime is an important tool which implements Australia's international obligation to cooperate on the prevention of terrorist financing. Section 15 of COTUNA, read in conjunction with subregulation 6(1) of the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulations 2002* (Terrorism and Dealing with Assets Regulations), obliges the person holding the position of Minister for Foreign Affairs (the Minister) to list a person or entity for counter-terrorism financial sanctions, if the Minister is satisfied that they are a person or entity mentioned in paragraph 1(c) of the UNSC Resolution 1373 (2001) (UNSCR 1373). That is, that they are: a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts; an entity owned or controlled by such persons; or a person or entity acting on behalf of, or at the direction of, such persons and entities.

Australia's counter-terrorism financial sanctions listings are subject to periodic review. Consequently, some persons and entities listed in Schedule 1 of this Instrument may no longer be subject to sanctions. All persons and entities who remain subject to financial sanctions under Australian sanctions law are set out in a document maintained by the Department of Foreign Affairs and Trade pursuant to section 40 of the *Dealing with Assets Regulations* (Consolidated List). The Consolidated List is available on the Department of Foreign Affairs and Trade website: www.dfat.gov.au/international-relations/security/sanctions/consolidated-list.

Human rights implications

This Instrument engages the following human rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR):

- the right to life (Article 6 of the ICCPR);
- the right to freedom of thought, conscience and religion (Article 18 of the ICCPR);
- the right to freedom from the advocacy of national, racial or religious hatred (Article 20 of the ICCPR);

- the right to self-determination, including to freely dispose of natural wealth and resources (Article 1 of the ICCPR and Article 1 of the ICESCR);
- the right to an adequate standard of living (Article 11(1) of the ICESCR; and
- the right to privacy (Article 17 of the ICCPR).

It is well accepted that international human rights law obligations are owed to individuals only, and are not owed to non-natural persons, such as bodies corporate or bodies politic. This Statement considers the extent to which the measures in Part 4 of COTUNA impact on the human rights of individuals located in Australia. In this context, it is noted none of the individuals listed for counter-terrorism financial sanctions have been in Australia at any time during their listing.

The right to life; to freedom of thought, conscience and religion; and to freedom from the advocacy of national, racial or religious hatred

The Instrument promotes the right to life; to freedom of thought, conscience and religion; and to freedom from the advocacy of national, racial or religious hatred.

The Instrument's effect is the prevention and suppression of terrorist acts. Counter-terrorism financial sanctions imposed in this Instrument will ensure that the persons and entities listed are denied access to assets that could be used to carry out or facilitate terrorist acts which may take lives, promote a particular thought, conscience or religion through acts of violence (thereby limiting the rights of others) or advocate for national, racial or religious hatred.

Counter-terrorism financial sanctions therefore promote human rights by reducing the threat of terrorist acts.

The right to self-determination, including to freely dispose of natural wealth and resources

Article 1 of the ICCPR and Article 1 of the ICESCR provides a right to self-determination, including to freely dispose of natural wealth, resources, and assets.

The effect of counter-terrorism financial sanctions is that members of the public are unable to provide assets to those listed for counter-terrorism financial sanctions under section 15 of COTUNA. It also means that a person (including the listed person) who holds an asset owned or controlled by a listed person is unable to use, or deal with, that asset.

The objective of this Instrument is to give effect to Australia's international obligation to suppress terrorist financing. The imposition of counter-terrorism financial sanctions through the listing of persons and entities which participate in or facilitate terrorist acts helps achieve this objective by denying such individuals or entities the financial means to undertake terrorist activities.

Listed persons and entities may apply for their designation to be revoked under section 17 of COTUNA. The application must set out the circumstances relied upon to justify the application. To assist with an application, the Department of Foreign Affairs and Trade will provide a listed entity, or their authorised representative, with an unclassified statement of reasons for the listing, upon written request.

Australia's counter-terrorism financial sanctions listings are also subject to periodic review. Section 15A of the Act provides that a listing ceases to have effect after three years, unless the Minister declares that the listing continues to have effect. This provision ensures the listing remains current and appropriate.

The measures in the Instrument which may limit a right to self-determination are reasonable, necessary and proportionate in achieving the objective of suppressing terrorism financing, and complying with Australia's international obligations.

The right to an adequate standard of living

This right is only applicable in relation to the listing of individuals. This right does not apply to the *Charter of the United Nations Act 1945 List 2003 (No 2)* which only lists an entity.

The right to an adequate standard of living is contained in Article 11(1) of 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.

Any limitation on the enjoyment of Article 11(1), to the extent that it occurs, is justified. Under subsections 22(3) and 22(3A) of COTUNA, the Minister may, on her own initiative, authorise an asset to be made available to a listed person, or authorise a 'freezable asset' (including an asset owned by the listed person) to be used or dealt with in a specified way. Under subsections 22(3) and 22(3A) of COTUNA, and regulations 30 and 31 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008*, the Minister may also, upon application by a listed person, authorise the use or dealing with a listed person's assets where the use or dealing is a 'basic expense dealing'. These authorisations would enable a listed person to access and pay for basic resources including food, housing, and medical treatment. Such authorisations reflect the permitted dealings in relation to listed persons and their assets that are allowed under United Nations Security Council Resolution 1452, which cover things such as food, rent or mortgage, medicine, legal fees and utilities. In the event that a listed person had family members in Australia who may be indirectly adversely affected by a person's listing, such consequences could be mitigated by the Minister authorising dealings between them (or their guardian) and the listed person.

The permit process is a flexible and effective safeguard on any limitation to the enjoyment of Article 11(1) of ICESCR.

The right to privacy

This right is only applicable in relation to the listing of individuals. This right does not apply to the *Charter of the United Nations Act 1945 List 2003 (No 2)* which only lists an entity.

Article 17 of 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

The Instrument is not an unlawful interference with an individual's right to privacy as the listings were made under section 15 of COTUNA which provides that the Minister must list a person or entity if satisfied on reasonable grounds that they are a person or entity mentioned in paragraph 1(c) of the UNSC Resolution 1373 (2001) (UNSCR 1373). That is, that they are: a person who commits, attempts to commit, or participates in or facilitates the commission of, terrorist acts; an entity owned or controlled by such persons; or a person or entity acting on behalf of, or at the direction of, such persons and entities.

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

The listings also do not represent 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 section 15 of COTUNA for counter-terrorism financial sanctions, the Minister uses predictable, publicly available criteria that has been set by the United Nations Security Council and which is reflected in legislation.

Accordingly, counter-terrorism financial sanctions imposed by the Minister through the listing of specific individuals under section 15 of COTUNA are reasonable, necessary and proportionate to the international obligation to prevent the financing of terrorists and terrorist entities. 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.

Conclusion

The Instrument is compatible with human rights because counter-terrorism financial sanctions preventing and suppressing terrorism financing promotes the right to life, to freedom of thought, conscience and religion, and to freedom from the advocacy of national, racial or religious hatred. To the extent that it may limit human rights, such limitations are reasonable, necessary and proportionate.