

Chapter 2

Background

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

UN sanctions

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

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

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

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

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

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

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

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

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

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

Administration in Australia of UN sanctions

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

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

Autonomous sanctions

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

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

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

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

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

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

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

10 UN Charter Act, ss 27, 28.

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

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

Australian autonomous sanctions

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

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

The need for new legislation

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

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

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

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

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

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

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

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

2.13 For example, the Reserve Bank of Australia (RBA) indicated that it has held longstanding concerns about the efficacy of the current financial sanctions regime under the *Banking (Foreign Exchange) Regulations 1959*. The RBA observed that these regulations were 'originally promulgated for the protection of Australia's currency and regulation of our foreign currency reserves'.¹⁹ Similarly, the Department of Defence—which administers sanctions pertaining to the export of arms and strategic goods²⁰—argued that using regulations intended for other purposes may prohibit the effective use of sanctions and have unintended consequences.²¹

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

Committee view

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

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

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

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

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