AUSTRALIAN CENTRE FOR INTERNATIONAL JUSTICE

Inquiry into Australia' Sanctions Regime

Submission to the Foreign Affairs, Defence and Trade Reference Committee

6 September 2024

About the Australian Centre for International Justice

The Australian Centre for International Justice (**ACIJ**) is an independent not-for-profit legal centre dedicated to seeking justice and accountability for victims and survivors of serious human rights violations. We work towards developing Australia's role in investigating, prosecuting, and providing remedies for these violations. We work with affected communities and partners locally and abroad in the global fight to end the impunity of those responsible for these violations. Our work is informed by the values of justice, accountability, human rights, dignity, courage and solidarity.

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1. Introduction

The Australian Centre for International Justice (**ACIJ**) welcomes the opportunity to make this submission to the Foreign Affairs, Defence and Trade Reference Committee's (the **Committee**) inquiry on Australia's sanctions regime (**Inquiry**).

The ACIJ's work focuses primarily on international criminal justice and accountability. Thus, this submission outlines potential amendments to the current sanctions regime to strengthen, promote and enforce international human rights and justice, with a focus on the following Terms of Reference (**ToR**) listed for this Inquiry:

(c) measures to coordinate, collaborate, and harmonise sanctions with partners and allies, and multilateralisation;

(d) mechanisms to freeze and confiscate assets belonging to sanctioned persons/entities and redistribution of proceeds to affected persons;

(e) engagement by the Australian community, civil society, financial institutions and other organisations in Australia's sanctions regime;

(f) methods to assess the effectiveness of sanctions decisions and/or the extent to which sanctions are having the intended impact, and recommended improvements; and

(g) how Australia's sanctions regime could better align with Australia's existing anti-corruption and crime measures, including to better target Australians involved in designated actions.

ACIJ welcomes any further opportunity to provide additional commentary or supplementary submissions to the Committee if it would assist its Inquiry.

Glossary

International crimes: the ACIJ's reference to 'international crimes' refer to those atrocity crimes which have been criminalised under federal Australian law pursuant to Divisions 268 and 274 of the *Criminal Code Act 1995* (Cth) (***Criminal Code***); namely, genocide, crimes against humanity, war crimes and torture.

Universal jurisdiction: a legal concept that allows states to investigate and prosecute certain criminal offences regardless of the place where they were committed and the nationality of the perpetrator or the victim. Universal jurisdiction applies to egregious international crimes, including those listed above. It arises from the idea that certain crimes are so grave that they affect the international community as a whole and that perpetrators of those crimes should not benefit from impunity.

Recommendations

The ACIJ makes the following recommendations:

Recommendation 1

The Regulations should be amended to introduce serious violations of international humanitarian law and threats to international peace and security as thematic sanction regimes under regulation 6A to expand the impact of sanctions on persons engaged in the most egregious international crimes.

Recommendation 2

Australia should strengthen collaboration with like-minded partners and improve on its response time to multilateralise sanctions impact.

Recommendation 3

Australia should establish mechanisms to freeze, confiscate and repurpose assets of designated persons for the benefit of communities that are victims of underlying wrongful conduct.

Recommendation 4

Legislation should specify a clear route and process for contribution and submission of information from civil society and non-governmental organisations.

Recommendation 5

Decisions to impose sanctions should ensure consultation with relevant government agencies and departments to consider whether the conduct alleged amounts to an extraterritorial criminal offence against the Commonwealth in Chapter 8 of the *Criminal Code* and to determine whether prosecution is more likely and appropriate in the circumstance. Such consultation would be particularly important if thematic sanctions were introduced for serious violations of international humanitarian law.

Recommendation 6

Other enforcement options, including infringement notices and civil pecuniary penalties, should be implemented for the purposes of providing an avenue for accountability for less serious contraventions.

Recommendation 7

The Australian Sanctions Office (**ASO**) should release guidance on best practice for individuals and entities concerning reasonable precautions to take while awaiting the outcome of a sanctions permit application, response from the ASO and/or judgment by the Federal Court in response to a declaration application.

2. Current Australian Sanctions Regimes

Legislative background

The underlying basis for imposing sanctions is that they can be an effective tool for responding to issues of global concern, which fall short of the use of armed force. Although the term 'sanctions' is not defined expressly in the United Nations Charter, the use of sanctions as a mechanism for addressing international concern is derived from Article 41 measures. Article 41 provides for 'measures not involving the use of armed force', and may include a 'complete or partial interruption of economic relations'.

Australia currently implements two sanctions regimes:

- the UN Security Council's sanctions regime, which Australia is obliged to implement as a matter of international law; and
- Australia's own autonomous sanctions which are implemented as a matter of Australian foreign policy and can be supplementary to, or independent of any UN Security Council sanctions. Autonomous sanctions include both country-specific regimes and thematic regimes.

The *Autonomous Sanctions Act 2011* (Cth) (the **Act**), together with the *Autonomous Sanctions Regulations 2011* (Cth) (the **Regulations**) authorise the Minister for Foreign Affairs (the **Minister**) to impose autonomous sanctions to 'facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia'.[1]

The Act is the enabling legislation that allows the Minister to establish new sanctions regimes under the Regulations through which individuals and entities can be the target of sanctions.

The types of sanctions measures that can be imposed include:

- targeted financial sanctions and asset freezes;
- visa restrictions and travel bans; and
- trade and commercial sanctions.

[1] *Autonomous Sanctions Act 2011* (Cth) s 10(2).

Magnitsky-style thematic sanctions

On 2 December 2021, the Australian Parliament passed the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021* introducing a new thematic sanctions regime to the Act.[2] The amendments expanded Australia's existing autonomous sanctions regime by creating a framework to facilitate the establishment of thematic sanctions, with the purpose of enabling Australia to respond more swiftly to situations of international concern.[3] On 21 December 2021, the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021* came into force, establishing thematic sanctions regimes in relation to serious corruption, serious abuses of human rights and significant cyber incidents.

These regulations allow the Minister to impose targeted sanctions and travel bans against individuals or entities that have:

- been engaged in, responsible for, or complicit in serious violations or abuses of three human rights relating to physical integrity (rights to life; not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; and to be free from slavery, servitude or forced or compulsory labour);
- been engaged in, responsible for, or complicit in serious corruption, defined as bribery or misappropriation of property; or
- 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.[4]

While some country-specific autonomous regimes currently include considerations for human rights violations such as that for Zimbabwe and Syria, the introduction of Magnitsky-style thematic sanctions established that sanctions would not be restricted in their operation to any particular country. Thus, individuals and entities meeting the listing criteria could be designated regardless of where the conduct occurred.

The adoption of Magnitsky-style sanctions stemmed from a global movement to adopt Magnitsky style laws similar to that of the United States (**US**). In 2012, the US adopted the *Magnitsky Act*,[5] and imposed sanctions (including asset freezes, travel bans and other financial restrictions) against those persons responsible for the detention, torture and death of Sergei Magnitsky, a tax

[2] Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021.
[3] Revised Explanatory Memorandum of the Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021, [5].
[4] *Autonomous Sanctions Regulations 2011* (Cth), regulation 6A.
[5] *Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012,* Pub L No 112-208 USC 2434.

accountant who was detained, tortured and subsequently died in prison, after exposing a significant tax fraud scheme being misappropriated by government officials working with organised crime.[6] In 2016, the US adopted the *Global Magnitsky Human Rights and Accountability Act* (the ***US Global Magnitsky Act***),[7] which broadened the scope of those who may be targeted for sanctions by the US government and included 'serious cases of human rights abuse and significant corruption'. In 2022, the US *Global Magnitsky Act* was permanently reauthorised and the associated amendments expanded the actors which could be sanctioned to include immediate family members.[8] Similar legislation has been introduced in the United Kingdom (**UK**),[9] Canada[10] and several countries in Europe.[11] The European Union has also adopted a global human rights sanctions regime but the regime notably does not deal with sanctions relating to corruption.[12]

[6] See, Aryeh Neier, 'Almost a Decade After His Death, Sergei Magnitsky Gets a Measure of Justice', *Open Society Justice Initiative*, 27 August 2019.
[7] *Global Magnitsky Human Rights and Accountability Act 2016,* Pub L No 114-328, 22 USC 2656.
[8] *Global Magnitsky Human Rights Accountability Reauthorisation Act*, S 93, 117th Congress (2022).
[9] *Sanctions and Anti-Money Laundering Act 2018* (UK). *Global Human Rights Sanctions Regulations 2020* (UK) and *Global Anti-Corruption Sanctions Regulations 2021* (UK).
[10] *Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law)* SC 2017 c 21.
[11] These include: Estonia, Lithuania, Latvia, Gibraltar, Kosovo, Jersey.
[12] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410I/1 and Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L 410I/13.

3. Recommendations

In relation to ToRs (c) and (f), concerning:

- **specific measures to coordinate, collaborate, and harmonise sanctions with partners and allies, and multilaterally; and**
- **methods to assess the effectiveness of sanctions decisions and/or the extent to which sanctions are having the intended impact, and recommend any improvements;**

the ACIJ recommends the following:

Australia should ensure the scope of sanctioned conduct includes serious violations of international humanitarian law and threats to international peace and security in order to enhance impact and accountability.

Recommendation 1

The Regulations should be amended to introduce serious violations of international humanitarian law and threats to international peace and security as thematic sanction regimes under regulation 6A, to expand the impact of sanctions on persons engaged in the most egregious international crimes.

The objects clause of the Act specifies that in relation to the thematic sanctions regime, autonomous sanctions may address one or more of the following:

- the proliferation of weapons of mass destruction;
- threats to international peace and security;
- malicious cyber activity;
- serious violations or serious abuses of human rights;
- activities undermining good governance or the rule of law, including serious corruption;
- serious violations of international humanitarian law.[13]

The list is non-exhaustive and indicates the types of thematic sanctions regimes that could subsequently be established under the Regulations.[14] While absent in the first iteration of the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021* (the **Bill**), serious violations of international humanitarian law was included in later versions of the

[13] *Autonomous Sanctions Act 2011* (Cth) s 3(3).
[14] Revised Explanatory Memorandum of the Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021, pg.1.

Bill, ultimately passed by Parliament.[15] In the accompanying second reading speeches, Senator Penny Wong outlined the importance of including serious violations of international humanitarian law as a theme in the Act, stating that:

> "[t]he bill does not cover the violations of the rules and norms of armed conflict. It does not cover the crime of genocide or other crimes against humanity. It does not cover instances where rape and sexual violence are used as weapons of war. It does not cover the targeting of civilians, nor the manipulation or blockage of humanitarian aid in conflict zones. This is why we will amend this legislation to enshrine violations of international humanitarian law—the law of conflict as an additional theme under which sanctions can be applied".[16]

Notwithstanding the above acknowledgements, the Regulations do not presently include thematic sanction regimes for serious violations of international humanitarian law or threats to international peace and security. A lack of these regimes position Australia as an isolated safe haven for individuals who have been involved in the most egregious international crimes.

The introduction of thematic sanction regimes which consider conduct of serious violations of international humanitarian law and threats to international peace and security would address gaps in enforcing accountability for international crimes where other measures of accountability are not available. Imposing targeted sanctions against individuals suspected of atrocity crimes can act as an influential deterrent and demonstrate that, where prosecutorial avenues are unavailable, there remains serious repercussions to perpetrators through visa bans and the freezing of assets.

The impunity of suspected perpetrators begins to erode when they are faced with legal or financial consequences for their behaviour. Bill Browder, one of the leaders of the global Magnitsky movement states simply, that disrupting abusers' safety of money has a profound impact on their psychology.[17] A strong proponent of human rights sanctions regimes, Geoffrey Robertson KC provides some examples and states: "[t]hose from Sri Lanka who were responsible for the Tamil genocide, […] [w]e shouldn't allow these people in, and we shouldn't

[15] Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021, as passed by both houses.
[16] Second Reading Speech, Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Bill 2021, Senator Penny Wong, 1 December 2021.
[17] Ibid.

allow them to put their children in our best private schools, or put their money in our banks, or put their parents in our hospitals".[18]

Accordingly, the Regulations should be amended to introduce serious violations of international humanitarian law and threats to international peace and security as thematic sanction regimes under regulation 6A.

Australia should work with partners globally on shared sanctions priorities.

Recommendation 2

Australia should strengthen collaboration with like-minded partners and improve on its response time to multilateralise sanctions impact.

Sanctions are multilateralised when more than one jurisdiction applies sanctions against the same person or entity. The multilateralisation of sanctions strengthens the overall impact of designations by further restricting the ability to travel and engage in transactions in other jurisdictions. In a report by Human Rights First and other public interest organisations published in November 2022, it was reported that between the US, Canada, UK and the European Union, only 11% of a total of 761 perpetrators sanctioned under respective Magnitsky-style programs were sanctioned by at least one other jurisdiction and that most multilateral sanctions involved only two jurisdictions.[19]

While Australia was not included in this analysis, the data highlights that on a global scale, there is a need to strengthen multilateralisation. Sanctions ultimately work best when multiple States act together. Australia should prioritise effective and collaborative approaches with sanctions partners globally to pool expertise, share information and extend collective reach to maximise the impact on targeted individuals and entities. Furthermore, Australia should collaborate and provide support to regional partners in developing sanctions capabilities as well as sharing expertise and experience.

Moreover, the multilateralisation of sanctions would have greater impact where the designations across jurisdictions occur simultaneously or within as short a timeframe as possible. Presently, Australia is falling behind in its response time to multilateralise sanctions. As at the date of this submission, there are a number of entities and individuals that have been designated in the US,

[18] Steve Cannane, 'Australia Should Pass Magnitsky Act to Target Putin's Cronies, Businessman Bill Browder Says' (20 February 2018) *ABC 7.30*.
[19] Human Rights First et al., 'Multilateral Magnitsky Sanctions at Five Years', November 2022, pg.14.

UK, European Union and Canada for human rights violations in the West Bank that have yet to be sanctioned by Australia. In correspondence dated 13 August to the Department of Foreign Affairs and Trade, the ACIJ identified nine individuals and entities that had been sanctioned in *at least* two of the above jurisdictions that had not been sanctioned by Australia. The majority of these have been sanctioned in at least the US, European Union and Canada and two have been sanctioned in *all* of the above jurisdictions except Australia.

While we understand that each jurisdiction needs to consider the facts against its own designation criteria, increased collaboration with like-minded partners would likely assist in reducing timeframes of certain designations. How such collaboration could be enhanced is a matter for the Australian Sanctions Office.

In relation to ToR (d), concerning:

- **consideration of mechanisms to freeze and confiscate assets belonging to sanctioned persons/entities and how the proceeds can be used to benefit peoples and countries impacted by the behaviour of sanctioned individuals and entities;**

the ACIJ recommends the following:

Australia should establish processes for asset forfeiture and repurposing in the context of sanctions designations.

Recommendation 3

Australia should establish mechanisms to freeze, confiscate and repurpose assets of designated persons for the benefit of communities that are victims of underlying wrongful conduct.

There are currently no legal avenues under Australian law that specifically allow for the seizure and repurposing of frozen assets of sanctioned individuals or entities for the benefit of individuals and communities who have been impacted by the behaviour of sanctioned individuals and entities. There are certain mechanisms for the confiscation of assets under the *Proceeds of Crime Act 2002* (Cth) (**POCA**) requiring the court to be satisfied that a person whose conduct or suspected conduct constitutes a 'serious offence'.

In our view, a clear amendment to the POCA or separate regulations made under the *Autonomous Sanctions Act 2011* (Cth) addressing the procedures for confiscation and repurposing with specific respect to sanctions would be appropriate. These amendments could propose that assets would vest in a trust, with decisions on distribution to be made subject to applications to an independent committee or following consultation with affected communities. The practicalities of how impacted individuals and communities would best be identified and how

funds would actually be paid would need further consideration, including with respect to ensuring that non-Australian citizens are not excluded from the reparation scheme. The amendment could also allow for a voluntary process whereby *sanctioned individuals* may apply for their sanctioned funds to be released for the express purpose of supporting recovery and reconstruction in the relevant conflict or to affected communities.

In relation to ToR (e) concerning:

- **consideration of opportunities for engagement by the Australian community, civil society, financial institutions and other organisations in Australia's sanctions regime;**

the ACIJ recommends the following:

Australia should ensure contribution of and engagement with civil society.

Recommendation 4

Legislation should specify a clear route and process for contribution and submission of information from civil society and non-governmental organisations.

The US Global Magnitsky process values input from non-governmental organisations and allows for their contribution. Section 1263(c) of the *Global Magnitsky Human Rights and Accountability Act* (***Global Magnitsky Act***) provides that in determining whether to impose sanctions, the President shall consider:

> credible information obtained by other countries and nongovernmental organizations that monitor violations of human rights.

This has led to non-governmental organisations coordinating efforts to document cases from around the world that meet the requirements of the *Global Magnitsky Act*. Non-governmental organisations are providing essential evidence and information in the form of dossiers and sanctions files to assist US authorities in making decisions on designation of individuals for sanctions.[20]

In the UK, the government released a policy paper in February 2024 titled 'Deter, disrupt and demonstrate – UK sanctions in a contested world: UK sanctions strategy', which disclosed that

[20] Julian Pecquet, 'Magnitsky Law Spawns Cottage Industry of Sanctions Lobbying' (30 January 2020) *Al Monitor*.

effective sanctions require strong partnerships, stating that this applies "equally to government-to-government relationships and the relationship between government and the private sector and other stakeholders".[21] The policy paper further specifies that the UK works with humanitarian organisations and non-governmental organisations and receives verifiable information to strengthen the evidence base for targeted sanctions.[22]

Australia's sanctions regime should include a similar avenue for direct input from non-governmental organisations that are recognised for their invaluable fact-finding and methodological research techniques. They are credible and provide authorities with direct access to witnesses, victims and other useful evidence and information required for their assessment, that may otherwise not be accessible to the government. The value and importance of civil society organisations cannot be overlooked. The legislative amendments could include the following:

- that the Minister consider any credible information provided by civil society organisations including those monitoring violations of human rights and international humanitarian law;
- the Minister convene regular meetings with civil society organisations, which could be held on a quarterly basis;
- opportunities for civil society to request confidential consultations to provide information to the Minister; and
- the development of guidelines for ministerial and departmental engagement with civil society organisations in relation to sanctions consultation.

Should such amendments not be effected through legislation, the ACIJ is of the view that a change in the present culture towards collaboration would benefit the overall efficiency and intended impact of the sanctions regime. Such collaboration could include regular, confidential meetings that allow for open and frank discussion, which can be followed by a real intention to act.

While the ACIJ understands that there may be some constraints to providing formal responses to those making submissions for the recommendation of designations, it is our view that at minimum, the ASO should engage meaningfully with civil society organisations by providing specific feedback on their submissions on recommended designations.

[21] United Kingdom Government, 'Deter, disrupt and demonstrate – UK sanctions in a contested world: UK sanctions strategy', February 2024, pg.16.
[22] Ibid, pg.18.

In relation to ToR (g) concerning:

- **consideration of how Australia's sanctions regime could better align with Australia's existing anti-corruption and crime measures, including to better target Australians involved in designated actions;**

the ACIJ recommends the following:

Australia should prioritise prosecution.

Recommendation 5

Decisions to impose sanctions should ensure consultation with relevant government agencies and departments to consider whether the conduct alleged amounts to an extraterritorial criminal offence against the Commonwealth in Chapter 8 of the Criminal Code and to determine whether prosecution is more likely and appropriate in the circumstance. Such consultation would be particularly important if thematic sanctions were introduced for serious violations of international humanitarian law.

Under international law, States have obligations to prosecute and punish those who engage in the commission of international or grave crimes. They also have a duty to prevent the commission of these crimes.[23] Encouraging effective investigations and prosecutions is therefore paramount in enforcing this obligation which is said to carry the status of *erga omnes*[24] legal obligations, further emphasising that the obligation to prosecute, in an architecture of accountability, should be prioritised, where possible, over other accountability tools, such as imposing sanctions measures.

In its resolution calling for an individual sanctions regime the European Parliament emphasised "that the criminal prosecution of the perpetrators of gross human rights violations should remain the primary objective of all efforts undertaken by the EU and its Member States to combat impunity".[25]

Sanctions are a tool to holding human rights violators accountable. They are not a substitute, but can augment or sometimes precede individual criminal responsibility. The ACIJ recognises

[23] See for example, *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951), art.1.
[24] See, Cherif Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', (1996) 59(4) *Law and Contemporary Problems* 63-74.
[25] *European Parliament Resolution 2019/2580 (RSP) of 14 March 2019, on a European Human Rights Violations Sanctions Regime* [12].

however that prosecutions are not likely in all circumstances particularly where there is difficulty in obtaining evidence to the required standard of proof.

There are numerous situations where there are no immediate prospects that alleged perpetrators might be prosecuted in either the courts of the territory of the State where the crimes were committed; at international tribunals such as the International Criminal Court (for lack of jurisdiction); in *ad-hoc* or regional tribunals; or in the domestic courts of nations under the principle of universal jurisdiction. As a result, perpetrators of these crimes enjoy impunity and often continue to commit grave crimes. It is in these circumstances where targeted sanctions can be a powerful tool for accountability.

Universal jurisdiction and Australia's obligations to investigate and prosecute

Australia has international obligations to investigate and prosecute allegations of international crimes. These obligations arise out of numerous treaties Australia has ratified. They are found in principles of customary international law,[26] the four *Geneva Conventions*[27] the *Convention against Torture,*[28] the *Genocide Convention*,[29] and the *Rome Statute of the International Criminal Court* (**Rome Statute**).[30] Australia is obligated to prosecute a person where there is a reasonable belief that the person has committed war crimes or other serious offences against humanity. These obligations reflect Australia's inclusion of these grave crimes as indictable offences in the Criminal Code.[31] In addition, Australia has acknowledged that it takes these obligations seriously.[32]

The preamble to the Rome Statute affirms that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international

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[26] For example, see International Committee of the Red Cross, *Customary International Humanitarian Law: Volume 1: Rules*, 2005, rule 158. See also, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res 60/147, 60th sess, UN Doc A/RES/60/147 (16 December 2005).
[27] Citing here just one of the four: *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention) opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), art 146.
[28] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987), art 7. See also, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, (Judgment), [2012] ICJ Rep, 422, 443, [50].
[29] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature, 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).
[30] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).
[31] See for example, Divisions 268 and 274 of *Criminal Code*.
[32] Permanent Mission of Australia to the United Nations *Australian Views on the Scope and Application of the Principle of Universal Jurisdiction*, 3 May 2016.

cooperation". Further, the Rome Statute recalls that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". To this end, the Rome Statute emphasised that the International Criminal Court is complementary to national criminal jurisdictions.

Australia's legislative framework for international crimes allows for absolute universality, meaning there is no requirement for a territorial or personality link. Extended geographical jurisdiction therefore applies to the offences of genocide, war crimes, crimes against humanity and torture.[33]

Imposing sanctions such as visa travel bans on perpetrators who might be of interest to Australian investigators and prosecutors, will directly impede prosecution. Therefore, any sanctions decision-making process adopted, should consult with relevant Australian departments and agencies, such as the Australian Federal Police, the Commonwealth Department of Public Prosecution and the Attorney-General's Department, to consider whether the circumstances would favour prosecution. If so, a decision against imposing some or all sanctions measures, such as visa travel bans, should be made.

In addition, other enforcement options should be introduced to broaden the scope of responses available to the Minister against Australians in contravention of sanctions laws.

Recommendation 6

Other enforcement options, including infringement notices and civil pecuniary penalties, should be implemented for the purposes of providing an avenue for accountability for less serious contraventions.

The contravention of sanctions laws is a criminal offence under section 16 of the Act, punishable on conviction by imprisonment for not more than 10 years, a fine calculated pursuant to the provision, or both. Criminal breaches must meet the criminal standard of proof of beyond a reasonable doubt, which often requires a lengthy and resource-intensive process with respect to both investigation and prosecution.

The ASO, as the prescribed sanctions regulator for the Australian Government, should be conferred statutory powers to issue infringement notices. The imposition of infringement notices would alleviate the need to engage in the court process under both civil and criminal enforcement

[33] See ss 268.117(1), 274.2(5) and 15.4 of the *Criminal Code*.

action. Infringement notices that have been paid should also be published on the Department of Foreign Affairs and Trade website, including a description of the conduct specified in the notice for which the infringement was issued and an acknowledgement that compliance with the notice is not an admission of guilt or liability. Such publication would act as both a specific and general deterrent. An infringement notice may be a more appropriate response than court-based action if for example, the misconduct was relatively minor, and the infringement notice would be a proportionate enforcement response in the circumstances. The process should also allow for the right to seek withdrawal of the infringement notice by application to the ASO.

The introduction of civil pecuniary penalties may otherwise allow for enforcement action that does not require satisfaction of the higher standard of proof,[34] and may be a reasonable middle ground option, similar to that in place in the US,[35] and the UK.[36]

Best practice guidance should be released by the Australian Sanctions Office.

Recommendation 7

The Australian Sanctions Office (ASO) should release guidance on best practice for individuals and entities concerning reasonable precautions to take while awaiting the outcome of a sanctions permit application, response from the ASO and/or judgment by the Federal Court in response to a declaration application.

It is incumbent on individuals and entities to ensure reasonable precautions and due diligence steps are undertaken before engaging in any dealing to ensure compliance with Australian sanctions laws. Under section 16(7) of the Act, an entity is taken to not have otherwise committed an offence of contravening sanctions laws if the entity proves that it took reasonable precautions, and exercised due diligence, to avoid such contravention. Notwithstanding this defence, little guidance is published by the Department of Foreign Affairs and Trade on what may constitute due diligence, and in any case, only the 'minimum' expectation is disclosed.[37]

Presently, the ASO advises that applications for permits may take a minimum of three months to process, particularly for complex activities and activities in high-risk countries or regions. Such delays are problematic, given the potential impact on business operations for entities, rendering

[34] Noting that a contravention of sanctions laws is a strict liability offence for bodies corporate, not requiring the prosecution to prove that the company breached sanction law intentionally, knowingly, recklessly or negligently.
[35] The US Office of Foreign Assets Control enforcement powers are detailed in Appendix A to Part 501 of the OFAC Reporting, Procedures and Penalties Regulations (31 CFR Part 501).
[36] Section 146 of the *Policing and Crime Act 2017*.
[37] Department of Foreign Affairs and Trade, 'Australia and sanctions – FAQs'.

the permit process critical to avoiding reputational, legal, and market risks. The risks are further exacerbated by a lack of guidance from the ASO on what best practice should be adopted for entities whilst awaiting the outcome of sanctions permits, response to inquiries and/or judgments by the court. As it is likely that the entity would be concerned with the risks of significant commercial consequences, further guidance should be published on how entities should manage commercial realities while awaiting any of the above outcomes.

The ACIJ is concerned that if such a gap is not addressed, entities can continue to operate and enjoy business profits awaiting the above outcomes, with the possibility that, in doing so, the entity is breaching sanction laws. The ACIJ appreciates that each matter would differ on the facts contributing to the level of risk exposure, though further guidance by the ASO on this would clarify best practice expectations of entities in the interim periods outlined above.

4. Conclusion

The Australian Government should take this opportunity to address the gaps and shortcomings within the existing autonomous sanctions framework to enhance accountability.