

## **Exposure Draft — Explanatory Memorandum**

Issued by the Authority of the Minister for Foreign Affairs

### *Autonomous Sanctions Regulations 2011*

#### *Autonomous Sanctions Amendment (Thematic Sanctions) Regulations 2021*

Section 10 of the *Autonomous Sanctions Act 2011* (the Act) enables the Governor-General to make regulations applying sanctions. Section 28 of the Act also 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 and implements as a matter of foreign policy. They are a discretionary tool which the Government can apply, alone or with like-minded countries, where appropriate, to address egregious situations of international concern.

When considering whether to apply autonomous sanctions, the Government considers Australia's national interest, including bilateral, regional and multilateral equities, and the impact of sanctions on Australia's economic, security or other interests.

Autonomous sanctions differ from United Nations Security Council (UNSC) sanctions which the UNSC imposes and which all UN Member States, including Australia, are obliged to implement as a matter of international law.

The *Autonomous Sanctions Regulations 2011* (the Regulations) enable, among other things, the Minister for Foreign Affairs (the Minister) to designate a person or entity for targeted financial sanctions, and declare a person for a travel ban, if the Minister is satisfied that the person or entity meets criteria specified in the Regulations. Designations and declarations are hereafter collectively referred to as 'listings'. The Regulations provide that the Minister must make listings by legislative instrument.

Schedule 1 of this instrument amends the Regulations to introduce cyber, human rights and corruption thematic sanctions. It introduces listing criteria to enable the Minister to list persons and entities where satisfied:

- they have caused, assisted with causing, or been complicit in, a cyber incident or an attempted cyber incident that is significant, or which had it occurred, would have been significant; or
- they have engaged in, been responsible for, or been complicit in serious violations or serious abuses of a person's right:
  - to life; or
  - not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; or
  - not to be held in slavery or servitude, or be required to perform forced or compulsory labour; or

- they have engaged in, been responsible for, or been complicit in an act of corruption that is serious; or
- they are an immediate family member of person who has been listed under the human rights or corruption listing criteria; or
- they are a person who, or entity that, has obtained a financial or other benefit as a result of another's act, being an act for which that other person or entity has been listed under the human rights or corruption listing criteria.

Schedule 1 makes consequential amendments to the Regulations to ensure that the usual administrative operation of the Regulations also applies to the new thematic listing criteria. Schedule 1 also makes minor consequential amendments to the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) and the *Migration Regulations 1994* (the Migration Regulations). These amendments are required to support the operation of the new thematic sanctions, in line with the existing processes in the PE Regulations and Migration Regulations in respect of autonomous sanctions generally. Details of the proposed instrument are set out at **Attachment A**.

The introduction of human rights and corruption sanctions was the focus of a 12-month Parliamentary inquiry which received written and oral submissions from both government and civil society. Measures included in the proposed instrument implement key aspects of the Government's response (tabled 5 August 2021) to the Joint Standing Committee on Foreign Affairs, Defence and Trade's report on its inquiry '*Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement?*'.

The introduction of cyber sanctions was the subject of consultation within Government, including with members of the National Intelligence Community.

All of the new thematic listing criteria form part of Australia's existing legal framework for the imposition and implementation of targeted financial sanctions and travel bans. This framework was the subject of extensive consultation with government and non-government stakeholders at the time of its introduction.

Given the new thematic listing criteria do not change the operation of Australian sanctions law and will have minimal additional regulatory impact, the public Parliamentary inquiry and engagement within Government constitutes appropriate consultation in the circumstances. The Department of Foreign Affairs and Trade conducts regular outreach to business to explain laws implementing Australia's autonomous sanctions.

The Office of Best Practice Regulation advised that the amendment to the Regulations will only have a minor regulatory impact (OBPR references ID43279 and ID12247).

The proposed 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*. A statement of compatibility with human rights is at **Attachment B**.

Section 1

The title of the instrument is the *Autonomous Sanctions Amendment (Thematic Sanctions) Regulations 2021*.

Section 2

Subsection 2(1) provides that the instrument commences the later of the day after it is registered and the day on which the *Autonomous Sanctions Amendment (Thematic Sanctions) Act 2021* commences.

Subsection 2(2) is a technical provision that makes clear that information to be inserted in column 3 of the table about the specific date of commencement is not part of the instrument and can be inserted or edited at a later date.

Section 3

The instrument is made under the *Autonomous Sanctions Act 2011*, the *Customs Act 1901* and the *Migration Act 1958*.

Section 4

Schedule 1 of the instrument amends the *Autonomous Sanctions Regulations 2011*, the *Customs (Prohibited Exports) Regulations 1958* and the *Migration Regulations 1994*.

Schedule 1—Amendments

*Autonomous Sanctions Regulations 2011*

Item 1

Regulation 3 of the Regulations sets out definitions of terms that are used in the Regulations.

This item inserts into regulation 3 of the Regulations definitions of ‘bribery’ and ‘corruption’. The term ‘bribery’ forms part of the definition of ‘corruption’. These terms are relevant to proposed subregulation 6A(5) (item 8) which sets out the listing criteria for thematic sanctions in relation to corruption.

Item 2

This item amends the definition of ‘designated person or entity’ in regulation 3 of the Regulations to include persons and entities designated under proposed regulation 6A (item 8). Its inclusion ensures that the prohibitions in Part 3 and the authorisations in Part 4 of the Regulations also apply to persons or entities designated for targeted financial sanctions under thematic listing criteria.

Item 3

This item is a consequential amendment and amends the note to the definition of ‘designated person or entity’ in regulation 3 of the Regulations to make it clear that a

person designated under proposed regulation 6A (item 8) may also be declared for the purposes of imposing a travel ban.

#### Item 4

This item inserts into regulation 3 of the Regulations definitions of ‘foreign public official’ and ‘misappropriation of property’. The term ‘foreign public official’ forms part of the definition of ‘bribery’ (see item 1). The term ‘misappropriation of property’ forms part of the definition of ‘corruption’ (see item 1). These definitions are relevant to proposed subregulation 6A(5) (item 8), which sets out the listing criteria for corruption thematic sanctions. The term ‘asset’ in the definition of ‘misappropriation of property’ is defined in section 4 of the Act.

The definitions of ‘bribery’ and ‘misappropriation of property’ are consistent with the United Nations Convention Against Corruption done at New York on 31 October 2003, the leading international anti-corruption instrument.

The definition of ‘foreign public official’ has the same meaning as in Division 70 of the *Criminal Code Act 1995*, noting this division gives effect to Australia’s international obligations.

#### Item 5

Regulation 6 of the Regulations sets out the listing criteria for existing sanctions.

Item 5 amends the heading to regulation 6 of the Regulations to reflect that the provision will only deal with country-specific sanctions. The listing criteria for thematic sanctions—including existing criteria in relation to the proliferation of weapons of mass destruction—will be set out in proposed regulation 6A (see item 8).

#### Item 6

Item 6 is a technical amendment that is consequential to items 7 and 8 and reflects that country-specific listing criteria and thematic listing criteria will be contained in separate provisions in the Regulations.

#### Item 7

Item 7 repeals subregulation 6(2) of the Regulations. Its content has been moved to proposed subregulation 6A(1). This amendment reflects that subregulation 6(2) of the Regulations sets out the listing criteria for applying sanctions in relation to the proliferation of weapons of mass destruction and should be included in proposed regulation 6A with the new thematic listing criteria proposed in this instrument.

#### Item 8

Item 8 inserts a new provision into the Regulations setting out thematic listing criteria to enable a person or entity to be designated for targeted financial sanctions or for a person to be declared for a travel ban.

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
- 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.

The thematic listing criteria set out in proposed regulation 6A cover the proliferation of weapons of mass destruction, significant cyber incidents, serious violations or serious abuses of human rights, and serious corruption. Before designating a person or entity or declaring a person under proposed regulation 6A, the Minister must, under the proposed amendments contained in the Autonomous Sanctions Amendment (Thematic Sanctions) Bill 2021, first consult the Attorney-General and obtain the Attorney-General’s agreement in writing, and must consult such other Ministers as the Minister considers appropriate. The designations and declarations must be made by legislative instrument and are disallowable by Parliament.

Proposed subregulation 6A(1) replicates the listing criteria in relation to the proliferation of weapons of mass destruction that was previously contained in subregulation 6(2) of the Regulations (now repealed by item 7).

Proposed subregulation 6A(2) provides the Minister with the discretionary power to designate a person or entity for targeted financial sanctions and declare a person for a travel ban where the Minister is satisfied the person or entity:

- has caused, or attempted to cause, a significant cyber incident;
- has assisted with causing, or with attempting to cause, a significant cyber incident; or
- has otherwise been complicit in causing, or in attempting to cause, a significant cyber incident.

A cyber incident is a cyber-enabled event (or a group of related cyber events) that results in, or seeks to cause, harm to Australia or another country or countries. This may include events that result in harm to individuals, businesses, economies or governments.

Proposed subregulation 6A(3) provides a non-exhaustive list of matters that the Minister may take into account when deciding whether a cyber incident is significant, or in the case of an attempted cyber incident would have been significant, such that it warrants the imposition of sanctions under proposed regulation 6A or the continuation of sanctions under regulation 9. The listed examples cover whether the conduct of the person or entity was malicious; and actions that may constitute a serious threat to Australia’s or another country’s security, stability and prosperity.

Proposed subregulation 6A(4) provides the Minister with the discretionary power to designate a person or entity for targeted financial sanctions and declare a person for a travel ban where the Minister is satisfied the person or entity has engaged in, has been responsible for, or is complicit in acts that constitute a serious violation or serious abuse of three human rights relating to physical integrity, being the rights:

- to life;
- not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; and
- not to be held in slavery or servitude, or required to perform forced or compulsory labour.

The application of sanctions will be reserved for the most egregious violations and abuses of human rights. Violations and abuses are more likely to be considered egregious and be captured under the regime where, for example, they involve sexual violence, violence against minors, or are perpetrated due to the victim's membership of a particular group (including minorities).

Proposed subregulation 6A(5) provides the Minister with the discretionary power to designate a person or entity for targeted financial sanctions and declare a person for a travel ban where the Minister is satisfied the person or entity has engaged in, has been responsible for, or is complicit in an act of corruption that is serious.

For the purpose of proposed subregulation 6A(5), corruption is defined to mean bribery or misappropriation of property (see item 1). Reference in subregulation 6A(5) to an 'act' of corruption includes multiple acts of corruption (see section 23 of the *Acts Interpretation Act 1901*).

Proposed subregulation 6A(6) provides a non-exhaustive list of matters that the Minister may take into account when deciding whether the act of corruption is serious, such that it warrants the imposition of sanctions under subregulation 6(5) or the continuation of sanctions under regulation 9.

When considering the status or position of the person or entity under proposed subregulation 6A(6)(a), the Minister may, for example, have regard to the level of influence of a person or entity in an organisation.

When considering the nature and extent of the conduct under proposed subregulation 6A(6)(b), the Minister may, for example, have regard to whether the conduct is systemic, sophisticated or occurring over a long period of time. Other factors the Minister may also have regard to include (but are not limited to) the financial value of the bribe, property diverted, or benefit or advantage derived (including its significance relevant to the local context) and whether the conduct was recent.

When considering the impact of the conduct under proposed paragraph 6A(6)(b), the Minister may, for example, have regard to possible secondary impacts (economic and political) in the relevant country and region, and/or if the corruption undermines a country's democratic governance, weakens public institutions and the rule of law, impedes international trade and investment, undermines sustainable development or deprives citizens of vital public resources.

When considering the circumstances of the conduct under proposed paragraph 6A(6)(c), the Minister may, for example, have regard to whether a person has committed multiple acts of corruption or whether the conduct is connected to serious human rights violations or abuses or to threats to Australia's national security or international security, terrorism, transnational, serious and organised crime or instability overseas.

Proposed paragraph 6A(6)(d) makes clear the list is not exhaustive; the Minister may have regard to any other matters the Minister considers relevant. This list is non-exhaustive because factors which may be relevant for the Minister to determine whether corruption is 'serious' will vary from case to case.

Examples of sanctionable conduct include, but are not limited to:

- serious corruption which results in a country's population being deprived of vital public resources; or
- the misappropriation of state property of significant value as part of a systemic fraudulent scheme.

Proposed subregulation 6A(7) provides that the Minister must not make a designation or declaration under thematic listing criteria unless the Minister is satisfied that the conduct of the person or entity concerned occurred, in whole or in part, outside of Australia. This requirement reflects the constitutional nexus to the external affairs power.

Proposed subregulation 6A(8) enables the Minister to list the immediate family members of persons listed under proposed subregulations 6A(4) or (5). The term 'immediate family member' is defined in regulation 3 of the Regulations to mean a listed person's spouse, adult child, spouse of an adult child, parent, sibling or step-sibling, or the spouse of a sibling or step-sibling.

Proposed subregulation 6A(9) enables the Minister to list a person or entity that the Minister is satisfied has obtained a financial or other benefit as a result of an act of a listed person or entity, being the act for which that listed person or entity has been designated under proposed paragraphs 6A(4)(a) or 6A(5)(a) or declared under proposed paragraphs 6A(4)(b) or 6A(5)(b).

The benefit may be, but is not limited to, a financial benefit, a benefit relating to a personal or commercial advantage, a reward or an inducement.

#### Item 9

Item 9 is a technical amendment that amends the heading to regulation 9 of the Regulations to reflect that country-specific listing criteria and thematic listing criteria are now contained in separate provisions in the Regulations.

#### Item 10

Regulation 9 of the Regulations addresses the duration of designations and declarations made under regulations 6, 7 and 8.

Item 10 amends subregulation 9(1) of the Regulations to reference relevant paragraphs of proposed regulation 6A (item 8). The effect of this is that the designation of a person or entity for targeted financial sanctions under thematic listing criteria will automatically lapse after three years unless continued in effect by declaration of the Minister under subregulation 9(3). This amendment will ensure that the usual administrative operation of the Regulations will apply to designations made under the new thematic designation criteria.

Item 11

Item 11 amends subregulation 9(2) of the Regulations to reference relevant paragraphs of proposed regulation 6A (item 8). The effect of this is that the declaration of a person under a thematic listing criteria for a travel ban will automatically lapse after three years unless continued in effect by declaration of the Minister under subregulation 9(3). This amendment will ensure that the usual administrative operation of the Regulations will apply to declarations made under the new thematic designation criteria.

Item 12

Item 12 is a technical amendment that is consequential to items 6 and 7.

Item 13

Item 13 is a technical amendment that is consequential to items 6 and 7.

Item 14

Item 14 is a technical amendment that is consequential to the amendments in items 6, 7 and 8.

Item 15

Item 15 is a technical amendment that is consequential to the amendments in items 7 and 8.

Item 16

Item 16 amends paragraph 9(5)(b) of the Regulations to reflect that country-specific designation criteria are now set out in paragraph 6(a) and to include a reference to the thematic designations set out in relevant paragraphs of proposed regulation 6A (item 8). The proposed amendment makes it clear that the Minister may still exercise his or her powers to designate even in circumstances where the designation is the same in substance to a designation which will lapse, or has lapsed, pursuant to subregulation 9(1) of the Regulations.

This amendment will ensure that the usual administrative operation of the Regulations will apply to designations made under the under the proposed thematic designation criteria.

Item 17

Item 17 amends paragraph 9(5)(d) of the Regulations to reflect that country-specific declarations are now set out in paragraph 6(b) and to include a reference to the thematic declarations set out in relevant paragraphs of proposed regulation 6A (item 8). The proposed amendment makes it clear that the Minister may still exercise his or



her powers to declare a person for a travel ban even in circumstances where the declaration is the same in substance to a declaration which will lapse, or has lapsed, pursuant to subregulation 9(2) of the Regulations.

This amendment will ensure that the usual administrative operation of the Regulations will apply to declarations made under the under the proposed thematic declaration criteria.

#### Item 18

Item 18 is a technical amendment that amends the heading to regulation 10 of the Regulations to reflect that country-specific listing criteria and thematic listing criteria are now contained in separate provisions in the Regulations.

#### Item 19

Regulation 10 of the Regulations currently addresses the revocation of designations and declarations made under regulations 6, 7 and 8 of the Regulations.

Item 19 amends paragraph 10(1)(a) of the Regulations to reflect that country-specific designations are now set out in paragraph 6(a) and to include a reference to the thematic designations set out in relevant paragraphs in proposed regulation 6A (item 8). This will enable the Minister to revoke a person or entity's designation under thematic designation criteria and ensure that the usual administrative operation of the Regulations will apply to designations made under those criteria.

#### Item 20

Item 20 amends paragraph 10(1)(b) of the Regulations to reflect that country-specific declarations are now set out in paragraph 6(b) and to include a reference to the thematic declarations set out in relevant paragraphs in proposed regulation 6A (item 8). This will enable the Minister to revoke a person or entity's declaration under thematic declaration criteria and ensure that the usual administrative operation of the Regulations will apply to declarations made under those criteria.

#### Item 21

Subregulation 10(3) of the Regulations provides that the Minister may revoke a designation on application by the designated person or entity. Item 21 amends paragraph 10(3)(a) of the Regulations to reflect that country-specific designations are now set out in paragraph 6(a) and to include a reference to the thematic designations set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the usual administrative operation of the Regulations will apply to designations made under the new thematic designation criteria.

#### Item 22

Item 22 amends paragraph 10(3)(b) of the Regulations to reflect that country-specific declarations are now set out in paragraph 6(b) and to include a reference to the thematic declarations set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the usual administrative operation of the Regulations will apply to declarations made under the new thematic declaration criteria.

#### Item 23

Item 23 does not change the operation of subregulation 10(3) of the Regulations. The proposed amendment is required because ‘designated person or entity’ is a defined term in regulation 3 that only relates to persons and entities designated for targeted financial sanctions, but the intention of subregulation 10(3) is that it also apply to persons who have been declared for a travel ban.

#### Item 24

Item 24 is a technical amendment that amends the heading to regulation 11 of the Regulations to reflect that country-specific listing criteria and thematic listing criteria are now contained in separate provisions in the Regulations.

#### Item 25

Item 25 amends paragraph 11(1)(b) of the Regulations to reflect that country-specific declarations are now set out in paragraph 6(b) and to include a reference to the thematic declarations set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the usual administrative operation of the Regulations in respect of making applications for revocations of a travel ban will apply to declarations made under the new thematic declaration criteria.

#### Item 26

Item 26 is a technical amendment that amends the heading to regulation 19 of the Regulations to reflect that country-specific listing criteria and thematic listing criteria are now contained in separate provisions in the Regulations.

#### Item 27

Regulation 19 of the Regulations currently provides that the Minister may, on national interest or humanitarian grounds, waive the operation of a declaration made under regulation 6 preventing a person from travelling to, entering, or remaining in, Australia.

Item 27 amends paragraph 19(1)(a) of the Regulations to reflect that country-specific declarations are now set out in paragraph 6(a) and to include a reference to the thematic declarations set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the usual administrative operation of the Regulations will apply to declarations made under the new thematic declaration criteria.

#### Item 28

The imposition of targeted financial sanctions means that persons are prohibited from dealing with a designated person or entity, or from using or dealing with their assets. Regulation 21 of the Regulations provides that the Department of Foreign Affairs and Trade may give advance notice of a proposed designation to persons who are engaged in the business of holding, dealing in, or facilitating dealing in, assets. Such advance notice, for example to banks, helps ensure that persons holding assets belonging to a designated person or entity do not inadvertently breach sanctions.

Item 28 amends subregulation 21(1) to reflect that country-specific designations are now set out in paragraph 6(a) and to include a reference to the thematic designations

set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the usual administrative operation of the Regulations will apply to designations made under the new thematic declaration criteria.

#### Item 29

Item 29 introduces a new Part into the Regulations that sets out the application, saving and transitional provisions that apply to the amendments made by this instrument.

Currently, regulation 6 of the Regulations sets out the listing criteria for imposing targeted financial sanctions and travel bans for both existing country-specific listings, and existing thematic listings in relation to the proliferation of weapons of mass destruction. Items 5 to 8 of this instrument separate country-specific listing criteria and thematic listing criteria into distinct provisions. After commencement of this instrument, the authority under which designations for the imposition of targeted financial sanctions and declarations for travel bans are made will reflect the renumbering that results from these amendments.

Proposed subregulations 27(1) and 27(4) preserves instruments in force under subregulations 6(1) and (2) of the Regulations immediately before the commencement of proposed regulation 27 by providing that they continue in force as if they were in force under the new provisions proposed by this instrument.

Proposed subregulations 27(2) and 27(5) preserves designations made before the commencement of proposed regulation 27 and in force immediately before that commencement by providing that those designations have effect as if they were in force under the new provisions proposed by this instrument.

Proposed subregulations 27(3) and 27(6) preserves declarations made before the commencement of proposed regulation 27 and in force immediately before that commencement by providing that those declarations have effect as if they were in force under the new provisions proposed by this instrument.

Proposed subregulation 27(7) preserves declarations of continuing effect made under subregulation 9(3) made before the commencement of proposed regulation 27 and in force immediately before that commencement by providing that the listings have effect as if they were made under the new separated country-specific listing criteria and thematic sanctions listing criteria proposed by this instrument.

Proposed subregulation 27(8) makes it clear that proposed regulation 27 does not affect the day on which a listing that has already been made took effect. This means that the prohibitions in respect of existing listings are not impacted, and that operational mechanisms — such as the duration of a listing under regulation 9 of the Regulations—apply as intended by the existing autonomous sanctions regime.

## *Customs (Prohibited Exports) Regulations 1958*

### Item 30

The *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) form part of Australia's autonomous sanctions framework. Regulation 11A of the PE Regulations prohibit the exportation of goods to, or for the benefit of, a designated person or entity (unless otherwise authorised by the Minister for Foreign Affairs pursuant to regulation 18 of the *Autonomous Sanctions Regulations 2011*). The prohibition in the PE Regulations is required in order for Australian Border Force to prevent goods leaving Australia in contravention of the *Autonomous Sanctions Regulations 2011* (noting the wide definition of 'asset' set out in the Act has the effect of prohibiting the provision of any good to a designated person or entity without authorisation).

Item 30 amends paragraph 11A(a) of the PE Regulations to reflect that country-specific designations are now set out in paragraph 6(a) and to include a reference to the thematic designations set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the existing provisions of the PE Regulations that give effect to autonomous sanctions will apply to designations made under the new thematic listing criteria.

### Item 31

Item 31 amends the note to regulation 11A of the PE Regulations to reflect that country-specific designation criteria are now set out in regulation 6 of the Regulations.

### Item 32

Item 32 amends the note to regulation 11B of the PE Regulations to reflect that to reflect that country-specific designation criteria are now set out in regulation 6(a) of the Regulations and to include a reference to the thematic designations set out in relevant paragraphs of proposed regulation 6A (item 8).

## *Migration Regulations 1994*

### Item 33

Regulation 2.43 of the *Migration Regulations 1994* (the Migration Regulations) sets out, for the purposes of paragraph 116(1)(g) of the *Migration Act 1958*, prescribed grounds on which the Minister for Home Affairs may cancel a person's visa. The prescribed grounds include circumstances where the Minister for Foreign Affairs has imposed a 'travel ban' under Australia's autonomous sanctions framework.

Item 33 amends subparagraph 2.43(1)(aa)(i) of the Migration Regulations to reflect that country-specific declarations are now set out in paragraph 6(b) and to include a reference to the thematic declarations set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the existing provisions in the Migration Regulations that give effect to autonomous sanctions preventing a person from travelling to, entering, or remaining in, Australia, will apply to declarations made under the new thematic designation criteria.

Item 34

Schedule 4 of the Migration Regulations sets out the Public Interest Criteria that the Minister for Home Affairs will have regard to in the context of making decisions under the Migration Regulations. Public Interest Criteria 4003 outlines various foreign policy considerations that should be taken into account when considering visa applications, including whether the applicant has been the subject of a ‘travel ban’ under the *Autonomous Sanctions Regulations 2011*.

Item 34 amends paragraph 4003(c)(i) in Schedule 4 of the Migration Regulations to reflect that country-specific declarations are now set out in paragraph 6(b) and to include a reference to the thematic declarations set out in relevant paragraphs of proposed regulation 6A (item 8). This amendment will ensure that the existing provisions in the Migration Regulations that give effect to autonomous sanctions preventing a person from travelling to, entering, or remaining in, Australia, will apply to declarations made under the new thematic designation criteria.

**EXPOSURE DRAFT – STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

**AUTONOMOUS SANCTIONS AMENDMENT (THEMATIC SANCTIONS) REGULATIONS 2021**

*The Autonomous Sanctions Amendment (Thematic Sanctions) Regulations 2021 (the proposed Regulations) are 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.*

**Overview of the Amendment Regulations**

Section 10 of the *Autonomous Sanctions Act 2011* (the Act) enables the Governor-General to make regulations applying sanctions. Section 28 of the Act also 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 and implements as a matter of foreign policy. They are a discretionary tool which the Government can apply, alone or with like-minded countries where appropriate, to address egregious situations of international concern.

When considering whether to apply autonomous sanctions, the Government considers Australia's national interest, including bilateral, regional and multilateral equities, and the impact of sanctions on Australia's economic, security or other interests.

Autonomous sanctions differ from United Nations Security Council sanctions which the United Nations Security Council imposes and which all UN Member States, including Australia, are obliged to implement as a matter of international law.

The *Autonomous Sanctions Regulations 2011* (the Regulations) enable, among other things, the Minister for Foreign Affairs (the Minister) to designate a person or entity for targeted financial sanctions, and declare a person for a travel ban, if the Minister is satisfied that the person or entity meets criteria specified in the Regulations. Designations and declarations are hereafter collectively referred to as 'listings'. The Regulations provide that the Minister must make listings by legislative instrument.

Schedule 1 of this instrument amends the Regulations to introduce cyber, human rights and corruption thematic sanctions. It introduces listing criteria to enable the Minister to list persons and entities where satisfied:

- they have caused, assisted with causing, or been complicit in, a cyber incident or an attempted cyber incident that is significant or which had it occurred, would have been significant; or

- they have engaged in, have been responsible for, or have been complicit in serious violations or serious abuses of a person's right:
  - to life; or
  - not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; or
  - not to be held in slavery or servitude, or required to perform forced or compulsory labour; or
- they have engaged in, have been responsible for, or have been complicit in an act of corruption that is serious; or
- they are an immediate family member of person who has been listed under the human rights or corruption listing criteria; or
- they are a person who or entity that has obtained a financial or other benefit because of another's act, being an act for which that other person or entity has been listed under the human rights or corruption listing criteria.

Schedule 1 makes consequential amendments to the Regulations to ensure that the usual administrative operation of the Regulations also applies to the new thematic listing criteria.

Schedule 1 also makes minor consequential amendments to the *Customs (Prohibited Exports) Regulations 1958* (the PE Regulations) and the *Migration Regulations 1994* (the Migration Regulations). These amendments are required to support the operation of the new thematic sanctions, in line with the existing processes in the PE Regulations and Migration Regulations in respect of autonomous sanctions generally.

### **Human rights implications**

Australia has a proud history of protecting and promoting human rights globally, and implementation of the Regulations will expand the range of tools available to the Government to respond to situations of international concern involving human rights violations and abuses.

Australia can, and already does, impose autonomous sanctions in response to situations of international concern within its existing country-based sanctions, and existing thematic sanctions in relation to the proliferation of weapons of mass destruction. The expansion of the autonomous sanctions framework to include new thematic sanctions will build on this existing approach and enhance the Government's ability to respond rapidly to such situations. This includes thematic sanctions which address serious violations and serious abuses of human rights and, in so doing, may protect against the infringement of those rights.

The proposed Regulations enable the Minister, among other things, to impose sanctions on persons and entities in response to serious violations and abuses of:

- the right to life (Article 6 of the International Covenant on Civil and Political Rights, hereinafter the ICCPR);

- the right not to be subjected to cruel, inhuman or degrading treatment or punishment (Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter the CAT, and Article 7 of the ICCPR); and
- the right not to be held in slavery or servitude or right not to be required to perform forced or compulsory labour (Article 8 of the ICCPR).

The effect of the proposed Regulations is the prevention and suppression of violations and abuses of the above rights. Targeted financial sanctions imposed under these proposed Regulations will ensure that persons and entities listed are denied access to assets that could be used to carry out or facilitate the proscribed serious human rights violations and abuses, serious corruption and significant cyber incidents.

Proposed regulation 6A gives the Minister the power to list persons for targeted financial sanctions and travel bans. In accordance with current sanctions listing practice, the specific human rights implications of particular listings will be set out in the Statement of Compatibility with Human Rights accompanying a legislative instrument listing persons when that instrument is made.

These legislative instruments have the potential to impact on the following rights:

- the right to privacy (Article 17 of the ICCPR);
- the right to respect for the family (Articles 17 and 23 of the ICCPR);
- the right to an adequate standard of living (Article 11(1) of the International Covenant on Economic, Social and Cultural Rights);
- the right to freedom of movement (Article 12 of the ICCPR); and
- the right to non-refoulement (which comes from obligations relating to the prohibition on torture and other cruel, inhuman or degrading treatment or punishment under Article 3 of 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).

We consider that the following aspects of the Regulations will prevent legislative instruments listing persons for targeted financial sanctions and travel bans from breaching the rights above.

The Regulations are transparent and targeted. When listing a person under the Regulations for targeted financial sanctions or a travel ban, the Minister uses predictable, publicly available criteria. These criteria are designed to capture only those persons the Minister is satisfied are involved in egregious situations of international concern, as set out in regulation 6A of the Regulations.

Once a listing has been made, the Minister may revoke the listing at any time, upon application or on his or her own initiative. The Regulations provide that listings automatically expire after three years if not otherwise continued in effect by legislative instrument.

When considering whether to continue a listing, the Minister invites submissions from the listed person or entity, or their authorised representatives. The Minister does not consult a person or entity in advance of listing them for the first time, which would



put the person or entity on notice that they may be listed, providing an opportunity for them to remove assets from Australian jurisdiction and rendering any listing less effective.

Listing decisions are subject to judicial review.

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.

The Regulations also allow the Minister, upon application, to provide for certain payments to be made to a designated person and for a designated person's assets to be dealt with in certain circumstances, including in relation to food, housing, medicine and medical treatment. The Minister may, upon his or her own initiative, provide for payments to be made to a designated person, or for a designated person's assets to be dealt with, if the Minister is satisfied that to do so is in the national interest.

## **Conclusion**

This instrument is compatible with human rights as the measures in the Regulations do not raise any human rights issues.