Committee Secretary

Senate Standing Committee on Foreign Affairs, Defence and Trade

Parliament House

Canberra ACT 2600

06/09/2024

Dear Officer,

RE: Inquiry into Australia's Sanctions Regime

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

1. Implement more Magnitsky-style sanctions to better align the regime with key western allies.

2. Be more proactive implementing Magnitsky-style sanctions in the Asia-Pacific region, where Australia likely has greater power.

3. Where sanctions are implemented, they should be more extensive and strive harder to target all complicit individuals/entities.

4. Australia should not introduce mechanisms that allow for the confiscation of assets frozen under sanctions.

5. Australia should develop mechanisms for the sanctions compliance of Australian companies and organisations, including an early reporting mechanism.

6. Build upon the Autonomous Sanctions Act 2010 (Cth) to include a mechanism for the determination of the distribution of proceeds from the freezing and confiscation of assets belonging to sanctioned persons/entities.

7. Recommendation 7: Australia explores the viability of an international sanctions coordination mechanism independent from the Five-Eyes and AUKUS networks.

8. Recommendation 8: The Committee seeks more information from DFAT about the diplomatic channels currently used to coordinate sanctions.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

On behalf of the ANU LRSJ Research Hub,
Authors: Fabian Bonacci, Bridie Liu, Tom North, Esther Bornstein
Editors: Jae Brieffies
Academic Supervisor: Anton Moiseienko

Topic 1 How Magnitsky-style Sanctions are Targeting Designated Individuals and Entities.

In 2021, Australia passed the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021* ("Magnitsky Amendment").[1] This allowed Australia to impose sanctions on individuals and entities associated with various themes. The following themes that may be addressed were specified:[2]

> *(a) the proliferation of weapons of mass destruction;*
> *(b) threats to international peace and security;*
> *(c) malicious cyber activity;*
> *(d) serious violations or serious abuses of human rights;*
> *(e) activities undermining good governance or the rule of law, including serious corruption;*
> *(f) serious violations of international humanitarian law.*

This amendment broadened the scope of the existing *Autonomous Sanctions Act 2011,* which was rarely applied for human rights abuses and could not previously target corruption.[3]

1.1 The Current Scope of Magnitsky Sanctions

Since the *Magnitsky Amendment* was passed, Australia has only implemented four batches of Magnitsky sanctions. (1) targeted at those complicit in the death of Sergei Magnitsky for whom the sanctions are named;[4] (2, 3) towards Iranian and Russian entities and individuals surrounding human rights violations and Iranian arms dealing supporting the Ukrainian invasion[5] and (4) towards violent Israeli settlers in the West Bank.[6] This is a total of 73 individuals and 17 entities to date.

While this use of targeted sanctions is certainly a positive start, it is also a noticeably narrow scope of application for an instrument with such a wide potential. Even on a surface level, many would be perplexed that Australia sanctions under 100 individuals worldwide for 'serious abuses

[1] (Cth) ('Magnitsky Amendment').
[2] Ibid s 4.
[3] (Cth); 'Why Australia needs a Magnitsky law' (2019) 89(4) Australian Quarterly 19-27, 24.
[4] Marise Payne, 'Australia's first Magnitsky-style sanctions' (Statement, Minister for Foreign Affairs, 29 March 2022).
[5] Penny Wong, 'Targeted sanctions in response to Iranian and Russian human rights violations and invasion of Ukraine' (Statement, Minister for Foreign Affairs, 10 December 2022); Penny Wong, 'Targeted Sanctions in response to Human Rights violations in Iran and Iranian support for Russia's invasion of Ukraine' (Media Release, Minister for Foreign Affairs, 20 March 2023).
[6] Penny Wong, 'Human Rights Sanctions in response to Israeli settler violence in the West Bank' (Media Release, Minister for Foreign Affairs, 25 July 2024) ('Israeli Settler Sanctions').

of human rights' and 'serious corruption' and only does so in four countries.[7] In 2023, professor of international law Cecily Rose highlighted a difference of several hundred sanctioned individuals between Australia and the US.[8] Admittedly Australia has grown its Magnitsky regime since then, but even so a large difference remains between Australia and the Magnitsky regimes of the US, UK and Canada.

1.2 Gaps in Australia's Magnitsky Regime

There are several notable gaps in Australia's Magnitsky regime. These are gaps between the regime of Australia and that of its allies (1.2.1); gaps from a failure to apply Magnitsky sanctions where it would be appropriate in the Asia-Pacific region (1.2.2) and gaps from under-applying existing Magnitsky regimes (1.2.3).

1.2.1 Gaps with Allies

Firstly, Australia has not sanctioned Eisa Zarepour: minister for Communication and Information Technology in Iran.[9] Zarepour has pioneered nationwide shutdowns of Iran's communications network to suppress, track and punish protests, and his ministry aggressively monitors Iranian internet communications.[10] Zarepour has had targeted sanctions put in place by the EU, US and UK, but is absent from Australia's consolidated sanctions list.[11] Notably, Zarepour studied a PhD in computer science at UNSW in Sydney whilst a member of the oppressive Iranian government – a fact which highlights the availability of Australian education to sanctionable individuals as well as the necessity of reducing gaps between our sanctions and those of our allies(see 1.3).[12] Zarepour is only one uniquely Australia-related example of Iranian government individuals who were not sanctioned in either Magnitsky batch 2 or 3 despite being complicit in an abusive government.

Australia is also yet to sanction Russian individuals involved in the forced deportation of Ukrainians (including children). The International Criminal Court has designated these activities as war crimes and Australia has sanctioned those with an arrest warrant from the ICC (Putin and Lvova-Belova). [13] However, it has not sanctioned any other individuals for forced

[7] *Magnitsky Amendment* (n 1) s 4(d, e).
[8] Cecily Rose, 'Magnitsky Sanctions, Corruption and Asset Recovery' (2023) (Grotius Centre Working Paper Series No 2023/104-PIL, 14 December 2023), 16.
[9] Comment, 'Magnitsky Laws, Eisa Zarepour & Justice For Iran' (2023) 94(1) Australian Quarterly 3, 4 ('Eisa Zarepour & Justice').
[10] Ibid.
[11] Ibid, 8; 'Consolidated List', Department of Foreign Affairs and Trade (Web Page, 29 August 2024) < https://www.dfat.gov.au/international-relations/security/sanctions/consolidated-list> ('Consolidated List').
[12] *Eisa Zarepour & Justice* (n 9), 7.
[13] 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (Press Release, International Criminal Court, 17 March 2023); *Consolidated List* (n 11).

deportation like the US and EU have done.[14] This is an example of a gap in sanctions with allies, but also a seemingly random inconsistency within Australia's own Magnitsky regime (see 1.2.3), as Australia has been otherwise proactive in sanctioning Russia (see 1.1).

Thus, this highlights both the need for greater coordination with allies as well as more sweeping Magnitsky sanctions once a problematic behaviour is identified.

Recommendation 1: Implement more Magnitsky-style sanctions to better align the regime with key western allies.

1.2.2 Gaps in the Asia-Pacific

Additionally, there are a number of instances of reported human rights abuse and corruption in the Asia-Pacific, some of which Australia has publicly condemned, but which have not led to any Magnitsky sanctions against offenders. Some examples were named in 2018 by Geoffery Robertson AO KC and Chris Rummery, including:

> *corrupt Malaysian politicians or Chinese officials involved in oppressing democracy advocates, human rights lawyers and Falun Gong members.*[15]

This is seemingly in reference to convicted corrupt former Malaysian PM Najib Razak (who siphoned US$4.5B) and the various alleged human rights abuses in China (as corroborated by Amnesty International).[16] Regarding China specifically, Australia's Minister for Foreign Affairs has even expressed '[deep concern]' regarding human rights in the Xinjiang province and the access of journalists to justice.[17] Nonetheless, since the article's publication in 2018 and Australia adopting the Magnitsky amendment in 2021, no such sanctions have been put in place. We believe this sends mixed messaging regarding Australia's foreign policy and tolerance for abuses of rights and international law if autonomous sanctions are applied in some serious cases of human rights abuse, but not in other similarly serious ones.

Hence, there is a strong overall case for Australia increasing its Magnitsky regime in order to a) be more aligned with key Western allies; b) be more active in the Asia-Pacific region and c) take

[14] Phil Orchard, 'The fix: Solving Australia's foreign affairs challenge' (2023) 19 Australian Foreign Affairs 93, 96.
[15] Geoffrey Robertson and Chris Rummery, 'Why Australia needs a Magnitsky law' (2019) 89(4) Australian Quarterly 19, 23.
[16] Jason Dasey, 'Malaysians outraged by reduced jail sentence for corrupt former prime minister Najib Razak as departing king grants leniency', ABC News (Australia, 6 February 2024); 'PRIORITISING HUMAN RIGHTS DURING CHINESE PREMIER LI QIANG'S VISIT TO AUSTRALIA', Amnesty International (Web Page, 14 June 2024) <https://www.amnesty.org.au/china-human-rights/>.
[17] Penny Wong, 'Human rights concerns in Xinjiang' (Ministerial statement, Minister for Foreign Affairs, 1 September 2022); Penny Wong, 'Detention of Cheng Lei' (Statement, Minister for Foreign Affairs, 11 August 2023).

more comprehensive action against unconscionable behaviour. The particular importance of a) and b) will be addressed later in 1.3.

Recommendation 2: Be more proactive implementing Magnitsky-style sanctions in the Asia-Pacific region, where Australia likely has greater power.

1.2.3 Gaps Arising from Under-Applying Sanctions

In general, there is the potential for Australia to take a more active approach to implementing Magnitsky-style sanctions. Even when sanctions have been imposed, they usually target a starkly low, incomprehensive number of individuals as per 1.1. An example is the 2024 Magnitsky sanctions against violent Israeli settlers, where only seven individuals were identified.[18] This is despite Australia affirming in the same statement that the settlements overall are 'illegal under international law', and Amnesty International reporting that individual incidents have seen 'hundreds of Israeli settlers [go] on a deadly rampage' (April '24).[19] This raises the question of how such a small number of individuals are selected, and may lead to a loss of public confidence in the methodology of Magnitsky sanction application.

However, this difficulty has been identified not just in Australia but in most countries with Magnitsky laws. Professor Anton Moiseienko called it a 'pinprick' approach that sees 'several targets sanctioned per country, with no claim to comprehensive coverage of everyone involved in similarly reprehensible conduct'.[20] At least in the US, Moiseienko attributes this to a failure to 'draw up a list of the worst offenders' and rather gaining information from a number of non-governmental sources, resulting in random-seeming sanction application.[21] This may be a difficult issue to solve, but we recommend developing a more publicly transparent and methodical approach to identifying individuals targeted by Magnitsky sanctions, and trying to avoid a 'less is more' approach given the highly targeted and individual nature of the sanctions already minimising spillover to third parties.

Recommendation 3: Where sanctions are implemented, they should be more extensive and strive harder to target all complicit individuals/entities.

[18] *Israeli Settler Sanctions* (n 6).
[19] Ibid; 'State-backed deadly rampage by Israeli settlers underscores urgent need to dismantle apartheid', Amnesty International (Web Page, 22 April 2024) <https://www.amnesty.org/en/latest/news/2024/04/state-backed-deadly-rampage-by-israeli-settlers-underscores-urgent-need-to-dismantle-apartheid/>.
[20] Anton Moiseienko, 'Crime and Sanctions: Beyond Sanctions as a Foreign Policy Tool' (2024) 25(1) German Law Journal 17, 42.
[21] Ibid.

1.3 Incentivisation and the Importance of Closing Gaps

Gaps in Magnitsky sanctions with allies can be especially problematic because of the risk of incentivising sanctioned individuals to use Australia as a haven for their assets. Unlike 'traditional' sanctions which target the assets and economies of entire nations, Magnitsky sanctions are obviously only concerned with individuals. But individuals are inherently better positioned to avert the impact of sanctions, such as by storing assets in new locations. This was emphasised by Robertson and Rummery, who wrote how those involved in corruption and abuses are likely to want to store their money in more stable, overseas institutions. Obviously, this is what makes Magnitsky sanctions effective deterrents to those targeted. However, problems arise when Australia doesn't sanction individuals sanctioned by allies like the US, EU and UK, as these individuals are incentivised to use Australia as a store for ill-gotten gains. Therefore, Magnitsky-style sanctions inherently demand a higher level of uniformity among allies. As mentioned at 1.2.1, there are some noticeable gaps in Australia's Magnitsky regime when compared to allies like the US, UK and EU. We recommend that these be a starting point of Australia expanding its regime, lest we inadvertently attract the corrupt or abusive individuals who our allies have sanctioned.

Furthermore, Australia is in a unique geographical position to apply Magnitsky sanctions. Robertson and Rummery described it as 'a financial hub of the Asia-Pacific region', 'envied' for its stable banks, hospitals and schools.[22] This is a major argument for more Magnitsky sanctions in the Asia-Pacific, where there are currently none (see 1.2.2).[23] Loss of financial and physical access to Australia due to a Magnitsky sanction could be a strong deterrent for problematic behaviour, especially for seriously corrupt figures in need of financial stability. This also reinforces the necessity of consistency with Western allies as outlined at 1.2.1, as Australia's desirable institutions only add to the incentive for problematic individuals to turn here if they aren't sanctioned.

Overall, Australia should comprehensively increase the scope of its Magnitsky sanction regime. It should close gaps with the regimes of allies, be proactive in the Asia-Pacific and also strive for more consistency across the regime in applying sanctions.In doing so, Australia will more effectively disincentivise and punish unconscionable conduct, while making itself less of a haven for ill-gotten assets.

[22] Robertson and Rummery (n 15), 23.
[23] See footnote n 5 and 6.

Topic 2 The freezing and confiscation of assets belonging to sanctioned persons/entities

2.1. Mechanisms for freezing and confiscating assets belonging to sanctioned persons/entities

Australia's targeted sanctions imposed against specific individuals or entities typically involve asset freezes or confiscation. The former requires States to 'prevent any move, transfer, alteration, use or dealing in funds, financial assets or economic resources whose value, amount, location, ownership, possession or character will be changed.'[24] For example, the recent sanctions imposed in response to Iran's destabilising activities in the Middle East that prohibit the use of both individuals and entities assets and the transfer of their ownership.[25]

As such, the freezing of assets is a political tool designed to persuade the sanctioned individual or entity to cease their adverse behaviour with the financial incentive of once again retrieving their sanctioned assets.

Recommendation 4: Australia should not introduce mechanisms that allow for the confiscation of assets frozen under sanctions.

Australia should not introduce any mechanisms that allow for the confiscation of assets frozen under sanctions despite the example of some other states, such as Canada's passing of a recent bill.[26] To do this would be to undermine the coercive and action-influencing effect of freezing assets, transforming sanctions into a tool 'operat[ing] to punish a target'[27] that is largely considered as the most effective means of sanctioning parties.

Rather, the proceeds resulting from the confiscation and freezing of assets should be used or repurposed to provide assistance or compensation to peoples or countries that have been negatively affected by the sanctioned individual/entity (see 2.2 for a discussion on the distribution of proceeds).

[24] Stephen Tully, 'Implementing Targeted Sanctions in Australia: A Role for Procedural Fairness' (2009) 16(1) *Murdoch University Electronic Journal of Law* 115, 116.
[25] Minister for Home Affairs, 'Targeted sanctions in response to Iran's destabilising activities in the Middle East' (Media Release, 14 May 2024).

[26] Andrew Dornbierer, 'From sanctions to confiscation while upholding the rule of law' (Working Paper 42, Basel Institute on Governance, February 2023) 1, 4, 14; Government of Canada, *Canadian Sanctions Related to Russia* (Web Page) https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/russia-russie.aspx?lang=eng.
[27] Dornbierer (n 26) 23.

Recommendation 5: Australia should develop mechanisms for the sanctions compliance of Australian companies and organisations, including an early reporting mechanism.

As a result of the expanding sanctions regime in response to conflicts around the world (such as Australia's adoption of sanctions against Russia for their invasion of Ukraine), the difficulties for Australian companies and organisations to remain compliant with these sanctions have been revealed. Financial sanctions can be burdensome for the business of these entities, as they drastically limit the ways in which they can interact with targeted individuals/entities and their associated assets. As the Federal Government imposes sanctions, Australian companies and organisations are required to stay-up-to-date with sanctions lists and to evaluate the changes they must take. Their obligations will typically involve a prohibition on making resources available to the targeted individuals/entities and taking any measures that would undermine the sanctions.

While Australia currently enforces compliance with the sanctions regime with substantial fines or imprisonment in serious cases, this does not address the actual compliance of Australian companies and organisations.[28] Therefore, we suggest that there needs to be more development into possibilities for increasing or making it easier for Australian organisations and businesses to comply with financial sanctions. For example, we suggest adopting legislation similar to the UK's legislative scheme that mandates that organisations submit a report to the Office of Financial Sanctions Implementation (OFSI) if suspicious that a client is a sanctioned individual/entity. Therefore, early reports could be made to allow governmental agencies to ensure the effectiveness of the sanctions regime and reduce the risk of fines for Australian companies/organisations.

2.2. Distribution of proceeds

Recommendation 6: Build upon the *Autonomous Sanctions Act 2010* (Cth) to include a mechanism for the determination of the distribution of proceeds from the freezing and confiscation of assets belonging to sanctioned persons/entities.

Russia's invasion on Ukraine has resulted in a marked shift in the way in which proceeds from sanctions are directed.[29] On 26 July 2024, the EU made available for Ukraine its first payment of

[28] Department of Foreign Affairs and Trade, *Australia and Sanctions* (Web Page) <https://www.dfat.gov.au/international-relations/security/sanctions/about-sanctions>.
[29] Phillipa Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine' (Research Paper, European Parliamentary Research Service, February 2024).

€1.5 billion generated from the immobilisation of assets of the Central Bank of Russia.[30] In this way, the EU is a fantastic example as to how engaging in the confiscation of assets can be used to benefit those most impacted by the behaviours of sanctioned individuals and entities.

On a smaller scale, Italy, has adopted an effective, slightly more flexible approach[31] through the Anti-Mafia Code where confiscated funds can be used to compensate victims of Mafia-type crime. The European Court of Human Rights has since upheld this legislation as compliant with the rights of property outlined in the European Convention of Human Rights.[32]

As this method becomes common practice, we recommend Australia to take part. To this end, we suggest the creation of legislation, similar to that of our European counterparts, that can build upon existing domestic criminal proceeds legislation.

The *Proceeds of Crime Act 2002* (Cth) is a legislative scheme enabling the confiscation of funds connected to, or derived from, crime, and allows for these funds to be used to benefit the community. These proceeds can be re-invested in the development of programs for the purposes of crime prevention and law enforcement.[33] The motivation seeming to underlie the scheme is that the ill-gained profits of wrongdoers should be re-distributed to the community, as the victim of crime generally.

This legislation provides us with a successful framework to establish a new policy for sanctions on a global scale. This must reflect a mechanism whereby preparation and discretion can be utilised to make an impact. Namely, the proceeds of financial sanctions should be accumulated, and then the amount necessary to benefit victims of sanctioned targets should be calculated and dispersed in that way. For example, Australia has several financial sanctions regimes simultaneously running, deriving from both the United Nations Security Council and its autonomous sanctions. Unfortunately, we find it likely that Australia's current sanctions regime will not generate sufficient funds from an individual target to provide real aid to a victim.

Therefore, if a new policy is to be made, discretion as to which actors benefit from these sanctions will be critical. Limitations will be necessary, particularly as this is a novel policy to Australia. To this end, we suggest some key factors that should be taken into account:

a. The restriction of this revenue to be utilised for aid, not just for the transfer of money;
b. Careful consideration of the potential diplomatic fall-out that could arise from certain sanctions;

[30] European Commission, *First transfer of €1.5 billion of proceeds from immobilised Russian assets made available in support of Ukraine today* (Web Page, 26 July 2024) https://neighbourhood-enlargement.ec.europa.eu/news/first-transfer-eu15-billion-proceeds-immobilised-russian-assets-made-available-support-ukraine-today-2024-07-26_en.
[31] Leanna Burnard and Mira Naseer, 'Sanction. Confiscate. Compensate. How Russian Money can be Repurposed as Reparations for Ukrainian Victims' (2023) 5 *Revue Européenne du Droit*.
[32] Ibid.
[33] *Proceeds of Crime Act 2002* (Cth) ss 298 and 298A.

c. Whether the proceeds result from a conviction-based confiscation of assets, where the target of the sanctions has been found guilty by some court or tribunal;[34] and
d. Opportunities for the funds to make a real impact on the lives of the victims.

Topic 3 The coordination of international sanctions

The introduction of the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act* 2021 amended the *Autonomous Sanctions Act 2011* to allow for an expanded coordination of sanctions implementation between Australia and its allies. This coordination is greatly discussed within the Australian public, particularly with regard to the conduct of foreign affairs. However, this area is also one with which the general public will know the least.

In discussions with academics, it was illuminated that even to those who may be involved in high level research regarding Australia's sanctions regime, the particular methods of coordination of autonomous sanctions is not known.

This submission will contend that public confidence and knowledge is an 'interest' that must be 'taken into account' when considering Australia's methods of sanctions coordination, whether or not those methods are changed.

In speaking with individuals who have been employed by the Department of Foreign Affairs and Trade, particularly with those involved in the implementation of sanctions, it was highlighted that coordination within DFAT will depend on the country or government being targeted. The country/regional branch within DFAT is on the policy side, while the Australian Sanctions Office will provide insight into how these sanctions may be legally implemented in Australia, and what sanctions could be implemented by Australia. This much is clear. What is less clear or publicly available, is what interactions that country/regional branch has with other government departments, both Australian and overseas.

The Department of Foreign Affairs and Trade does not drive the campaigns for which countries and individuals to sanction. Rather they provide legal advice and oversee implementation recommended by other sections of the Department, whilst coordinating this with the sanctions of our allies. Rather, research proposals about whom to sanction are conducted by each respective country desk at DFAT, resulting in a scenario where no specific criteria tends to be used.

[34] Burnard and Naseer (n 31).

Though efforts are made to streamline coordination efforts where possible (most notably through direct communication through the Five Eyes network), this can be difficult because:

a) The legislative process for sanctions is different between governments.
b) Australia is presently excluded from some formal sanction dialogues, such as the G7 Enforcement Coordination Mechanism Deputies Meeting

To the extent that some of these coordination bodies such as The European Union Sanctions Coordinators Forum attempt to 'bring together a broad coalition of international allies and like-minded partners', leading to Australia's participation in these meetings, there is no Regional organisation in the Asia-Pacific focussed on coordinating sanctions. Instead, most coordination is done through the U.S. Office of Sanctions Coordination with 'shadowing' and no Australia-specific criteria, which poses questions about how a soon-to-be designated individual will pre-emptively move their assets before sanctioning.

Elucidating the process by which our sanctions are coordinated will increase public trust in our sanctions regime, and show that Australia as a sovereign nation can have a level of independent decision-making.

Recommendation 7: Australia explores the viability of an international sanctions coordination mechanism independent from the Five-Eyes and AUKUS networks.

Recommendation 8: The Committee seeks more information from DFAT about the diplomatic channels currently used to coordinate sanctions.