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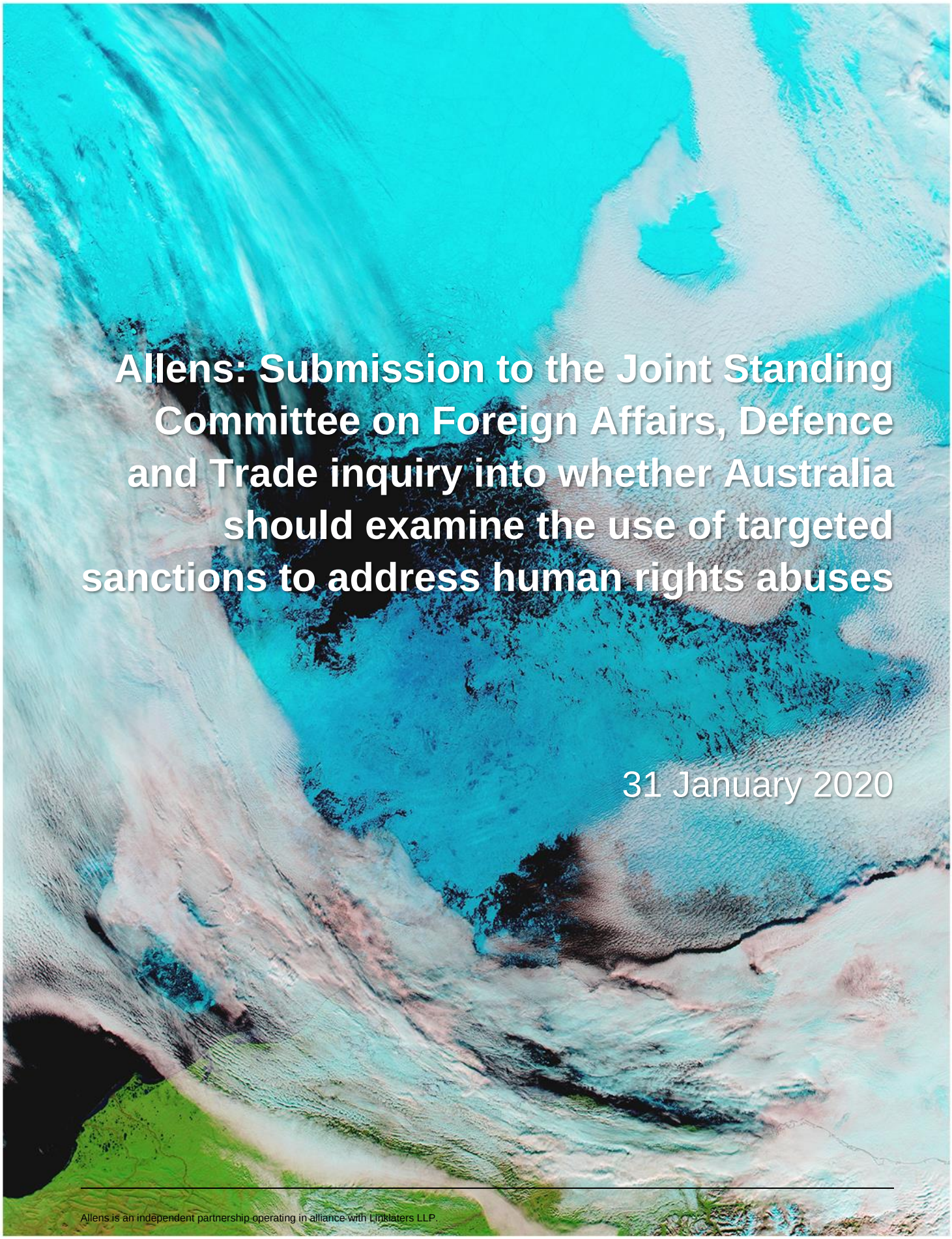

Allens: Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses

31 January 2020

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1 Introduction

We welcome the opportunity to make this submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's inquiry into whether Australia should examine the use of targeted sanctions to address human rights abuses.

Allens' disputes and investigations practice is recognised as 'Band 1' and its financial services regulation practice is recognised as 'Band 2'.[1] We have a long history of representing many of Australia's largest companies in regulatory investigations, civil penalty proceedings and criminal prosecutions. We have extensive experience advising on the effect of Australia's trade sanctions and export control regimes in compliance, transactional and investigations contexts, and we have significant exposure to foreign sanctions regimes, including those of the European Union and the United States.

We respond to the Terms of Reference by commenting on the advisability of introducing a new thematic regulation within Australia's existing autonomous sanctions regime for human rights abuses.

In general, we view the proposal to enact legislation comparable to the United States' Global Magnitsky Human Rights Accountability Act (the ***Magnitsky Act***)[2] as a positive step in combating global human rights abuses, and we consider that the proposal could be accommodated within Australia's existing autonomous sanctions regime. However, we recommend that the Joint Standing Committee give special consideration to the potential compliance burden for Australian companies and to whether the proposal extends to using sanctions to address grand corruption in investigating and further developing the proposal.

2 The proposal could act as a positive step in combating global human rights abuses

Allens is committed to being a responsible corporate citizen. We promote human rights through our pro bono work and our programme of community engagement. We were the first organisation in Australia to sign the United Nations Global Compact, and we have worked to implement the Compact's ten principles within our business, including by publishing an annual Communication on Progress.[3] We endorse the United Nations Guiding Principles on Business and Human Rights and endeavour to avoid causing or contributing to adverse human rights impacts in the running of our business, including in supplier procurement, and to address such impacts when they occur. We take seriously our obligations under the *Modern Slavery Act 2018* (Cth), and we will publish Modern Slavery statements in accordance with the Act.

Allens welcomes law reform that advances human rights in Australia and abroad, and we consider that the enactment of legislation comparable to the Magnitsky Act could give the Australian Government more strength and capacity to respond to gross human rights violations abroad. For that reason, we support in principle the proposal to enact such legislation.

3 The existing autonomous sanctions regime can accommodate Magnitsky-style sanctions

Australia's existing autonomous sanctions regime comprises the *Autonomous Sanctions Act 2011* (Cth) (the ***Australian Act***) and the *Autonomous Sanctions Regulations 2011* (Cth) (the ***Australian Regulations***). These laws authorise the Government to impose autonomous sanctions to 'facilitate the conduct of Australia's relations with other countries or with entities or

[1] Chambers Asia Pacific 2020 law firm rankings.
[2] 22 USC §2656.
[3] Available at https://www.unglobalcompact.org/participation/report/cop/create-and-submit/active/427690.

persons outside Australia'.[4] Currently, Australia only imposes autonomous sanctions with reference to states' contraventions of their international obligations.

In 2018, the Hon Michael Danby MP introduced a private member's Bill (the ***2018 Bill***)[5] that would have established a regime for the imposition of Magnitsky-style sanctions separate and additional to the autonomous sanctions regime. We see no principled or legal basis for establishing a separate regime for the imposition of Magnitsky-style sanctions and consider that Magnitsky-style sanctions could be introduced within Australia's existing autonomous sanctions regime.

If Magnitsky-style sanctions are to be introduced within Australia's existing autonomous sanctions regime, we suggest that section 10 of the Australian Act be revised to specifically empower the Minister for Foreign Affairs to make sanctions regulations relating to human rights contraventions.

Currently, section 10 provides that the Minister may make sanctions regulations if she is satisfied that they 'will facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia' or 'otherwise deal with matters, things or relationships outside Australia'. By comparison, section 3 of the Magnitsky Act allows the United States President to impose sanctions on a foreign person who, based on credible evidence, is determined to be 'responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any foreign country' who seek to expose government corruption or promote human rights.

While section 10 of the Australian Act clearly provides scope for combating human rights contraventions in which states are complicit,[6] for legal and normative clarity, the autonomous sanctions regime should be clarified to provide that the Australian Act also provides scope for combating human rights contraventions when it is not clear that a state is complicit.

4 The proposal could have significant compliance implications for Australian companies, and should account for this possibility

The enactment of legislation comparable to the Magnitsky Act could complicate the sanctions compliance landscape for Australian companies.

Presently, many companies assess their sanctions risk profiles with reference to the countries in which they operate. However, the introduction of legislation comparable to the Magnitsky Act could result in Australia sanctioning individuals in a broader range of countries, in relation to transnational, geographically dispersed human rights issues, as well as domestic, geographically concentrated human rights issues. For example, the United States imposes targeted financial sanctions and/or travel bans against several hundred individuals and entities from a diverse set of countries, including Kenya, Myanmar, Russia, Saudi Arabia, Serbia and South Africa, under the Magnitsky Act.

Consequently, if legislation comparable to the Magnitsky Act were enacted:

- companies that do not have sophisticated sanctions compliance systems in place because they do not operate in presently sanctioned jurisdictions may need to develop and implement such systems; and
- companies that have developed their sanctions compliance systems with reference to the countries in which they operate may need to refresh their sanctions compliance programs

[4] *Autonomous Sanctions Act 2011* (Cth) s 10(2)
[5] The International Human Rights and Corruption (Magnitsky Sanctions) Bill 2018, which lapsed when Parliament was dissolved in advance of the 2019 federal election.
[6] For example, Items 7 and 8 of reg 6 of the Australian Regulations (which are designated under section 10 of the Australian Act) impose sanctions against persons and entities involved in human rights abuses in Syria and Zimbabwe respectively.

to account for the fact that sanctions risk may materialise anywhere in the world, including in countries that themselves are not sanctioned.

Therefore, if legislation comparable to the Magnitsky Act were enacted, we suggest that the Government consider providing regulatory guidance to Australian companies facing a changed sanctions compliance landscape.

Additionally, companies should be provided with a sufficient opportunity to reassess their risk profiles and revise their sanction compliance systems. It may be inefficient for Australian companies with low current exposure to sanctions risk (for example, because they operate in low-risk sectors in low-risk jurisdictions) to expend time and resources upon the enactment of legislation comparable to the Magnitsky Act, in order to implement sophisticated compliance systems on the unlikely chance that Australia adopts human rights sanctions affecting their business. Consequently, we suggest that the Joint Standing Committee consider amending the autonomous sanctions regime to provide for the granting of general sanctions permits that would allow companies a grace period in the event that particularly burdensome sanctions against a novel set of actors were adopted.

In the United States, the Office of Foreign Assets Control (***OFAC***) sometimes issues 'general licenses' to allow companies time to update their compliance programs following the imposition of novel sanctions. While Part 4 (and, specifically, regulation 18) of the Australian Regulations allows the Minister to grant permits authorising a person to engage in otherwise sanctioned activity, this power is narrower than OFAC's power, and we are not aware of the Minister pre-emptively granting a sanctions permit to a class of persons. Accordingly, we suggest that the Joint Standing Committee consider expanding the scope of the Minister's power to grant sanctions permits to account for the possibility that the enactment of legislation comparable to the Magnitsky Act could significantly complicate the sanctions compliance landscape for Australian companies.

5 The proposal should be clarified to address whether it extends to corruption

The US Magnitsky Act and other foreign Magnitsky laws provide for the imposition of sanctions to combat grand corruption, as well as gross human rights abuses. For example, the United States recently imposed targeted sanctions against a Latvian major who has 'systematically exploit[ed politicians, political parties and business and development associations] for his own economic gain' and Cambodian officials complicit in large-scale illegal logging.[7]

It is unclear from the Terms of Reference whether the Joint Standing Committee is considering using targeted sanctions to address grand corruption, as well as gross human rights abuses.

While such a proposal could function as a positive step in combating grand corruption, we note that: (i) the Commonwealth has adopted measures that address grand corruption by criminalising foreign bribery by Australian persons and companies;[8] (ii) a Bill proposing significant amendments to Commonwealth foreign bribery laws is currently before the Senate;[9] and (iii) many Australian companies have developed and implemented sophisticated compliance systems to promote compliance with Commonwealth foreign bribery laws.

If the Joint Standing Committee proposes using targeted sanctions to address grand corruption, we suggest that interested persons (for example, companies with extensive anti-corruption compliance experience) be given an opportunity to make submissions on the potential implications of the proposal.

[7] See https://home.treasury.gov/news/press-releases/sm849.
[8] *Criminal Code 1995* (Cth) s 70.2.
[9] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.