

## Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

### *Autonomous Sanctions Regulations 2011*

#### *Autonomous Sanctions (Designated and Declared Persons—Former Federal Republic of Yugoslavia) Amendment (No. 1) 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 the commission of genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions and violations of the laws or customs of war, as occurred in the Former Federal Republic of Yugoslavia (**FFRY**).

The *Autonomous Sanctions Regulations 2011* (**the Regulations**) make provisions for, among other things, the proscription of persons or entities for autonomous sanctions in relation to the FFRY. Regulation 6 of the Regulations enables the Minister for Foreign Affairs (**the Minister**) to designate a person for targeted financial sanctions and/or declare a person for the purposes of a travel ban, in a range of circumstances, including if the Minister is satisfied (pursuant to item 2 of regulation 6, '**FFRY criteria**') that a person:

- has been indicted for an offence by the International Criminal Tribunal for the former Yugoslavia (**the ICTY**), or within the jurisdiction of the ICTY by a domestic court in Bosnia-Herzegovina, Croatia or Serbia;
- is subject to an Interpol arrest warrant related to an offence within the jurisdiction of the ICTY;
- is a supporter of the former regime of Slobodan Milosevic; or
- is suspected of assisting a person who is indicted by the ICTY and not currently detained by the ICTY.

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:

- 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
- any asset owned or controlled by a designated person or entity is a “controlled asset” and subject to the prohibition in regulation 15 (which prohibits a 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 the FFRY are listed in the *Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012 (the 2012 List)*.

Under subregulations 9(1) and (2) of the Regulations, designations and declarations that are declared to continue to have effect under subregulation 9(3) of the Regulations cease to have effect three years after the making of the most recent declaration, unless the Minister declares they are to continue to have effect pursuant to subregulation 9(3) of the Regulations.

The *Autonomous Sanctions (Designated and Declared Persons—Former Federal Republic of Yugoslavia) Amendment (No. 1) Instrument 2023 (the 2023 Instrument)* gives effect to a renewal of the designations and declarations (together referred to as **listings**) of 21 persons for targeted financial sanctions and travel bans under the FFRY criteria. The Minister exercised their discretion to make the designations and declarations being satisfied that each of the persons meet the FFRY criteria.

The 2023 Instrument also allows the listings for 87 persons to lapse on the anniversary of their latest listing (13 January 2021), either because the person is deceased, has served their sentence, was not indicted by ICTY, or was indicted but acquitted by the ICTY.

Details of the 2023 Instrument 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. The Department of Foreign Affairs and Trade (DFAT) undertook public consultation through its website in relation to the listings contained in the 2023 through its website. No submissions were received in response to this public consultation.

The Office of Impact Analysis has advised that a Regulation Impact Statement is not required for listing instruments of this nature (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—Former Federal Republic of Yugoslavia) Amendment (No. 1) Instrument 2023*

Section 1

The title of the instrument is the *Autonomous Sanctions (Designated and Declared Persons—Former Federal Republic of Yugoslavia) Amendment (No. 1) Instrument 2023*.

Section 2

Sections 1 to 4 of the 2023 Instrument commence the day after it is registered. Schedule 1 of the instrument commences on 12 January 2024. Schedule 2 of the 2023 Instrument commences on 14 January 2024.

Section 3

Section 3 provides that the 2023 Instrument is made under paragraphs 6(a) and (b) and subregulation 9(3) of 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 9 of the Regulations, to renew the designations and declarations of 21 persons in the *Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012 (the 2012 List)*.

Section 4

Section 4 provides that 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 this instrument has effect according to its terms.

Schedule 1 – Amendments

*Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012*

Item 1

Item 1 is a technical amendment necessitated due to a change in the numbering of the Regulations. This amendment ensures that the relevant paragraph of the Regulations is referenced.

Item 2

Item 2 is a technical amendment necessitated due to a change in the numbering of the Regulations. This amendment ensures that the relevant paragraph of the Regulations is referenced.

### Item 3

Item 3 contains the Minister for Foreign Affairs' (**the Minister**) declaration under subregulation 9(3) of the Regulations that the designations and declarations of 21 persons under paragraphs 6(a) and 6(b) of the Regulations continue to have effect.

### Schedule 2 – Repeals

*Autonomous Sanctions (Designated and Declared Persons – Former Federal Republic of Yugoslavia) List 2012*

### Item 1

Item 1 repeals the listings of 87 persons in Schedule 1 of the 2012 List, either because the person is deceased, has served their sentence, was not indicted by ICTY, or was indicted but acquitted by the ICTY.

## 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—Former Federal Republic of Yugoslavia) Amendment (No. 1) Instrument 2023*

*The Autonomous Sanctions (Designated and Declared Persons—Former Federal Republic of Yugoslavia) Amendment (No. 1) 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 the commission of genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions and violations of the laws or customs of war, as occurred in the Former Federal Republic of Yugoslavia (**FFRY**). 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 of persons that were last continued in effect in January 2021. The Minister made the 2023 Instrument being satisfied that each of the persons meets the criteria set out in item 2 of the table in regulation 6 and is a person who:

- (a) has been indicted for an offence by the ICTY (whether or not the person has been convicted of the offence);
- (b) has been indicted for an offence within the jurisdiction of the ICTY by a domestic court in Bosnia-Herzegovina, Croatia or Serbia (whether or not the person has been convicted of the offence);
- (c) is subject to an Interpol arrest warrant related to an offence within the jurisdiction of the ICTY;
- (d) the Minister is satisfied is a supporter of the former regime of Slobodan Milosevic;
- (e) is suspected of assisting a person who is:
  - (i) indicted by the ICTY; and
  - (ii) not currently detained by the ICTY.

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'.<sup>1</sup>

### 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 continued in the 2023 Instrument were made pursuant to regulation 9 of the Regulations, which provides that the Minister may, by legislative instrument, continue in effect a person's designation for targeted financial sanctions and/or a declaration for a travel ban.

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 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 2023 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

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

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 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 justified. The Regulations allow for any adverse impacts on family members as a consequence of targeted financial sanctions to be mitigated. The Regulations also 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) 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) 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 has been involved in the commission of war crimes or genocide, 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 such egregious acts.

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 Bosnia-Herzegovina, Croatian and Serbian 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 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.