



Autonomous Sanctions Bill 2010

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Law and Bills Digest Section

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Autonomous Sanctions Bill 2010

Date introduced: 30 September 2010

House: House of Representatives

Portfolio: Foreign Affairs

Commencement: On the day after Royal Assent

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The aim of the Bill is to establish an autonomous sanctions framework providing for greater flexibility in the range of measures Australia can implement (in scope and extent) for the purpose of facilitating the conduct of Australia's external affairs, and for related purposes.¹ Supporting this, are provisions for enforcement and facilitating the 'collection, flow and use of information relevant to the administration of autonomous sanctions, whether applied under this Act or another law of the Commonwealth'.²

History of the Bill

An earlier version of the Autonomous Sanctions Bill 2010 was first introduced into the House of Representatives on 26 May 2010 during the term of the 42nd Parliament. However, that Bill lapsed on 19 July 2010 when Parliament was prorogued for the 2010 federal election. The Bill was re-introduced in the first week of the 43rd Parliament unchanged.

Background

Sanctions are widely recognised as a viable yet imperfect foreign policy tool at the disposal of states in their efforts to influence and or enforce international norms and laws, and to maintain or restore international peace and security³. International sanctions encompass a range of measures including

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1. Explanatory Memorandum, Autonomous Sanctions Bill 2010, p. 3; Autonomous Sanctions Bill, p. 1.
 2. Clause 3, Autonomous Sanctions Bill 2010.
 3. S Smith, MP, (former) Minister for Foreign Affairs, 'Second reading speech: Autonomous Sanctions Bill 2010', House of Representatives, *Debates*, 26 May 2010, p. 4112, viewed 23 June 2010, http://parlinfo.parlInfo/genpdf/chamber/hansardr/2010-05-26/0023/hansard_frag.pdf;fileType=application%2Fpdf

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restraints on official and diplomatic contacts or travel, the application of legal measures aimed at restricting or prohibiting trade or other economic activity between one state and the target state, or the seizure or freezing of property of individuals/entities.

Australia uses two types of sanctions regimes, mandatory United Nations (multilateral or collective) sanctions and autonomous sanctions.

United Nations Security Council sanctions

The United Nations Security Council (UNSC) can only impose non-military sanctions where it has determined ‘the existence of any threat to the peace, breach of the peace, or act of aggression’ and achieves a two-thirds majority vote, in addition to the assenting vote of all five permanent members.⁴ When the United Nations Security Council applies sanctions, all UN member states are under a legal obligation to comply with and implement those sanctions in accordance with the UN Charter.⁵

The decision-making process in relation to sanctions is generally divided between two key bodies: the Security Council and the regime specific sanctions committees.⁶ However, as already mentioned the decision to apply sanctions is taken by the UNSC.

The transparency and accountability of the decision-making process relating to UN sanctions has received a deal of attention over the past decade or so. According to Devika Hovell⁷:

Though the Security Council continues to oversee the implementation of the sanctions regime, responsibility for the day-to-day administration of sanctions is then delegated to a sanctions committee ... Many of the key decisions affecting individuals and entities are taken by these subsidiary organs ...

Reflecting broader Security Council practice, much of the work of sanctions committees takes place in ‘informal consultations of the whole’, meetings that are held behind closed doors without a record being taken... Decisions rarely provide any justification and, on occasion, are not even communicated to affected parties... Non-participating states, not to mention the states and individuals targeted by the sanctions, have no means to assess the principles that guide decisions made by sanctions committees. This has led to descriptions of sanctions committee decision-making as ‘prone to politicization and ... at times bewildering to the observer’.⁸

4. Articles 39, 41 and 42 UN Charter; H Kelsen, *The law of the United Nations: A critical analysis of its fundamental problems*, London Institute of World Affairs, The Law Book Exchange, LTI Union, New Jersey, 2000, pp. 735—736.

5. Articles 25, 103 and 2(5) UN Charter; Chapter VII UN Charter.

6. D Hovell, ‘The deliberative deficit: Transparency, access to information and UN sanctions’ in J Farrall & K Rubenstein, eds, *Sanctions, accountability and governance in a globalised world*, Cambridge University Press, New York, 2009, p. 94.

7. D Hovell is a lecturer in international law at the University of New South Wales, and a director at the Gilbert + Tobin Centre of Public Law.

8. *Ibid.*, pp. 94—95.

However, Hovell goes on to mention that the Security Council has been making an effort to address such criticism through transparency enhancing measures including:

...notes from the President of the Security Council ... encouraging greater openness. Sanctions committees have been encouraged to convene substantive and detailed briefings on the work of the committees following each meeting, increase press releases, publish information about sanctions committees on the Internet, make summary records of formal meetings publicly available and to prepare annual reports with a concise summary of activities undertaken in the reporting period. Many of these measures have been implemented, albeit at times in a desultory fashion ...⁹

Hovell's basic argument is that the call for transparency in sanctions decision-making must be established and done so on strong foundations, incorporating reasonable and carefully deliberated limitations.

In his discussion of the potential UN Charter-based limits on the Security Council's sanctions powers, Dr Jeremy Farrall¹⁰ argues that Articles 24 and 25 of the UN Charter provide an indication that the Security Council's powers are circumscribed. Specifically, 'UN member states agree to carry out the decisions of the Security Council in accordance with the Charter', which in turn can be interpreted as meaning that 'states are only obligated to carry out Council decisions that are taken in conformity with the Charter'.¹¹ Farrall has found basis for this view in the decision of the International Court of Justice in the *Certain Expenses* case and also in the *Tadić* case, where the International Criminal Tribunal for the former Yugoslavia (ICTY) held that the Security Council's powers are subject to constitutional limitations.¹² However, while Farrall acknowledges that the UN Purposes and Principles are the subject of varied interpretation, he also points to work which demonstrates that certain rules may be distilled which arguably serve as a check on the Security Council in the area of sanctions. It has been contended for example, that the Security Council must respect human rights (Article 1(3)) and must exercise its responsibilities in good faith (Article 2(2)) and also norms of *jus cogens*¹³. On the other hand, it is also acknowledged that there are qualifications to these limits which serve to curtail their application.¹⁴

Especially over the past decade or so, an increasing amount of work has been done around the issue of appropriate and careful definition of limits and or checks on the powers of the Security Council in the area of sanctions, in particular, in relation to targeted sanctions. The area of due process in relation to targeted sanctions is one which has received some attention from legal scholars and other commentators. In simple terms, the principle of due process requires that an assumption of

9. Ibid., p. 96; J Farrall, *United Nations sanctions and the rule of law*, Cambridge University Press, Cambridge, 2007, pp. 203—205.

10. J Farrall is a Fellow at the Centre for International Justice and Governance at the Australian National University.

11. J Farrall, *United Nations sanctions and the rule of law*, op. cit., pp. 68—69.

12. J Farrall, *United Nations sanctions and the rule of law*, op. cit., p69.

13. Jus cogens are pre-emptory norms of international law

14. D Schweigman, The authority of the UN Security Council under Chapter VII of the UN Charter, cited in J Farrall, *ibid.*, pp. 69—71.

innocence should be accorded in some form to any potential sanctions target. In response to concerns regarding the process by which an individual may be placed on the financial blacklist, 'in 2006, the UN Security Council adopted resolution 1730 in which it adopted standardised procedures for listing and delisting individuals and entities created for the purposes of applying travel bans and assets freezes'.¹⁵

Basis of policy commitment/Main issues

Autonomous sanctions

Autonomous sanctions can be distinguished from sanctions applied under international obligations arising from UNSC decisions discussed above. Autonomous sanctions are imposed by a government as a matter of its foreign policy choices.

In discussing the Government's rationale for the Bill in May 2010, former Foreign Affairs Minister, Stephen Smith, stated that:

They are highly targeted measures intended to apply pressure on regimes to end the repression of human rights, to end the repression of democratic freedoms, or to end regionally or internationally destabilising actions.

Such situations include Iran's failure to cooperate fully with the International Atomic Energy Agency (IAEA) to enable it to confirm Iran's nuclear program is exclusively for peaceful purposes and the autonomous sanctions Australia has had in place on North Korea since 2006 in response to its missile and nuclear tests.

Or, in the case of Zimbabwe where the Mugabe regime has been responsible for acts undermining the rule of law, corruption, violence and intimidation.

Or the December 2006 military coup in Fiji, that robbed the population of Fiji of their constitutional rights and has seen the sustained abuse of basic freedoms, including the suppression of press freedom.

Or the September 2007 violent crackdown on pro-democracy protesters by the military regime in Burma, and the ongoing disrespect for the human rights and democratic aspirations of the Burmese people.

Autonomous sanctions are applied so as to minimise, to the extent possible, the adverse impact on the general population of the affected country.¹⁶

15. J Farrall, *United Nations sanctions and the rule of law*, op. cit., pp. 222—223.

16. S Smith, MP, (former) Minister for Foreign Affairs, 'Second reading speech: Autonomous Sanctions Bill 2010', House of Representatives, *Debates*, 26 May 2010, p. 4112, viewed 23 June 2010,

Autonomous sanctions may be used to supplement and or reinforce sanctions imposed by the Security Council. But, there may also be circumstances not covered by UN sanctions because either the specific situation does not fall within the UN mandate, or because member states are unable to reach an agreement.¹⁷

The Security Council imposes a range of sanctions against Iran and the DPRK — North Korea — in response to the threat to international peace and security posed by their programs of weapons of mass destruction-proliferation concern.

Australia, as well as the United States, the European Union and other states, imposes autonomous targeted financial sanctions and travel restrictions on a range of individuals and entities beyond those required by the Security Council.¹⁸

In simple terms, the Autonomous Sanctions Bill is designed to cut red tape and allow Australia to be flexible in its sanctions tools that is, punitive measures not involving the use of force¹⁹ without waiting for the UNSC.²⁰ However, while the UNSC process may be seen as red tape, it may also be regarded as a necessarily careful and considered process.

The Bill is modelled on the legislation with which Australia implements UNSC sanctions, namely the *Charter of the United Nations Act 1945* (UN Charter Act). This is meant to bring into line the administration of autonomous sanctions and simplify compliance.²¹ However, this approach may not be very optimal or appropriate. This is because, in particular, the procedural provisions in the UN Charter Act are informed by an understanding of the nature of the legally binding UN sanctions, which Australia implements, and the due process and international decision-making process from which these resolutions derive.

According to former Minister for Foreign Affairs, Stephen Smith MP:

It does not, however, include the specific sanctions measures itself. Instead, it provides for sanctions laws to be primarily applied by regulations made under the Bill.

http://parlinfo/parlInfo/genpdf/chamber/hansardr/2010-05-26/0023/hansard_frag.pdf;fileType=application%2Fpdf;
Explanatory Memorandum, Autonomous Sanctions Bill 2010, p. 2.

17. Department of Foreign Affairs and Trade, *Submission to the Senate Inquiry into the Autonomous Sanctions Bill 2011 [Provisions]*, Canberra, 7 July 2010, p. 2, viewed 5 April 2011, http://www.aph.gov.au/Senate/committee/fadt_ctte/autonomoussanctions_43/submissions.htm
18. S Smith, MP, (former) Minister for Foreign Affairs, 'Second reading speech: Autonomous Sanctions Bill 2010', House of Representatives, *Debates*, 26 May 2010, p. 4112, viewed 23 June 2010, http://parlinfo/parlInfo/genpdf/chamber/hansardr/2010-05-26/0023/hansard_frag.pdf;fileType=application%2Fpdf
19. Explanatory Memorandum, op. cit., p. 2.
20. 'Australia eyes Iran, N Korea with new sanctions', *Khaleej Times Online*, 26 May 2010, viewed 9 June 2010, http://www.khaleejtimes.com/DisplayArticle08.asp?xfile=data/international/2010/May/international_May1424.xml§ion=international
21. Explanatory Memorandum, op. cit., p. 2.

This is critically important for the effectiveness of the Bill, and for Australia's national interest in the imposition of autonomous sanctions measures.

Allowing these measures to be applied by regulations will allow the necessary flexibility for the Government to respond to fluid and rapidly changing international developments in a timely way.

The Bill will continue to allow other Commonwealth laws to be used to apply autonomous sanctions where this is necessary. It will, however, require the Minister for Foreign Affairs to specify, in a legislative instrument, any law — including those in regulations made under the Bill — that is to be applied as a sanction law. This will ensure greater certainty and transparency in terms of compliance with Australia's sanctions laws.²²

For some years, Australia has made use of autonomous sanctions as a foreign policy instrument. However, it has done so by relying on ad hoc measures basically designed for other purposes relying legislation dealing with migration, banking and customs. As Professor Gowlland-Debbas points out— this is not an unusual practice²³:

In the absence of enabling laws, the majority of States have been able to respond to Security Council decisions, and continue to do so, through reliance on pre-existing legislation not related to United Nations Security Council Resolutions [...].²⁴

According to Foreign Minister Kevin Rudd:

The recent concerted international action targeting Iran's nuclear and missile programs demonstrates the urgent need to strengthen Australia's autonomous sanctions regime by allowing greater flexibility in the range of measures Australia can implement, beyond those achievable under existing instruments.

This will ensure that Australia's autonomous sanctions can match the scope and strength of measures implemented by like-minded countries.²⁵

The like-minded jurisdictions which Foreign Minister Rudd refers to by way of example include the United States of America, the European Union, Canada and the Republic of Korea.

As the Senate Foreign Affairs, Defence and Trade Legislation Committee points out:

In 2007, DFAT advised the Senate Standing Committee on Legal and Constitutional Affairs that the UN Charter Act did not include external review or other procedural fairness-related

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22. S Smith, MP, (former) Minister for Foreign Affairs, 'Second reading speech: Autonomous Sanctions Bill 2010', House of Representatives, *Debates*, 26 May 2010, p. 4112, viewed 23 June 2010, http://parlinfo.parlInfo/genpdf/chamber/hansardr/2010-05-26/0023/hansard_frag.pdf;fileType=application%2Fpdf
 23. Professor of Public International Law, Graduate Institute of International Studies, Geneva.
 24. Vera Gowlland-Debbas, ed, *National implementation of United Nations sanctions: A comparative study*, Martinus Nijhoff Publishers, The Hague, 2004, p. 43.

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provisions because it is concerned with implementing Australia's obligations under Article 25 of the UN Charter to apply UN sanctions. DFAT advised that there is no legal scope to delay or alter the implementation of UN sanctions by including such measures in the UN Charter Act.

The committee notes, however, that the same rationale does not automatically apply to autonomous sanctions, which do not uniformly have a basis in binding obligations under international law.²⁶

Indeed, as already discussed, the UN sanctions process has been steadily evolving measures and procedures designed to enhance due process and to make sanctions committees more transparent, accountable and to improve their legitimacy in the international sphere.

In order to enhance Australia's overall capacity to more flexibly and successfully employ autonomous sanctions, it would be interesting to know if the government has been or will be undertaking some amount of research to provide important data and evaluation on the most efficient and effective use of sanctions in promoting desired outcomes.²⁷ Of relevance in this regard is the European Parliament's resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights.²⁸

The European Parliament,

...

General considerations with a view to an effective EU sanctions policy

1. Deplores the fact that, to date, no evaluation or impact assessment has been carried out in respect of the EU's sanctions policy and that it is therefore extremely difficult to gauge the policy's impact and effectiveness on the ground and thus to draw the necessary conclusions; calls on the Council and the Commission to carry out this evaluation work; considers, nevertheless, that the sanctions policy used against South Africa proved effective in helping to end apartheid;

2. Considers that disparities in the legal bases for the implementation of the EU's sanctions policy, involving different decision-making, implementation and supervision levels, are undermining the transparency and coherence of the EU's sanctions policy and, as a result, the credibility thereof;

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25. K Rudd, MP, Minister for Foreign Affairs, 'Second reading speech: Autonomous Sanctions Bill 2010', House of Representatives, *Debates*, 30 September 2010, p. 259. See also Explanatory Memorandum, Autonomous Sanctions Bill 2010, p. 2.
26. Australian Parliament, Senate Foreign Affairs, Defence and Trade Legislation Committee, *Report of Inquiry into the Autonomous Sanctions Bill 2010 [Provisions]*, 3 March 2011, p. 9.
27. 'The Stockholm process recommended that the Security Council should include regular humanitarian and socio-economic impact assessment in its sanctions monitoring procedures, under established methodology: *Results from the Stockholm Process*, 27 (para. 50)' in J Farrall, *United Nations sanctions and the rule of law*, Cambridge University Press, 2007, p. 226.
28. *European Parliament's resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights* (2008/2031(INI)), viewed 29 March 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295E:0049:0062:EN:PDF>

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3. Considers that, for sanctions to be effective, their introduction must be seen as legitimate by public opinion at European and international levels and in countries in which changes are expected; stresses that consultation of Parliament in the decision-making process gives them added legitimacy;

[...]

7. Acknowledges that the overall EU sanctions instruments are generally deployed flexibly in accordance with needs on a case-by-case basis; deplores, however, the fact that the EU has often applied its sanctions policy inconsistently, by treating third countries differently even though their human rights and democratic records are similar, and thus triggering criticism for applying 'double standards';

[...]

Coordinated action by the international community

24. Takes the view that coordinated action by the international community has a stronger impact than disparate and uneven actions by States or regional entities; welcomes, therefore, the fact that the EU's sanctions policy should continue to be based on the notion of a preference in favour of the UN regime;

25. Calls on the Council, in the absence of UN Security Council sanctions, to cooperate with non-EU sanctioning states, to share information, and to coordinate action at international level to prevent sanctions evasions and to maximise the effectiveness and implementation of EU sanctions and other sanctions, in conformity with international law;

Setting-up of clear decision-making processes, objectives, benchmarks and review mechanisms

30. Underlines the need for an in-depth analysis of each specific situation prior to the adoption of sanctions in order to assess the potential impact of different sanctions, and to determine which are the most effective in the light of all other relevant factors and comparable experiences; considers that such prior analysis is all the more justified since it is difficult to backtrack once the sanctions process has been initiated without undermining the EU's credibility and the expression of the EU's support for the population of the target third country, given the fact that the country's authorities can instrumentalise the EU decision; takes note in this respect of the current practice whereby the appropriateness, nature and effectiveness of the proposed sanctions are discussed in the Council on the basis of assessment by the EU Heads of Mission in the country concerned, and calls for the inclusion of an independent expert's report in such assessment;

31. Stresses, however, that such analysis should not be used to delay the adoption of sanctions; emphasises in this respect that the two-step procedure for the imposition of sanctions under the CFSP provides scope for an urgent political reaction, initially through the adoption of a common position to be set out after a more in-depth analysis of the Regulation, detailing the exact nature and scope of the sanctions;

32. Calls for the systematic inclusion in the legal instruments of clear and specific benchmarks as conditions for the lifting of the sanctions; insists, in particular, that the reference criteria should be established on the basis of an independent evaluation and that those criteria should not be altered at a later stage, depending on political changes within the Council;

33. Calls on the Council and the Commission to set up an exemplary sanctions review process, notably involving the systematic inclusion of a review clause which entails revisiting the sanctions regime on the basis of the established benchmarks and assessing whether the objectives have been met; insists that declarations of intent or the will to establish procedures that will produce positive results are to be welcomed, but stresses that they should under no circumstances, when sanctions are evaluated, replace the achievement of tangible and genuine progress in meeting reference criteria;²⁹

In view of the fact that Australia's autonomous sanctions do not have the same legal standing as UN sanctions and, given that the provisions of the Bill do not seem to require a decision-making process that involves the same kind of scrutiny, perhaps the Bill should nonetheless be strengthened by inserting measures in support of a decision-making process with integrity and more evident basic support for the protection of individual rights.

Committee consideration

On 30 September, the Bill was reintroduced in the House of Representatives and, on the same day, the Senate referred the provisions of the Bill to the Committee on Foreign Affairs, Defence and Trade (the Foreign Affairs Committee) for inquiry and report by 18 November 2010. The Senate granted an extension and the Foreign Affairs Committee reported on 3 March 2011.³⁰ Details of the inquiry and report are at:

http://www.aph.gov.au/Senate/committee/fadt_ctte/autonomoussanctions_43/index.htm

In addition, it is noted that the Senate Scrutiny of Bills Committee reviewed the earlier version of the Bill.³¹ The Scrutiny of Bills Committee expressed concern about various provisions in the Bill, including, but not limited to:

- incorporation by reference provision in **clause 10** and
- abrogation of self-incrimination without derivative use immunity in **clause 22**.

It is noted that the Government provided its response on 23 November 2010.³²

Financial implications

According to the Explanatory Memorandum, there is no financial impact from this Bill.³³

29 *European Parliament resolution of 4 September 2008 on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights*, op. cit., C 295 E/54–57.

30. Details of the Foreign Affairs Committee's inquiry and report are at:

http://www.aph.gov.au/Senate/committee/fadt_ctte/autonomoussanctions_43/index.htm

31. For comments made by the Scrutiny of Bills Committee, see Senate Scrutiny of Bills Committee, *Alert Digest*, 16 June 2010, pp. 6–11, viewed 9 May 2011, <http://www.aph.gov.au/senate/committee/scrutiny/alerts/2010/d06.pdf>
See also Senate Scrutiny of Bills Committee, *Tenth Report of 2010*, 24 November 2010, pp. 386–400, viewed 9 May 2011, <http://www.aph.gov.au/senate/committee/scrutiny/bills/2010/b10.pdf>

32. For a copy of the Government's response, see *ibid*.

Key provisions

Clause 4 contains definitions for the purposes of key provisions contained in this Bill including the following.

Asset means an asset of any kind or property of any kind, whether tangible or intangible, moveable or immovable, however acquired. It also means a legal document or instrument in any form (including electronic or digital) evidencing title to or interest in such an asset or property—for example: bank credits, traveller’s cheques, shares and debt instruments.

Autonomous sanction means a sanction that:

- is intended to influence, directly or indirectly, one or more of the following in accordance with Australian Government policy:
 - a foreign government entity
 - a member of a foreign government entity
 - another person or entity outside Australia or
- involves the prohibition of conduct in or connected with Australia, that facilitates the engagement by a person or entity (described above) in an action outside Australia that is contrary to Australian Government policy.

Designated Commonwealth entity means a Commonwealth entity that is designated under the *United Nations Charter Act 1945*, or one that is specified by the Minister for Foreign Affairs by legislative instrument under **clause 5**.

Sanction law means a provision made under **clause 6**. **Subclause 6(1)** provides that, for the purposes of this Bill, a minister may, by legislative instrument, specify a provision of the law of the Commonwealth as a sanction law. **Subclause 6(2)** provides that the Minister for Foreign Affairs may specify a provision of law in relation to particular circumstances.

Relationship with other laws

Clause 9 provides that this Act is not intended to limit the operation of other Commonwealth laws, which operate to provide for autonomous sanctions or operate in relation to autonomous sanctions.

Part 2—Regulations to provide for sanctions

Division 1- Making and effect of regulations

Subclause 10(1) authorises the Governor-General to make regulations relating to matters including:

33. Explanatory Memorandum, Autonomous Sanctions Bill 2010, p. 2.

- the proscription of persons or entities
- restrictions or prevention of use, dealings and availability of assets
- restrictions or prevention of supply, sale or transfer of goods or services
- indemnities for acting in compliance with regulations
- the provision of compensation for owners of assets that are affected by regulations relating to a restriction or prevention described above.

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

- facilitate the conduct of Australia's relations with other countries or with entities or persons outside Australia or
- otherwise deal with matters, things or relationships outside Australia (**subclause 10(2)**).

The Bill does not contain any provision relating to merits review of decisions to apply sanctions that have been made pursuant to a regulation under subclause 10(1), such as the proscription of persons or entities on a sanctions list.

There is also nothing in the Explanatory Memorandum or Bill which indicates a removal of judicial review rights under such circumstances. However, the Queensland Law Society reflected with concern on the implications of a 2010 decision of the Federal Court³⁴, which seemed to signal decisions to proscribe certain persons or entities were going to be non-reviewable as they were non-justiciable political decisions.³⁵ Hence, it is possible for example, that a young adult who is estranged from their dictator father living overseas and who is on a sanctions list, may be captured by that listing on account of their blood relationship, without any examination of the facts to support such an assumption of actual association.

Perhaps it is the case that the need for a timely and flexible regulation-making power to give effect to autonomous sanctions is not necessarily incompatible with notions of transparency and accountability. As already discussed, the UN itself has recognised the need to provide for a process for de-listing. And, the principles and guidelines produced by the Council of Europe may be instructive in assisting with the crafting of best practice guidelines for the formulation, application, enforcement and administration of autonomous sanctions.³⁶

34. *Aye v Minister for Immigration and Citizenship* [2010] FCAFC 69 (11 June 2010).

35. Queensland Law Society, Submission 2A, p.1, *Submission to the Senate Inquiry into the Autonomous Sanctions Bill 2011 [Provisions]*, Canberra, 1 July 2010, viewed 5 April 2011.

36. See, for example, Council of the European Union, *Basic Principles on the Use of Restrictive Measures (Sanctions)*, 7 June 2004, Doc. 10198/1/04, REV1, PESC 450, viewed 9 May 2011, <http://register.consilium.europa.eu/pdf/en/04/st10/st10198-re01.en04.pdf>; Council of the European Union, *Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the*

Subclause 10(3) provides that regulations may make provision in relation to a matter by applying, adopting or incorporating anything contained in an instrument or other document that is in force or existing from time to time. The Explanatory Memorandum does not identify the types of ‘other writing’ that may be incorporated by reference, and the Explanatory Memorandum provides insufficient assistance in this regard. While recognising the argued need for flexibility mentioned in the Explanatory Memorandum, for the purposes of timely response to changing international developments, it does not provide sufficient guidance to the rights of affected individuals and entities in terms of the range of sources they should be expected to consult to assist them in complying with their obligations.

Clauses 12 and 13 confirm the intended operative strength of the regulations. **Clause 12** generally provides that regulations have effect despite a Commonwealth or State law enacted before the commencement of this Act and despite an instrument made under such a law. **Clause 13** provides that later Acts are not to be interpreted as overriding Part 2 of the Bill (Regulations to provide for sanctions) or the regulations.

Division 2- Enforcing the regulations

Clause 14 provides that where a person has engaged, or is engaging, or proposes to engage in conduct involving a contravention of the regulations, then a superior court may, on application by the Attorney-General, grant an injunction restraining a person from engaging in such conduct. A court is not to require the Attorney-General or anyone else to give an undertaking as to damages as a condition to granting an interim injunction.

Normally, the court would have the discretion to require an undertaking as to damage where an interim injunction restraining conduct, such as engagement in trade or commerce, would result in adverse consequences if it is subsequently determined that the person has not contravened an autonomous sanction. In such circumstances, the court could require an undertaking as to damages to provide compensation for the person who may have suffered a loss of earnings for example. The removal of such requirement and the attendant loss that may be visited on an innocent person, would seem to fairly require an explicit and principled justification.

Clause 15 provides that an authorisation granted under the regulations, to engage in activities that would otherwise be prohibited by sanctions, will be deemed to have never been granted if information contained in, or information or a document accompanying, the application for the authorisation is false or misleading in a material particular, or omits any matter or thing without which, the information of document is misleading in a material particular. This mirrors provisions that apply to UN sanction enforcement laws specified under the *Charter of the United Nations Act 1945*.

Framework of the EU Common Foreign and Security Policy, 2 December 2005, Doc. 15114/05, PESC 1084, Fin 475, viewed 9 May 2011, <http://register.consilium.europa.eu/pdf/en/05/st15/st15114.en05.pdf>

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Part 3—Offences relating to sanctions

Clause 16 provides for offences relating to conduct which contravenes a sanctions law.

The penalty for an individual who contravenes a sanction law, or an authorisation under a sanction law, is a maximum of 10 years' imprisonment, and or a fine of \$275 000 (2500 penalty units) or three times the transaction value, whichever is the greater.

For a body corporate, the offence is a strict liability offence carrying a maximum fine of \$1.1 million (10 000 penalty units), or three times the transaction value, whichever is the greater. The offence would not, however, apply to any body corporate that can prove it took reasonable precautions, and exercised due diligence, to avoid contravening the sanction law or permit condition.

Similarly, **clause 17** provides that it will be an offence, punishable by conviction of a maximum of 10 years imprisonment and / or a fine of \$275 000 (2500 penalty units) to provide false or misleading information in connection with the administration of a sanction law.

Part 4—Information relating to sanctions

This Part contains provisions designed to facilitate access to and sharing of information for purposes associated with the administration of sanction laws. Together, **clauses 18, 19 and 20** enable the CEO of a designated Commonwealth entity, responsible for the administration and enforcement of sanction laws, to require, by written notice, the production of documents and written information – including under oath – from persons in or outside of government in order to determine whether a sanction law is being complied with. This includes a written request, under **clause 19**, to a person to provide particular information or documents within a reasonable timeframe, for the purposes of determining whether a sanction law has been or is being complied with. The person must comply with such request.

Clause 21 makes it an offence to refuse to comply with a request under **clause 19** (with a maximum penalty of 12 months) and self-incrimination may not be used as an excuse (**clause 22**).³⁷

Subclause 24 enables the CEO of a designated Commonwealth entity to disclose information with a range of other entities for sanctions law related purposes.

37. However, **subclause 22(2)** provides for the inadmissibility of information given in certain other proceedings.

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