23 August 2024

INQUIRY INTO AUSTRALIA'S SANCTIONS REGIME

SUBMISSIONS FROM THE AUSTRALIAN MUSLIM ADVOCACY NETWORK LTD

1. ACKNOWLEDGEMENT

We acknowledge the lands of the Jagera, Toorbul and Gadigal people, where we work and live. We respect the Elders of those lands, both past and present. This land always was and always will be Aboriginal and Torres Strait Islander land because sovereignty has never been ceded. We recognise the role of the colonial legal system in establishing, entrenching, and continuing the oppression and injustice experienced by First Nations peoples. We want to work in solidarity with Aboriginal and Torres Strait Islander people to undo this.

We also acknowledge the incredible network of tireless academics and legal volunteers who assisted with the research and preparation of this submission.

2. ABOUT AMAN

The Australian Muslim Advocacy Network Ltd (AMAN) works to prevent the harmful impact of systemic racism, online hatred and Islamophobia through policy engagement and law reform. As a Muslim organisation, we are deeply concerned about the ongoing suffering of Australian Palestinians, Arabs, and the Muslim community due to the genocide, bombings, denial of medical aid, and starvation in Gaza. This situation will not end without intervention from Israel's allies like Australia, who have yet to set any red lines or consequences.

3. SUBMISSION

Throughout history, genocides have inflicted immeasurable suffering and loss across the globe. Genocides have targeted specific ethnic, religious, or national groups, resulting in mass killings, displacement, and trauma on a profound scale. Despite international efforts to prevent such horrors, genocides continue to occur, underscoring the urgent need for effective legislative measures to combat impunity and protect vulnerable populations.

In a domestic environment where autonomous sanctions are not deployed in line with international legal rulings or developments but with Australia's overall defence and foreign policy aligning with the US, this opens up Australia, its officials, members of parliament and companies to tremendous legal and reputational risk.

We are now in an international environment where proceedings are brought against countries like Germany for aiding Israel in the commission of genocide, where arrest warrants are issued for Israeli leaders (major US partners), and where courts find that state legal obligations to prevent genocide and other crimes cannot be excused by national political or policy prerogatives, leading to successful rulings against exports.

Australia formally aims to rank among the world's top 10 arms exporters by 2028, has established defence and cyber security partnerships with Israel since 2017, and the Albanese government wants Australia to be a top maker of US weapons outside America. It recently introduced the Future Made in Australia Bill which will help to make that dream a reality by allowing more public funds to be invested in weapons companies and defence manufacturing in Australia.

A statement from 20 June 2024 by the United Nations lists arms companies involved in arms transfers to Israel and financial institutions investing in those companies. The Australian

Government has maintained contracts with quite of few of those companies and announced new contracts in the past ten months. The United Nations is calling on the Australian Government to end transfers to Israel, even if they are executed under existing export licenses. An end to transfers must include indirect transfers through intermediary countries that could ultimately be used by Israeli forces, particularly in the ongoing attacks on Gaza.

Australia has ratified the Genocide Convention through the *Genocide Convention Act 1949*, fulfilling its obligation to enact legislation to provide effective penalties for persons guilty of genocide under Article V of the Genocide Convention. Australia, therefore, has an international and national obligation to prevent and punish genocide under Article I of the Genocide Convention. However, Australia has failed to uphold its obligation to prevent and punish genocide by failing to call upon organs of the United Nations to take action on the genocide of Gaza, impose sanctions under the National Autonomous Sanctions Regimes or divest ties with companies with ties to Israel. A failure to fulfil this obligation under Article I may incur state responsibility, leading to diplomatic or legal consequences and risks complicity in genocide.
Beyond the Genocide Convention, the International Court of Justice (ICJ) has also stated that genocide is a peremptory norm of international law (*jus cogens*). Therefore, regardless of if states have ratified the Convention, they are bound by its jus cogens nature.

The ICJ's preliminary measures orders against Israel not only have implications for Israel to follow the orders but also put all other states on notice of the risk of being an accessory to genocide. Additionally, Article IV of the Genocide Convention extends the complicity of genocide to include private individuals as well, and it can be established that as individuals comprising the State, persons in Australia would have obligations to prevent or punish genocide where the State itself refuses to uphold these obligations.

These obligations may be extended to relevant individuals whose decisions have had implications in Gaza, such as the Australian foreign minister Penny Wong, who cut funding to UNRWA, directly restricting aid to combat the genocide through collective punishment. Penny Wong may also be held liable concerning her failure to designate individuals and entities to be subject to financial sanctions and travel bans under the Australian Magnitsky sanctions framework for serious violation or serious abuses of human rights (s 3(3)(d) Autonomous Sanctions Act (2011)).

Australia has also ratified the Rome Statute. Prime Minister Anthony Albanese has been referred to the International Criminal Court pursuant to Article 15 of the Rome Statute for accessorial support to the genocide in Gaza.

While removing barriers to commencing proceedings under Division 268 of the Criminal Code removes a clear conflict of interest that exists in enabling the Attorney General to moderate litigation against its own government, AMAN is concerned that this step alone will not prevent further genocide in Gaza or elsewhere, especially when the scale of impugned government and corporate involvement is prolific and subject to extensive national security and commercial sensitivity protections, as is the case right now.

This submission reviews various legal frameworks and makes recommendations about how Australia can strengthen this framework to vastly reduce the risk that it is contributing to active genocides.

The existing sanctions framework relies heavily on ministerial discretion. Red lines must be introduced into existing legislation where certain thresholds are crossed; for example, genocide risk is established through international court proceedings.

There is currently no formal mechanism in Australia that directly targets genocide in business operations and supply chains or supports the business community to take action to address genocide.

Given the ongoing situation in Gaza and the broader implications of unchecked arms trading, it is imperative to prevent the misuse of public funds and ensure compliance with international standards. Australia's future should not be synonymous with contributing to global suffering and devastation.

4. RECOMMENDATIONS

1. AMEND Autonomous Sanctions Act 2011 (Cth) section 3 to include the following additional sub-paragraph in sub-section 3(3): (g) serious violations of the right to self-determination; and (h) serious violations of the right of all peoples to live free from genocide, apartheid, racial segregation or illegal foreign occupation.

2. EXPAND Australia's Serious Violations or Serious Abuses of Human Rights thematic sanctions regime to explicitly include additional core violations of peremptory norms of international law. This includes amending the Regulation 6A (Thematic designation of persons or entities or declaration of persons) of the Autonomous Sanctions Regulations 2011 (Cth) so that it includes violations of the right to self-determination; violations of the prohibition on genocide; violations of the prohibition on apartheid and racial segregation; and the prohibition on foreign illegal occupation. This could be done through inserting the following new sub-paragraph into Regulation 6A(4)(a): (i) Right to self-determination; and (ii) Right of all peoples to live free from genocide, apartheid and racial segregation, and illegal foreign occupation.

3. INCLUDE a trigger mechanism in Australia's sanctions regime that responds to and implements authoritative decisions of international courts, in particular the International Court of Justice, concerning serious violations and abuses of fundamental human rights. This includes implementing determinations in relation to serious violations of the right to life and serious violations of the right to self-determination in a consistent and comprehensive manner. In the case of Israel, this must include applying sanctions in line with ICJ fact-findings and legal findings to include sanctions on the Israeli state authorities, including Israel's military and security forces and Israel's political and military leadership, as key actors who have created, enforced and continue to maintain its entrenched regime of illegal occupation in Palestine.

   For example, in circumstances where the International Court of Justice has provided or provides a provisional ruling against a nation-state finding a real and imminent risk of irreparable prejudice to a group's rights to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention[3]; or the United

Nations issues a statement requesting states and companies end arms transfer to a state to avoid the risk of being held responsible for serious human rights violations[4], sanctions need to be triggered that include coverage of

a Economic, diplomatic and military sanctions on the accused state;

b Magnitsky Act sanctions;

c Australian nationals must not be allowed to serve in the military of the accused nation-state.

d Future Fund and other public investments in impugned arms companies (identified as having criminal involvement risk) should be immediately divested. This also applies, without limitation, to Future Made in Australia investments and Export Finance Australia investments, and local government sister city arrangements with authorities of the accused state.

e Contracts with impugned arms companies involved in arms transfers to the impugned state, which should be ended.

f Reversal of any national exemption for the 'United Kingdom and the United States from Australia's export control permit requirements' under the Defence Trade Controls Act 2012, where parties to the AUKUS arrangement are military suppliers to the accused state.

4. INTRODUCE legal obligations on defence industry companies to monitor their supply chains for genocide risk and to disclose and avoid genocide risk. Civil remedies must be available against companies that fail to disclose their genocide risk or mitigate that genocide risk.