The Senate

Foreign Affairs, Defence and Trade Legislation Committee

Autonomous Sanctions Bill 2010 [Provisions]

March 2011

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Recommendation 1

3.33 The committee recommends that the government consider developing best practice guidelines for the policy formulation, drafting, implementation, enforcement, monitoring and administration of autonomous sanctions. These guidelines could be informed by relevant international resources, research and public consultation.

Recommendation 2

3.41 The committee recommends that the government amend the Explanatory Memorandum to include guidance about the types of 'other writing' that may be incorporated by reference in regulations made under subclause 10(3).

Recommendation 3

3.56 The committee recommends that the government should amend the Explanatory Memorandum to set out the reasons for including subclause 14(5).

Recommendation 4

3.63 The committee recommends that the government consider:

- extending Part 2, Division 2 to the enforcement of sanction laws as defined in Clause 4; or
- if there is no legislative intention to do so, including in the Explanatory Memorandum an explanation of how Part 2, Division 2 is consistent with the purpose of the bill expressed in subclause 3(b).

Recommendation 5

3.73 The committee recommends that the government amend the Explanatory Memorandum to include a statement of reasons for the imposition in subclause 16(8) of strict liability in respect of the offences contained in subclauses 16(5) and 16(6).

Recommendation 6

3.88 The committee recommends that, for the avoidance of doubt, the government consider including in subclause 16(2) an element that an individual must hold an authorisation.

Recommendation 7

3.104 The committee recommends that the government consider including in the bill or the Explanatory Memorandum an express statement of the fault elements applicable to each of the physical elements of the offences set out in Clause 17.

Recommendation 8

3.108 The committee recommends that the government consider including in the bill:

- an inclusive definition of the 'administration' of an autonomous sanctions regime for the purposes of Clause 17; and

- a definition of an SES employee, by reference to the *Public Service Act 1999,* for the purpose of Clause 27.

Recommendation 9

3.117 The committee recommends that the government amend the Explanatory Memorandum to the bill to set out the reasons for:

- derogating from the privilege against self incrimination in Clause 22; and
- the non-inclusion of derivative use immunity in subclause 22(2).

Recommendation 10

3.118 The committee recommends that the government consider extending the use immunity recognised in subclause 22(2) to documents provided pursuant to a notice issued under Clause 19.

Recommendation 11

3.127 The committee recommends that the government amend the Explanatory Memorandum to the bill to explain the reasons for the immunity contained in Clause 25.

Recommendation 12

3.134 The committee recommends that the government amend the Explanatory Memorandum to the bill to set out the reasons for including the following clauses:

- subclause 10(3);
- Clause 12;
- Clause 13;
- subclause 14(5);
- Clause 16;
- Clause 22; and
- subclause 24(2).

Recommendation 13

3.146 The committee recommends that, subject to consideration of recommendations 1-12 of this report, the Senate pass the bill.

Chapter 1

Introduction

Background

1.1 On 26 May 2010, the Autonomous Sanctions Bill 2010 (the bill) was introduced into the House of Representatives. By resolution of the Senate, the provisions of the bill were referred to the Foreign Affairs, Defence and Trade Legislation Committee on 26 May for inquiry and report by 15 June. On 15 June, the Senate granted an extension of the time to report to 26 August 2010.

1.2 On 19 July 2010, the Governor-General prorogued the 42nd Parliament and dissolved the House of Representatives. After due consideration, the committee reported to the Senate that it had resolved not to continue its inquiry into the provisions of the bill. On 30 September, the bill was reintroduced in the House of Representatives and on the same day the Senate referred the provisions of the bill to the committee for inquiry and report by 18 November 2010. The Senate granted an extension until the end of the first sitting period in February 2011 (3 March 2011).

1.3 The Senate Standing Committee for the Scrutiny of Bills considered the bill and raised a number of concerns,[1] which are discussed in chapter 3. When recommending the proposed legislation for inquiry and report, the Selection of Bills Committee identified the domestic privacy implications of the bill as an issue for consideration.[2] This matter is also discussed in chapter 3.

Purpose of the bill

1.4 The purpose of the bill is to establish a framework for the implementation, enforcement and administration of autonomous sanctions. Autonomous sanctions are 'punitive measures, not involving the use of force, which a government imposes as a matter of foreign policy—as opposed to an international obligation under a UN Security Council decision'.[3] The latter measures are referred to as 'UN sanctions'.

1.5 According to the Explanatory Memorandum (EM), autonomous sanctions are intended to:

- limit the adverse consequences of a situation of international concern (for example, by denying access to military or paramilitary goods, or to goods, technologies or funding enabling programs of proliferation concern);

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1 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010*, 24 November 2010, pp. 388-400.

2 Senate Selection of Bills Committee, *Report No 11 of 2010,* 30 September 2010, paragraph 2(c) and Appendix 3.

3 Explanatory Memorandum, p. 1.

- influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern (by motivating them to adopt different policies); and
- penalise those responsible (for example, by denying access to international travel or to the international financial system).[4]

1.6 Autonomous sanctions may be applied to specific governments, individuals or entities, or specific goods and services that are responsible for, or involved with, a situation of international concern. According to the EM, these measures may be supplementary to, or independent of, UN Security Council sanctions. Autonomous sanctions are 'likely to play an increasing part in responses of like-minded countries to situations of concern'.[5]

1.7 The proposed legislation aims to expand the range of autonomous sanctions that Australia can implement to ensure that such measures match the scope and extent of those implemented by like-minded countries. The bill is also intended to create a flexible administrative framework to enable timely responses to situations of international concern.[6]

1.8 The bill is modelled on the *Charter of the United Nations Act 1945* (Cth) (UN Charter Act), which establishes a framework for the implementation, enforcement and administration of UN sanctions. This is intended to harmonise the administration of autonomous and UN sanctions and simplify compliance.[7]

Conduct of the inquiry

1.9 The committee advertised the inquiry on its website and in the *Australian* on 5, 9, 16 and 30 June, 14 July, 11 August and 13 October 2010. It wrote to relevant ministers and departments calling for written submissions and also contacted a number of other organisations, commentators and academics inviting them to make submissions to the inquiry. The committee received six submissions which are listed at Appendix 1. The committee agreed that, based on these submissions, a public hearing was not required.

Acknowledgements

1.10 The committee thanks all those who assisted with the inquiry.

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4 Explanatory Memorandum, p. 1.

5 Explanatory Memorandum, p. 1.

6 Explanatory Memorandum, p. 2.

7 Explanatory Memorandum, p. 2.

Chapter 2

Background

2.1 Sanctions are a foreign policy tool designed to persuade recalcitrant leaders to change their behaviour—for example, to improve recognition of human rights, to adopt or restore democratic institutions, and to promote respect for the rule of law.[1] Sanctions are punitive measures, not involving the use of armed force.[2] As noted in chapter 1, sanctions fall into two categories: UN sanctions and autonomous sanctions.

UN sanctions

2.2 The UN Security Council is the international decision-making body on peace and security matters. Its aim is to prevent threats to peace and security. It derives authority from Article 41 of the Charter of the United Nations to impose sanctions against persons or regimes when their actions threaten or breach international peace and security.

2.3 Actions that may threaten or breach international peace and security include: systematic oppression; abuses of human rights and democratic freedoms within a country; internal or international armed conflicts; and proliferation of weapons of mass destruction.[3] Sanctions imposed by the UN Security Council are legally binding on all UN member states. Member states are required to apply sanctions in accordance with decisions of the Security Council.[4]

2.4 According to DFAT, the 'contemporary practice of the Security Council is to impose highly targeted measures aimed at removing the circumstances that have led to a particular threat to, or breach of, international peace and security'.[5] These include:

- freezing funds, financial assets and economic resources owned or controlled by persons or entities in the member country;
- ensuring that these funds, assets or resources are not made available to persons or entities subject to sanctions; and
- preventing designated persons entering or transiting through their territories.[6]

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1 Reed M. Wood, 'The Hand upon the Throat of the Nation: Economic Sanctions and State Repression 1976–2001', *International Studies Quarterly,* (2008), 52, p. 490.

2 DFAT, *Submission 3*, p. 1.

3 DFAT, *Submission 3*, p. 1.

4 DFAT, Australia and the United Nations, What measures are imposed as UN Sanctions? http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_measures.html (accessed 2 June 2010).

5 DFAT, Australia and the United Nations, What measures are imposed as UN Sanctions? http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_measures.html (accessed 2 June 2010).

2.5 Goods subject to sanctions include military and security goods and services, including those with potential application to weapons of mass destruction and missile programs, or 'items that are used to fund conflict'.[7] Food and medical items have been traditionally exempted, but may be indirectly affected 'when a ban on exports deprives the target of the means of paying for food and other essentials'.[8]

Administration in Australia of UN sanctions

2.6 As mentioned in chapter 1, Australia implements UN sanctions through the UN Charter Act. Sanctions are applied by regulations made under the UN Charter Act, or under other legislation—for example, the *Customs Act 1901* and regulations, the *Migration Act 1958* and regulations, and the *Banking (Foreign Exchange) Regulations 1959*.[9] Contraventions of sanctions are criminal offences.[10]

2.7 The Department of Foreign Affairs and Trade (DFAT) is the lead Australian Government agency responsible for the administration of UN sanctions. Other agencies with administrative responsibilities include the Department of Defence, Australian Customs and Border Protection Services and the Reserve Bank of Australia.

Autonomous sanctions

2.8 UN and autonomous sanctions are distinct but complementary measures. According to DFAT, autonomous sanctions may be imposed:

- when the UN Security Council is unable to act—for example, because the situation does not fall within its mandate, or because member states cannot reach agreement; or
- to supplement a UN Security Council measure. [11]

2.9 Autonomous sanctions are similar in type to UN sanctions and, in addition, may be used to suspend non-humanitarian development assistance and

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6 DFAT, Australia and the United Nations, What measures are imposed as UN Sanctions? http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_measures.html (accessed 2 June 2010).

7 DFAT, Australia and the United Nations, What measures are imposed as UN Sanctions? http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_measures.html (accessed 2 June 2010).

8 Margaret Doxey, 'Reflections on the sanctions decade and beyond', *International Journal*, Spring 2009, p. 543.

9 DFAT, Australia and the United Nations, How are UN sanctions implemented in Australia?, http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_how.html (accessed 27 July 2010).

10 UN Charter Act, ss 27, 28.

11 Department of Foreign Affairs and Trade, *Submission 2*, p. 2. See further, Margaret Doxey, 'Reflections on the sanctions decade and beyond', *International Journal*, Spring 2009, p. 541.

government-to-government links.[12] They may be applied by individual countries or groups of like-minded countries. The European Union is an example of a regional group imposing sanctions.[13] Governments and academic commentators have foreshadowed a greater role for autonomous sanctions in international diplomacy.[14]

Australian autonomous sanctions

2.10 In his second reading speech, the Minister for Foreign Affairs, the Hon Kevin Rudd MP, emphasised that Australian autonomous sanctions follow international practice—they are intended to be selected measures aimed at maintaining international peace and security.[15]

2.11 DFAT explained that traditionally, autonomous sanctions in Australia have included financial sanctions, travel restrictions, restrictions on arms exports and a number of executive measures, including suspension of ministerial visits, cultural relations and non-humanitarian development assistance.[16] In contrast to UN sanctions, autonomous financial sanctions 'do not amount to a freeze on all the assets of, or a prohibition on making any assets available' to, individuals and entities subject to sanctions. At the time of writing, Australia has autonomous sanctions in place against seven countries. Measures include financial sanctions, travel restrictions, arms embargos and the downgrading of government-to-government contacts.[17]

The need for new legislation

2.12 Australia has no legislation designed specifically to implement autonomous sanctions. Several submitters to this inquiry supported the enactment of a coordinated legislative framework, replacing the existing 'patchwork' of instruments, which were said to be limited in many instances because they are intended for other purposes.[18]

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12 DFAT, Australia and the United Nations, What measures are imposed as autonomous sanctions? http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_measures.html (accessed 2 June 2010).

13 Margaret Doxey, 'Reflections on the sanctions decade and beyond', *International Journal*, Spring 2009, p. 548.

14 See Explanatory Memorandum, p. 1. See also, Margaret Doxey, 'Reflections on the sanctions decade and beyond', *International Journal*, Spring 2009, p. 547.

15 The Hon Kevin Rudd MP, Minister for Foreign Affairs, Second reading speech, *House Hansard*, 30 September 2010, p. 259.

16 DFAT, *Submission 3*, p. 1.

17 These countries are: Burma, Democratic People's Republic of Korea (North Korea), Fiji, the former Federal Republic of Yugoslavia, Iran, Libya and Zimbabwe. See further DFAT, Australia and the United Nations, What measures are imposed as autonomous sanctions? http://www.dfat.gov.au/un/unsc_sanctions/unsc_sanctions_measures.html (accessed 2 March 2011).

18 Reserve Bank of Australia, *Submission 1*; Department of Foreign Affairs and Trade, *Submission 3*; Department of Defence, *Submission 4*; Financial Services Council, *Submission 5*.

2.13 For example, the Reserve Bank of Australia (RBA) indicated that it has held longstanding concerns about the efficacy of the current financial sanctions regime under the *Banking (Foreign Exchange) Regulations 1959*. The RBA observed that these regulations were 'originally promulgated for the protection of Australia's currency and regulation of our foreign currency reserves'.[19] Similarly, the Department of Defence—which administers sanctions pertaining to the export of arms and strategic goods[20]—argued that using regulations intended for other purposes may prohibit the effective use of sanctions and have unintended consequences.[21]

2.14 Submitters identified substantial benefits in the proposed legislation, including a more flexible range of policy options, a capacity to match the measures applied by other like-minded countries, enhanced legal certainty, administrative efficiencies, a reduced compliance burden, and improved enforcement.[22]

Committee view

2.15 The committee recognises that autonomous sanctions are an important foreign policy tool, and acknowledges the need for Australia to have a coordinated legislative framework to optimise the effectiveness of such measures.

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19 Reserve Bank of Australia, *Submission 1*, p. 1.

20 Under the *Customs (Prohibited Exports) Regulations 1958* and the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*.

21 Department of Defence, *Submission 4*, p. 1.

22 Reserve Bank of Australia, *Submission 1*; Department of Foreign Affairs and Trade, *Submission 3*; Department of Defence, *Submission 4*; Financial Services Council, *Submission 5*.

Chapter 3

Provisions of the bill

Overview of the bill

3.1 The purpose of the bill is to provide a framework for the application, enforcement and administration of autonomous sanctions.[1] The bill defines an autonomous sanction as one that:

(a) is intended to influence, directly or indirectly, one or more of the following in accordance with Australian Government policy:

(i) a foreign government entity;

(ii) a member of a foreign government entity;

(iii) another person or entity outside Australia; or

(b) involves the prohibition of conduct in or connected with Australia that facilitates, directly or indirectly, the engagement by a person or entity described in subparagraph (a)(i), (ii) or (iii) in action outside Australia that is contrary to Australian Government policy.[2]

3.2 The three substantive parts of the bill:

- provide for the making of autonomous sanctions by regulation, and the enforcement of regulations;[3]
- create offences for:
  - the contravention of autonomous sanction laws; and
  - the provision of false or misleading information in connection with the administration of an autonomous sanction law;[4] and
- establish a scheme for the provision, collection, disclosure and use of information relevant to the administration of autonomous sanction laws.[5]

Key issues

3.3 The committee acknowledges the significant merit in the policy underlying the bill, but has identified three matters for further consideration, which were also raised by the Scrutiny of Bills Committee.[6] These matters are:

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1 Clause 3.

2 Clause 4.

3 Part 2.

4 Part 3.

5 Part 4.

- procedural safeguards in the exercise of proscriptive powers against individuals or entities;
- drafting matters, particularly apparent ambiguities within provisions and inconsistencies between parts of the bill; and
- the reasoning provided in the Explanatory Memorandum (EM).

3.4 As noted in chapter 1, the Selection of Bills Committee identified the domestic privacy implications of the bill as an issue for consideration.[7] The committee is satisfied that the bill is compliant with the *Privacy Act 1988*. This matter is also addressed below.

Procedural safeguards

3.5 The committee has been made aware of issues relating to procedural safeguards in the bill, in particular:

- maintaining transparency and accountability in the application of sanctions made by regulation;[8]
- minimising the risk that persons may unintentionally contravene autonomous sanctions because they:
  - act in reliance upon other primary legislation, unaware that such legislation is subject to sanctions made by regulation;[9] or
  - are unaware that non-legislative instruments applying sanctions have been incorporated by reference into sanctions made by regulation;[10]
- balancing the significant public interest in the efficient and effective enforcement of autonomous sanctions with personal rights and liberties.[11]

3.6 Before turning to individual provisions, the committee notes that these matters arise primarily from the replication of provisions of the UN sanctions implementation legislation, the UN Charter Act. In an advice to the Scrutiny of Bills Committee, the Minister for Foreign Affairs (the Minister) referred extensively to consistency with the UN Charter Act as a rationale for several clauses in the bill.[12]

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6 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010,* 24 November 2010.

7 Senate Selection of Bills Committee, *Report No 11 of 2010,* 30 September 2010, paragraph 2(c) and Appendix 3.

8 Clause 10.

9 Clauses 12 and 13.

10 Subclause 10(3).

11 Subclause 14(5).

12 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010* (24 November 2010), pp. 389, 390, 392, 393, 394, 396, 398, 399.

3.7 The committee notes, however, that relying on the UN Charter Act to support the provisions in the bill may not be adequate. This view is based on three factors:

- the approach taken to procedural provisions in the UN Charter Act appears to be specific to the legally binding nature of the UN sanctions it implements;
- the international decision-making context in which UN sanctions are made; and
- the guidelines and practices governing due process in the development and implementation of UN sanctions.

The legally binding nature of UN sanctions

3.8 In 2007, DFAT advised the Senate Standing Committee on Legal and Constitutional Affairs that the UN Charter Act did not include external review or other procedural fairness-related provisions because it is concerned with implementing Australia's obligations under Article 25 of the UN Charter to apply UN sanctions. DFAT advised that there is no legal scope to delay or alter the implementation of UN sanctions by including such measures in the UN Charter Act.[13]

3.9 The committee notes, however, that the same rationale does not automatically apply to autonomous sanctions, which do not uniformly have a basis in binding obligations under international law.[14]

Decision making context of UN sanctions—international standing

3.10 Under Chapter VII of the Charter of the United Nations, the Security Council can take enforcement measures to maintain or restore international peace and security. In some cases the Council has resorted to using mandatory sanctions as an enforcement tool[15] and has established a number of committees charged with overseeing and implementing specific sanctions measures.[16] For example, the Al-Qaida and Taliban Sanctions Committee considers listing submissions from

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13 Senate Standing Committee on Legal and Constitutional Affairs, *Report on the International Trade Integrity Bill 2007*, (November 2007), [3.7].

14 *Explanatory Memorandum*, Autonomous Sanctions Bill 2010 (Cth) (EM), p 1; Department of Foreign Affairs and Trade, *Submission 3*, p.1.

15 See for example, Security Council S/RES/1373 (2001), 28 September 2001 (prevention and suppression of the financing of terrorist acts), implemented in Australia under Part 4 of the UN Charter Act.

16 See for example, Security Council Committee established pursuant to Resolution 1267 (1999); Security Council Committee established pursuant to 1636 (2005); and Security Council Committee established pursuant to Resolution 1718 (2006).

member states, delisting requests and proposed updates to the existing information relevant to the list of individuals or entities associated with Al-Qaida or the Taliban.[17]

3.11 The committees, established pursuant to a resolution passed by the Council, are subsidiary organs of the Council, consist of all members of the Council, and make decisions by consensus of all its members. As acknowledged by the Foreign Minister of Greece, UN sanctions are:

> A powerful expression of the collective voice and collective will of the international community …
>
> Sanctions, imposed in a manner that signals the unity of purpose and determination of the international community, can achieve results without the use of force.[18]

3.12 Thus UN sanctions—and the due process requirements built into them—carry significant weight, legitimacy and credibility in the international community. Autonomous sanctions do not necessarily have this advantage.

Guidelines and practices governing due process in UN sanctions

3.13 The Security Council has over many years recognised the importance of ensuring due process for the listing and de-listing of individuals or entities designated for targeted sanctions.[19] In September 2005, the UN General Assembly passed a resolution that, among other things, called upon the Security Council 'to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and removing them, as well as for granting humanitarian exceptions.' In October 2005 the General Assembly resolved that:

> Sanctions should be implemented and monitored effectively with clear benchmarks and should be periodically reviewed, as appropriate, and remain for as limited a period as necessary to achieve their objectives and should be terminated once the objectives have been achieved.

3.14 The Assembly called on the Security Council 'to improve its monitoring of the implementation and effects of sanctions, to ensure that sanctions are implemented in an accountable manner, to review regularly the results of such monitoring and to develop a mechanism to address special economic problems arising from the

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17 Security Council Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities, *Guidelines of the Committee for the Conduct of its Work.*.

18 United Nations Security Council, Annex to letter dated 12 December 2007 from the Permanent Representative of Greece to the United Nations addressed to the President of the Security Council, 'Enhancing the Implementation of the United Nations Security Council', A Symposium, 30 April 2007, S/2007/734, p. 2.

19 For a summary of measures see, for example, Thomas J. Biersteker and Sue E. Eckert, *Strengthening Targeted Sanctions Through Fair and Clear Procedures,* White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006.

application of sanctions in accordance with the Charter.' It also called on the Security Council 'to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.'[20]

3.15 In December 2006, the Security Council gave its commitment to ensuring that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.[21] Since then the Security Council has continued to adopt resolutions directing its sanctions committees to review their guidelines and their consolidated lists. It has encouraged the committees to continue to ensure that 'fair procedures exist for placing individuals and entities on and for removing them from the Consolidated List and direct them to keep guidelines under 'active review in support of these objectives'.[22] Each committee has guidelines for the conduct of its work. In 2009, as part of this commitment, the Security Council adopted a resolution establishing the Office of the Ombudsperson for the Al-Qaida and Taliban Sanctions Committee.[23]

3.16 The Council of the European Union has similarly taken steps to ensure that the implementation and evaluation of its UN and autonomous sanctions adhere to basic principles. For example, its guidelines state that:

> The introduction and implementation of restrictive measures must always be in accordance with international law. They must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy. The measures imposed must always be proportionate to their objective.[24]

3.17 The guidelines also note the need to respect fundamental rights, which implies, in particular, that proper attention is given to the protection and observance of due process rights of the persons to be listed.[25]

3.18 In June 2010, the Permanent Representative of Australia to the UN Security Council commented that due process is essential to the credibility of targeted sanctions:

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20 United Nations General Assembly, A/RES/60/1, 24 October 2005, paragraphs 106–109.

21 It resolved to adopt a de-listing procedure and directed its various sanctions committees to revise their guidelines accordingly. United Nations Security Council, S/RES/1730 (2006), 19 December 2006. See also Statement by the President of the Security Council, S/PRST/2006/28, 22 June 2006.

22 See for example, Security Council, S/RES/1822 (2008), 30 June 2008, paragraphs, 21, 22, 25, 26, 28, 29 and S/RES/1904 (2009), paragraphs 14, 19, 20, 21, 34, 35.

23 Security Council, RES/1904 (2009), 17 December 2009, paragraphs 20-21.

24 European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 2 December 2005, Doc. 15114/05 PESC 1084 Fin 475.

25 ibid.

> Member States have a legal obligation under the Charter to accept and enforce sanction measures created by the Council pursuant to Chapter VII. Australia takes this obligation seriously. However, as we have seen in recent years, the legitimacy and effectiveness of such measures depends, in large part, on perceptions of procedural fairness.[26]

3.19 Australia's autonomous sanctions do not have the same legal standing as UN sanctions and, based on the provisions of the bill, will not require a decision-making process that is subject to the same level of scrutiny. In this regard, the committee believes that the bill would benefit from providing assurances about the soundness of the decision-making process and of the protection of individual rights.

3.20 As noted above, the Scrutiny of Bills Committee has identified a number of provisions that raise issues about procedural safeguards in provisions of the bill. These provisions are examined individually below.

The application of sanctions by regulation

3.21 Subclause 10(1) authorises the Governor-General to make sanctions by regulation for purposes including the proscription of persons or entities, and restrictions on the uses or availability of assets and the provision of goods and services.[27]

3.22 Before the Governor-General makes such regulations, the Minister must be satisfied that the proposed regulations will:

- facilitate the conduct of Australia's relations with other countries, or with entities or persons outside Australia; or
- otherwise deal with matters, things or relationships outside Australia.[28]

3.23 The bill does not make provision for the internal or external merits review of decisions to apply sanctions made by regulation under subclause 10(1)—for example, decisions to name an individual or entity on a sanctions list, or to determine that an individual or entity falls within categories of persons or entities identified on a sanctions list.

3.24 While the provisions of the bill do not oust judicial review rights, one submitter, the Queensland Law Society (QLS), expressed concern about the limitations of this remedy. The QLS referred to a 2010 decision of the Federal Court, suggesting that such decisions are not reviewable because they are non-justiciable

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26 Gary Quinlan, Ambassador and Permanent Representative of Australia to the United Nations Security Council, *Statement to the United Nations Security Council Regarding the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security*, S/PV6347 (Resumption 1), 29 June 2010, p. 8.

27 Subclauses 10(1)(a)-(f).

28 Subclause 10(2).

political decisions.[29] In *Aye v Minister for Immigration and Citizenship,*[30] a 2:1 majority of the Full Federal Court held that a Ministerial decision in relation to the application of bilateral financial sanctions to a Burmese national in Australia on a student visa was a non-justiciable political decision.[31]

3.25 The QLS referred to the court's finding of fact that the Minister made a determination under the Migration Regulations that the appellant's presence in Australia was contrary to Australia's foreign policy interests. This had the effect of cancelling the appellant's visa. The basis for the determination was that the appellant was deemed to fall within a class of persons who were subject to sanctions. The appellant was the adult daughter of a senior member of the Burmese military. Her father was identified by name in the sanctions list, together with his 'close family members' who were identified by that category. The appellant had not concealed her identity at the time of her entry into Australia. She had been in Australia for some time, had almost completed a masters degree and was about to enter into full-time employment when her identity was discovered and the Ministerial determination made. Her claim to remain in Australia rested on a submission that she was estranged from her father, did not share the views that led to the imposition of the sanction and was financially independent of her parents.[32]

3.26 The QLS noted the court's decision that, if the Minister's determination were justiciable, any duty to afford procedural fairness would have been limited to a requirement that the Minister advise the appellant he was considering making the decision, and allowing her to make submissions as to whether she was a member of the listed person's family, and whether in particular she was the daughter of the listed person.[33]

3.27 According to the QLS, the decision that such determinations are non-reviewable heightens concerns about the sanctions policy underlying the bill. The QLS commented, in relation to the sanction applied in Ms Aye's case, that:

> …the language of the sanction means that it accepts and embodies the principle of guilt by association without examination of the facts that support the policy of the sanction. This is repugnant to our common law tradition, and it is only in times of the gravest national crisis that our laws have operated on that basis.[34]

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29 Queensland Law Society, *Submission 2A,* p. 1.

30 [2010] FCAFC 69 (11 June 2010).

31 ibid, [9]-[15] (Spender J), [125]-[128] (McKerracher J); [108] (Lander J, in dissent).

32 ibid, [18]-[45] (Lander J).

33 ibid, [16] (Spender J), [122] (McKerracher J), [114]-[115] (Lander J).

34 Queensland Law Society, *Submission 2A*, p 2.

3.28 The QLS submitted that 'more precision is needed as to the language and focus of the policy underlying autonomous sanctions'.[35]

Committee view

3.29 The committee considers that a regulation-making power is necessary for autonomous sanctions to be applied with the requisite speed and flexibility to respond effectively to situations of international concern.

3.30 The committee notes that the decision of the Full Federal Court in *Aye v Minister for Immigration and Citizenship* is consistent with the application of sanctions. There was no prima facie breach of rights in that case. The decision to apply sanctions is a non-justiciable political decision that is, by definition, not open to judicial review. There was no substantial argument put by any submitter for the internal or external merits review of a decision to impose sanctions. However, government decision making needs to be clear and transparent. The agreement between the Gillard government and the Independent Members of Parliament of 7 September 2010 included an agreement to pursue the principle of transparent and accountable government.[36] This agreement does not exclude DFAT, Defence or the Attorney-General's Department. To the extent that it is a whole-of-government agreement, the commitment to pursue this principle is binding on these departments of state.

3.31 The committee has not been made aware of any substantial abuse, systematic misuse or even aberrant behaviour in the application of autonomous sanctions to date. Nevertheless, mistakes or abuse could occur in the future. This needs to be avoided as it could compromise the utility of sanctions application in the future. Accordingly, as an aid to sound, proper and lawful decision making, the government should consider firm steps to implement a suite of appropriate measures that provide for such outcomes on all occasions.

3.32 Such measures could include the development of best practice guidelines for the formulation, application, enforcement and administration of autonomous sanctions. The principles and guidelines produced by the Council of Europe may provide useful guidance in this respect.[37] The committee encourages comprehensive public and industry consultation in the development of any such guidelines.

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35 ibid.

36 Agreement between the Australian Labor Party (The Hon Julia Gillard MP and the Hon Wayne Swan MP) and the Independent Members (Mr Tony Windsor MP and Mr Rob Oakeshott MP), 7 September 2010, Clause 2.1(a).

37 See for example, Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 7 June 2004, Doc. 10198/1/04 PESC 450 REV1; Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 2 December 2005, Doc. 15114/05 PESC 1084 Fin 475.

Recommendation 1

3.33 The committee recommends that the government consider developing best practice guidelines for the policy formulation, drafting, implementation, enforcement, monitoring and administration of autonomous sanctions. These guidelines could be informed by relevant international resources, research and public consultation.

Incorporation by reference to extrinsic material

3.34 Subclause 10(3) permits sanction regulations made under subclause 10(1) to incorporate material by reference to other instruments, or other writing as in force from time-to-time. Neither subclause 10(3) nor the EM identify the types of 'other writing' that may be incorporated by reference.

3.35 The Scrutiny of Bills Committee identified subclause 10(3) as a possible inappropriate delegation of legislation, because the EM does not justify specifically the need for incorporation by reference. While recognising the need for flexibility in the application of autonomous sanctions, the Scrutiny of Bills Committee stated that this explanation 'does not identify the necessity for regulations to incorporate other instruments by reference'.[38]

3.36 In response, the Minister advised that subclause 10(3) corresponds substantially to subsection 6(3) of the UN Charter Act. The Minister further noted the targeted nature of autonomous sanctions, the need for flexibility in setting the scope of sanctions measures, the importance of rapid responses to situations of international concern, and the benefits of ensuring harmonised measures across like-minded implementing countries. The Minister advised that the provision is intended to enable the incorporation of government-prepared sanctions lists and those prepared by international export control regimes, such as the Nuclear Suppliers Group, the Missile Technology Control Regime, the Australia Group and the Wassenaar Arrangement.[39]

Committee view

3.37 The committee recognises the overriding importance of maintaining consistency with autonomous sanctions imposed by like-minded countries, and the need for flexibility and timeliness in responding to situations of international concern. Accordingly, the committee notes the explanation offered by the government in paragraph 3.36 above. One further matter remains for discussion.

3.38 The committee notes that the incorporation by reference of 'other writing' may not provide sufficient guidance to persons whose rights may be affected by autonomous sanctions.

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38 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010* (24 November 2010), p. 388.

39 ibid, p. 389.

3.39 The committee considers that an indication in the EM of the types of 'other writing' that may be incorporated by reference would assist such persons to understand the sources they should consult to ascertain the existence and content of sanctions, and inform themselves of their compliance obligations.

3.40 The committee notes that the EM to the legislation amending the UN Charter Act, the *International Trade Integrity Act 2007*, indicated that 'other writing' may include UN Security Council Resolutions, decisions of UN sanctions committees, or documents prepared by the government where it is not possible or is inappropriate to identify the matter by reference to UN Security Council materials. The EM to the International Trade Integrity Act further expressed the government's intention to incorporate by reference 'publicly available' documents.[40]

Recommendation 2

3.41 The committee recommends that the government amend the Explanatory Memorandum to include guidance about the types of 'other writing' that may be incorporated by reference in regulations made under subclause 10(3).

Effect of sanctions on other legislation

3.42 Clauses 12 and 13 provide that sanctions applied by regulations made under Clause 10 take effect over, respectively, existing and future legislation.

3.43 The Scrutiny of Bills Committee identified these clauses as possible inappropriate delegations of legislation because:

- Clause 12 is a Henry VIII clause, in that it permits subordinate legislation (regulations made under Clause 10) to take precedence over primary legislation; and
- Clause 13 overrides the doctrine of implied legislative repeal—'the normal assumption that future legislation may impliedly repeal earlier legislation'.[41]

3.44 The Minister advised the Scrutiny of Bills Committee that the provisions are necessary and appropriate due to:

- the existence of corresponding provisions in the UN Charter Act;
- the fact that decisions to impose sanctions are properly matters for the executive as matters of foreign policy, with Parliamentary oversight of the legal framework and parameters for adoption;

40 *Explanatory Memorandum*, International Trade Integrity Bill 2007, p. 4. See further, Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 7 of 2007* (20 June 2007), p 7.

41 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010* (24 November 2010) pp. 390-392.

- the highly targeted nature of autonomous sanctions, meaning that there would be limited circumstances in which autonomous sanctions regulations would override existing or future laws;
- the efficacy of the proposed scheme—in particular, the need to respond rapidly to situations of grave international concern, without complications caused by the inadvertent creation of exceptions to, or the unintentional repeal of, autonomous sanctions; and
- the maintenance of appropriate parliamentary scrutiny via subclause 13(2), which enables future legislation to override sanctions regulations by express provision.[42]

3.45 DFAT further submitted that alignment with the corresponding provisions in the UN Charter Act is necessary to ensure that autonomous sanctions laws will have 'legal equivalence' to Australian laws implementing UN sanctions.[43]

Committee view

3.46 The committee acknowledges that in order to respond rapidly to situations of international concern, autonomous sanctions must be applied and administered efficiently. The proposed measures have the advantages of efficiency and convenience.

3.47 The committee is concerned, however, about the risk that a person may unintentionally contravene the proposed legislation because he or she relies upon another Act of Parliament, unaware that sanction regulations have superseded the provisions in that other Act. Given the proposed criminal consequences for the contravention of sanctions, the committee considers that the EM should provide reasons for the reversal of established principles of statutory interpretation.

3.48 The committee notes this risk could be further managed through effective 'front-end' compliance measures—including public notification mechanisms for autonomous sanctions created by regulation. The committee notes the Minister's advice to the Scrutiny of Bills Committee that the government makes substantial efforts to ensure that the public is advised of sanction laws:

> [DFAT] conducts extensive outreach activities to attempt to ensure that potentially affected persons have relevant information on sanction laws. This includes targeted outreach activities throughout Australia with business and industry (at least annually); maintenance of a comprehensive sanctions website which provides links to relevant legislation and legislative instruments; and operation of a public email service.[44]

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42 ibid.

43 DFAT, *Submission 3*, p. 3.

44 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010* (24 November 2010), pp. 394-395.

3.49 However, one submitter, the Group of Eight Ltd (Go8), expressed concerns about the adequacy of existing notification mechanisms. The Go8 commented in December 2010 on difficulties experienced by member universities in obtaining the necessary information to screen applications from overseas students:

> Universities do not have access to intelligence services and could find themselves in a very difficult position. How should universities assess the risk posed by individual applicants in advance without such intelligence services?
>
> ...
>
> One Go8 member university, in an attempt to do the right thing ... sent a batch of more than 20 applications from students in Iran directly to DFAT for consideration [as to whether these persons were subject to sanctions]. Nearly three months later there has been no final response. Clearly this is not a solution for the longer term as universities need to have flexibility to respond quickly to student enquiries and applications.[45]

3.50 The committee reiterates its support for the government taking firm steps to implement measures to prevent inadvertent breaches of autonomous sanctions. The committee encourages comprehensive public consultation in the development and regular review of notification procedures, to ensure that they meet stakeholder needs.

Enforcement—interim injunctions

3.51 Clause 14 provides that a superior court may, on the application of the Attorney-General, grant an injunction restraining a person from engaging in conduct that contravenes an autonomous sanction made by regulation under Clause 10. Clause 14 provides for permanent (final) injunctions and interim injunctions, which apply pending the determination of an application for a permanent injunction.

3.52 Subclause 14(5) prevents the court from requiring, as a condition of an interim injunction, the Attorney-General to provide an undertaking as to damages. This removes the usual discretion of the court to require an undertaking where an interim injunction restraining conduct (such as trade or business) would, in its opinion, cause adverse consequences if it is ultimately found that a person has not contravened an autonomous sanction.[46] A court may determine that adverse consequences would arise, for example, where an interim injunction would prevent a person from earning a livelihood until the application for a permanent injunction is resolved. An undertaking as to damages would compensate the person for his or her lost earnings, should the court subsequently dismiss the application for a permanent injunction.

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45 The Group of Eight Ltd, *Submission 6*, p. 1.

46 See, for example, Federal Court of Australia, Practice Note CM 14 (usual undertaking as to damages).

3.53 As the EM was silent on the reasons for this provision, the Scrutiny of Bills Committee identified subclause 14(5) as potentially trespassing unduly on personal rights and liberties. The Scrutiny of Bills Committee called upon the Minister to explain the rationale for this provision and identify the extent of detriment that persons may suffer as a result.

3.54 The Minister advised that:

- the UN Charter Act contains a corresponding provision;
- it is not appropriate, as a matter of policy, to require an undertaking as to damages in an application to prevent the commission of a criminal offence; and
- the provision is consistent with the concept of crown immunity in respect of a lawfully made decision of a Minister.[47]

Committee view

3.55 The committee notes the explanation offered by the government for the inclusion of this provision. Each piece of advice at paragraph 3.54 above is capable of rebuttal or rejection. Arguments for the inclusion of subclause 14(5) appear to be delicately balanced. Accordingly, the committee has had determinative regard in this instance to the overriding purpose of the bill as outlined in chapter 1 of this report. Nonetheless, the wider community should be aware of this significant development and its potential implementation. Accordingly, the committee considers that the EM should set out the reasons for including subclause 14(5).

Recommendation 3

3.56 The committee recommends that the government should amend the Explanatory Memorandum to set out the reasons for including subclause 14(5).

Drafting matters

3.57 The committee now turns to several drafting issues contained in the bill. The committee has been made aware of apparent ambiguities within provisions and inconsistencies between parts of the bill.

Enforcement of sanctions made by regulation under Clause 10

3.58 Part 2, Division 2 of the bill creates mechanisms for the enforcement of sanctions applied by regulations made under Clause 10. These mechanisms are:

- injunctions to restrain contraventions, or apprehended contraventions, of sanctions;[48] and

47 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010* (24 November 2010), p 393.

48 Clause 14.

- the invalidations of authorisations (such as licences, permissions, consents or approvals granted to persons or entities to engage in conduct or activities that would otherwise be prohibited by sanctions), where such authorisations are obtained through the provision of materially false or misleading information.[49]

3.59 These provisions are expressed as applying to sanctions imposed, or authorisations granted, pursuant to regulations made under Clause 10.[50] Clauses 14 and 15 do not extend to the enforcement of 'sanction laws' more broadly. ('Sanction laws' are defined in Clause 4 as 'a provision that is specified in an instrument under subsection 6(1)'.[51] The effect is that a contravention of a sanction law enlivens the offence provisions in Clauses 16 and 17.)

3.60 This means that enforcement mechanisms for 'sanction laws' will be governed by the provisions of the relevant 'sanction law', or the common law if that legislation is silent. This may lead to inconsistencies between enforcement mechanisms available in respect of regulations made under Clause 10, and those available under other sanction laws.

Committee view

3.61 The committee notes that the limitation of Part 2, Division 2 to sanctions made by regulation may be inconsistent with the purpose of the bill, to 'provide for the enforcement of autonomous sanctions (whether applied under this Act or another law of the Commonwealth)'.[52]

3.62 Accordingly, the committee considers that there would be benefit in giving consideration to extending Part 2, Division 2 to the enforcement of sanction laws more broadly. If there is no legislative intention to do so, however, the committee considers that the EM should explain how Part 2, Division 2 is consistent with the purpose of the bill, as expressed in subclause 3(b).

Recommendation 4

3.63 The committee recommends that the government consider:

- **extending Part 2, Division 2 to the enforcement of sanction laws as defined in Clause 4; or**
- **if there is no legislative intention to do so, including in the Explanatory Memorandum an explanation of how Part 2, Division 2 is consistent with the purpose of the bill expressed in subclause 3(b).**

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49 Clause 15.

50 Subclause 14(1) and Clause 15.

51 Subclause 6(1) provides that a Minister may, by legislative instrument, specify a provision of a law of the Commonwealth as a sanction law.

52 Subclause 3(b).

Offences for the contravention of sanctions

3.64 Clause 16 creates offences for the contravention, by individuals and bodies corporate, of:

- sanction laws; and
- conditions of an authorisation (such as a licence, permission or consent) to engage in conduct or activities otherwise prohibited by a sanction law.[53]

3.65 The relevant maximum penalties identified in subclauses 16(4) and 16(9) are:

- for individuals, 10 years imprisonment and the greater of 2,500 penalty units or three times the value of the relevant transaction or transactions; and
- for bodies corporate, the greater of 10,000 penalty units or three times the value of the relevant transaction or transactions.

3.66 Clause 16 is based on a corresponding provision in the UN Charter Act, which was inserted by amendment in 2007, in response to the recommendations of the Cole Inquiry into the conduct of certain Australian companies in relation to the UN Oil-for-Food Program.[54]

3.67 The offences applying to individuals in subclauses 16(1) and 16(2) are expressed as fault-based offences. This means that each physical element of the offences (namely, conduct, which contravenes a sanction law or the condition of an authorisation) must be accompanied by a corresponding mental element (such as intention, recklessness, knowledge or negligence). Because the bill does not identify specific fault elements, the Criminal Code implies the following fault elements:

- an individual must *intentionally* engage in the conduct identified in subclauses 16(1)(a) and 16(2)(a); [55] and
- the individual must be *reckless* as to whether the conduct contravenes a sanction law or a condition of an authorisation under a sanctions law for the purposes of subclauses 16(1)(b) and 16(2)(b).[56]

3.68 Subclause 16(8) provides that the body corporate offences are of strict liability, meaning that the offences in subclauses 16(5) and 16(6) do not require fault elements, but only physical elements (that is, engaging in conduct, which contravenes a sanction law or a condition of an authorisation). Subclause 16(7) provides an absolute defence for bodies corporate which can prove that they took reasonable

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53 Subclauses 16(1)-16(10).

54 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010*, 24 November 2010, p. 394 (the Minister's advice referred to s 27 of the UN Charter Act).

55 *Criminal Code* s 5.6(1).

56 *Criminal Code* s 5.6(2). Note that under s 5.4(4), recklessness can be established by proving intention or knowledge, or recklessness as defined in ss 5.4(1)-(3).

precautions and exercised due diligence to avoid contravening subclauses 16(5) and 16(6).[57] In addition, bodies corporate may plead the defence of honest and reasonable mistake of fact in the Criminal Code.[58]

3.69 Four issues arise in respect of Clause 16, which are considered below.

Strict liability offences for bodies corporate

3.70 As noted above, offences committed by bodies corporate under subclauses 16(5) 16(6) are of strict liability. The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* provides that strict liability offences must be properly justified. The guide cites the Scrutiny of Bills Committee opinion that such offences should be introduced only after careful consideration on a case-by-case basis of all available options.[59]

3.71 The rationale for the strict liability of bodies corporate in Clause 16(8) is not addressed in the EM, however the Minister advised the Scrutiny of Bills Committee that:

- the clause corresponds to provisions of the UN Charter Act, to ensure identical consequences for a breach of Australian laws implementing both autonomous and UN sanctions;
- the provision in the UN Charter Act follows the recommendation of the Cole Inquiry;[60] and
- the strict liability of bodies corporate is balanced by the absolute defence of due diligence in the bill.[61]

Committee view

3.72 The committee considers that there is a strong case for the inclusion of strict liability offences in subclauses 16(5) and 16(6). However, consistent with the *Guide to*

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57 The Criminal Code provides that the body corporate bears the legal burden of establishing the defence on the balance of probabilities. Once this is done, the prosecution must refute the defence beyond reasonable doubt: Criminal Code ss 13.4 and 13.5.

58 *Criminal Code* s 9.2.

59 *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers,* issued by authority of the Minister for Home Affairs (December 2007), [4.5].

60 The Hon Terrence Cole AO RFD QC, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme*, Volume 1 (November 2006), Recommendation 2. This recommendation was accepted by government (in respect of bodies corporate but not individuals) and considered appropriate for broader application to all sanctions regimes: Australian Government, *Response to the Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme* (2007).

61 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010,* 24 November 2010, pp. 396-397.

Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, the committee considers that these reasons should be set out in the EM.

Recommendation 5

3.73 The committee recommends that the government amend the Explanatory Memorandum to include a statement of reasons for the imposition in subclause 16(8) of strict liability in respect of the offences contained in subclauses 16(5) and 16(6).

Defining criminal offences by reference to legislative instruments

3.74 The Scrutiny of Bills Committee identified subclauses 16(1) and 16(5) as potentially trespassing unduly on personal rights and liberties because the offences are defined by reference to a legislative instrument—namely a 'sanction law' as designated by a legislative instrument made under Clause 6. The Scrutiny of Bills Committee sought the Minster's advice as to whether it would be possible to 'prescribe mechanisms for ensuring that potentially affected persons receive appropriate notice that a particular law has, under Clause 6, been specified as a sanction law'.[62]

3.75 The Minister advised that the specification of a sanction law by legislative instrument provides transparency and affords parliamentary scrutiny by way of disallowance. As noted above, the Minister stated that the government makes substantial efforts to provide public outreach and advice services.[63] DFAT further commented that 'the sanction law instrument will act as an index to all laws to which the provisions of the bill, once enacted, will apply'.[64]

Committee view

3.76 The committee considers that the definition of offences by reference to 'sanction laws' in subclauses 16(1) and 16(5) is desirable. The committee sees significant benefit in identifying all sanction laws in a single legislative instrument. This approach would facilitate public awareness of the existence of sanction laws, as well as parliamentary scrutiny, since the instrument would be subject to disallowance. The committee considers it important that Clause 16 is accompanied by effective public notification mechanisms. It is encouraged by the Minister's assurance of the government's commitment to public outreach.

Defining criminal liability by reference to administrative instruments

3.77 The QLS expressed concern that subclause 16(2) is a violation of the doctrine of the separation of powers. It stated:

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62 ibid, p. 394.

63 See further, Department of Defence, *Submission 4,* p. 2 for a summary of Defence involvement in industry engagement on sanctions, through the Defence Export Control Office.

64 DFAT, *Submission 3*, p. 5.

> [Sub]clause 16(2)(a) fails to describe what 'conduct' is prohibited. Therefore an individual cannot refer to the bill and simply ascertain what acts or omissions will be caught by the legislation. Instead, the clause purports to criminalise conduct which contravenes a condition of an authorisation under a sanction law. The making of such authorisations is a function of the executive arm of government. Therefore, by stating that an individual who engages in conduct that contravenes a condition of an authorisation ... under a sanction law, is tantamount to the executive having the power to create offences of an ad hoc basis. The making of laws and the creation of offences is a function of the legislature and the delegation of this power to the executive has serious implications for the separation of powers'.[65]

3.78 The QLS further submitted that subclause 16(2) may have 'unintended and unfair consequences' in that it may expose to criminal liability individuals who are not directly subject to an authorisation. It further noted that there is 'no reasonable precautions defence available to individuals as there is for bodies corporate in [sub]clause 16(7)'.

3.79 To address its concerns, the QLS proposed a single offence of 'engaging in conduct that is proscribed under a sanction law', with an inclusive definition of what may constitute 'proscribed conduct'.[66]

Committee view

3.80 The committee is not convinced that subclause 16(2) presents any separation of powers issues. It is clear on the face of the provision that the role of the executive is limited to the granting of authorisations. It is the legislature that ascribes criminal consequences to the contravention of an authorisation.

3.81 The committee considers remote the prospect that a person may be exposed to criminal liability where he or she is not directly subject to an authorisation. The illustrative examples of an authorisation in the note to subclause 16(2)[67] suggest that such instruments are issued to individuals upon application, and their conditions apply only to those individuals. Further, in the event that the conditions of authorisations have a broader application, the fault element of the *reckless* contravention of a condition would likely prevent this outcome. Under the Criminal Code, a finding of recklessness would require an individual to have been aware of a substantial risk that his or her conduct would contravene a condition of an authorisation, and to have nevertheless taken that risk unjustifiably.[68] It is unlikely, in the committee's view, that

65 Queensland Law Society, *Submission 2*, p. 1.

66 ibid, p. 2.

67 Namely, a licence, permission, consent or approval.

68 Criminal Code, s 5.4.

an individual would be aware of a substantial risk that he or she may contravene the conditions of an authorisation granted to another person.[69]

3.82 The committee notes, however, that while the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* does not expressly address this issue, it includes the following sample offence (to illustrate a different point, about the identification of the physical elements of an offence for the contravention of a licence condition):

> [T]he offence should be framed in the following terms:
>
> A person is guilty of an offence if:
>
> (a) *the person holds a licence* (emphasis added); and
>
> (b) engages in conduct; and
>
> (c) that conduct contravenes a licence condition.

3.83 Accordingly, the committee considers that for the avoidance of doubt, consideration should be given to including in subclause 16(2) an additional element that an individual must hold an authorisation.

3.84 The committee favours the approach taken to the framing of the offence in subclause 16(2) over a single offence of 'engaging in conduct that is proscribed under a sanction law'. In reaching this view, the committee is guided by the requirement in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* that offences should be drafted:

> …so that each physical element of the offence is a in a separate paragraph. In particular, the conduct, circumstances and results constituting the offence should be set out in separate paragraphs.[70]

3.85 This drafting practice enables the relevant fault elements to be applied to each physical element. The committee notes that the offence as it is currently drafted requires an individual to have *intentionally* engaged in conduct (that is, an act or omission), and to have been *reckless* as to whether that conduct contravenes the condition of an authorisation. Consistent with the abovementioned Guide, this formulation makes clear that the contravention is the result of conduct, rather than the conduct itself.

3.86 Framing an offence around the conduct itself—that is, the intentional contravention of a licence condition—may have unintended consequences. It may mean that an individual who holds an authorisation could avoid criminal responsibility for contravening its conditions simply because he or she did not specifically mean to

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69 The defences of mistake or ignorance of fact, and subordinate legislation in ss 9.1 and 9.4 of the Criminal Code may also be available to individuals in such circumstances.

70 Australian Government, *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (December 2007), pp. 17-18.

do so. This would be the case even if the individual was aware of a substantial risk that his or her conduct may contravene the condition, and elected, unjustifiably in the circumstances, to take that risk. The committee is concerned that this approach may undermine the enforceability of autonomous sanctions, and may not provide a sufficient incentive to comply with sanction laws or the conditions of authorisations.

3.87 Finally, while the committee is conscious of the need to prevent unintentional contraventions of autonomous sanctions, it is not convinced that a 'due diligence' defence to subclause 16(2) is necessary for individuals. The fact that an individual exercised due diligence is relevant to the fault element of recklessness. It is unlikely that an individual who took reasonable precautions and exercised due diligence to avoid contravening the condition of an authorisation could be found to have taken an unjustifiable risk in the circumstances. The committee considers that a specific 'due diligence' defence, such as that contained in subclause 16(7) for bodies corporate, is necessary only in respect of strict liability offences.

Recommendation 6

3.88 The committee recommends that, for the avoidance of doubt, the government consider including in subclause 16(2) an element that an individual must hold an authorisation.

Front-end compliance

3.89 The QLS expressed concern that Clause 16 does not provide sufficient guidance on front-end compliance—that is, the acts or omissions that are necessary to comply with the provisions of the bill. It submitted that:

> Failure to provide guidance on what is appropriate due diligence will result in many individuals inadvertently breaching the legislation. For example, a lawyer performing due diligence in a transaction may fail to undertake a search which may result in an unintentional breach of the legislation.[71]

3.90 The QLS suggested a front-end compliance model by which DFAT would undertake measures including:

> Guidance documents, hypothetical scenarios, compliance checklists and decision trees (similar to those used by the Queensland Office of State Revenue) on their website which would assist the legal profession and public in complying with this legislation.[72]

3.91 It further submitted that:

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71 Queensland Law Society, *Submission 2*¸p. 2.

72 ibid.

> If the individual or body corporate complies or makes a genuine attempt to comply with these guidance materials, their actions and omissions should not be subject to prosecution under Clause 16(10) of the bill.[73]

3.92 The Financial Services Council Ltd similarly commented that, 'at the least, guidance should be provided on the application of the law to clarify who should comply [with autonomous sanctions] and how'. It proposed legislative measures directed to promoting front-end compliance, including:

- limiting obligations to perform due diligence about the existence of sanctions to designated 'gatekeepers', to avoid duplication of compliance activities. (For example, in the case of financial sanctions, it suggested that only the last sender of funds out of Australia and the first receiver of funds into Australia should be required to undertake due diligence, and other entities would be entitled to rely upon those gatekeepers);
- limiting criminal liability to international transactions, on the assumption that the Australian Government (through agencies such as the Department of Immigration and Citizenship and ASIC) will ensure that there are no persons in Australia who are on autonomous sanctions lists;[74] and
- as an additional safeguard to assist Australian companies comply with the autonomous sanctions regimes of other like-minded countries, requiring the government to monitor the autonomous sanctions lists of other countries and provide public notifications of listed entities or persons with a presence in Australia. [75]

Committee view

3.93 The committee reiterates its support for effective notification and public outreach mechanisms, including those directed to front-end compliance. It strongly encourages widespread consultation with relevant stakeholders in the formulation and ongoing development of outreach strategies.

3.94 The committee does not, however, support the inclusion in the bill of legislative front-end compliance measures, such as statutory notification requirements. It is evident from submissions that the nature and scope of due diligence requirements may be highly specific to individual sanctions. Prescribing standardised notification and front-end compliance measures may inadvertently enlarge the compliance burden by requiring actions that may not be necessary in all cases. The committee notes that the Governor-General has a regulation-making power in Clause 28 for various matters incidental to the operation of the proposed legislation. This power would enable the

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73 ibid.

74 The Group of Eight Universities Ltd raised a similar point, submitting that the government should implement a process to 'flag the individuals considered to pose a risk and communicate this information to DIAC to ensure that those students are not issued a visa': *Submission 6,* p. 1.

75 Financial Services Council *Submission 5*, pp. 2-4.

government to implement regulatory front-end compliance measures that are specific to individual sanctions, if required.

3.95 Similarly, the committee is not convinced that a new defence is necessary for 'genuine attempts' to comply with guidance materials. In the case of bodies corporate, this factor would be relevant to the 'due diligence' defence in subclause 16(7). In the case of individuals, this would go to the issue of recklessness in contravening a sanction law or condition of an authorisation under subclauses 16(1) and (2).

Offences for providing false or misleading information

3.96 Clause 17 creates offences for providing false or misleading information in connection with the administration of a sanction law. Subclause 17(1) creates the offence of providing false or misleading information or a document to a Commonwealth entity. Subclause 17(2) creates the offence of providing false or misleading information to another person, where the first person is reckless as to whether the second person will provide that information to a Commonwealth entity. In both cases, the information or document must be misleading in a material particular.

3.97 As the provision is silent about the fault elements applicable to the physical elements of the offences, the Criminal Code implies that a person must *intentionally* provide the information to the Commonwealth (or a third person in the case of subclause 17(2)), in connection with the administration of a sanctions law, and must be *reckless* as to whether the information or document was false or misleading.

3.98 The QLS identified various concerns with Clause 17, namely:

- that the requirement in subclauses 17(1) and 17(2) that information is provided *in connection with* the administration of a sanction law is inconsistent with the purpose of the bill, to 'facilitate the collection, flow and use of information *relevant to* the administration of autonomous sanctions';
- a perceived absence of mens rea (fault) in subclauses 17(1) and 17(2); and
- that the 'reckless giving' of information or documents in subclause 17(2) should not be a criminal offence.

3.99 The QLS proposed the following amendments:

- amending subclauses 17(1) and 17(2) to require a person to *know* that the information or document he or she provided was false or misleading;
- amending subclauses 17(1) and 17(2) to require the information or document provided to be *directly relevant* to the administration of a sanction law, rather than provided *in connection with* a sanction law; and
- removing the element of recklessness from subclause 17(2).[76]

76 Queensland Law Society, *Submission 2*, pp. 3-4.

Committee view

3.100 The committee supports the policy underlying Clause 17 and the drafting of the provision. To ensure effective compliance monitoring, the committee considers it appropriate to criminalise the provision of false or misleading information or documents *in connection with* the administration of a sanction law (rather than the narrower requirement of direct relevance). The committee further supports the fault element of *recklessly* providing documents or information that may be false or misleading (as opposed to the narrower requirement of *knowingly* providing false or misleading documents or information).

3.101 The committee considers that a direct relevance requirement would not offer an adequate incentive for persons to provide information or documents to the Commonwealth in order to monitor compliance. It may enable persons who deliberately provided false or misleading information or documents to avoid criminal liability simply due to the degree to which the document or information was connected with the administration of a sanction law. Similarly, a requirement that a person must *know* that the document or information was false or misleading would inappropriately remove criminal liability from persons who are aware of a substantial risk that the document or information may be false or misleading, but nevertheless took the unjustifiable risk of providing it to the Commonwealth.

3.102 Given the importance of enforcement mechanisms to the effectiveness of autonomous sanctions, and thus Australia's international trading reputation, the committee considers that it is appropriate to require a high standard of conduct. It is satisfied that the offences proposed in Clause 17 are proportionate to the interests sought to be protected.

3.103 Given the uncertainty apparent in submissions about the application of fault elements, the Committee sees benefit in including in the bill or the EM a statement of the fault elements applicable to each of the physical elements of the offence. This measure could aid compliance by drawing attention to the standard of conduct required.

Recommendation 7

3.104 The committee recommends that the government consider including in the bill or the Explanatory Memorandum an express statement of the fault elements applicable to each of the physical elements of the offences set out in Clause 17.

Undefined terms

3.105 In its submission, the QLS identified two undefined terms in the bill, which it considered would benefit from definition for the avoidance of doubt. These terms are:

- the 'administration' of an autonomous sanctions regime, for the purposes of the offence of providing false or misleading information in Clause 17; and

- an 'SES employee' for the purposes of delegating the powers and functions of a CEO of a designated Commonwealth entity in Clause 27.[77]

3.106 The QLS suggested that 'administration' be defined inclusively, to provide guidance to the legal profession and the public.

Committee view

3.107 Given the criminal consequences of contravening sanction laws, and the importance of limiting and identifying precisely the persons to whom legislative power is delegated,[78] the committee considers that these terms would benefit from definition to provide certainty. The committee notes that the term 'SES employee' is defined in the *Public Service Act 1999*, by reference to the Public Service *Classification Rules*.

Recommendation 8

3.108 The committee recommends that the government consider including in the bill:

- **an inclusive definition of the 'administration' of an autonomous sanctions regime for the purposes of Clause 17; and**
- **a definition of an SES employee, by reference to the *Public Service Act 1999,* for the purpose of Clause 27.**

Use immunity

3.109 Clause 22 abrogates an individual's privilege against self-incrimination, in relation to the provision of documents or information to the Commonwealth pursuant to a notice issued under Clause 19.[79] Subclause 22(2) grants a 'use immunity' to such individuals, in that 'information given' and 'the giving of a document' cannot be used in subsequent proceedings against them (other than proceedings for offences against Clauses 17 and 21).[80]

3.110 The Scrutiny of Bills Committee identified Clause 22 as potentially trespassing unduly on personal rights and liberties. It noted that the EM did not justify the abrogation of the privilege, or provide reasons as to why the provision did not also

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77 Queensland Law Society, *Submission 2*, p. 3.

78 Australian Government Department of the Prime Minister and Cabinet, *Legislation Handbook* (2000), paragraph [6.38].

79 Clause 19 invests the CEO of a designated Commonwealth entity with power to serve on a person a notice to provide certain information or documents, for the purpose of assessing compliance with a sanction law.

80 Clause 17 creates offences for the provision of false or misleading information in connection with the administration of a sanction law. Clause 21 creates an offence for non-compliance with a notice issued under Clause 19.

include a 'derivative use' immunity. (That is, a prohibition on the *indirect* use of information provided by an individual to gather other, admissible evidence against him or her.)[81]

3.111 The Minister advised that Clause 22 corresponds to a provision in the UN Charter Act, which implements Recommendation 3 of the Cole Inquiry in relation to conferring investigatory powers on Commonwealth agencies to monitor compliance with sanctions. The Minister stated that:

> given the correspondence between autonomous and [UN sanctions], it is appropriate that the same authority exists to enable sanctions enforcement agencies to monitor compliance with both [UN sanctions] and autonomous sanctions.[82]

3.112 The QLS stated that it did not support Clause 22 for two reasons. First, it submitted that a 'blanket abrogation of the privilege' is not 'essential in achieving the objectives of the Federal Government'. It commented that the privilege is necessary to 'maintain a proper balance between the powers of the State and the rights and liberties of citizens', and that it is 'a human right focused on preventing the indignity which occurs in compulsory self-incrimination'. The QLS acknowledged the need to balance individual rights with the effective administration of justice, but submitted that a preferable approach would be a public policy test, placing an onus on the government to prove, in individual cases, that it is in the public interest to override the privilege.

3.113 Secondly, the QLS observed that the immunity does not apply to documents provided pursuant to a Clause 19 notice—only the *giving of* a document. It submitted that subclause 22(2) should be amended to include the non-admissibility of a document.[83]

Committee view

3.114 The committee acknowledges that the privilege against self-incrimination is not absolute and must be balanced with the equally important public interest in enforcing sanctions and holding accountable persons who contravene them. The committee notes the finding of the Cole Inquiry that the enforcement of sanctions is critical to the maintenance of Australia's international trading reputation.[84]

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81 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010*, 24 November 2010, p. 397.

82 ibid, p. 398.

83 Queensland Law Society, *Submission 2*, pp. 4-5.

84 The Hon Terrence Cole AO RFD QC, *Report of the Inquiry into Certain Australian Companies in Relation to the UN Oil-for-Food Programme*, Volume 1 (November 2006), p. 80; recommendation 3.

3.115 The committee is of the view, however, that any derogation from the privilege against self-incrimination, and the absence of derivative use immunity, should be justified in the EM.

3.116 The committee further considers that the use immunity proposed in subclause 22(2) should extend to documents provided pursuant to a Clause 19 notice, in addition to the giving of the document. It appears to the committee that the exclusion of documents from the provision would frustrate the immunity. Indeed, the Minister's advice to the Scrutiny of Bills Committee indicates that the omission of 'documents' from subclause 22(2) may be an oversight. The Minister explained the operation of the provision in the following terms:

> the information *or document* is not admissible in evidence against the person who made it available ... (emphasis added).[85]

Recommendation 9

3.117 The committee recommends that the government amend the Explanatory Memorandum to the bill to set out the reasons for:

- **derogating from the privilege against self incrimination in Clause 22; and**
- **the non-inclusion of derivative use immunity in subclause 22(2).**

Recommendation 10

3.118 The committee recommends that the government consider extending the use immunity recognised in subclause 22(2) to documents provided pursuant to a notice issued under Clause 19.

Immunity of Commonwealth officers

3.119 Clause 25 contains an extensive immunity in favour of persons who, in good faith, give, disclose, copy, make records or use information or documents under clauses 18, 19, 23 and 24. The immunity extends to liability to 'any proceedings for contravening any other law because of their conduct' and 'civil proceedings for loss, damage or injury of any kind suffered by another person or entity because of that conduct'. Subclause 25(2) provides that the immunity does not prevent the person from 'being liable to a proceeding for the conduct of the person that is revealed by the information or the document'.

3.120 Three issues arise in respect of this provision. First, the QLS submitted that:

> [Sub]clause 25(2), as it relates to information and documents under Clause 19, appears to contradict the protection provided by [sub]clause 22(2). In our view, we consider that the interplay between Clauses 19, 22 and 25 needs to be revisited.

85 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2010*, 24 November 2010, p. 398.

3.121 Secondly, the immunity appears to apply exclusively to Commonwealth officers performing functions under Clauses 18, 23 and 24, and persons providing documents or information pursuant to notices issued under Clause 19. It does not extend to whistleblowers who disclose information or documents to the Commonwealth—including persons from private or non-government entities who may disclose such information. This issue was raised in the context of the 2007 amendments to the UN Charter Act. In a submission to the Legal and Constitutional Affairs Committee, Transparency International Australia suggested amending the provision to include such whistleblowers. The Committee noted, but did not express an opinion on, this matter and the proposed amendment was not incorporated.[86] The bills digest to the amending legislation noted that such an approach would accord with reforms to UN practices and the former Secretary-General's calls for member states to replicate them.[87]

3.122 Thirdly, the need for a wholesale immunity is not justified in the EM. The committee notes the availability of various immunities and exceptions in other statutory information management schemes. For example, the *Privacy Act* makes provision for the collection, use and disclosure of information other than in accordance with the Information Privacy Principles, where required or authorised by law, or for law enforcement purposes. Similar provisions exist in other statutes, including secrecy legislation.[88] There is also a defence of 'lawful authority' in section 10.5 of the Criminal Code, removing criminal responsibility for conduct that is 'justified or excused by or under a law'.

Committee view

3.123 Turning first to the issue raised by the QLS, the committee is of the view that the relationship between Clauses 19, 22 and 25 is satisfactory. On the committee's reading, the effect of subclause 25(2) is that subclause 25(1) provides an immunity only in respect of the performance of functions under Clauses 18, 19, 23 and 24. Persons performing functions under these provisions remain liable for their conduct undertaken *outside* of or *separately* to these provisions, but which may be recorded in documents or information provided under Part 4 of the bill.

3.124 The committee is satisfied that there is no conflict between subclauses 22(2) and 25(2) because subclause 22(2) is limited to use immunity rather than derivative use immunity. This means that the conduct revealed in the information or document

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[86] Senate Standing Committee on Legal and Constitutional Affairs, *Report on the International Trade Integrity Bill 2007* (August 2007), paragraph [3.13], citing the submission of Transparency International Australia.

[87] Juli Tomaras, Parliamentary Library, Parliament of Australia, *Bills Digest: International Trade Integrity Bill 2007*, No 12 2007-08 (3 August 2007), pp 21-22.

[88] See, eg, *Public Service Regulations 1999* (Cth) reg 2.1(5). For a comprehensive survey of similar provisions in secrecy laws, see Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC Report 112 (2010), paragraphs [3.73]-[3.89].

provided, used or disclosed in accordance with Clauses 18, 19, 23 and 24 can be used to gather admissible evidence to support criminal charges in respect of that conduct.

3.125 On the second issue of whistleblower immunity, the committee considers that this matter is more appropriately addressed in the broader context of public interest disclosure policy and legislation.

3.126 On the third issue of the scope of the proposed immunity, the committee notes that the EM does not address the reasons for the inclusion, or the scope, of the immunity in Clause 25. Given that such immunities are a departure from the fundamental principle of equality before the law, the committee considers that it is appropriate to explain in the EM why Clause 25 is necessary and proportionate to the interests sought to be protected.

Recommendation 11

3.127 The committee recommends that the government amend the Explanatory Memorandum to the bill to explain the reasons for the immunity contained in Clause 25.

The Explanatory Memorandum

3.128 A further issue—arising substantially from the reliance on provisions of the UN Charter Act—is the lack of information provided in the current EM.

3.129 The committee notes that the EM to the International Trade Integrity Bill 2007—which contained the relevant amendments to the UN Charter Act—was comprehensive, especially in providing reasons for provisions on strict liability and delegations of legislative power (including incorporation by reference).[89] The Scrutiny of Bills Committee referred to the reasoning in that EM in its report on the International Trade Integrity Bill, and consequently made no further comment on several provisions.[90]

3.130 In contrast, as identified by the Scrutiny of Bills Committee, the EM accompanying the Autonomous Sanctions Bill provides limited or no explanations for a number of provisions pertaining to core principles governing the scrutiny of bills. These provisions, and the relevant scrutiny of bills issues, are:

- subclause 10(3)—delegation of legislative power (incorporation by reference);[91]
- Clause 12—delegation of legislative power (Henry VIII clause);

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89 *Explanatory Memorandum,* International Trade Integrity Bill 2007, pp. 4-7.

90 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No 7 of 2007* (20 June 2007) pp. 7-8; Senate Standing Committee for the Scrutiny of Bills, *Eighth Report of 2007* (8 August 2007) pp. 294-298.

91 See recommendation 2 of this report.

- Clause 13—delegation of legislative power (overriding the doctrine of implied legislative repeal);
- subclause 14(5)—curtailment of personal rights and liberties (waiver of undertakings as to damages in applications for interim injunctions);[92]
- Clause 16—curtailment of personal rights and liberties (notification procedures for the designation of 'sanctions laws');[93]
- Clause 22—curtailment of personal rights and liberties (abrogation of privilege against self-incrimination);[94] and
- subclause 24(2)—delegation of legislative power (disclosure of information to persons specified by legislative instrument).

3.131 The committee notes the direction in the *Legislation Handbook*, prepared by the Department of Prime Minister and Cabinet, that:

> … where a measure in a bill is likely to be the subject of comment by the Senate Standing Committee for the Scrutiny of Bills, the reasons for proceeding in the manner proposed in the bill should be explained in the explanatory memorandum.[95]

3.132 In 2006, the committee commented that EMs should 'provide members of parliament with the information necessary to be able to make informed decisions about the legislation before them'.[96]

Committee view

3.133 The committee notes that the EM, while explaining the effect of provisions in the bill, did not explain the reasons for including the provisions identified above. Accordingly, in addition to the matters identified in recommendations 2, 3, 4, 5, 7, 9 and 11 of this report, the committee considers that the reasons for these provisions should be included in the EM.

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92 See recommendation 3 of this report.

93 See recommendation 5 of this report.

94 See recommendation 9 of this report.

95 Australian Government Department of the Prime Minister and Cabinet, *Legislation Handbook* (2000), paragraph [8.19]. See further, Senate Standing Committee for the Scrutiny of Bills, *Third Report of 2004: The Quality of Explanatory Memoranda Accompanying Bills*, 24 March 2004, Chapters 3 and 4.

96 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Export Finance and Insurance Corporation Amendment Bill 2006*, September 2006, paragraphs [3.4]-[3.11], Recommendation 1.

Recommendation 12

3.134 The committee recommends that the government amend the Explanatory Memorandum to the bill to set out the reasons for including the following clauses:

- **subclause 10(3);**
- **Clause 12;**
- **Clause 13;**
- **subclause 14(5);**
- **Clause 16;**
- **Clause 22; and**
- **subclause 24(2).**

Domestic privacy implications of Part 4

3.135 In debate, the Deputy Leader of the Opposition and Shadow Minister for Foreign Affairs, the Hon Julie Bishop MP, expressed concern about the domestic privacy implications of the bill, arising from Part 4. The opposition called on the government to elaborate on this aspect of the bill.[97]

3.136 Part 4 sets out an information management scheme, to enable a whole-of-government approach to monitoring and ensuring compliance with autonomous sanctions. Key provisions are:

- Clause 19 (supported by Clauses 20-23),[98] which invests the CEO of a designated Commonwealth entity (as identified by regulation) with coercive powers to require persons or entities to provide information or documents for the purpose of determining compliance with sanction laws; and
- Clauses 18 and 24, which permit:
  - the CEO of a designated Commonwealth entity to request information from a CEO of another Commonwealth entity to provide information or documents for a purpose directly related to the administration of a sanction law;[99]

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97 The Hon Julie Bishop MP, Deputy Leader of the Opposition, Shadow Minister for Foreign Affairs, *House of Representatives Hansard*, 26 October 2010, p. 1665. See further, Senate Selection of Bills Committee, *Report No 11 of 2010,* 30 September 2010, paragraph 2(c) and Appendix 3.

98 Clauses 20-23 provide for, respectively: the provision of information to the Commonwealth on oath; criminal offences for failure to comply with a request for information; abrogation of the privilege against self-incrimination; and the copying and return of documents provided in accordance with a request for documents.

99 Clause 18.

- the disclosure and use of information and documents within a designated Commonwealth entity for a purpose connected with the administration of a sanction law;[100] and
- the disclosure of information or documents by a designated Commonwealth entity to persons and entities specified in subclause 24(2), or others who are prescribed by legislative instrument, for a purpose connected with the administration of a sanction law. The provision is subject to a requirement that the CEO of the designated Commonwealth entity must be satisfied that the recipient will not disclose the information to anyone else without consent.[101]

3.137 In its submission, DFAT stated that the measures contained in Part 4 accord with the Information Privacy Principles (IPPs)[102] because they do not permit:

- record keepers to disclose personal information, other than as authorised under the measures in Part 4; or
- persons, bodies or agencies to whom personal information is disclosed under Part 4 to use or disclose that information other than for purposes connected with the administration of sanction laws.[103]

3.138 DFAT submitted that this is consistent with IPP 11, governing the disclosure of personal information. IPP 11 relevantly provides that:

- a record keeper must not disclose personal information other than as required or authorised by law (ie, as authorised by Part 4 of the bill); and
- those to whom information is disclosed must not use or disclose the information other than for the purpose for which the information was disclosed to them (ie, purposes connected with the administration of sanction laws).[104]

3.139 DFAT explained that Clause 19 limits the collection of information to the purpose of determining compliance with a sanction law. It stated that Clause 18 would allow a designated Commonwealth entity access to information held by other Commonwealth agencies only for a purpose directly related to the administration of a

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100 Subclause 24(1).

101 Subclauses 24(2)(a)-(f), 24(3), 24(4).

102 The IPPs are contained in section 14 of the *Privacy Act 1988* and impose requirements on Commonwealth agencies in relation to the collection, solicitation, storage, access, alteration, use and disclosure of personal information. Personal information is defined in section 6 as information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

103 DFAT, *Submission 3*, pp. 6-7.

104 IPP 11, paragraphs (1)(d) and (3).

sanction law. Clause 24 would then limit the authority of the designated Commonwealth agency to share that information:

- within the entity or with specified external entities to purposes connected with the administration of sanction laws; and
- with external entities to cases where the CEO of the designated Commonwealth authority is satisfied that the recipient of the information will not disclose the information to anyone else without the CEO's consent.[105]

3.140 DFAT further advised that:

> These measures are based on Part 5 (and section 2A) of the *Charter of the United Nations Act 1945*, which implemented Recommendation 3 of the Cole Inquiry. Recommendation 3 called for an appropriate body to be given a power to obtain evidence and information of any suspected breaches or evasion of sanctions that might constitute the commission of an offence against a law of the Commonwealth.[106]

Committee view

3.141 The committee is satisfied that the bill is compliant with the Privacy Act. In considering the provisions in Part 4, the committee has given weight to the advice of DFAT and the statements of the Minister. The committee further notes that the legislative policy approval process prescribed in the *Legislation Handbook* requires consultation with the Office of the Privacy Commissioner where the proposed legislation has implications for the privacy of individuals.[107]

3.142 The committee notes the importance of monitoring compliance with sanctions, as identified in the recommendations of the Cole Inquiry. It considers that these information-sharing arrangements are necessary to facilitate a coordinated, whole-of-government approach to the administration of sanctions.

Conclusion

3.143 The committee supports the policy underlying the bill. The creation of a framework for the administration of autonomous sanctions will address shortcomings in the existing scheme of ad hoc regulations. In doing so, the proposed legislation will enhance Australia's capacity to respond to, and contribute to the resolution of, situations of international concern. Similarly, the effective administration of sanctions—both autonomous and UN-mandated—is integral to the maintenance of Australia's international trading reputation.

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105 DFAT, *Submission 3*, pp. 6-7.

106 ibid, p. 6. See further, DFAT, *Submission 3A*.

107 Australian Government Department of the Prime Minister and Cabinet, *Legislation Handbook* (2000), paragraph [4.7(h)(vi)].

3.144 As outlined in this report, however, the committee has identified issues in relation to procedural safeguards in some provisions of the bill. The committee further considers that the bill could be strengthened through giving consideration to the drafting matters identified in this report, and including in the EM statements of reasons for including the provisions identified in this report.

3.145 The committee notes that the effectiveness of targeted sanctions depends, in a large part, on the perceived credibility of the mechanisms and processes through which they are implemented.[108] In making recommendations on these matters, it is the committee's intention to help enable the proposed legislation to operate more effectively.

Recommendation 13

3.146 The committee recommends that, subject to consideration of recommendations 1-12 of this report, the Senate pass the bill.

SENATOR MARK BISHOP
CHAIR

108 As noted by Gary Quinlan, Ambassador and Permanent Representative of Australia to the United Nations Security Council in his *Statement to the United Nations Security Council Regarding the Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security*, S/PV6347 (Resumption 1), 29 June 2010, p. 8.

Appendix 1

Public submissions

1	Reserve Bank of Australia
2	Queensland Law Society
2A	Queensland Law Society
3	Department of Foreign Affairs and Trade
3A	Department of Foreign Affairs and Trade
4	Department of Defence
5	Financial Services Council Ltd
6	The Group of Eight Ltd