Foreign Affairs, Defence and Trade Committee Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear members of the Committee,

Thank you for the opportunity to make a submission to this inquiry. I am a doctoral candidate at the Griffith Law School and have an article on the 2021 'Magnitsky' amendments to the *Autonomous Sanctions Act 2001* (Cth) pending publication. Based on that analysis I would like to make the following observations, which I hope will assist the Committee.

I. AUSTRALIA'S AUTONOMOUS SANCTIONS LACK NECESSARY PROCEDURAL FAIRNESS GUARANTEES

The operation of the *Autonomous Sanctions Act 2011* (Cth) ('ASA') lacks procedural fairness guarantees because it is modelled on that of the *Charter of the United Nations Act 1945* (Cth) ('the UN Charter Act').[1] The UN Charter Act does not include provisions relating to natural justice or procedural fairness for two reasons. First, at the time the Charter Act was drafted, sanctions were typically levied against States or major armed groups, to whom considerations of procedural fairness would not be expected to apply. Second, given that the UN Charter Act is only a vehicle for Australia to implement its obligations as a member of the United Nations, it carries with it the assumption that due diligence and procedural fairness have already been afforded (where appropriate) at the level of the United Nations, prior to the Security Council passing any resolution.

In recent decades, however, both multilateral and autonomous sanctions have become much more targeted, increasingly targeting individuals associated with either situations of international concern or (following the 2021 amendments) with (inter alia) serious corruption

[1] Stephen Tully, 'Australia's Autonomous Sanctions Regime: Problems and Prospects' (2013) 20 *Australian Journal of Administrative Law* 149.

or human rights abuse. Sanctions against individuals should be seen as being of a different character to those against a state or an armed group and should attract at least some measure of procedural justice. The European Court of Human rights found in the *Kadi* case[2] that sanctioning decisions against individuals must attract procedural guarantees—comprising at least a summary of reasons for a decision. Australia's law has no such provision, which leaves it out of step with the EU and with the UK, both of whose sanctioning regimes include a requirement that reasons for a decision be provided.[3]

Australia has an obligation under the International Covenant for Civil and Political Rights (ICCPR) to 'to respect and to ensure' the rights enumerated therein to 'all individuals within its territory and subject to its jurisdiction'.[4] Those rights include relevantly the right to 'a fair and public hearing by a competent, independent and impartial tribunal' following criminal charges or a suit at law.[5] While it is accepted that sanctions are a non-judicial, administrative process, Magnitsky-style sanctions are in effect a state-made accusation of serious criminality and some analogous forms of protection could be argued. A failure to provide for some level of procedural fairness might therefore risk bringing Australia into conflict with its international human rights obligations.

The Consolidated List of sanctions targets maintained by the Department of Foreign Affairs and Trade does not include reasons for listings, except when the listing is made pursuant to a Security Council directive (in which case the reasons are received from the UN).[6] Further, the Federal Court of Australia confirmed in the recent *Abramov* case that procedural fairness guarantees that would typically apply under Australian administrative law to Ministerial or departmental decisions do not apply to sanctioning decisions, in part because of the political and sensitive nature of the decision.[7] This is all the more reason why procedural fairness guarantees should be explicitly provided for in Australia's sanctions legislation.

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[2] *Kadi and Al Barakaat v Council and Commission* (Joined cases C-402/05 P and C-415/05 P) [2008].

[3] See *Sanctions and Anti Money Laundering Act 2018* (UK) ('*SAMLA*') and ; *Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses* [2020], OJ LI 410/1.

[4] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art (2)(1) ('*ICCPR*').

[5] Ibid art 14.

[6] Department of Foreign Affairs and Trade, 'Consolidated List' <https://www.dfat.gov.au/sites/default/files/regulation8_consolidated.xls> ('Consolidated List').

[7] *Alexander Abramov v Minister for Foreign Affairs (No 2)* [2023] FCA 1099.

A *Procedural fairness supports behaviour change*

It has been repeatedly shown that sanctions work best to alter a target's behaviour when it is clear what behaviour is at issue, and what the target can do to have the sanctions lifted.[8] When a target has no reason to believe that altering their behaviour would lead to sanctions being lifted, they have no incentive to alter their conduct. The sanction then becomes purely punitive and largely arbitrary, since it cannot be honestly said to be aimed at restoring legal behaviour. A statement of reasons would assist with targets' behaviour change because they would have a reasonable expectation that amending the behaviour described in the listing would give them some chance of being delisted upon application.

II. THERE SHOULD BE A PUBLIC PATHWAY TO THE DECISION MAKER

During the Committee consultation process conducted prior to the adoption of Australia's thematic sanctions in 2021, many submissions were concerned with the transparency of the decision-making process.[9] Several recommended that a body be set up to receive public submissions in relation to proposed sanctions, arguing that it would improve public confidence in sanctioning decisions and allow the Government to receive information on a wider range of potential targets.

In its response, the Government rejected the idea of a public body that could receive submissions from civil society, on the basis that making such proposals public might serve to warn any potential targets of possible action and allow them to move assets or otherwise protect themselves.[10] With respect, this reasoning seems faulty. If a civil society group is sufficiently aware of a foreign individual's conduct that it can make a submission to a public body, it is quite likely that the Government would also be aware of the same conduct, and the target themselves likely to know that they could be at risk of sanctions. In any event, submissions could be made confidentially in the first instance. By rejecting any opportunity for civil society

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[8] Daniel W Drezner, *The Sanctions Paradox: Economic Statecraft and International Relations* (Cambridge University Press, 1999); Thomas Bierstecker et al, *The Effectiveness of United Nations Targeted Sanctions: Findings from the Targeted Sanctions Consortium* (Targeted Sanctions Consortium, 2013).

[9] Joint Standing Committee on Foreign Affairs, Defence, and Trade, *Criminality, Corruption and Impunity: Should Australia Join the Global Magnitsky Movement? : An Inquiry into Targeted Sanctions to Address Human Rights Abuses* (Report, Parliament of Australia, 7 December 2020) ('*JSC Report*').

[10] Australian Government, *Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee Report: Criminality, Corruption and Impunity: Should Australia Join the Global Magnitsky Movement?* (9 August 2021) ('*JSC Report, Government Response*').

input in listing decisions, the Government has limited the public legitimacy of the sanctions regime. For example, Australian Muslim groups may remain justly skeptical of the decision-making process if there is no way to see that listing candidates are drawn from a wide and balanced range of possibilities (and not unfairly concentrated on Islamic targets).

III. INDIVIDUALLY TARGETED CORRUPTION & HUMAN RIGHTS SANCTIONS SHOULD BE AUTHORISED UNDER A SEPARATE LEGISLATIVE REGIME

As noted above, sanctions against individuals have become much more common in recent years and yet our sanctions regime continues to rely on legislation originally designed to respond to State behaviour. Given that existing statutes are designed to be as broad as possible, and to allow for timely Governmental responses to a range of situations of international concern, it would be impractical to 'retrofit' them with procedural provisions specific to individuals. Instead, where sanctions are proposed to be levied against individuals in relation to their own behaviour (i.e. 'Magnitsky' style sanctions relating to human rights abuse or serious corruption), those sanctions should be authorised under a separate legislative regime that provides for additional protection for the target individual. This would avoid the need for significant redrafting of the ASA while providing the Australian sanctions regime with greater public legitimacy and allowing it to meet our international human rights obligations. This is also the approach favoured by jurist and human rights barrister Geoffrey Robertson in his submissions to the abovementioned inquiry.[11]

Thank you again for the opportunity to assist this inquiry.

Kind regards,

Yuri Banens

[11] Geoffrey Robertson, 'Sanctions Law Falls Well Short.' [2021] *The Age (Melbourne, Australia)* 31.