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Appendix D – The Robertson document

The following document was received from Mr Geoffrey Robertson OAM, QC.

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The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

International Human Rights (Global Magnitsky Law) Bill 2020

No. , 2020

*(**insert name**)*

A Bill for an Act to provide for the taking of restrictive measure against foreign persons complicit in grave human rights abuses or in serious corruption

Contents

Preamble 1

Part 1—Preliminary 4

1 Short title 4
2 Commencement 4
3 Simplified outline of this Act 4
4 Definitions 4
5 Objects 6
6 Violation of human rights 6
7 Human rights violator 6
8 Significant corruption 7
9 Magnitsky conduct 7
10 Extended meaning of person 7
11 Owned or controlled directly or indirectly 8
12 Geographical limitation 8
13 Act binds the Crown 8
14 Application of this Act 8

Part 2—Power to Designate Persons 10

15 Minister may designate persons 10
16 Associates may be designated 10
17 Minister may vary or revoke the designation 10
18 Notification and publicity of designation 10
19 Right to request designation 12

Part 3—Right of Review 13

20 Right to request review of designation 13
21 Independent review 13
22 Procedures for the independent review 14
23 Outcome of the independent review 15

Part 4—Asset Freeze 16

24 Asset-freeze in relation to designated persons 16
25 Making funds available to designated persons 17
26 Making funds available for benefit of designated person 17
27 Making other assets available to designated persons 18
28 Making other assets available for benefit of designated persons 18
29 Circumventing prohibitions 19
30 Exceptions from prohibitions 19

31 Exception for acts done for purposes of national security or prevention of serious crime 20
32 Exceptions for which consent is necessary....20
33 Freezing order to enable financial institution to meet government imposed liabilities....21
34 Relationship with Probate Laws 21
35 Insolvency....21
36 Systems of Title Registration....22
37 Contracts and other corporate assets....22
38 Relationship with Proceeds of Crime Laws....23
39 Anti-Money Laundering Laws 24
40 Security Interests 24
41 State and Territory Laws 24

Part 5—Immigration 26

Part 7—Miscellaneous 27

42 Oversight by Parliament 27
43 Review of operation of Act....27
44 Amendment to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AMLCTF Act 27
45 Amendment to the Administrative Decisions (Judicial Review) Act 1976....28
46 Annual Reports 28
47 Delegation....28
48 Penalties for Offences....29
49 Digital Format....29
50 Public Register....29
51 Immunities from Suit....29
52 Regulation-Making Power....30

Schedule 1—Corruption 31

Schedule 2—Rules for Interpretation of Section 10(2) 35

Application of Schedule....35
Joint Interests 35
Joint arrangements 35
Calculating shareholdings....35
Voting rights 36
Rights to appoint or remove members of the board....36
Shares or rights held indirectly 37
Shares held by nominees....38
Rights treated as held by person who controls their exercise 38

Arrangement 38
Rights exercisable only in certain circumstances etc.....39
Rights attached to shares held by way of security 39

Schedule 3—Exceptions to assets freeze 40

Basic needs 40
Legal services 41
Maintenance of frozen funds and other assets 41
Extraordinary expenses.....41
Pre-existing judicial decision etc. 41
Extraordinary situation 42
Prior obligations.....42
Diplomatic missions etc.....42
Humanitarian assistance activity 43

A Bill for an Act to provide for the taking of restrictive measures against foreign persons complicit in grave human rights abuses or in serious corruption

Preamble

An act to provide for the taking of restrictive measures against foreign nationals complicit in grave human rights abuses or in serious corruption.

PARLIAMENT

Conscious of its democratic duty to uphold, protect and advance the hard-won liberties of the Australian people, in a nation bound by the rule of law and by covenants which confirm their commitment to international justice and to human rights,

Mindful in particular of the Universal Declaration of Human Rights, in the drafting and promulgation of which Australia played an important role, and of all the treaties our nation has ratified to assert the dignity of the individual, in Australian and throughout the world,

Respectful of the Anzac tradition of willingness to fight for freedom, internationally and in our region, against any power that threatens democracy and individual liberty, exemplified by Australia's courageous response to the United Nation's request to protect the people of East Timor in 1999, when more powerful member states quailed,

Recalling the sacrifices made by this country during the struggle against fascism in order to secure for the peoples of the world the war aim declared by President Roosevelt, namely the four freedoms - freedom of speech and religion and freedom from want and fear,

Proud of how these freedoms have been nurtured and embellished by the vigilance of generations of Australians so they have become fundamental to our values as a people, but

Regretful that they have been jeopardised elsewhere in the world by persons and corporations who have engaged in and profited from grave human rights abuses and from acts of serious corruption and who are not likely to be punished or otherwise sanctioned for their crimes.

Determined that any such person or associates should not be allowed to enter Australia or to spend here their ill-gotten gains, either by residence or by transfer of funds through banks or financial institutions, and nor should they or their families enjoy our educational, medical or tourist facilities, and

Believing that targeted sanctions of this kind will, especially if replicated by sanctions imposed under the Magnitsky laws of allied nations, serve as a measure of retribution for reprehensible acts and will deter others from attempting such acts in the future, and

Cognisant, moreover, that the imposition of a sanctions regime against proven perpetrators of human rights abuses will serve both to symbolise and to celebrate Australia's continuing commitment to the cause of global justice, as well as providing comfort to those members of our ethnic communities who fear that they, or their families still abroad, may suffer reprisals for exercising their freedom of speech.

Whereas this statute, to reflect its connection with targeted sanction laws passed by our allies, namely the US, UK, Canada and members of the European Union, enshrines the name of Sergei Magnitsky, a Moscow accountant who uncovered a massive fraud committed by tax officials and law enforcement agents of the Russian state, and in revenge was imprisoned without trial and without bail, which was denied by craven judges, and who was tortured and killed in jail without any subsequent investigation and without accountability for those responsible either for the corruption he exposed or for the death he suffered.

Whereas this statute also pays tribute to the many Australians who have made a contribution to the advancement of human rights here and abroad, including as examples

- *Reverend John Dunmore Lang*, who first alerted the British Parliament to the massacres and mistreatment of indigenous peoples,
- *Andrew Inglis Clarke*, Tasmanian Attorney General and judge, the founding father who at Federation advocated for human rights,
- *Faith Bandler*, who led the campaign at the 1967 referendum to remove racist clauses from the Australian Constitution,
- *Dr HV Evatt*, whose legal genius infused the Charter of the United Nations and who, as president of its General Assembly, promulgated the Universal Declaration of Human Rights,
- *Jessie Street*, Australian delegate to the post-war the Peace Conferences who was an influential advocate for women's rights.

Accepting the need for a human rights law to provide fair process, this Act allows a reasonable opportunity for those who are sanctioned to show why they were not complicit in criminal acts attributed to them, in which case they will be entitled to have their names removed from the list and,

Hopeful that this advanced Magnitsky law will lead to links with the sanctions systems adopted by other parliamentary peoples and will enable the identification and ostracism of those whose behaviour is beyond the pale of democratic society.

Resolved, therefore, to declare by this statute the Australian people's abomination of serious corruption and of crimes against humanity, and to provide sanctions targeted against foreign nationals and entities which can be proven to be complicit in them.

The Parliament of Australia enacts-

Part 1—Preliminary

1 Short title

This Act may be cited as the *International Human Rights (Global Magnitsky Law) Act 2020*.

2 Commencement

(1) This Act commences on the day after this Act receives the Royal Assent.

3 Simplified outline of this Act

To be provided.

4 Definitions

In this Act:

asset means-

(a) an asset of any kind (including, to avoid doubt, funds) or property of any kind, including a legal or equitable estate or interest in real or personal property, a contingent or prospective interest in property, property whether tangible or intangible, moveable or immoveable, however acquired,; and

(b) a legal document or instrument in any form including electronic or digital, evidence of title to, or interest in, such an asset or such property, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, stored value cards, derivatives, debit cards, drafts and letters of credit; and

(c) digital currency as defined in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AMLCTF Act).

asset freezing provisions see Part 4.

associate is a person designated by the Minister under section 16.

Australia, when used in a geographical sense, includes the external Territories.

Australian person is an Australian citizen or permanent resident.

conduct includes omissions and failures to act.

Corruption – see Schedule 1.

Criminal Code is the Schedule to the *Criminal Code Act 1995*.

financial and other services has the same meaning as designated services in section 6 (excluding subsection (6)) of the *AMLCTF Act*.

financial institution includes the provider of financial and other services.

foreign person has the same meaning as in the *Foreign Acquisitions and Take-overs Act 1975*.

human rights violator - see section 7

independent person – see section 21.

internationally recognised human rights and fundamental freedoms has the same meaning as human rights in section 3 of the *Australian Human Rights Commission Act 1986*.

Magnitsky conduct – see section 9

other assets means assets other than funds.

owned or controlled directly or indirectly - see section 11.

person see section 10.

significant corruption - see section 8

violation of human rights - see section 6

5 Objects

The objects of this Act are to deter gross violations of human rights and significant corruption by foreign persons outside Australia by designating and naming perpetrators, preventing entry to Australia by perpetrators and their associates and freezing the assets of perpetrators and their associates.

6 Violation of human rights

(a) A violation of human rights is conduct that would be a breach of Divisions 268 (genocide, crimes against humanity, war crimes and crimes against the administration of justice of the International Criminal Court), 270 (slavery and slavery-like offences) or 274 (torture) if the conduct occurred in Australia or partly in Australia.

(b) To avoid any doubt, a violation of human rights includes weaponizing, microbial or other biological agents, toxins and chemicals to cause harm to persons or induce terror in populations.

7 Human rights violator

A person is a human rights violator if, in the opinion of the Minister –

(a) the person is responsible for or engages in a violation of human rights;

(b) the person facilitates, incites, promotes or provides support for that violation;

(c) the person consents to or acquiesces in that violation;

(d) the person, whether or not in an official capacity, knows of or reasonably suspects that violation, is in a position to discourage or stop it, but fails to do so;

(e) the person conceals evidence of the violation;

(f) the person provides financial and other services, or makes available assets, goods or technology, knowing or having reasonable cause to suspect that those financial and other

services, assets, goods or technology will or may contribute to that violation or to a similar violation;

(g) the person provides financial and other services or makes available assets, goods or technology to a violator;

(h) the person profits financially or obtains any other benefit from a violation of human rights;

(i) the person is responsible for investigation or prosecution of the violation and intentionally or recklessly fails to fulfill that responsibility; or

(j) the person contravenes or assists with the contravention of the asset freezing provisions in Part 3 of this Act.

8 Significant corruption

Significant corruption occurs when, in the Minister's opinion, a person commits, plans to commit or participates in the commission of corruption, having regard to its impact, the amounts involved, the person's influence or position of authority or the complicity of the government of the State concerned.

9 Magnitsky conduct

(a) Magnitsky conduct involves a violation of human rights by a human rights violator or significant corruption, or both.

(b) Magnitsky conduct may also involve harm or threats of harm (whether physical, financial or other harm, including to family, friends or business associates) to persons that attempt to or expose Magnitsky conduct, or who obtain, exercise, defend or promote internationally recognised human rights and fundamental freedoms.

10 Extended meaning of person

Person has the same meaning as in section 2C of the *Acts Interpretation Act 1901* and also includes trusts, partnerships, receivers, liquidators, administrators, executors and legal institutions.

11 Owned or controlled directly or indirectly

(1) A person who is not an individual (C) is owned or controlled directly or indirectly by another person (P) if either of the following two conditions are met (or both are met).

(2) The first condition is that P-

(a) holds directly or indirectly more than 50% of the shares in C,

(b) holds directly or indirectly more than 50% of the voting rights in C, or

(c) holds the right directly or indirectly to appoint or remove a majority of the board of directors of C.

(3) Schedule 2 contains provisions applying for the purpose of interpreting subsection (2).

(4) The second condition is that it is reasonable, having regard to all the circumstances, to expect that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes.

12 Geographical limitation

Magnitsky conduct must be carried out –

(a) outside Australia by any person; or

(b) in Australia by a person who is not an Australian person.

13 Act binds the Crown

This Act binds the Crown in each of its capacities.

14 Application of this Act

(1) This Act extends to every external territory.

(2) This Act applies both within and outside Australia.

(3) This Act applies to Magnitsky conduct even if it existed or was carried on or completed before the commencement of the Act.

(4) This Act applies to assets even if they were created or obtained before the commencement of the Act.

Part 2—Power to Designate Persons

15 Minister may designate persons

The Minister may designate a person if satisfied that the person is or has been involved in Magnitsky conduct.

16 Associates may be designated

The Minister may also designate a person that is owned or controlled directly or indirectly by a person who is or has been involved in Magnitsky conduct or is acting on behalf of or at the direction of a person who is or has been so involved or is a member of, or associated with, a person who is or has been so involved.

17 Minister may vary or revoke the designation

(1) The Minister may at any time vary or revoke the designation.

(2) The Minister must revoke the designation if the Minister is no longer of the opinion that the designated person is or has been involved in Magnitsky conduct.

(3) The Minister must also revoke the designation if of the opinion that the associate is no longer involved as set out in section 16.

18 Notification and publicity of designation

(1) The Minister must without delay take such steps as are reasonably practicable to inform the designated person of the designation, variation or revocation.

(2) The information given under subsection (1) where a designation is made must include a statement of reasons.

(3) A statement of reasons means a brief statement of the matters that the Minister knows, or has reasonable grounds to suspect, in relation to the designated person which have led the Minister to make the designation.

(4) Information may be excluded from the statement of reasons if the Minister considers that disclosure may—

(a) damage national security or international relations

(b) interfere with the prevention or detection of serious crime in Australia or elsewhere, or

(c) disclose the name of a confidential informant or whistle-blower or of information that may lead to that person's identification or the identification of a group of persons to whom that person belongs,

(d) be contrary to the interests of justice.

(5) The Minister must also take steps to publicise the designation, variation or revocation, and in the case of a designation the statement of reasons.

(6) However, the Minister may decline to publicise the decision if the Minister believes that the designated person is an individual under the age of 18 or that disclosure would—

(a) damage national security or international relations

(b) interfere with the prevention or detection of serious crime in Australia or elsewhere, or

(c) disclose the name of a confidential informant or whistle-blower or of information that may lead to that person's identification or the identification of a group of persons to whom that person belongs,

(d) be contrary to the interests of justice.

(7) The Minister must, if it becomes the case that none of the conditions for excluding publicity are now met, take such steps as are reasonably practicable to inform the designated person and to publicise generally the designation and the statement of reasons relating to it.

19 Right to request designation

(1) Any person whose interests are affected by alleged Magnitsky conduct may propose to the Minister that a person and others involved in the conduct or the person's associate be designated (a proposal).

(2) An organisation or association (whether incorporated or not) may also make a proposal if at any time in the two years before it does so it has engaged in a series of activities anywhere for the protection and promotion of international human rights and fundamental freedoms and at the time of the proposal its objects or purposes include protection or promotion of international human rights and fundamental freedoms.

(3) The proposal must be in writing and be accompanied by the information and documents required by the regulations.

(4) Any such proposal must be considered and determined by the Minister.

(5) However, the Minister may decline to consider and determine a proposal which has in substance already been considered and determined by the Minister, where no credible and relevant new information has been provided or is available to the Minister.

(6) Any other person, organisation or association may make a proposal, but the Minister may without reasons decline to consider it.

Part 3—Right of Review

20 Right to request review of designation

(1) A designated person may request the Minister to review the designation or variation decision.

(2) The request must be made in writing and be accompanied by the information and documents required by the regulations.

(3) The Minister must review the decision if requested. However, if a second or subsequent request is made to review the decision, the Minister may decide not to review the decision unless credible and relevant new information is provided or is otherwise available to the Minister.

21 Independent review

(1) In undertaking the review, the Minister must appoint an independent person to conduct a review of the designation and report to the Minister, and the Minister must then consider the independent person's report before making a decision on the review.

(2) The Minister may appoint an independent person for a particular review or for reviews generally.

(3) The independent person must be a person with training or experience in any one of the following—

(a) the protection or promotion of international human rights and fundamental freedoms;

(b) the investigation or prosecution of serious crimes;

(c) the investigation of significant corruption;

(d) judicial office.

(4) The person appointed must not be currently serving in an Australian judicial office.

(5) Regulations may be made for the terms and conditions of appointment and remuneration of the independent person, including the avoidance of conflicts of interest.

(6) The independent person is not subject to the direction or control of the Minister or any other Government official in conducting the review or reporting to the Minister but must comply, as far as possible, with time limits and other procedures imposed by the regulations.

22 Procedures for the independent review

(1) The independent person is to publicise the review as required by the regulations, unless the person is of the opinion that any of the circumstances in s 18(6) exist. If that opinion changes during the review, the person is to publicise the review.

(2) The independent person is to afford the designated person and anyone who made a proposal under section 19 in relation to that or a related designation notice of the review and its subject matter and a reasonable opportunity to participate in it, in accordance with the regulations.

(3) Any other person whose interests are or have been affected by alleged Magnitsky conduct by the designated person and any association or organisation that meets the description in section 19(2) above but did not make a proposal may also participate.

(4) The independent person may accept information in any form and from any source and is not obliged to disclose it to the designated person or anyone else if the independent person believes that disclosure—

(a) would damage the interests of national security or relations with other nations or international organisations, or

(b) interfere with the prevention or detection of serious crime in Australia or elsewhere, or

(c) disclose the name of a confidential informant or whistle-blower or of information that may lead to that person's identification or the identification of a group of persons to whom that person belongs,

(d) be contrary to the interests of justice.

(5) If the independent person decides to conduct a hearing, the person has all the rights, powers and immunities of a Royal Commissioner as if appointed under the *Royal Commissions Act 1902*.

(6) In that case, Part 4 of the Act applies to the independent person as if he was a Royal Commission prescribed by the regulations under section 6OAB of the Act.

23 Outcome of the independent review

(1) To avoid doubt, the Minister is not obliged to implement any recommendation of the independent person but must consider the report in deciding whether to allow the review and vary or revoke the designation. The Minister may but is not obliged to consider any other information when doing so and is not obliged to afford the designated person or any other person the opportunity to make further submissions after receipt of the independent person's report.

(2) The report must be made available to the designated person and any other person who participated in the independent person's inquiry, and made public, subject to the exclusion of any material that the Minister believes should not be disclosed on any of the grounds in section 18(6).

(3) The Minister's decision with reasons, is to be notified to the participants in the review and made public, subject to the exclusion of any material that the Minister believes should not be disclosed on any of the grounds in section 18(6).

Part 4—Asset Freeze

24 Asset-freeze in relation to designated persons

(1) A person (P) must not deal with assets owned, held or controlled by a designated person if P knows, or has reasonable cause to suspect, that P is dealing with such assets.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) For the purposes of subsection (1) a person deals with funds if the person—

(a) uses, alters, moves, transfers or allows access to the funds

(b) deals with the funds in any other way that would result in any change in volume, amount, location, ownership, possession, character or destination, or

(c) makes any other change, including portfolio management, that would enable use of the funds.

(4) For the purposes of subsection (1) assets that are owned, held or controlled by a person include, in particular, a reference to—

(a) exchanging the assets for funds, goods or services, or

(b) using the assets in exchange for funds, goods or services (whether by pledging them as security or otherwise).

(5) The reference in subsection (1) to assets that are owned, held or controlled by a person includes, in particular, a reference to—

(a) assets in which the person has any legal or equitable interest, regardless of whether the interest is held jointly with any other person and regardless of whether any other person holds an interest in the assets;

(b) any tangible property (other than real property), or bearer security, that is comprised in the assets and is in the possession of the person.

(6) For the purpose of subsection (1) assets are to be treated as owned, held or controlled by a designated person if they are owned, held or controlled by a person who is owned or controlled directly or indirectly by the designated person.

(7) For the avoidance of doubt, the reference in subsection (1) to a designated person includes P if P is a designated person.

25 Making funds available to designated persons

(1) A person (P) must not make funds available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) The reference in subsection (1) to making funds available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly by the designated person.

26 Making funds available for benefit of designated person

(1) A person (P) must not make funds available to any person for the benefit of a designated person if P knows, or has reasonable cause to suspect, that P is making the funds so available.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) For the purposes of this subsection—

(a) funds are made available for the benefit of a designated person only if that person thereby obtains, or is able to obtain, a significant financial benefit, and

(b) "financial benefit" includes the discharge (or partial discharge) of a financial obligation for which the designated person is wholly or partly responsible.

27 Making other assets available to designated persons

(1) A person (P) must not make other assets available directly or indirectly to a designated person if P knows, or has reasonable cause to suspect—

(a) that P is making the other assets so available, and

(b) that the designated person would be likely to exchange the other assets for, or use them in exchange for, funds, goods or services.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) The reference in subsection (1) to making other assets available indirectly to a designated person includes, in particular, a reference to making them available to a person who is owned or controlled directly or indirectly by the designated person.

28 Making other assets available for benefit of designated persons

(1) A person (P) must not make other assets available to any person for the benefit of a designated person if P knows, or has reasonable cause to suspect, that P is making the other assets so available.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

(3) For the purposes of subsection (1)—

(a) other assets are made available for the benefit of a designated person only if that person thereby obtains, or is able to obtain, a significant financial benefit, and

(b) "financial benefit" includes the discharge (or partial discharge) of a financial obligation for which the designated person is wholly or partly responsible.

29 Circumventing prohibitions

(1) A person must not intentionally participate in activities knowing that the object or effect of them is (whether directly or indirectly)—

(a) to circumvent any of the prohibitions in ss 24-28, or

(b) to enable or facilitate the contravention of any such prohibition.

(2) A person who contravenes the prohibition in subsection (1) commits an offence.

30 Exceptions from prohibitions

(1) The prohibition in section 24 (asset-freeze in relation to designated persons) is not contravened by an independent person (P) transferring to another person a legal or equitable interest in assets where, immediately before the transfer, the interest—

(a) is held by P, and

(b) is not held jointly with the designated person.

(2) In subsection (1) "independent person" means a person who—

(a) is not the designated person, and

(b) is not owned or controlled directly or indirectly by the designated person.

(3) The prohibitions in sections 24 to 26 (asset-freeze in relation to, and making funds available to, or for the benefit of, designated persons) are not contravened by an institution providing financial and other services crediting a frozen account with interest or other earnings due on the account.

(4) The prohibitions in sections 25 and 26 (making funds available to, or for the benefit of, designated persons) are not contravened by an institution providing financial and other services crediting a frozen account where it receives funds transferred to that institution for crediting to that account.

(5) The prohibitions in sections 25 and 26 are not contravened by the transfer of funds to an institution for crediting to an account held or controlled (directly or indirectly) by a designated person, where those funds are transferred in discharge (or partial discharge) of an obligation which arose before the date on which the person became a designated person.

31 Exception for acts done for purposes of national security or prevention of serious crime

(1) Where an act would, in the absence of this section be prohibited by this Part, that prohibition does not apply to the act if the act is one which the Minister has determined would be in the interests of—

(a) national security, or

(b) the prevention or detection of serious crime in Australia or elsewhere.

(2) The Minister must make the determination in writing, and may vary or revoke it at any time.

32 Exceptions for which consent is necessary

(1) The prohibitions in sections 24 to 28 (asset-freeze etc) do not apply to anything done with the consent of the Minister for the purposes set out in Schedule 3.

(2) A designated person or anyone else whose interests are affected by the asset freeze may apply in writing in accordance with the regulations for consent.

(3) A consent—

(a) must specify the acts authorised by it;

(b) may be general or may authorise acts by a particular person or persons of a particular description

(c) may—

(i) contain conditions;

(ii) be of indefinite duration or a defined duration.

(4) The consent may be varied, revoked or suspended at any time.

(5) If so, the Minister must give written notice to that person of the issue, variation, revocation or suspension of the consent.

(6) The Minister must take such steps as are considered appropriate to publicise the issue, variation, revocation or suspension of the consent.

33 Freezing order to enable financial institution to meet government imposed liabilities

A freezing order relating to an account with a financial institution does not prevent the institution from allowing a withdrawal from the account to enable the institution to meet its liabilities to a government or government agency imposed by or under a written law of the Commonwealth, a State or a Territory.

34 Relationship with Probate Laws

[Upon death, the property of the deceased is transferred by operation of law to an administrator *ad litem* or an executor appointed under the will of the deceased. Transfers of title would be potentially prohibited by the freezing provisions. It would not be necessary to interfere with these laws and actions if the legal personal representative were deemed to hold the property according to the same freezing prohibition as obtained during the life of the deceased. In Australia laws of succession are prescribed by State or Territory law. This does not create a constitutional problem (it is solved by section 109).]

35 Insolvency

[In Australia, insolvency is indirectly defined in both the *Bankruptcy Act* and the *Corporations Act* as an inability to pay debts as and when they fall due. However, insolvency can be created as a means of avoiding obligations. For example, the majority of secured or unsecured creditors may be relatives or associates of a company controller and vote for an administrator or liquidator that is expected to comply with the wishes of the (former) controller. Insolvent companies frequently enter schemes

arrangement which often cause the transfer of corporation property or the creation of additional interests by the issue of shares or rights. Changes of control can readily be effected through such schemes. Insolvency involves a statutory transfer of assets to a trustee in bankruptcy or an administrator or liquidator. The administrator does not displace the board of directors which may continue, but usually has the power to control the affairs of the company in place of the board. These processes need to be affected by the freezing laws if the obligation not to deal with assets is transferred to the new controller or owner of the asset.

Inevitably, this will also involve consideration of joint interests where one co-holder is "innocent". In the case of a company controlled by a designated person, there may be (and usually are) minority shareholders. A significant question which must be resolved is whether, upon freezing the shares of the designated person, another person such as a statutory trustee may exercise the rights attached to the shares. If the shares are frozen, that should mean that the designated person may no longer exercise any their rights.]

36 Systems of Title Registration

[Title to land is secured by registration, even if there is another person who is the true owner of the land. It is only in cases of fraud (which is difficult to prove) that the registered title holder's registered interest is void. Even statutory invalidity of the transfer to the registered holder will not interfere with that person's legal title to the property. There are other schemes for securities over personal property which also depend for priority and title upon registration – see eg *Personal Property Securities Act 2009*. Many assets that are used in a business context are subject to such securities, and in some cases the security holder will be a designated person. If the owner of the underlying asset or the owner of the registered security is a designated person, that should appear on any relevant register.]

37 Contracts and other corporate assets

[Where a contract of loan is frozen, who is to make the payments of interest and principal under the contract? In complex business arrangements, there are often cross-securities, guarantees and debt covenants which are satisfied from several funds from different sectors of an overall business enterprise. Once an asset becomes frozen, that may

well cause the collapse of the busines enterprise and reduce or remove the value of the frozen asset. What if the conditions of contracts of loan or guarantee precipitate an event of default upon the making of a freezing order?

Development loans are usually given where there are multiple assets, and a schedule of repayment is dependent on the subdivision of each asset and the sale of its subdivided parts. What effect will a freezing order have upon such an enterprise?

It may be necessary for there to be an ability for the designated person or a Commonwealth trustee to carry on the business so as not to destroy the value of the asset. The extent to which the Commonwealth would be prepared by itself or through an agent such as an administrator to conduct the designated person's business affairs must be considered.]

38 Relationship with Proceeds of Crime Laws

[The Commonwealth has two Proceeds of Crime Acts which makes this area unnecessarily complicated. The 2002 Act deals with unexplained wealth orders and other matters of interest to the States and Territories. It purports to be a national scheme. If it is not, the earlier Proceeds of Crime Act will operate. These Acts are highly judicialized and, generally speaking, freezing or confiscation orders cannot be made without judicial warrant. A Magnitsky law is an entirely different scheme. It does not confiscate the frozen asset and, generally speaking, the Magnitsky laws have not been developed so that the frozen asset is controlled by a third party. Nor is a designation of a person dependent upon conviction or charge for any criminal offence. Generally speaking, such a person will be a foreign national and Australia may not be able to secure evidence admissible in criminal proceedings to charge or convict such a person of an extra-territorial crime. It is partly in answer to the inadequacy of such laws that the Magnitsky scheme has developed. However, in the course of the administration of the Magnitsky law, admissible evidence may be obtained which would found a confiscation order under the *Proceeds of Crime Act*. There should be a power for the Minister (and perhaps the independent person) to provide that evidence to an appropriate investigator or prosecutor, either in Australia or in a foreign country.]

39 Anti-Money Laundering Laws

[A better but much more complex system for tracking assets and imposing obligations on financial and other institutions that facilitate holding, transfer or sale of assets is the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*. Importantly, it extends to gaming venues and other obscure places where funds have been secreted, and of course deals with international transfers of funds which is of particular significance in the case of assets held by foreign persons.

There are several possible entry points where its provisions (and administration) can be harnessed to identify, track and prohibit transfer of assets belonging to designated persons. Several such points are identified in Part 7 below, and amendments to the Act have been proposed. However, a complete analysis of the necessary changes has not been attempted.

The alternative course is to create some parallel system of tracking, reporting and enforcement, but without appropriate administration and regulation such a system would be unnecessarily complex and expensive. It would be much better to use an existing regulator with proven capacity to administer a funds tracking system.]

40 Security Interests

[As has already been noted, many assets are subject to securities. The extent of the control of the security holder of the asset is dependent upon both statute and contract. The value of securities over circulating assets will vary from day to day. Systems of registration of security interests are not always mandatory, but competing registration affords a priority where there is a competing as well as the position of the security holder, who will often be an innocent third party (e.g. a bank mortgage). A statutory trustee for the frozen assets may have a role here.]

41 State and Territory Laws

[Other systems of title registration under State or Territory laws should be considered. For example, in the mining area, exploration licences and mining leases are subject to detailed regulation and generally speaking, changes of ownership can only be undertaken with the consent of the relevant Minister or agency administering the laws. Security interest may

also be registered. Obligations are imposed on holders, such as environmental restoration during or at the conclusion of a particular project. Problems have arisen recently where the holder of the mining interest has become insolvent. The liquidator of Live Energy Ltd disclaimed onerous property, which was held to include liabilities under State environmental and mining laws: *Longley v Chief Executive, Department of Environment and Heritage Projection* [2018] 3 Qd R 459. The extent to which the Commonwealth may become liable as a putative holder of the frozen asset must also be considered. Section 109 of the Constitution will enable valid Commonwealth laws to override State laws but consideration must be given to the interrelationship with State or Territory mining laws in particular.]

Part 5—Immigration

Part 7—Miscellaneous

42 Oversight by Parliament

This Act is subject to the oversight of the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade.

43 Review of operation of Act

(1) The Minister must cause an independent review of the operation of this Act to be undertaken as soon as practicable after the third anniversary of the commencement of the Act.

(2) The persons who undertake such a review must give the Minister a written report of the review.

(3) The Minister must cause a copy of the report to be tabled in each House of Parliament within 15 sitting days of that House after its receipt by the Minister.

44 Amendment to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (the AMLCTF Act

(1) Insert after section 36(1)(v) of the AMLCTF Act—

"(vi) a breach of sections 24-28 of the International Human Rights (Global Magnitsky Law) Act 2021"

(2) Insert after section 41(1)(f)(iii) of the Act—

"(iiia) may be relevant to a designated person or an associate under the International Human Rights (Global Magnitsky Law) Act 2021"

(3) Insert after section 48(2)(c)(ii) of the Act—

"(iii) proceedings under the International Human Rights (Global Magnitsky Law) Act 2021"

(4) Insert after section 49(1)(g)—

"or

(h) the Minister or an independent person, acting under the International Human Rights (Global Magnitsky Law) Act 2021;"

45 Amendment to the Administrative Decisions (Judicial Review) Act 1976

(1) Schedule 2 to the Administrative Decisions (Judicial Review) Act 1976 is amended by inserting where appropriate

"decisions under the International Human rights (Global Magnitsky Law) Act 2010"

46 Annual Reports

(1) The Minister must cause a report to be prepared for each calendar year (including the year in which this section commences) about the implementation of this Act.

(2) The report must be—

(a) started as soon as practicable after the end of the calendar year for which it is prepared; and

(b) completed by 1 April of the calendar year in which it was started.

(3) The Minister must cause copies of the report to be tabled in each House of Parliament within 15 sitting days of that House after the completion of the report.

47 Delegation

(1) The Minister may, be writing, delegate all or any of the Minister's powers and functions under this Act except those in or arising under Part 2 of the Act, to an SES employee, or acting SES employee, in the Department.

(2) In exercising powers or functions under a delegation, the delegate must comply with any directions of the Minister.

48 Penalties for Offences

[Offences have been created in the Bill, largely for failing to report suspicious transactions or breaching the freeze provisions. Consideration must be given to the penalty for each offence and whether the procedural provisions relating to the offences should be cross referenced to another law which contains similar offences for financial crimes.]

49 Digital Format

[any documents or other information referred to in the Act or regulations should be able to be stored and retrieved in digital form. A boiler plate provision to that affect should be inserted here.]

50 Public Register

[A public register of decisions, reasons and reports should be created, again in digital format. A useful precedent is the Modern Slavery Statements Register created by sections 18-19 of the *Modern Slavery Act 2018*.]

51 Immunities from Suit

[The Minister, his or her officials, the independent person (when not acting as a Royal Commissioner) and persons making proposals and other informants should be immune from suit for civil liability, especially for defamation, and perhaps for any liability when acting in good faith. The Commonwealth has numerous different versions of immunities in most of its laws and an appropriate precedent should be selected. To make the proposal regime effective, it will be essential to protect from liability persons and organisations making proposals for designation. It will be particularly important to protect from liability persons providing information to the Minister or the independent person for defamation and injurious falsehood. There should be absolute privilege for media reporting of designations under this Act and the reasons therefore.]

52 Regulation-Making Power

[Throughout the Bill there are provisions for regulations, but in accordance with the best Commonwealth practice, the regulations deal only with procedural matters and do not create offences or substantive obligations. This is quite different to the UK, Canadian and US practice in this field, where whole schemes of sanctions laws are contained in regulations. As well, the *Autonomous Sanctions Act 2011* is only brought into effect by regulation, and the substantive provisions of the Act are contained, in the main, in the regulation. The regulation-making power should be in the usual "necessary or convenient" form but also specify particular matters of procedure that should be covered.]

Schedule 1—Corruption

The following conduct is corruption—

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(c) the promise, offering or giving to an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, or in order to obtain or retain business or other undue advantage in relation to the conduct of international business;

(d) the solicitation or acceptance by an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(e) the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position;

(f) the promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority an undue advantage for the original instigator of the act or for any other person;

(g) the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or

herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority an undue advantage;

(h) the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of applicable laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity;

(i) illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income;

(j) the promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(k) the solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(l) embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position;

(m) conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(n) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(o) the concealment or continued retention of property when the person involved knows that such property is the result of significant corruption;

(p) the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to deter another person from disclosing acts of significant corruption to any person, official, investigator, journalist or to the public, or to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of significant corruption;

(q) the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of significant corruption;

(r) participation in any capacity such as an accomplice, assistant or instigator in significant corruption,

(s) any attempt to commit significant corruption;

(t) the planning or preparation for significant corruption,

(u) fault is in every case an element of significant corruption. It has the same meaning as in ss 5.1-5.5 of the *Criminal Code*. It may be informed from objective factual circumstances.

(v) In this Schedule—

Public official mean:

(i) any person holding a legislative, executive, administrative or judicial office, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;

(ii) any other person who performs a public function, including for a public agency or public enterprise, or

(iii) any other person defined as "public official" in the law of the place where the person resides or works.

Official of a public international organisation means an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation

Schedule 2—Rules for Interpretation of Section 10(2)

Application of Schedule

1. (1) The rules set out in the following paragraphs of this Schedule apply for the purpose of interpreting Section 10(2).

(2) They also apply for the purpose of interpreting this Schedule.

Joint Interests

2. If two or more persons each hold a share or right jointly, each of them is treated as holding that share or right.

Joint arrangements

3. (1) If shares or rights held by a person and shares or rights held by another person are the subject of a joint arrangement between those persons, each of them is treated as holding the combined shares or rights of both of them.

(2) A "joint arrangement" is an arrangement between the holders of shares or rights that they will exercise all or substantially all the rights conferred by their respective shares or rights jointly in a way that is pre-determined by the arrangement.

(3) "Arrangement" has the meaning given by paragraph 12.

Calculating shareholdings

4. (1) In relation to a person that has a share capital, a reference to holding "more than 50% of the shares" in that person is to holding shares comprised in the issued share capital of that person of a nominal value exceeding (in aggregate) 50% of that share capital.

(2) In relation to a person who does not have a share capital—

(a) a reference to holding shares in that person is to holding a right or rights to share in the capital or, as the case may be, profits of that person;

(b) a reference to holding "more than 50% of the shares" in that person is to holding a right or rights to share in more than 50% of the capital or, as the case may be, profits of that person.

Voting rights

5. (1) A reference to the voting rights in a person is to the rights conferred on shareholders in respect of their shares (or, in the case of a person not having a share capital, on members) to vote at general meetings of the person on all or substantially all matters.

(2) In relation to a person that does not have general meetings at which matters are decided by the exercise of voting rights—

(a) a reference to holding voting rights in the person is to be read as a reference to holding rights in relation to the person that are equivalent to those of a person entitled to exercise voting rights in a company;

(b) a reference to holding "more than 50% of the voting rights" in the person is to be read as a reference to holding the right under the constitution of the person to block changes to the overall policy of the person or to the terms of its constitution.

6. In applying section 10(2) and this Schedule, the voting rights in a person are to be reduced by any rights held by the person itself.

Rights to appoint or remove members of the board

7. A reference to the right to appoint or remove a majority of the board of directors of a person is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all or substantially all matters.

8. A reference to a board of directors, in the case of a person who does not have such a board, is to be read as a reference to the equivalent management body of that person.

Shares or rights held indirectly

9. (1) A person holds a share indirectly if the person has a majority stake in another person and that other person—

(a) holds the share in question, or

(b) is part of a chain of persons—

(i) each of whom (other than the last) has a majority stake in the person immediately below it in the chain, and

(ii) the last of whom holds the share.

(2) A person holds a right indirectly if the person has a majority stake in another person and that other person—

(a) holds that right, or

(b) is part of a chain of persons—

(i) each of whom (other than the last) has a majority stake in the person immediately below it in the chain, and

(ii) the last of whom holds that right.

(3) For these purposes, a person (A) has a majority stake in another person (B) if—

(a) A holds a majority of the voting rights in B,

(b) A is a member of B and has the right to appoint or remove a majority of the board of directors of B,

(c) A is a member of B and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in B, or

(d) A has the capacity to exercise or actually exercises dominant influence or control over B.

(4) In determining whether A has this capacity—

(a) the practical influence that A can exert rather than the rights that it can enforce, is the issue to be considered, and

(b) any practice or pattern of behaviour affecting B's financial or operating policies is to be taken into account even if it involves a breach of B's constitution, international rules, and an agreement, a breach of trustor of the law.

(5) In the application of this paragraph to the right to appoint or remove a majority of the board of directors, a person (A) is to be treated as having the right to appoint a director if—

(a) any person's appointment as director follows necessarily from that person's appointment as director of A, or

(b) the directorship is held by A itself.

Shares held by nominees

10. A share held by a person as nominee for another is to be treated as held by the other (and not by the nominee).

Rights treated as held by person who controls their exercise

11. (1) Where a person controls a right, the right is to be treated as held by that person (and not by the person who in fact hold the right, unless that person also controls it).

(2) A person controls a right if, by virtue of any arrangement between that person and others, the right is exercisable only—

(a) by that person,

(b) in accordance with that person's directions or instructions, or

(c) with that person's consent or concurrence.

Arrangement

12. **Arrangement** includes—

(a) any scheme, agreement, promise, undertaking or understanding, whether express or implied and whether or not it is or is intended to be legally enforceable,

(b) any convention, custom or practice of any kind, and

(c) any arrangement even if in breach of the constitution or rules of a person or in breach of any agreement, trust or the law.

Rights exercisable only in certain circumstances etc.

13. (1) Rights that are exercisable only in certain circumstances are to be taken into account only—

(a) when the circumstances have arisen, and for so long as they continue to obtain, or

(b) when the circumstances are within the control of the person having the rights.

(2) But rights that are exercisable by an administrator, receiver or by creditors while a person is subject to insolvency proceedings are not to be taken into account while the person is subject to those proceedings.

(3) Insolvency proceedings includes proceedings under the insolvency law of another country during which a person's assets and affairs are subject to the control or supervision of a third party or creditor.

(4) Rights that are normally exercisable but are temporarily incapable of exercise are to continue to be taken into account.

Rights attached to shares held by way of security

14. Rights attached to shares held by way of security provided by a person are to be treated for the purposes of this Schedule as held by that person—

(a) where apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with that person's instructions, and

(b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in that person's interests.

Schedule 3—Exceptions to assets freeze

Basic needs

(1) To enable the basic needs of a designated person, or (in the case of an individual) any dependent family member of such a person, to be met.

(2) In the case of an individual, in sub-paragraph (I) "basic needs" includes-

(a) medical needs;

(b) needs for-

(i) food;

(ii) payment of insurance premiums;

(iii) payment of tax;

(iv) rent or mortgage payments;

(v) utility payments.

(3) In the case of a person other than an individual, in sub-paragraph (I) "basic needs" includes needs for—

(a) payment of insurance premiums;

(b) payment of reasonable fees for the provision of property management services;

(c) payment of remuneration, allowances or pensions of employees;

(d) payment of tax;

(e) rent or mortgage payments;

(f) utility payments.

(4) In subparagraph (1)—

“dependent” means financially dependent;

"family member" includes—

(a) the wife, husband or civil partner of the designated person;

(b) any parent or other ascendant of the designated person;

(c) any child or other descendant of the designated person;

(d) any person who is a brother or sister of the designated person , or a child or other descendent of such a person.

Legal services

(5) To enable the payment of-

(a) reasonable professional fees for the provision of legal services, or

(b) reasonable expenses associated with the provision of legal services.

Maintenance of frozen funds and other assets

(6) To enable the payment of—

(a) reasonable fees, or

(b) reasonable service charges.

arising from the routine holding or maintenance of frozen funds or other assets.

Extraordinary expenses

(7) To enable an extraordinary expense of a designated person to be met.

Pre-existing judicial decision etc.

(8) To enable, by the use of a designated person's frozen funds or other assets implantation or satisfaction (in whole or in part) of a judicial, administrative or arbitral decision or lien, provided that

(a) the funds or other assets so used are the subject of the decision or lien.

(b) the decision or lien—

(i) was made or established before the date on which a proposal was made the person became a designated person or the date on which the person was designated, whichever is earlier; and

(ii) is enforceable I Australia, and

(c) the use of the frozen funds or other assets does not directly or indirectly benefit any other designated person.

Extraordinary situation

(9) To enable anything to be done to deal with an extraordinary situation.

Prior obligations

(10) To enable, by the use of a designated person's frozen funds or other assets, the satisfaction of an obligation of that person (whether arising under a contract, other agreement for otherwise), provided that—

(a) the obligation arose before the date on which a proposal was made that the person became a designated person or the person was designated ????, and 'no payments are made to another designated person, whether directly or indirectly.

Diplomatic missions etc

(11) To enable anything to be done in order that the functions of a diplomatic mission or consular post, or of an international organisation enjoying immunities in accordance with international law, may be carried out.

(12) In this paragraph—

"consular post" has the same meaning as in the Vienna Convention on Consular Relations done at Vienna on 24 April 1963, and any

reference to the functions of a consular post is to be read in accordance with that Convention;

"diplomatic mission" and any reference to the functions of a diplomatic mission are to be read in accordance with the Vienna Convention on Diplomatic Relations done at Vienna on 18 April 1961.

Humanitarian assistance activity

(13) To enable anything to be done in connection with the performance of any humanitarian assistance activity.

(14) In sub-paragraph (I), "humanitarian assistance activity" includes the work of international and non-governmental organisations carrying out relief activities for the benefit of the civilian population of a country.